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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1933,
AND JANUARY TERM, 1934

VOLUME CXXV

HENRY P. STODDART
OFFICIAL REPORTER

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BY HENRY P. STODDART, REPORTER OF THE SUPREME COURT,

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

CHARLES A. GOSS, Chief Justice
WILLIAM B. ROSE, Associate Justice
JAMES R. DEAN, Associate Justice
EDWARD E. GOOD, Associate Justice
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice
BAYARD H. PAINE, Associate Justice

HENRY P. STODDART	Reporter
GEORGE H. TURNER	Clerk
ELBERT M. WHITE	Deputy Clerk
PAUL F. GOOD	Attorney General
GEORGE W. AYRES	Assistant Attorney General
PAUL P. CHANEY	Assistant Attorney General
WILLIAM C. RAMSEY	Assistant Attorney General
DANIEL STUBBS	Assistant Attorney General
EDWIN VAIL	Assistant Attorney General
WILLIAM H. WRIGHT	Assistant Attorney General

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Second	Cass, Otoe and Sarpy.	James T. Begley	Plattsmouth
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		Ellwood B. Chappell	Lincoln
		Lincoln Frost	Lincoln
		Frederick E. Shepherd	Lincoln
Fourth	Burt, Douglas and Washington.	Francis M. Dineen	Omaha
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		William G. Hastings	Omaha
		Charles Leslie	Omaha
		William A. Redick	Omaha
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		Willis G. Sears	Omaha
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		Harry D. Landis	Seward
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Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
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		Charles H. Stewart	Norfolk
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge	Hastings
		Frank J. Munday	Red Cloud
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		Ralph R. Horth	Grand Island
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Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Edward F. Carter	Gering
Eighteenth	Gage and Jefferson.	Frederick W. Messmore	Beatrice

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Admitted since the Publication of Vol. CXXIV

BACKUS, EDGAR
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CRANDALL, LESLIE A.
DAY, DONALD D.
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FISCHER, HOWARD H.
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HARRIS, ROBERT E.
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KANOUFF, HOWARD V.
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MAHER, JOHN J.
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TWINEM, LINN K.
VOMACKA, FRED B.
WELLS, O. STUM
WERNIMONT, DALE KENNETH
WHEELER, D. JACK
WOLCOTT, F. ALAN
WRIGHT, FRANK P.

IN MEMORIAM

ANDREW M. MORRISSEY

At the session of the Supreme Court of the State of Nebraska, December 4, 1933, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable Edward E. Good, Honorable George A. Eberly, Honorable L. B. Day, and Honorable Bayard H. Paine, Associate Justices, the following proceedings were had:

Honorable Harvey Johnsen.

May it Please the Court:

Your Committee on Memorial to Andrew M. Morrissey ask leave to submit the following memorial and tribute:

Andrew M. Morrissey was Chief Justice of this Court from 1915 to 1927. He was appointed by the Governor to fill the term of Judge Hollenbeck, who died almost immediately after taking office in 1915, and he was elected for an additional six-year term in 1920.

This twelve-year period was the brightest and most fruitful in Judge Morrissey's life. Every man is happiest when he is proving himself. At the time of his appointment, Judge Morrissey's merits and qualifications were relatively unknown, except to his friends, and he was confronted with the task of demonstrating his ability and of making his leadership felt.

How thoroughly he won the hearts of the other members of the Court, and how well he succeeded as the presiding officer of the Court are best known to those of your Honors who were his immediate associates. He was a singular executive, and, in the abstraction with which the

work of the Court is surrounded, he strove for a definite objective and a routine of systematic performance. He was a masterful tactician and he did much to reconcile and fuse academic differences and personal opinions and to preserve a unity on the Court.

As a judge, his chief qualities were his simplicity, his courtesy, his conscientiousness, his diligence, his fearlessness, his impartiality, and his understanding. Socrates is reputed to have said:

> "Four things belong to a judge: To hear courteously, to answer wisely, to consider soberly, and to decide impartially."

These attributes he possessed. His opinions are not filled with the pedanticism and ornate irrelevances that to some men are the mark of a jurist, but they are notable for their brevity and clearness of expression. He did not strive to appear learned, but only to reach a sound conclusion and to make it possible for the layman, as well as the profession, to understand what he was deciding and the reason for it. He believed that almost every case could be narrowed down to one or two fundamental points of controversy. He felt that in the attainment of justice, the result of a lawsuit should be an actuality for the parties, and not the mere affirmation of an antiquated precedent.

Judge Morrissey won the profession, both as a presiding officer and a judge, but he endeared himself even more by those professional qualities which he manifested off the bench. He took a particular interest in young lawyers and in stimulating and encouraging them in their professional beginnings. His charming manner, coy humor, and good fellowship made itself felt at every professional gathering—American, state and local bar association meetings.

As a judge and as a man he has left his stamp upon the bench and the bar of this state. In our legal annals let it be written that we are better because he came our way. We hear his gentle footsteps echo in the corridors of time. Onward he quietly goes, observing those he passes, giving to each a courteous nod or a friendly greeting. He pauses

to note what a group of men are doing, or to speak to a corner urchin. He quickens his step, for he recalls that this is consultation day and he must see one of the judges about a passage in a proposed opinion. All day the consultation session lasts. In the late afternoon he emerges from the chamber with his associates. They smile and disband.

And now we are to usher him into the hall of memory. As the door opens we hear a gentle melody and the verse of the poet that was so typical of him:

"I came at morn,—'twas spring,—I smiled;
The fields with green were clad;
I walked abroad at noon,—and lo!
'Twas summer,—I was glad;
I sate me down, 'twas autumn eve,
And I with sadness wept;
I laid me down at night, and then
'Twas winter,—and I slept."

May these few paragraphs be spread upon the records of the Court to the memory of him who was both a judge and a man.

Respectfully submitted,

ARTHUR F. MULLEN
HARVEY JOHNSEN
F. D. WILLIAMS
GEORGE H. TURNER
JOHN W. DELEHANT

Honorable Frank D. Williams.

May it Please the Court:

Andrew M. Morrissey was born December 27, 1869, at Livonia, Livingston county, New York, a son of Andrew and Catherine Dowling Morrissey. He had eight brothers and three sisters, of whom four brothers and one sister survive.

He attended the public schools at Livonia, but lived on a farm until he reached manhood's estate.

At the age of twenty-one years he moved to Chadron, Nebraska, where he lived for eight years. There he studied law in the office of Fannie O'Linn, Alfred Bartow, and Allen G. Fisher, and during a part of the time was assistant to the county clerk of the county. He was admitted to practice law January 6, 1897, and entered the practice in Chadron, where he pursued his profession for a short time. He moved to Valentine in the spring time of 1898, and was elected county attorney for Cherry county in the fall of that year. He served two terms as county attorney of the county, and formed a law partnership with F. M. Walcott in 1903, which continued until 1911, at which time this partnership was dissolved and he moved to Lincoln, where he entered into a partnership with the late F. M. Tyrrell of Lincoln. In the fall of 1912, he was a candidate for attorney general of the state on the Democratic ticket, but was unsuccessful. In 1913, he was appointed private secretary to Governor John H. Morehead, and by the Governor appointed Chief Justice of the Supreme Court of Nebraska, on January 25, 1915. He remained in this position until January 6, 1927. In that month and that year he formed a partnership with Attorney Arthur F. Mullen of Omaha, which continued up to a short time before his death. In the summer of 1925, he taught classes in the College of Law of the Northwestern University, in Chicago. In May, 1933, he moved to Washington, where he had been appointed attorney for the Comptroller of the Currency. He died in Lincoln September 8, 1933.

Such in brief is a chronological résumé of some of the more outstanding events in the life of Judge A. M. Morrissey.

To him of intelligence, of good character, who will study and practice law honestly, industriously, and with singleness of purpose, reasonable success is almost certain.

At an early age, Judge Morrissey began the study of law and pursued it with fidelity and devotion which soon brought him satisfactory returns.

He was self-educated in the fullest sense of the term. He had no college training, but to one of his rare mental powers and studious habits, the lack of college training was overcome.

He was not only a student of the principles of the law, but was a student of the finest literature and history, and traveled extensively, and was intensely interested in public affairs. He became a master of English and, as an example of his fine English, I quote an extract from a letter written by him on April 14, 1931, as follows:

"We might add greatly to the sum of human happiness were there some way to remove the barrier that restrains us from the full appreciation of friends, while our friends' ears are still attuned to catch the faintest note of appreciation—or may I say praise."

And again from the same letter I quote:

"We are enjoying a glorious spring day. The coming of spring is as sure a sign of improved health as was the homing pigeon with a sprig of green an assurance to Noah of the receding flood."

He reached the Chief Justiceship of this Court at the early age of forty-six years. As presiding judge of this Court he was diligent and industrious, and of all the faithful members of this Court, it is safe to say that none of them ever gave of himself to the Court more than he.

He never married and had few outside interests.

He exercised the most assiduous care that the substantive law of the State as interpreted by the earlier decisions of the Court should not be carelessly infringed upon, but should be preserved as lasting pronouncements of the Court.

Perhaps no more fundamentally sound or scholarly opinions have been written by members of this Court than those written by the late Ex-Chief Justice, A. M. Post.

Judge Morrissey's opinions are models of terse English, clearness of expression, and do not leave the reader in doubt, and they do not suffer greatly in comparison with the opinions of Judge Post.

He had a fine personality, pleasing voice, was modest, courteous, and agreeable.

He never betrayed a friend, trust, or a principle. He had no tricks of speech. He spoke plain words. He was never mercenary, but lived a life of honor and rectitude.

His qualities were the worthwhile and abiding things of life.

When Judge Morrissey retired from this Court his health was shattered, and he never fully recovered.

Later he engaged in the practice of law in Omaha, and still later, and up to the time of his death, occupied the important position of attorney to the Comptroller of the United States Currency at Washington. There he was stricken with fatal illness and was brought to Lincoln, where he died.

When I stood by his bier and looked into that calm untroubled face, I thought of his honest service wherever duty found him.

It is inexorable that to the grave goeth all—the innocent babe, the fairest youth, the strong man in the fullness of his powers, the old, the sick, and the weary.

The golden bowl was broken, and Judge Morrissey lay down to his last sleep.

"God giveth, he took,
He will restore,
He doeth all things well."

Honorable John W. Delehant.

May it Please the Court:

The most inappropriate tribute we could offer to him whose memory we recall this morning would be a protracted eulogy. For, as in life he exemplified the gentle quality of modesty and shunned all personal notoriety, so in this service of recollection, he would ask us to use all things moderately, and admonish us respecting the virtue of brevity.

While it is eminently fitting that this honored court and

the bar of the state unite in this tribute of affection to an eminent lawyer and an able jurist, it is only natural and inevitable that the attributes we recall should be not so much those of the advocate and the judge, as those of the man. After all, the social being is removed by death, the man lives on. And the characteristics of the lawyer and the presiding judge to which we cling in memory, being analyzed, are discovered to be the incidental manifestations of a noble human soul that might equally well have found expression in some other walk of life.

Therefore, we think today of the simple, gentle, generous character that, for nearly twelve years, united this bench in uniform and edifying harmony and invited and obtained for the court the universal and sincere affection and cordiality and confidence of the Nebraska bar. We think of the unostentatious industry and learning of the man, a learning acquired probably more than in the ordinary case, through effort and unremitting toil. We think of the clear and penetrating intellect with its genuine education, an education that aimed, not at the acquisition of encyclopedic knowledge, either in the law or in other fields, but rather at the development of the faculty of lucid and accurate thinking, of the ability to see things and people and philosophies and see them in their true perspective.

We think—and how many of us with deeply moving gratitude—of his kindly, human tolerance that accorded to the humblest advocate or litigant the sympathy he would himself have craved if he were standing before the court. May I suggest that it was this quality of soul that made all of the lawyers in the state, and especially those newly called to the bar, feel that in him they had a friend in the finest sense of that term. Unimpeachable integrity and unflinching courage we regard as axiomatic in our estimate of our judges. Yet, it is none the less inspiriting to remember how admirably he exemplified these indispensable ingredients of the judicial character.

Nor can we escape the recollection and acknowledgment of the supreme factor which contributed powerfully to his

every quality we are proud to proclaim. He was a man of deep religious conviction, of unswerving faith in the goodness and mercy and justice of God. He was punctual and unfailing in his attendance upon public worship according to his convictions, and he found refuge from the inevitable perplexities, and trials and disappointments of life in a faith as simple, as devout, as universal, as consoling as that of his ancestors through countless generations, from whom, indeed, he derived it as his most priceless inheritance.

So, in these moments during which we recall and record our recollections of Andrew M. Morrissey, while we think of him as a well loved brother at the bar, and especially as a distinguished presiding member of this court, our thoughts linger more especially on the endearing qualities of the man himself, the attributes that made him not so much the judge as our friend, not so much a leading citizen of his state as an exemplary Christian gentleman.

Honorable George H. Turner.

May it Please the Court:

I cannot let this occasion pass without a personal word to the memory of one I loved so well.

For a time it was my privilege to serve as secretary to Judge Morrissey and in that capacity came to know and appreciate him.

During all his professional career his integrity and outstanding ability inspired the confidence of those who knew him. In the performance of his official duties as a member of this court he was calm, deliberate and, above all, fair and impartial. The dictates of his conscience ruled his every act, regardless of the cost to him or the effect upon his personal fortunes. He was highly courageous in his convictions, yet tolerant of the views held by others. The excellence of his opinions won for him a high degree of professional recognition.

In personal contact Judge Morrissey was a lovable char-

acter. The charm of his personality captivated those who came in contact with him and his kindliness and sympathy drew close the bonds of friendship. He was intensely loyal to his friends and delighted in sharing their burdens. With Judge Morrissey the first consideration was not self, but others.

Death has closed a distinguished career, and in the passing of Judge Morrissey the bar has lost an able and outstanding leader, the state has lost a useful citizen, and I have lost a true friend.

Honorable Arthur F. Mullen.

May it Please the Court:

My affection for Andrew M. Morrissey makes it difficult for me to adequately express my appreciation of him. When he died the light of a dear friend went out. Our acquaintance began forty years ago; we were friends from the beginning. He was at that time an employee in the county clerk's office at Chadron and I was an employee in the county treasurer's office at O'Neill. Later, we were admitted to the bar; most of our practice was in the old Fifteenth Judicial District. He became the county attorney of Cherry county; I held a similar position in Holt county. At times we were interested in the same litigation, either as associates or as opponents. After his retirement from this Court in 1927, he became and continued to be my partner until a few months before his death.

Because of our long and intimate association, I knew him well and can truthfully say that he was a remarkable man. Few knew how seriously handicapped he was in the race of life. In his youth he left New York, the state of his birth, and became a resident of Chadron, Nebraska; this change was made because he was threatened with tuberculosis. In addition to this, his sight was always defective. Although rarely free from suffering, he never complained and was reticent about mentioning his physi-

cal ills. Shortly before his death, a friend expressed curiosity as to the reason why he had never married. The Judge smiled and said: "Oh! I have been about three steps ahead of the undertaker all my life." Notwithstanding the handicap of ill health, I know of no one in all my acquaintance who went so far and did so much as this frail, gentle, and kind man.

When Governor Morehead appointed him Chief Justice, it was feared by some that he would not measure up to the high standard of the other eminent men who were and have been judges of this Court. Within a few months after his appointment this situation changed and he was recognized by the Bench, the Bar, and the Public as a great executive, an outstanding jurist, and an eminent judge. His record is remarkable in this, that, although he served as Chief Justice for nearly twelve years and during that time went through three political campaigns, his honesty, fairness, and ability were never questioned.

The members of this Court who were associated with him know of his sterling worth, his intellectual honesty, his ability, and his learning. They know how free he was from bias, and how considerate he was of the rights of others. Judge Morrissey possessed the peculiar qualifications necessary to make a great judge. He had a broad understanding of human affairs; wide and liberal views on all matters. He was tolerant of those who disagreed with him, and singularly free from prejudice, inherited or acquired. He was open-minded, willing to listen and consider arguments; he was diligent and carefully investigated the facts and the law, with a view of ascertaining the truth.

He had a keen sense of justice and a passion for doing what was right. While he had a high regard for precedent, he believed that laws should be construed to further justice rather than to base judgments on subtle logic and hair-splitting technicalities.

In closing, I cannot describe this truly great man better than to quote the eloquent words of Chief Justice White who, speaking on a similar occasion of one of his colleagues, said:

"O true American and devoted public servant, O cherished friend and faithful comrade, O sweet and noble soul, may it be vouchsafed that the results of your work may endure and fructify for the preservation of the rights of mankind; and may there be given to us who remain, wiping from our eyes the mist begotten of your loss, to see that through the mercy of the inscrutable providence of God you have been called to rest and to your exceeding reward."

Judge Bayard H. Paine.

It is a noble custom to speak well of the dead, and were it not so, one could not speak otherwise of Andrew M. Morrissey.

As early as 1922 I was one of the district judges invited by him to sit as a member of this court and thereby came in close touch with him in the conference room as well as on many other occasions. He won my profound respect and esteem.

I recall how greatly he enjoyed teaching classes in criminal law in Northwestern University at Chicago in the summer of 1925. He confided to a close friend in Lincoln that nothing had pleased him more than when Dean Wigmore complimented him highly at the close of the session upon his work. His life is an inspiration to those younger lawyers who must depend, as he did, upon patience and industry to take the place, to some extent, of a college training.

In casting about for some outstanding incident in the life of the one whose memory we honor today, it occurred to me that it might not be improper to present what Judge Morrissey considered one of the most notable events of his many-sided life. I refer to the part he took in the pilgrimage of the American Bar Association to London in 1924 under the guidance of its president, Honorable Charles Evans Hughes.

The Nebraska members of the Association who reg-

istered at headquarters in Hotel Cecil were eight in number, to wit: Andrew M. Morrissey, Chief Justice, Arthur C. Wakely, District Judge, E. R. Burke, E. J. Burkett, Joseph B. Fradenberg, Wm. F. Gurley, R. A. Van Orsdel and O. A. Williams.

I remember hearing Judge Morrissey give a very interesting account of the entertainments which were provided for them. Upon arrival, each member was given a schedule of the events he was invited to attend, beginning with the official welcome at Westminster Hall on Monday July 21 and ending with the reception by the Lord Chancellor on Friday. I will mention but a few of the many functions—a garden party by Viscount and Lady Astor, the grand banquet by the Lord Mayor of London at Guildhall, an afternoon party by Sir John and Lady Simon, formal dinners at Inner Temple, Lincoln's Inn, Middle Temple, and Gray's Inn, and the Royal Garden Party given by King George, Queen Mary and the Prince of Wales. The visiting members of the American Bar Association, with very few exceptions, at once decided to conform to the particular dress which was required on each of these occasions as a settled part of English social life. Judge Morrissey told with a chuckle of the various suits he had to buy and of what a figure he presented in one of them. One of the London papers said on Monday noon after their arrival on Saturday that not a silk hat was left for sale in London.

The committee selected Judge Morrissey for the important place of proposing the last toast at the dinner given at Gray's Inn on July 24. This assignment was only received by him at noon just as he was preparing for the King's Garden Party which lasted until nearly 6 o'clock, so that not more than a half hour could be given by him to the preparation of the toast. The other five speakers were Right Honorable the Earl of Birkenhead, Treasurer of Gray's Inn, presiding, Frank H. Scott of the Chicago bar, Honorable T. W. Gregory, attorney general of the United States, Justice Greer, and James M. Beck.

Judge Morrissey had been a member of the reception committee appointed by the Governor of Nebraska when

the Earl of Birkenhead had visited Omaha and Lincoln to arouse our people to the needs of the Great War. A firm friendship was formed between them which had been kept alive by letters during the intervening years. Therefore the Earl used these words: "My old friend, the Chief Justice of Nebraska, with whom I made close friendship five years ago, which I have never since abandoned."

If we do not count Dean Roscoe Pound as a citizen of Nebraska, then Judge Morrissey was the only Nebraskan honored by being given a place on any of the formal programs in London at this time.

Therefore I feel that the short address which Judge Morrissey gave on that truly great occasion can well be made a part of our record here today, for his own words show better than can be told by us the deep sympathy, the strong patriotism, and the honest heart of the one we honor today. This was his address:

"Mr. Treasurer, my Lords, Ladies and Gentlemen:

"It has been said that 'There are ties of all sorts in this world of ours; there are ties of friendship and ropes of flowers and true lovers knots, I ween; the boy and the girl may be bound by a kiss, but in all the world there is no bond like this: "We have drunk from the same canteen." '

"During the past ten years Great Britain and America have drunk from the same canteen. The British draught has been larger and more bitter than the draught which America has taken, but as we look back over this decade and recall the dark days that have passed over our countries we ought not to forget those men who, in your country and in mine, made possible the victory which humanity achieved over an arrogant and unreasoning enemy. I well remember that soon after we declared war, in large sections of our country the question was going out why we, who were separated by a great ocean from the European conflict, should engage in this world catastrophe.

"Great Britain sent her child of genius to our country

and he sounded a trumpet blast which called to arms a nation of more than one hundred million.

"We were aroused to that sense of responsibility which rested upon us by virtue of our wealth, our population, our ties of blood and our obligations to humanity. Much, indeed, did he contribute in the way of arousing our people to a sense of their obligations, and he quickened us in the discharge of that duty which Providence had laid upon us. Happily those days are past, and you and I are enjoying the blessing of peace and tranquility, but you know it has been written that 'Peace hath her victories no less renowned than those of war.' And as he crossed the Atlantic in 1917 and aroused our nation, so today some three thousand of us have crossed the Atlantic to impose ourselves as guests upon your hospitality. Your Treasurer has made captive every American heart here, and if we lawyers occupy that proud place in America which we are vain enough to believe we do occupy, by winning the bar of America he has won America.

"Ladies and Gentlemen: Will you stand and drink with me to the Health of the Right Honorable the Earl of Birkenhead, Treasurer of Gray's Inn."

Permit me to add in closing that those who knew him best declare to us that Andrew M. Morrissey had clean hands and a pure heart; that he had not lifted up his soul unto vanity nor sworn deceitfully, and that he naturally ascends into the hill of the Lord.

Judge Edward E. Good.

The notable achievements of Judge Morrissey, as an able lawyer and upright jurist, are permanently preserved in the records of this court, over which he presided as Chief Justice for twelve years, and in the records of this and other courts in which he appeared in the practice of his profession. His kindly disposition, his gentle manner, his genial personality are recorded in the hearts and memory

of a large circle of devoted friends. He was a generous, true, faithful friend. In his passing I feel the loss of a cherished friendship.

Chief Justice Charles A. Goss.

In one of Paul's letters to Timothy he wrote:

"Study to show thyself approved unto God, a workman that need not to be ashamed, rightly dividing the word of truth. But shun profane and vain babblings."

Upright and loyal citizen, learned and eloquent lawyer, inspired and inspiring apostle, St. Paul here recorded a rule, applicable to all phases of human life.

Inherently, and almost unconsciously I suspect, Andrew M. Morrissey embodied in his daily life and work the practice of the principles announced by the evangel. He patiently winnowed the grains of truth from the husks and chaff in which they were enveloped. Under established rules he apportioned to the true owners the fruits of the legal harvest. Without fear he rendered unto Caesar the things that were his. His decisions were expressed in clear and concise language, free from flippancy and acidity. As an administrator he was able and accurate. He was modest and had no undue pride of accomplishment. But, in this presence, we are glad to be permitted to testify to the abiding fact that he was a workman who need not to be ashamed.

"Yea, saith the Spirit, that they may rest from their labors; and their works do follow them."

The memorial and the remarks on this occasion meet the approval of the Court. They will be spread upon the records and published in the current Nebraska Report.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1933

CHARLES L. CAMPBELL, APPELLANT, V. COLUMBIA CASUALTY COMPANY, APPELLEE.

FILED MAY 24, 1933. No. 28550.

1. **Insurance.** A statutory condition of issuing and delivering a contract for accident insurance is part of the policy therefor.
2. ———: NOTICE OF INJURY. Under a policy of accident insurance, a contractual requirement that notice of a claim for an accidental injury shall be given within 20 days from the accident, and that failure to give it shall not invalidate a claim for insurance, if not reasonably possible to give such notice and notice is given as soon as reasonably possible, compliance with the requirement, unless waived, is a condition precedent to the validity of a claim for accident insurance.
3. **Evidence.** In the examination of a witness, the trial court may properly sustain an objection to a question calling for a conclusion only.
4. **Appeal:** OFFER OF PROOF. To make error available in the sustaining of an objection to a question propounded to a witness, an offer of proper proof is ordinarily necessary.
5. **Trial:** PEREMPTORY INSTRUCTION. Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant or excuse the jury and enter a nonsuit.

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

John F. Brady and *Emmet L. Murphy,* for appellant.

Kennedy, Holland & De Lacy, contra.

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

ROSE, J.

This is an action on an accident policy of insurance to recover $1,287.87. Plaintiff pleaded execution and delivery of the policy and in substance stated, among other things: While attempting to push his car in a street, January 18, 1931, when the policy was in force, he slipped, fell and struck the lower part of his back against a curb and injured his sacrum. As a result of the accident, he was totally disabled from that date until August 3, 1931, and thereafter was partially disabled until November 2, 1931; was confined to a hospital four weeks and three days; was required to submit to two operations, one March 23, 1931, and the other May 16, 1931.

In an answer to the petition, defendant admitted the issuance of the policy and that it was in force January 18, 1931, but denied that plaintiff's injury resulted from an accident against which he was insured. Defendant also interposed the defense that plaintiff failed to give notice of an injury within 20 days or within a reasonable time thereafter—a condition precedent to his right to a recovery under the terms of the policy.

After the evidence had all been adduced on both sides, the district court excused the jury and, on motion of defendant, dismissed the action for want of timely notice required by the policy.

The question presented by the appeal is raised by an assignment of error directed to the failure of the court below to submit the issue of notice to the jury. The solution depends on the statute, the terms of the policy and the undisputed evidence. The statute provides:

"No policy of insurance against loss or damage from disease or by bodily injury by accident, or both, of the assured, shall be issued or delivered * * * unless it contains in substance the following provisions: * * * A provision that specifies the time within which notice of accident or disability shall be given, which time shall not be

less than ten days from the date of the accident or the beginning of the disability from sickness upon which claim is based." Comp. St. 1929, sec. 44-604.

The statutory requirement is by construction a part of the insurance contract. Defendant insured plaintiff against disability resulting directly, independently and exclusively of all other causes from accidental, bodily injuries. The policy itself provides:

"Written notice of injury on which claim may be based must be given to the company within twenty days after the date of the accident causing such injury. * * *

"Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

Notice is not only required by statute, but issuance and delivery of a policy without a provision for notice of not less than 10 days after an accident are positively forbidden. The requirement for notice is thus made a condition of accident insurance. "Failure to give notice," says the policy, "shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible." This means, in connection with the statutory requirement, that the stipulated notice, if not waived, is a condition precedent to the validity of a claim for accident insurance. The policy is not forfeited by want of the notice, but a claim for accident insurance is invalidated, if the statutory and contractual notice is not given.

The alleged accident occurred January 18, 1931, and notice thereof was not given until June 13, 1931. In the petition it is alleged that plaintiff was totally disabled by the accident from the date on which it occurred until August 3, 1931. He testified to this and to other facts alleged in his petition. Among other things, he said he had pain in the injured area immediately after falling

against the curb, that the pain increased and was continuous until after the second operation May 16, 1931. He was examined and treated by his physician February 8, 1931; had two operations afterward, one March 23, 1931, and the other May 16, 1931; was therefore acquainted with the accident and with any resulting injury; was able to be at his office in Omaha from the date of the accident until January 28, 1931, and after each operation; drove his own car for a time; could have given timely, valid notice of the accident and injury at an agency of defendant in Omaha where he procured his policy; was an insurance underwriter and wrote insurance policies; did not give notice from January 18, 1931, until June 13, 1931. These facts are established without dispute. Plaintiff did not prove that earlier notice was not reasonably possible or that he gave notice as soon as was reasonably possible. As a witness in his own behalf he was asked for a reason for the delay in giving notice, but an objection to the question was properly sustained as calling for a conclusion. There was no offer to prove a fact showing that earlier notice was not reasonably possible or that he gave notice as soon as was reasonably possible. After receiving notice of plaintiff's claim June 13, 1931, defendant denied liability, but this was not a waiver of timely notice or of the invalidity of the claim, because it had been previously invalidated for want of notice. The record shows conclusively without dispute that the notice required by the statute and the policy was not given, that plaintiff could reasonably have given it within the time specified by the contract. There was no excuse for the delay. In this situation, there was nothing to submit to the jury and the district court did not err in sustaining a motion for judgment in favor of defendant. On this point the law is well settled. *George v. Aetna Casualty & Surety Co.*, 121 Neb. 647, cited by plaintiff, is not at variance with the conclusion reached in the case at bar. There is no error in the record.

AFFIRMED.

OTTO E. CARLSON, APPELLEE, V. CARL A. NELSON, APPELLANT.

FILED MAY 24, 1933. No. 28486.

1. **Mortgages: FORECLOSURE SALE: CONFIRMATION: OBJECTIONS.** Objections to the confirmation of a sheriff's sale in regular, valid proceedings foreclosing a mortgage, if wholly unsupported by evidence, will not be sustained on appeal.
2. ———: ———: ———: **POSSESSION.** In a proceeding to foreclose a mortgage, defendant *held* not entitled to possession of the land, after confirmation of the sale, for the purpose of harvesting a crop, under the circumstances stated in the opinion.

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

Charles W. Peasinger, for appellant.

P. H. Peterson, contra.

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

DEAN, J.

This is a suit to foreclose a mortgage securing a note for $5,000. The mortgaged premises consisted of 160 acres of land in Knox county. The mortgagee, Otto E. Carlson, is plaintiff and the mortgagor, Carl A. Nelson, is defendant. A decree of foreclosure was entered April 15, 1931. Defendant took a stay of execution for nine months from the date of the decree. While the sheriff's foreclosure sale was suspended by the stay of execution, defendant sowed rye on a portion of the land in the fall of 1931. An order of sale under the decree was issued January 15, 1932. Pursuant thereto the sheriff sold the land to plaintiff for $5,000 on February 23, 1932. On the same day, in the same proceeding, defendant applied to the district court for permission to retain possession of the premises for the crop season beginning March 1, 1932, for the purpose of harvesting the rye. The sale was confirmed March 9, 1932, and the sheriff ordered to

deed the land to plaintiff and to put him in possession. At the same time the district court took under advisement the question of defendant's right, if any, to retain possession for the purpose of harvesting the rye, and March 28, 1932, held that plaintiff, by virtue of the confirmation of the sheriff's sale March 9, 1932, was entitled to the possession of the premises "together with all appurtenances thereunto belonging." Defendant appealed from both orders.

The only objections to confirmation below were: Defective notice; bid disproportionate to value; subsequent sale would bring more money; proceedings irregular. There was no evidence in support of any one of these objections. Consequently they were properly overruled. There is nothing in the record to show a ground for setting aside the confirmation.

It is urged as a reason for a reversal that defendant was entitled to retain possession of the premises for the purpose of harvesting rye. A review of the record shows that this position is untenable. No objection to confirmation on this ground was made in the trial court. After having had the benefit of a stay of execution for nine months, as authorized by law, defendant applied for an additional stay for the crop season beginning March 1, 1932. He did not offer to surrender possession with the privilege of a temporary reentry for the sole purpose of harvesting his crop. His prayer was for continued possession for a crop season after his stay of nine months expired. When he sowed the rye, while a sale of the land was stayed, he was charged by the foreclosure proceedings with notice that plaintiff would have a right to dispossess him before maturity of the crop. The rye was sown on corn land. The sowing of rye in the fall of 1931 and defendant's possession of the farm for the crop season of 1932, if granted, would have deprived plaintiff of his right to the use of his land after acquiring the title and the right of possession, as he did, on March 9, 1932, by a valid confirmation of the sheriff's sale. Moreover, de-

fendant did not prove that the rye sown in the fall of 1931 had any value when defendant acquired title and right of possession of the farm by a valid order of confirmation March 9, 1932. There is evidence, however, that the rye, though sown in a dry season, sprouted. The record shows that defendant is not entitled to the relief sought by him and that there is no error in the proceedings and orders of the district court.

AFFIRMED.

MASSACHUSETTS BONDING & INSURANCE COMPANY, APPELLEE, V. JAMES J. STEELE, APPELLANT.

FILED MAY 24, 1933. No. 28551.

1. **Counties and County Officers: COUNTY TREASURERS: DEPOSIT OF PUBLIC FUNDS.** A county treasurer is not authorized to deposit county funds in any bank except when it has been duly designated as a depository and given bond, as such, and then only to the extent provided by statute.
2. ———: ———: ———: **LIABILITY.** County treasurer and surety on official bond are liable to the county for any loss of county funds deposited in depository bank in excess of the bank's depository bond.
3. **Limitation of Actions.** Running of the statute of limitations on a contract obligation will be arrested by any voluntary partial payment thereon, made or authorized by the debtor.

APPEAL from the district court for Wayne county: DEWITT C. CHASE, JUDGE. *Affirmed.*

Harry E. Siman, for appellant.

Davis, Hendrickson & Davis and *Kennedy, Holland & De Lacy, contra.*

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

GOOD, J.

Plaintiff, as surety on the official bond of defendant, as county treasurer of Wayne county, paid to the county money due it from defendant in his official capacity.

Plaintiff brings this action to recover the balance necessary to fully reimburse it for the money so paid. Plaintiff had judgment, and defendant has appealed.

The Citizens National Bank of Wayne had been duly designated as a depository of county funds and, as such depository, gave bond to the county in the amount of $30,000. Defendant, as county treasurer, deposited county funds in the bank to the amount of $67,758.67. In June, 1926, the bank became insolvent and closed its doors. The sureties on the bank's depository bond paid to the county $30,000, and plaintiff, as surety on defendant's official bond, paid to the county $37,758.67. Thereafter, Wayne county and defendant, as treasurer, joined in an assignment whereby they assigned to plaintiff the claim of the county against the insolvent bank, with the right to collect whatever dividends were paid on the company's claim in the course of the bank's liquidation. The dividends received by plaintiff from the liquidation of the assets of the insolvent bank amounted to $33,982.80, which was insufficient to fully reimburse plaintiff, and it brings this action to recover $3,775.87, the amount necessary to fully reimburse it.

Defendant in his answer alleges that he was not legally liable to the county for the deposit in excess of the depository bond, and that the payment by plaintiff was voluntary; and further pleads that the county commissioners had designated only banks in Wayne county as depositories, and that the combined capital and surplus of those banks fixed the amount for which they could become legal depositories, which was much less than the amount of county funds in the hands of defendant, as county treasurer; that he had brought this fact to the attention of the county commissioners, and had requested them to designate other banks outside of the county as depositories; that they had failed and neglected so to do, and that, by reason of these facts, it was necessary for him to deposit county funds either in banks not designated as depositories, or in depository banks in amounts in excess of the

depository bond; that, because of this necessity, he was relieved from liability. He further alleges that plaintiff's action was barred by the statute of limitations.

Defendant relies upon the provisions of section 77-2506, Comp. St. 1929. Said section provides in part: "That county treasurer of each and every county in the state of Nebraska shall deposit, and at all times keep on deposit for safe-keeping in the state, national or private banks doing business in the county, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such county treasurer. * * * Any such bank located in the county may apply for the privilege of keeping such moneys upon the following conditions: * * * It shall be the duty of the county board to act on such application or applications of any and all banks, state, national or private, as may ask for the privilege of becoming the depository of such moneys, as well as to approve the bonds of those selected incident to such relation, and the county treasurer shall not deposit such money or any part thereof in any bank or banks other than such as may have been so selected by the county board for such purposes, if any such bank or banks have been so selected by the county board."

Section 77-2508, Comp. St. 1929, *inter alia,* provides: "For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits * * *. The treasurer shall not have on deposit in any bank at any time more than the maximum amount of the bond given by said bank in cases where the bank gives a guaranty bond, nor in any bank giving a personal bond more than one-half of the amount of the bond of such bank, and the amount so on deposit at any time with any such bank shall not in either case exceed fifty per cent. of the paid-up capital stock and surplus of such bank." It is further provided in said section that, if the county funds are in excess of the amount that could be legally deposited, under the foregoing provisions,

in the banks of the county, the county board might select depositories without the county.

Evidently, the provisions of sections 77-2506 and 77-2508, Comp. St. 1929, must be construed together and harmonized, if possible. We think, in so doing, it is clear that the county treasurer is required to deposit county funds in properly designated banks, but in no event can he exceed the amount as limited by section 77-2508.

In the case of *Shambaugh v. City Bank of Elm Creek,* 118 Neb. 817, it was held: "A county treasurer's sole authority for the deposit of public moneys in banks is to be found in sections 6191-6196, Comp. St. 1922 (now appearing as sections 77-2506 *et seq.,* Comp. St. 1929), and the directions, limitations and public policy evidenced thereby must be complied with by such officer and all who deal with him with reference to such public funds."

We think, clearly, that under the statutes quoted and previous decisions of this court, the county treasurer was not authorized to deposit county funds in any bank except when it had been duly designated as a depository, and had given bond as such, and only to the amount and extent provided by statute.

Defendant cites and relies upon the holding of this court in *State v. Peoples State Bank,* 111 Neb. 126, wherein it was held: "Where a county treasurer, in violation of section 6193, Comp. St. 1922, deposits county funds in a state bank, in excess of 50 per cent. of the capital stock of such bank, the depositors' guaranty fund is not liable for such excess." However, on rehearing of that case, reported in 111 Neb. 136, the first opinion was vacated, and the court held that a deposit of county funds in excess of 50 per cent. of the paid-up capital stock and surplus of the bank was within the protection of the depositors' guaranty fund. Any expressions in the vacated opinion have no force as a precedent.

Defendant cites and relies upon the case of *Beadle County v. Lloyd,* 238 N. W. (S. Dak.) 133, wherein it was held: "County treasurer and her sureties *held* ac-

countable for loss sustained by reason of deposits in excess of statutory limit in failed banks of county, in absence of showing of necessity therefor." We find nothing in the opinion in that case that would indicate what facts would amount to a necessity; nor, under the circumstances disclosed by the record in the instant case, are we called upon to determine whether or not any necessity could arise which would excuse a county treasurer from liability for making deposit of county funds in a depository bank in excess of the depository bond. In the instant case there is no showing that the county treasurer's office was not equipped with a fire-proof vault and burglar-proof safe, nor any showing that he could not readily have had access to some safe deposit vault and box in a nearby bank or safe deposit company, wherein he could have placed any surplus funds with reasonable security. Moreover, if defendant found the burdens, responsibilities and liabilities of his office greater than he was willing to assume and carry, he could have had recourse to a letter of resignation, directed to the proper officers, and could have thus relieved himself of liability.

Under the facts and circumstances disclosed by the record, defendant, as county treasurer, was liable to the county for any loss occasioned by deposits in the Citizens National Bank, in excess of the bank's depository bond, and plaintiff, as surety on defendant's official bond, was likewise liable to the county. In making payment to the county, it was fulfilling a contract obligation, and not making a voluntary payment.

When plaintiff made payment to the county and took an assignment from the county and the defendant treasurer of the county's claim against the insolvent bank, it stepped into the shoes of the county and the treasurer. The dividends paid to plaintiff by the receiver of the insolvent bank were paid at the instance and direction of defendant, and had the same force and effect as though the payment had been made by defendant.

The action was brought long before the expiration of

the statutory limitation after the last dividend was received. Running of the statute of limitations on a contract obligation will be arrested by any voluntary partial payment thereon, made or authorized by the debtor. It is clear that the action was not barred by the statute of limitations.

From an examination of the record, we are convinced that the judgment of the district court is right, and it is

AFFIRMED.

PETER O'SHEA & SON, APPELLANT, V. ALVINA LEAVITT ET AL., APPELLEES.

FILED MAY 24, 1933. No. 28452.

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

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

J. M. Fitzgerald, for appellant.

Beach Coleman and *Mothersead & York, contra.*

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

EBERLY, J.

This is an action by the plaintiff, a real estate agent, against Alvina Leavitt, alleged to be the owner in fee of the premises described in the second amended petition, and one C. A. Eastman, who it is alleged had or claimed to have some equitable right in the premises, and in addition "was duly authorized to act for and on behalf of the said Alvina Leavitt as agent for the sale of the said premises." This petition further alleges the making of a contract in writing whereby the defendants employed plaintiff to secure a purchaser for the lands owned by them, at a compensation, and that plaintiff procured a purchaser, ready, able and willing to purchase the prem-

ises, and that defendants failed to comply with their contract, to plaintiff's damage. The action was commenced by service of attachment on the real estate involved, as the property of nonresidents of Nebraska. No personal service of summons was made upon either of the defendants. Alvina Leavitt alone appeared, and for her answer (1) admitted that she was the owner in fee of the premises described in plaintiff's petition; (2) denied that "Eastman had or claimed to have any right in and to said premises;" (3) expressly denied that "Eastman was authorized in any manner to act for and on behalf of this defendant for the sale of the premises;" (4) and further denied generally the allegations of the second amended petition.

There was a trial to a jury, in which, at the conclusion of plaintiff's evidence, upon motion of defendant Leavitt, a verdict was instructed for defendant Alvina Leavitt, and the action was dismissed. From the order of the court overruling a motion for a new trial, the plaintiff appeals.

The terms of the controlling statute are: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." Comp. St. 1929, sec. 36-108.

The evidence wholly fails to establish that Eastman had any right or title in and to the real property involved, and there is no competent evidence that Eastman was authorized in any manner to act for and on behalf of defendant Leavitt for the sale of the premises. Plaintiff's evidence justifies the conclusion that defendant Leavitt became the owner of, and vested with the fee title in, the premises long before the inception of the transaction in suit. We may also infer that the answering defendant is a widow, and that the executors of her husband's

will, and possibly in the capacity of trustees created thereby, carried on certain negotiations with plaintiff, evidenced by telegrams and letters introduced in evidence by plaintiff over defendant's objections. These communications were signed by the name of Eastman. But if we are justified in making these inferences, we must also credit the force and effect of the statement in plaintiff's exhibit 36, a letter signed by J. Louis Donnelly, viz.: "All steps taken by Mr. Eastman were done so at my request and his wires to you, as an executor, and the signing of leases, as an executor, were all a misunderstanding as the estate had no legal right to sell or lease the land. The executors could readily agree to any sale of property but had no power of sale."

In the most favorable view of this evidence from the standpoint of plaintiff, the situation thus presented can at most but invoke the application of the principle announced by this court in *Tecumseh Nat. Bank v. Chamberlain Banking House,* 63 Neb. 163, viz.: "When a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent."

However, there is no evidence in the record that Eastman, or any of the executors or trustees of the estate of Heyward G. Leavitt, were in any manner authorized in writing to represent the defendant in the transaction as her agent. *Morgan v. Bergen,* 3 Neb. 209; *O'Shea v. Rice,* 49 Neb. 893; *Miller v. Wehrman,* 81 Neb. 388. In fact, none of the several communications in the record, ostensibly made in behalf of Eastman or his coexecutors, purport to be made in behalf of the defendant Leavitt. True, they, in their official capacities, mistakenly assumed to have a legal interest or title in the land, and erroneously supposed that the estate they represented would be bene-

fited by their acts. But mistakes coupled with entire lack of power are certainly wholly ineffective to raise, create, or vest rights in the parties with whom they were dealing as against the responsible defendant from whom they had received no authority whatever. These negotiations therefore must be wholly eliminated from consideration, save and except as Mrs. Leavitt expressly made them her own in the manner contemplated by statute.

The consideration of the remaining evidence in the record must be made in the light of the statutory provisions quoted. As construed by this court, such provisions mean that, in order for a broker to recover for commission for sale of land, the contract of brokerage must be in writing, subscribed by the owner of the land and the broker, and among other things set forth the compensation to be allowed by the owner. Comp. St. 1929, sec. 36-108; *Spence v. Apley,* 4 Neb. (Unof.) 358; *Nelson v. Woodhouse,* 112 Neb. 359; *Covey v. Henry,* 71 Neb. 118; *In re Estate of Brockway,* 100 Neb. 281; *Gill v. Eagleton,* 108 Neb. 179; *Smith v. Aultz,* 78 Neb. 453.

It may be conceded that a binding contract of employment under the terms of the statute may be made by correspondence. But in order to be a binding contract, either of an agency employment or sale of real estate, there must be in effect a meeting of the minds of the parties, and there must finally be a written offer by one party which is accepted in writing by the other, and is established by the writings relied on. *Melick v. Kelley,* 53 Neb. 509; *Fulton v. Ryan,* 60 Neb. 9; *Sennett v. Melville,* 76 Neb. 690; *Cooper v. Kostick,* 112 Neb. 816; *Olmsted v. Caldwell,* 110 Neb. 18; *Krum v. Chamberlain,* 57 Neb. 220; *Lopeman v. Colburn,* 82 Neb. 641; *Smith v. Bertrand,* 107 Neb. 301; *Ross v. Craven,* 84 Neb. 520.

Thus, the words of the controlling statute necessitate a written contract subscribed by the parties thereto, which is not satisfied by a written memorandum of a parol agreement signed only by one party thereto. *Spence v. Apley,* 4 Neb. (Unof.) 358.

The plaintiff firm failed to comply with this requirement. Its proof did not bring it within the restrictions of the quoted statute. Not only is there a lack of competent evidence to establish the making of the brokerage contract, or agreement of agency, but the evidence affirmatively establishes that the land in controversy was actually sold to a purchaser with whom the plaintiff had no connection whatever, and upon terms not shown to be substantially identical with those claimed to have been submitted by plaintiff to defendant Leavitt.

It follows that the action of the trial court is fully sustained by the record, and the judgment entered is

AFFIRMED.

SUSIE M. WHITEHALL, APPELLEE, V. COMMONWEALTH CASUALTY COMPANY ET AL., APPELLANTS.

FILED MAY 24, 1933. No. 28559.

1. Trial: REQUESTED INSTRUCTIONS. Unless a requested instruction for the jury is presented at the proper time, the trial court may refuse to consider it.
2. ———: ———. The proper time to submit requested instructions is as early in the trial as possible, but not later than at the close of the evidence. Comp. St. 1929, secs. 20-1107, 29-2016.
3. Insurance: PAROL CONTRACTS. An insurance contract is usually in writing, but oral or parol contracts of insurance are not uncommon, and attach in much the same manner, and according to the same principles, as do written contracts of insurance.
4. ———: AGENTS: AUTHORITY. The scope and extent of the agent's authority are shown, not merely by reference to his title, or commission, or credentials, but by the business which he is permitted to do in the company's name, or by its apparent acquiescence and consent.
5. ———: PAROL CONTRACTS. An oral contract of insurance may be binding upon the company, notwithstanding it was entered into in violation of the private instructions or limitations of the agent's authority, of which the insured had neither actual nor constructive knowledge.
6. ———: ———. A parol contract of insurance, in order to be valid, must be fairly entered into, for a good considera-

tion, between parties competent to contract, whose minds have met in a mutual agreement as to all of the essential elements of the contract, such as subject-matter, the amount of the insurance, the exact risks insured against, the time it goes into effect, and the amount of premium paid for a definite duration of time.

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

Swarr, May & Royce, for appellants.

Edward C. Fisher, contra.

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

PAINE, J.

This is a suit brought on an oral contract of accident insurance. The jury returned a verdict and judgment was for $686.94, together with an attorney's fee of $200. Defendants appeal.

The plaintiff was visiting her sister in Fremont, and Leslie Emigh and H. S. Marks, agents for the defendant company, came there on September 16, 1930, to collect a premium from her sister, and while there they solicited the plaintiff to buy accident and health insurance of them, and promised her that, for $1.60 a month, she would be insured against disability caused by any kind of accident or sickness, and would be paid $7 a week during the time that she was disabled from either cause for not exceeding two years, and that her insurance would go into effect as soon as she paid her money. Relying upon these statements, the plaintiff accepted the offer made, and thereupon paid to the agents of the defendant company the sum of $1.60, for which amount she was given a binding receipt. Certain questions were asked her, and her answers were written down on an application blank, which was filled out by the agent, and she was told that she did not need to read the application, but simply sign it, which she did, not knowing what it contained. She believed the statements of the agent, relied upon his assurances that

she was immediately insured, and did not purchase other insurance, although she was intending to make a trip to Chicago at that time, and had planned to get accident insurance for that reason. The application, which was signed that day, was sent to the company, and a policy was duly issued and sent to H. S. Marks for unconditional delivery to the plaintiff, and he says that he immediately mailed it to her, about noon on September 22. There was a question in the evidence about the receipt of the policy. The plaintiff said the mail carrier brought it to her about 9:30 in the morning, just as she was leaving to go down town on September 22, 1930, and that she did not read it, but laid it aside, and in making a trip down town, she was injured about 12:30 p. m. of the same day.

The accident occurred when a young lad lost control of the car which he was driving at high speed, and crashed into the car in which plaintiff was riding, tipping it over so that plaintiff's arm and shoulder were dragged between the car and the curb; the lad not shutting off his engine. Plaintiff's arm was badly torn and fractured, her jaw fractured, her mouth and lips cut, and many other injuries to other parts of her body, including the fingers and thumb of one hand. She was confined in hospitals from the date of the accident until the 18th of the following February. In grafting skin from her lower limbs to cover her shoulder and arm, infection set in in the limbs. At the time of the trial in May, 1932, the physician testified the heavy scar from below the elbow to the shoulder caused a contracture of the muscles and all the soft tissues, so that she can extend her arm only partially. The scars on her limbs have drawn and contorted her limbs, and she is at least 75 per cent. disabled, and totally disabled so far as pursuing her occupation of seamstress is concerned.

The Commonwealth Casualty Company having been absorbed by the Independence Indemnity Company, the latter company filed answer, denying that any oral contract of insurance was ever entered into, and alleging that the

$1.60 was paid upon a written contract of insurance, which had not been delivered to her at the time of the accident. It is further alleged that the payment was returned to her, which plaintiff denies in her reply.

At the trial, plaintiff tendered ten instructions, all of which were adopted, and given as the court's own instructions. The defendant offered nine instructions, and this comment appears written upon the bottom of the last one: "These instructions not given to the court until immediately before the court began reading instructions to the jury. Therefore all refused. J. H. Broady, Judge."

In the motion for new trial, 22 errors are alleged, setting up that the verdict is contrary to the evidence and the law, and objecting to the first 12 out of the 16 instructions given by the court, and of the failure to give the nine offered by the defendant, and in failing to direct the jury to return a verdict for the defendant at the close of all the evidence.

We will first consider the error charged to be prejudicial in the refusal to consider the nine instructions, citing *Billings v. McCoy Brothers*, 5 Neb. 187, which held that instructions should be given if requested at any time before the jury retire.

At common law, and in the absence of statute, instructions may be either oral or in writing, at the discretion of the judge. Decisions in Florida, Georgia, Idaho, Oregon, and Washington show that oral instructions may be given if neither party requests the same to be in writing before the evidence closes. In several states they may be given orally to the jury, but transcribed by the official stenographer. 1 Blashfield, Instructions to Juries (2d ed.) 78, etc.

In Nebraska, section 20-1107, Comp. St. 1929, for civil trials, and section 29-2016, for criminal trials, treat this matter, in the fifth paragraph, in exactly the same language in each section, and require requests for instructions to be submitted at the close of the evidence. These sections both state that the instructions shall be reduced

to writing if either party requires it, and in former times parties sometimes consented to oral instructions. *Kuhn v. Nelson,* 61 Neb. 224; *Fitzgerald v. Fitzgerald,* 16 Neb. 413. But section 20-1114, Comp. St. 1929, now requires that all instructions be in writing, and filed by the clerk before being read to the jury.

In *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, 49 Am. Rep. 724, it was held that instructions submitted to the court should not be given to the jury if they had marginal citations of authorities upon them, as appear upon each of the nine offered by defendant in case at bar.

A trial court is not allowed to add oral explanations to its written instructions. *Hartwig v. Gordon,* 37 Neb. 657. But, if so given, and not objected to at the time, objections to such oral additions will be deemed waived. *Horbach v. Miller,* 4 Neb. 31; *Republican Valley R. Co. v. Arnold,* 13 Neb. 485.

It has been held that not every statement made by the court to the jury is a formal instruction, required to be in writing. *Grammer v. State,* 103 Neb. 325; *Millard v. Lyons,* 25 Wis. 516; *State v. Potter,* 15 Kan. 302; 1 Corcoran, Instructions to Juries (2d ed.) 2.

Instructions should be given in writing and carefully bound together, and filed by the clerk as the complete charge to the jury, in accordance with section 20-1114, Comp. St. 1929. It is unfair to the court and delays the trial, and deprives the jury of receiving the law immediately at the close of the argument, to have instructions handed up at that late time. While our law requires instructions to be submitted at the close of the evidence, so that they may be carefully considered by the court, yet a request for an instruction might be received and allowed at any time before the jury have retired, when it was made necessary by an omission of the trial judge of some material question presented in the case. *McKennan v. Omaha & C. B. Street R. Co.,* 95 Neb. 643; *Billings v. McCoy Brothers,* 5 Neb. 187; 5 R. C. L. Permanent Supp. p. 3676, note 61; 14 R. C. L. 802, sec. 61; 13 Standard Ency. of Procedure, 717.

We have held in *Osborne v. State,* 115 Neb. 65, that the proper time to make request for instructions is when the evidence is concluded, and in many districts the bar rules promulgated by the district courts so provide. The general rule is, however, that, unless the request is made at the proper time, it may be refused by the court, as was done in the case at bar.

In the criminal conspiracy case of *State v. Townley,* 149 Minn. 5, 17 A. L. R. 253, under a statute reading very similar to the Nebraska statute, it was held that it was within the discretion of the trial court to receive and consider instructions submitted near the end of the argument, notwithstanding the request of the court, made several days before, that the attorneys present their proposed instructions in time to enable the court to consider them. A careful examination of the instructions given by the court shows that the issues were fully and fairly presented, and gave the jury an understanding of the defense of the insurance company and of the law of the case.

The most difficult question is, whether an oral contract of insurance was perfected in the case at bar. The testimony of one of the agents present at the time has an important bearing on this point. Leslie Emigh testified that he was present at the time with H. S. Marks, under whom he was working; that Mr. Marks was the general agent and manager for the defendant company at Omaha, and he identified stationery printed for him by the company, showing that position. He also testified that Mr. Marks hired agents, which the company paid; that all applications were sent in through Mr. Marks, who adjusted claims for the company, and drew drafts in payment thereof, and that Mr. Marks, upon receipt of the $1.60, told plaintiff that he would give her a binding receipt, which he did, and promised her that the insurance would go into effect at once. Mr. Emigh admitted that there was an application, which plaintiff signed, in which she agreed that the insurance would not take effect until

the delivery of a policy to her in good health, and that he wrote "Yes" as her answer to that question, without her knowledge, and that she signed the application without reading it, at his suggestion.

In section 44-307, Comp. St. 1929, the term "agent," when relating to insurance matters, covers any person who shall, with authority, receive or receipt for any money on account of any contract of insurance. And he is an agent although the policy to be issued may not be signed by him. *Robinson v. Union Automobile Ins. Co.*, 112 Neb. 32; *Barrett v. Northwestern Mutual Life Ins. Co.*, 124 Neb. 864. And it is held that, in procuring applications for insurance, he is the agent of the company, and not of the insured, as to any representations and statements made in preparing applications. *State Ins. Co. v. Jordan*, 29 Neb. 514.

The common law of England contained nothing rendering it necessary that contracts of insurance should be in writing. *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636.

A few early cases declared parol contracts of insurance void on the ground that they would encourage fraud. Such cases were found in Missouri, Louisiana, Ohio, Pennsylvania, Arkansas, and Kentucky, but later cases can be found upholding them in several of these states. So far as the law is now concerned, a parol contract of insurance is valid, in the absence of a statutory requirement, provided the parol contract is complete and the minds of the parties have met as to all of the essential elements of the contract. 1 Couch, Ency. of Insurance Law, secs. 78-81; 1 Cooley, Briefs on Insurance (2d ed.) 533-561.

It has been held that it is within the apparent scope of the authority of an agent, with power to solicit insurance and deliver policies and collect premiums, to make an oral contract of insurance, which is binding upon the company, unless the insured had knowledge of circumstances suffi-

cient to put the insured upon inquiry. *Georgia Casualty Co. v. Bond-Foley Lumber Co.*, 187 Ky. 511; *Hahn v. Guardian Assurance Co.*, 23 Or. 576, 37 Am. St. Rep. 709; 2 Couch, Ency. of Insurance Law, secs. 526, 527; *Mathers v. Union Mutual Accident Ass'n*, 78 Wis. 588; *Hertz v. Security Mutual Ins. Co.*, 131 Minn. 147; *Anderson v. Northwestern Fire & Marine Ins. Co.*, 51 N. Dak. 917.

The scope and extent of the agent's authority is shown, not merely by reference to his title or to his written commission or credentials, but by the business which he is permitted to do and perform, and does do and perform in the company's name or by its apparent acquiescence and consent. *Stoner v. First American Fire Ins. Co.*, 246 N. W. (Ia.) 615.

The question of an oral, or parol, insurance contract is discussed at length, with citations from practically all the states of the Union, in a note in 15 A. L. R., beginning on page 995, and a continuation of that note is found in 69 A. L. R., beginning on page 559. A discussion of temporary insurance, pending the approval of the application or the issuance of the policy, is found in the helpful note in 81 A. L. R. 332.

This question has been before the Nebraska supreme court a number of times, and while the holdings are not entirely uniform in every respect, yet nearly every phase of an oral insurance policy has been discussed, and the leading cases will be reviewed briefly. The first case was *McCann v. Aetna Ins. Co.*, 3 Neb. 198. It appears that, upon October 11, 1865, while the steamer Sunset was lying at the wharf in St. Louis, Missouri, the plaintiff applied to the agent of the defendant company in Nebraska City for insurance upon his one-half of said steamboat. The agent said he could not issue the policy, but would take his application and send it in. No premium was paid. Six days later the steamboat, on its way up the Missouri, was wrecked and destroyed. Oral notice of loss was given to the agent at Nebraska City. Six days after the destruction of the boat, the premium was tendered, but not

received. When the case reached this court, in May, 1871, Chief Justice Mason, having been engaged as counsel, was disqualified, and Justice Lake, having tried the case in Otoe county, was likewise disqualified, and the case was therefore held until the January term, 1874, when the opinion was rendered by Justice Gantt, concurred in by Justice Maxwell. Many cases are reviewed in the briefs published with the opinion, and it is clearly shown that a parol contract of insurance will be valid if it is clearly established, but that such evidence was lacking in this case, as it was in the case of *Kor v. American Eagle Fire Ins. Co.*, 104 Neb. 610.

Nebraska & Iowa Ins. Co. v. Seivers, 27 Neb. 541, involved a parol contract to insure or issue a policy, covering a hotel building and barn, and it was held that proof of loss arising under such a parol contract of insurance need not follow the requirements of the policy which would have been issued in such case. Recovery was had by verdict of the jury, and the same was affirmed.

Carter v. Bankers Life Ins. Co., 83 Neb. 810, was an action for damages, appealed from Valley county, for failure to issue a policy of life insurance, for which a note was given for the first year's premium. The medical examination was duly passed, and the defendant company informed the insured that it had accepted his application, and would issue a policy on condition that he would consent to accept a 10-payment policy, with a premium of $48.10, instead of a 20-payment policy, with a premium of $31.10, which had been paid. The insured consented, and gave his check for $17 additional, and died less than 60 days thereafter, before the policy had been delivered. It was held that section 15, ch. 52, Laws 1903, requiring life insurance policies to be signed by the president and secretary, applied only to companies formed under the provisions of that act, and that the oral contract of insurance sued on was not obnoxious to our statute of frauds, as it might terminate within one year.

In *Rankin v. Northern Assurance Co.*, 98 Neb. 172, the

defendant entered into a contract, partly verbal and partly in writing, with the plaintiff's wife, to insure her life for $1,000 and three weeks later she died. The company admitted a written application had been made, and $5 paid upon the first premium, but it was proved that the balance of the first year's premium had been accepted in the form of a note. It was held that the contracts of a local agent, if within the apparent authority of the agent, and entered into in good faith by the insured, are binding upon the company. A similar holding was entered in the case of *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381.

Muhlbach v. Omaha Life Ins. Co., 107 Neb. 206, was an action upon an oral contract of insurance on the life of Nicholas Muhlbach, who had signed the application on January 17, 1919, and paid $162.40 for the first year's premium. Four days later he was killed in a fall from a windmill. In this case, in the receipt given it provided that the insurance should be effective on the date of the receipt and the application, if approved by the medical director, and it also states that, if the policy shall not be issued, the premium paid shall be returned, and it was held that there was no oral contract of insurance, because the minds of the parties had not met on definite terms to that effect.

In *Cline v. Fidelity Phenix Fire Ins. Co.*, 113 Neb. 481, an oral contract to renew fire insurance upon a barn was held to be good, notwithstanding it was in violation of the private instructions or limitations upon the agent's authority, of which the insured had neither actual nor constructive knowledge.

Glatfelter v. Security Ins. Co., 102 Neb. 464, was on an oral contract for fire insurance, made on May 8, 1914, but no premium was paid and no policy delivered, and the property was destroyed by fire December 27. The jury returned a verdict for the plaintiff, and it was held that, if the oral agreement is definite as to all of the material terms of the contract, it can be enforced.

We are convinced that the instructions submitted fairly

set forth the law of our state upon the subject of oral contracts of insurance, and that there is no reversible error in any instruction given. While there is a general feeling of prejudice against oral contracts of insurance, yet this court has upheld them in many decisions, some of which we have reviewed. Oral contracts attach in much the same manner, and according to the same principles, as do written contracts of insurance.

Finding no prejudicial errors in the record or judgment entered, the same is hereby affirmed. Attorney's fee taxed in this court at $100, as part of the costs.

AFFIRMED.

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

FILED JUNE 9, 1933. No. 28346.

Statute of Frauds. An oral agreement, to be void under the first subdivision of section 36-202, Comp. St. 1929, must indicate by its terms that it is not to be performed within one year from the making thereof.

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

Patrick & Smith and *O'Sullivan & Southard,* for appellant.

Finlayson, Burke & McKie, contra.

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

GOSS, C. J.

Plaintiff sued for damages for alleged breach of an oral contract. At the end of plaintiff's testimony he rested his case and defendant moved for a directed verdict on the ground that the oral promise was within the statute of frauds. The court sustained the motion and entered judgment dismissing the cause. Plaintiff appealed.

The evidence shows that about May 17, 1923, plaintiff purchased from defendant four bonds or promissory notes for $1,000 each, belonging to a series of bonds or notes, aggregating $75,000, made payable to First Trust Company of Omaha, and secured by a first mortgage on real property in Dixon county. They were not due until May 1, 1933, but bore 5½ per cent. interest, payable semi-annually, evidenced by coupons attached. When they were offered plaintiff by the vice-president of the trust company, plaintiff expressed objection on the ground that they were for too long a period. As an inducement to the purchase, the trust company through this officer entered into an oral agreement with plaintiff that at any time the plaintiff was in need of money the trust company would repurchase them. Plaintiff fairly showed, for the purpose of supporting a judgment in his favor, that the condition of the oral agreement was met; that is, that he needed the money. The four bonds were indorsed without recourse in the name of the trust company by its vice-president, and delivered to plaintiff. In the spring of 1924 the plaintiff turned over to defendant one of the bonds as part payment on another bond purchased by him from defendant. About the first of June, 1931, plaintiff negotiated unsuccessfully with defendant to get it to repurchase his remaining three bonds. On June 10, 1931, he made a formal written tender and demand which was refused. On June 11, 1931, this action was commenced.

So much of section 36-202, Comp. St. 1929, as is applicable, says: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: First. Every agreement that, by its terms, is not to be performed within one year from the making thereof; Second. Every special promise to answer for the debt, default or misdoings of another person."

Appellee argues that, as the note and the indorsement thereof form a written instrument indicating its freedom

from liability, therefore appellant is seeking to vary or contradict the terms of a written instrument by oral evidence. Appellant mistakes the object of the suit. The action is not upon the instrument, but for damages for appellee's breach of an oral contract to repurchase an instrument (perfectly good so far as the record shows, but not due) upon a condition which is shown by the evidence to have arisen. The effect of the qualified indorsement "without recourse" was two-fold: First, to relieve the appellee from liability to pay the debt of the maker; and, second, to assign the note to the appellant, with its negotiable character unimpaired. Comp. St. 1929, sec. 62-309. This is not a suit to compel appellee to pay the debt of another, but to pay its own obligation arising out of its oral agreement to repurchase the notes and to repay the appellant the money he had paid the appellee for them. Liability cannot be predicated upon the note, but arises, if at all, upon the appellee's own promise orally made. It is an original contract. *Trenholm v. Kloepper,* 88 Neb. 236; *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419.

The facts are fixed as we have stated them. The appellee admitted them when he moved for judgment. The only question of law is whether the admitted oral agreement is void because it comes within the definition of the statute as one "not to be performed within one year from the making thereof." The statute is general and does not specify any particular subject-matter of oral agreements.

An oral contract for leasing lands, depending upon a contingency which may occur within a year, though in fact it does not happen until later, is not void under the statute of frauds. *McCormick v. Drummett,* 9 Neb. 384. An oral contract by which a landlord agrees to give a tenant the use of the land and to pay the tenant the actual cost of a building and baking oven erected by the tenant, at any time the landlord desired possession, held not a defense to a forcible entry and detainer action, but not

void under the statute of frauds, for the reason the contract might have required performance within one year. *Connolly v. Giddings,* 24 Neb. 131. To be void, the contract must be one that shows by its terms it was not to be completed within the year. *Kiene v. Shaeffing,* 33 Neb. 21. To be void, the contract "must be one that, by its terms, is not to be performed within one year from the making thereof. The statute does not refer to such contracts as may possibly or probably not be performed within that time." *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339. "A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year." *Carter White Lead Co. v. Kinlin,* 47 Neb. 409; *Grotte v. Rachman,* 114 Neb. 284.

In *Griffin v. Bankers Realty Investment Co.,* 105 Neb. 419 (quoting *Hankwitz v. Barrett,* 143 Wis. 639) it was said: "The sale and delivery of stock and payment of the price, under a contract whereby the seller agreed to repurchase at the buyer's option, constituted an entire transaction which was sufficiently performed to take it out of the statute of frauds, relating to contracts for sale of goods, though the agreement to repurchase was oral." We applied the same rule to sales of stock in *Stratbucker v. Bankers Realty Investment Co.,* 107 Neb. 194, and in *Grotte v. Rachman,* 114 Neb. 284.

We conclude that the district court erred in sustaining the motion and in entering judgment for defendant. The judgment is reversed and the cause remanded.

REVERSED.

JOHN KERN, APPELLEE, V. FRENCHMAN VALLEY IRRIGATION DISTRICT, APPELLANT.

FILED JUNE 9, 1933. No. 28555.

Damages. "The measure of damages to a growing crop by a wrongful act or omission which destroys it is its value at the time and place of destruction." *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550.

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

Lehman & Swanson and *Cordeal, Colfer & Russell,* for appellant.

J. F. Ratcliff, contra.

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

GOSS, C. J.

Defendant appeals from a judgment in favor of plaintiff for damages resulting from flooding ten acres of unmatured corn crops by reason of defendant's lateral being negligently maintained and operated. The damages occurred to two successive crops planted the same year on the same land. The first flooding was about May 31, 1928, and, after replanting, the second flooding was about June 15, 1928. The jury gave a general verdict for $100, but, in answer to special interrogatories, fixed $50 as the damages to each crop.

Defendant assigns as errors, first, that there was no competent evidence as to damages, and, second, that the jury were not properly instructed as to the measure of damages.

The evidence as to damages, while not so concisely accurate and adequate as might be desired from the academic viewpoint, was, we think, competent. We assume that the evidence would be understood in its practical aspects by the type of jurors drawn from the agricultural area in which the case was tried.

Without quoting the words of the necessarily long instruction on the measure of damages and the things to consider in determining the value of a crop destroyed, it suffices to say that it was, in substance, a paraphrase of the instruction given in *Hopper v. Elkhorn Valley Drainage District,* 108 Neb. 550, so far as was necessary to cover the facts in common. In that case the court said: "The measure of damages to a growing crop by a wrongful act or omission which destroys it is its value at the time and place of destruction." This is the general rule. *Fremont, E. & M. V. R. Co. v. Marley,* 25 Neb. 138; *Berard v. Atchison & N. R. Co.,* 79 Neb. 830; *Chicago, B. & Q. R. Co. v. Emmert,* 53 Neb. 237; *Pribbeno v. Chicago, B. & Q. R. Co.,* 81 Neb. 657; *Morse v. Chicago, B. & Q. R. Co.,* 81 Neb. 745; *Boyd v. Lincoln & N. W. R. Co.,* 89 Neb. 840. With the instruction on the general rule should be coupled a direction to consider the facts in evidence.

In the instant case the court gave the substance of the foregoing general rule, recited a number of evidential facts to be considered by the jury in determining the value of the crop at the time of its destruction, and then added the inclusive words "and any other facts and circumstances shown by the evidence to establish such value." There was no prejudicial error in the instruction.

We find some difficulty in harmonizing the general verdict of $100 and the special findings that the damages to each crop were $50. This difficulty arises out of the fact that there was no real market for an unmatured crop so young as this. Necessarily the evidence of value was based somewhat upon the elements of the cost of production, the probable yield, and the market value of matured crops that year. Only one crop, of course, could have been matured on this land. While the amount involved is not large, yet the verdict appears to be excessive. The appellant is here rather for the purpose of obtaining an adjudication of the applicable rule. In the circumstances, we have determined that we will hold the judgment over $75 to be excessive. Unless appellee within

twenty days file a remittitur of $25, as of the date of the judgment in the district court, the judgment will be reversed; if such remittitur be so filed, the judgment for $75 will be affirmed.

AFFIRMED ON CONDITION.

NENA A. SCOTT, APPELLANT, V. FRED F. SCOTT, APPELLEE.

FILED JUNE 9, 1933. No. 28558.

1. **Limitation of Actions:** SUIT TO VACATE JUDGMENT FOR FRAUD. Section 20-2008, Comp. St. 1929, requires a proceeding to vacate a judgment for fraud, practiced by the successful party against a person of unsound mind, to be commenced within two years after the removal of such disability.
2. **Pleading:** PRACTICE. Ordinarily, when no action has been taken on a demurrer to a petition, the court may give defendant leave to withdraw the demurrer and to move to make the petition more definite and certain.
3. **Appeal:** PLEADING: ORDER TO MAKE PETITION MORE DEFINITE. An order of the district court requiring a petition to be made more definite and certain will be sustained unless it clearly appears that the court abused its discretion to plaintiff's prejudice.

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

Anson H. Bigelow, for appellant.

Abbott, Dunlap & Corbett, contra.

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

GOSS, C. J.

Plaintiff appeals from a final order sustaining a demurrer to her amended petition and dismissing her cause of action.

The suit was commenced December 27, 1930, by filing a petition in equity praying that a decree rendered November 17, 1917, in the same court, in a divorce suit between the same parties, be vacated. That decree divorced the

parties, awarded custody of minor children and determined property rights of the parties.

The district court sustained a motion of defendant to make the petition more definite by stating when plaintiff first employed legal counsel to protect her rights and by stating whether she instituted suit for that purpose, if so, when and in what court, and requiring her to attach a copy of her petition in that cause. In compliance plaintiff filed her amended petition and attached thereto a copy of her petition, verified by herself and filed in the district court for Douglas county on December 12, 1928.

The allegations of the amended petition are to the effect that in the divorce suit (1) the husband, who was plaintiff there, practiced fraud upon her to bring her into the jurisdiction and in respect of the pleadings, hearing and judgment in that case; (2) that prior thereto, then and long thereafter she was under such mental disability as not to know or appreciate the nature and consequences of her acts and that this condition was known to him; and (3) that this mental condition of plaintiff continued until late in 1926, when she emerged from it, but that it was not until the summer and fall of 1927 that she began to realize what had occurred as to the suit, and in the fall of 1928 she employed her present attorney; and on December 12, 1928, brought the suit in Douglas county.

The demurrer to the amended petition was sustained by the district court on the ground that the suit was brought more than two years after the actual removal of the disability of plaintiff.

The petition shows on its face that she had recovered from her mental unsoundness at least as early as December 12, 1928, which was more than two years before December 27, 1930, when this suit was commenced. An examination of the facts stated in the petition filed December 12, 1928, in the district court for Douglas county shows that she was there seeking damages from her former husband for the same wrongs alleged here and that she there alleged "she gradually recovered her mental

clarity and in 1925 began to gradually realize what had happened to her, and in 1926 realized but not until then knew the manner and extent to which she had been wronged and damaged." Section 20-2008, Comp. St. 1929, requires a proceeding to vacate a judgment for fraud, practiced by the successful party against a person of unsound mind, to be commenced within two years after the removal of such disability. As more than two years had elapsed after the removal of plaintiff's disability before she brought the instant case, it comes within the terms of the statute cited.

However, appellant cites *Krause v. Long*, 109 Neb. 846, as an authority that equity will intervene and afford relief after the time allowed by the statute for a proceeding to vacate the judgment. But the rule of equity laid down there, extending the statutory limitation, was expressly based upon the ground that "the injured party did not, in the exercise of reasonable diligence, discover, within the time allowed for commencing a statutory proceeding to vacate such judgment, sufficient evidence of the fraud to warrant a reasonable belief and expectation that such a proceeding would be successful if begun." So *Krause v. Long* and other Nebraska cases cited therein do not aid appellant but rather negative her position. We are of the opinion the district court did not err in sustaining the demurrer to the amended petition.

Appellant's assignments of error go back of the amended petition and contend that the district court erred in allowing defendant to withdraw his demurrer to the original petition and in allowing his motion to require the petition to be made more specific in the manner heretofore stated. The demurrer to the original petition was filed March 7, 1931. It does not appear that there was anything further done in the case until January 25, 1932, when the transcript shows defendant was allowed to withdraw his demurrer and to file a motion to make more definite and certain. This matter, which went to the formation of the issues, was in the discretion of the trial

court. In the absence of any showing that it prejudiced the ultimate rights of plaintiff, we will not say that this discretion was abused. In plaintiff's original petition she had pleaded her emergence in the last days of 1926 from her mental disability and that it was some time after that before it was possible to procure legal assistance and late in 1928 before she learned the facts with definiteness. She pleaded she had been diligent in behalf of said matters, but in that respect did not plead more than the conclusion. So the court sustained the motion. The result has been to bring out and settle in the pleadings, with a saving of time and expense, what was bound to appear on a trial on the merits. This was an equity case triable to the court. It does not appear that the trial judge abused his discretion to the prejudice of plaintiff. An order of the district court requiring a petition to be made more definite and certain will be sustained unless it clearly appears that the court abused its discretion to plaintiff's prejudice. *Bennett v. Baum*, 90 Neb. 320; 49 C. J. 730.

We find no reversible error in the record. The judgment of the district court is

AFFIRMED.

CHARLES C. MACHUREK, APPELLEE, V. OHIO NATIONAL LIFE INSURANCE COMPANY, APPELLANT.

FILED JUNE 9, 1933. No. 28538.

1. **Evidence**: INSURANCE CONTRACT: AMBIGUITY: PAROL EVIDENCE. In determining rights and liabilities under an ambiguous insurance contract drafted by the insurer, parol testimony, when justified by the circumstances, may be admitted to throw light on the terms upon which the minds of the contracting parties met.

2. ———: ———: ———: EXTRINSIC EVIDENCE. To prevent a wrong and to do justice, extrinsic evidence may be admitted to show the mutual understanding of the parties to a life insurance contract, when executed, as to ambiguous terms to which they subscribed.

3. **Insurance:** CONTRACT: CONSTRUCTION. Ambiguous language in a contract for disability insurance, if open to different interpretations, may be construed against the insurer that drafted the instrument.
4. ———: ———. The premium or consideration for insurance should be designated in the policy.
5. ———: INCOME: DISBURSEMENT. Insurance corporations, stockholders and policyholders are entitled to the proper disbursement of insurance funds arising from premiums and other legitimate sources of corporate income.
6. ———: ———: ———. Insurance corporations and their officers are not at liberty to apply insurance funds to unauthorized compensation of agents or others for services.
7. ———: ACTION ON POLICY: RECOVERY. In an action on a contract for disability insurance, wherein a settlement in full was pleaded as a defense, insurer *held* entitled to credit for a payment which insured claimed as compensation for services in addition to the amount due him under the policy, the verdict being in his favor on both items.
8. **Appeal:** REMITTITUR. On appeal, a remittitur may be required as a condition of affirmance, where excess in the amount of the recovery may be estimated with reasonable certainty on the face of the record.

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

Brown, Fitch & West, for appellant.

Baker, Lower & Sheehan, contra.

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

ROSE, J.

This is an action to recover disability insurance in the sum of $2,100 with interest. The American Old Line Insurance Company issued to Charles C. Machurek, plaintiff, a 15,000-dollar life insurance policy May 16, 1927. The annual premium was $489.75. Attached to the policy, when issued, was a supplemental agreement providing for proof of disability and for the payment of a monthly income of one per cent. of the face of the policy each calendar month during the continuance of disability, if the

insured, by reason of accident or disease, "has become wholly disabled by bodily injuries or disease," so that he is and "will be, presumably, thereby permanently, continuously, and wholly prevented from engaging in any occupation or employment whatsoever for remuneration or profit, or performing any work, and that such disability has then existed for not less than ninety days." The annual premium for the supplemental agreement was $55.20 which was included in the premium stated in the policy. When the policy and supplemental agreement were in force July 12, 1930, a shotgun was accidentally discharged by plaintiff, causing the loss of his left hand and a portion of his left arm. Plaintiff pleaded that, as a result of the accident and injury, he was "wholly disabled and was permanently, continuously, and wholly prevented from engaging in any occupation or employment whatsoever for remuneration or profit, and from performing any work;" that such disability continued for more than 90 days from the date of said injury to the date of filing his petition—October 13, 1931; that the proof and notice required by the insurance contract were given. Plaintiff sued for the unpaid monthly income of 1 per cent. of the face of the policy during disability, or for $2,100 and interest.

The Ohio National Life Insurance Company, defendant, acquired the business of the American Old Line Insurance Company and became liable for compliance with plaintiff's policy and with the supplemental agreement for disability insurance.

The answer to the petition admitted the issuance of the policy and the making of the supplemental agreement and that defendant assumed the obligations thereof. Otherwise there was a general denial and a plea of settlement of plaintiff's claim December 15, 1930, under which defendant paid and plaintiff accepted $750. All allegations inconsistent with the petition were denied in a reply to the answer. Upon a verdict in favor of plaintiff for $2,411.65, including interest, judgment was rendered. Defendant appealed.

On appeal it was argued at considerable length that the district court erred in overruling a motion by defendant to direct a verdict in its favor after all the evidence had been adduced on both sides. This assigned error is based on the propositions that plaintiff was not permanently disabled, within the meaning of the policy, and that there was no plea or evidence that, when proofs of a claim were made, he or his physician presumed, or had any reason to believe, the disability resulting from the gunshot was permanent. The solution of these problems depends on the risk assumed and the evidence.

By virtue of the supplemental agreement and the annual payments of $55.20 in premiums, plaintiff had some kind of accident and disability insurance. Defendant's liability was that of the original insurer. The policy and the supplemental agreement were in force when the accident occurred. As a result of the gunshot plaintiff was totally disabled for 12 or 14 months. Due notice of the accident and disability and proofs of the claim were given. These facts are shown by the evidence and are conceded by defendant. Did the insurer assume the risk of this total disability for 12 or 14 months? What disability insurance, if any, did plaintiff purchase with his annual premiums of $55.20 in connection with the 15,000-dollar policy? The supplemental agreement contains such terms as "a monthly income of one per cent. of the face of the policy each calendar month during the continuance of such disability;" "wholly disabled by bodily injuries or disease," so that he "will be, presumably, thereby permanently, continuously, and wholly prevented from engaging in any occupation or employment whatsoever for remuneration or profit, or performing any work, and that such disability has then existed for not less than ninety days." These terms, in the connection used, are ambiguous, if not inconsistent in some respects. Plaintiff was not a lawyer, insurance agent or underwriter. He was engaged in the automobile business and was approached at his garage by an authorized agent who procured the life in-

surance policy and also the supplemental agreement for accident and disability insurance in controversy. At the time, he naturally asked the agent about the perplexing language in the supplemental agreement. The identical agent was a witness at the trial and, referring to plaintiff, in answering questions, testified:

"Mr. Machurek asked me about the total and permanent disability clause, and asked me if he was laid up if he would receive compensation, and I told him that in the policy it stated that, if he was disabled for ninety days, that he would receive compensation the same as the rest of them received it; if he was disabled for a period of ninety days, and would receive $150 a month until he was well again. * * * I told him that if he was disabled for life that he would receive $150 a month as long as he lived."

This and other testimony of a similar import were not disputed. Objections were interposed on the grounds that such evidence contradicted or varied the written instrument and was inadmissible; that without it there was no evidence of a claim for which defendant incurred liability under the insurance contract. Insurers, by inserting in their policies misleading, uncertain, ambiguous or inconsistent terms and by construing them in their own favor, cannot always force the insured into a court of equity to establish the contract actually made or forfeit the insurance. In determining rights and liabilities under an ambiguous insurance contract drafted by the insurer, parol testimony, when justified by the circumstances, may be admitted to throw light on the terms upon which the minds of the contracting parties met. To prevent a wrong and to do justice, extrinsic evidence may be admitted to show the mutual understanding of the parties to a life insurance contract, when executed, as to the meaning of ambiguous terms to which they subscribed. These rules of evidence, when restricted to a particular infirmity in language inserted by an insurer in a printed form, are sanctioned by both reason and authority and are occasion-

ally essential to the administration of justice. Ambiguous language in a contract for disability insurance, if open to different interpretations, may be construed against the insurer that drafted the instrument. The blank form of the supplemental agreement for accident and disability insurance was put into the hands of an authorized agent of the insurer with power to solicit insurance risks under it. He acted for the insurer. It may fairly be inferred from the writings and from other competent evidence that the parties to the contract, when executed, mutually understood the ambiguous provisions to mean that insured, if totally disabled for more than 90 days, would be entitled to $150 a month during such disability, and that defendant procured the risk and received the premium on those terms. There is nothing to show that the annual premium of $55.20 which plaintiff paid was not adequate compensation for the insurance risk of $150 a month during total disability. In these views of the law and the testimony, there does not seem to be a reversible error in the order overruling the motion to direct a verdict in favor of defendant or a sufficient reason to set aside the judgment for assigned errors in instructions and in rulings on evidence.

The issue raised by the defense of settlement was submitted to the jury and by them determined in favor of plaintiff. Agents and officers of insurer met plaintiff in a bank in David City, where they remained in conference for two hours. Witnesses testified to facts tending to prove that an agreement to settle the controversy for $750 was made. After the meeting insurer mailed to plaintiff a 750-dollar check, dated December 12, 1930, which he received and cashed. Insurer did not offer any documentary evidence of a settlement. The check itself did not mention payment in full or recite the settlement of the claim. Plaintiff denied that he agreed to a settlement and testified to the effect that the check was given in appreciation of services rendered by him to insurer in assisting its agents in the procuring of business. On this

feature of the defense, the evidence seems to be sufficient to support a finding that plaintiff did not agree to the settlement pleaded; but it does not follow that he was entitled to recover the full amount of his claim for insurance and at the same time retain the $750. If this item was not paid to settle the claim for insurance, it was a payment thereon. Plaintiff testified in substance that the check was given and received for services and influence on behalf of insurer in procuring business, but his own testimony shows that he had not been employed as an agent. He admitted he did not have a contract of employment. The evidence is insufficient to support a valid claim for compensation in addition to disability insurance. The law seems to require the premium or consideration for insurance to be designated in the policy. The commission of an agent for procuring a risk is customarily paid from the premium shown on the face of the contract. A statute provides:

"It shall be unlawful for any insurance company, association or society, or for any officer, manager, agent or other representative thereof, to include in the sum charged or designated in any policy as the consideration for insurance, any fee, compensation, charge or perquisite whatsoever not specified in the policy. When collected the same shall be reported as such." Comp. St. 1929, sec. 44-339.

Insurance corporations, stockholders and policyholders are entitled to lawful disbursements of insurance funds arising from premiums and other legitimate sources of corporate income. Insurance corporations and their officers are not at liberty to apply insurance funds to unauthorized compensation of agents or others for services. Otherwise, funds created to pay insurance risks, legitimate expenses and corporate profits could be squandered on void claims for compensation. Premiums and other insurance funds are collected and held for proper purposes of the insurance business.

Plaintiff seems to have made a case for disability in-

surance, but he did not prove facts showing a lawful right to retain the $750 paid by the insurer, except as a payment on his claim. Defendant is entitled to a credit of $750 with interest at the rate of 7 per cent. per annum from the time the payment was made, December 15, 1930, until the date of the judgment, March 22, 1932, or for $816.80 in all. The judgment for $2,411.65 will be affirmed to the extent of $1,594.85, if a remittitur of $816.80 is filed herein within 20 days. Otherwise, it will be reversed and the cause remanded for further proceedings.

AFFIRMED ON CONDITION.

WILLIAM MORCUMB V. STATE OF NEBRASKA.

FILED JUNE 9, 1933. No. 28618.

Criminal Law: CONFESSIONS. Only confessions are admissible in evidence which were freely and voluntarily made and which were not induced by promise of benefit or fear of threat.

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

Scott & Scott, for plaintiff in error.

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

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

DEAN, J.

Plaintiff in error was convicted of unlawfully making an assault upon a six-year-old girl with intent to commit rape. The sole assignments argued before the court and discussed in the briefs are (1) that the evidence is not sufficient to sustain the verdict, and (2) that a confession introduced in evidence was involuntary and not competent against defendant.

The sordid story in this record need not and should not be written into this opinion. It is sufficient to say that, after a careful examination, it is determined sufficient to support the verdict. True, the defendant denied the overt act; but, upon the day when the crime was alleged to have been committed, he told the officers who arrested him that he had done the thing charged, whereupon he was arraigned before the county judge of Red Willow county and pleaded guilty. Immediately thereafter he signed a confession which was sworn to before the county judge.

Objection was made to the competency of the confession for that it was involuntary. Such a confession is incompetent. *Jones v. State,* 97 Neb. 151. Only confessions are admissible in evidence which were freely and voluntarily made and which were not induced by promise of benefit or fear of threat. *Ringer v. State,* 114 Neb. 404; *State v. Force,* 69 Neb. 162.

But the inference most favorable to the defendant that can be drawn from the evidence is not sufficient to establish that this confession was other than voluntary. It seems to have been prompted by remorse and a gnawing consciousness of guilt rather than induced by the promise of any benefit or the fear of any threat.

The evidence, while in conflict, is sufficient to support the verdict, and no prejudicial error appearing in the record, that verdict, determining as it does the credibility of the witness, will not be disturbed by this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLEE.

FILED JUNE 9, 1933. No. 28520.

1. Evidence: TENSILE STRENGTH. Where tensile strength of materials is an issue, evidence may be received as to tests of tensile strength of materials that are, in all respects, similar to those whose tensile strength is in controversy.

2. **Contracts**: CONSTRUCTION OF PIPE LINE: APPROVAL OF ENGINEERS. Where a contract for the construction of a steam pipe line makes the engineers of the owner supervising agents, with power to reject any material or work that does not comply with the requirements of the contract, and which contract authorizes the engineers to approve the work and issue final certificate, such certificate of approval by the engineers constitutes *prima facie* evidence that the work has been performed according to contract requirements.
3. **Parol Evidence**: WRITTEN CONTRACTS. Parol evidence is admissible to show the meaning of technical terms in a written contract.
4. ———: ———. A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous. Such evidence may be received, not to contradict the terms of the contract, but to ascertain and give effect to the intent of the parties.
5. **Contracts**: CONSTRUCTION: QUESTION OF FACT. Where there are contradictions and ambiguities in a written instrument, and where evidence relating to the contradictory provision and ambiguity is in conflict, the interpretation to be given the contract in these respects is a question of fact for the jury to determine.
6. ———: ———: ———. Where a technical term is used in a contract, and expert witnesses differ as to its meaning, and where the evidence relating thereto is in conflict, the meaning of such term becomes a question of fact for the jury to determine.
7. ———: ———: SPECIAL PROVISIONS. As a rule, where there are general and special provisions in a construction contract, relating to the same thing, the special will control over the general provisions.
8. ———: CONSTRUCTION CONTRACT: LIABILITY OF CONTRACTOR. Where plans and specifications for an improvement are prepared by the owner's engineers, who are to inspect and supervise the construction and see that materials are furnished and work performed in accordance with the specifications, ordinarily the contractor is not liable for the sufficiency of the specifications, but only for the skill with which he performs the work and the soundness of the material used by him.
9. ———: ———: ———. Ordinarily, when a contract prescribes the materials chosen by the owner, or his engineer, and the contractor has no choice in respect to them, the contract cannot be construed to impose on the contractor an un-

dertaking that the materials chosen will meet the demands to be made upon them.

10. Appeal. The verdict of a jury, based on conflicting evidence, in a law action will not be disturbed by the appellate court unless clearly wrong.

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

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

C. L. Clark and *J. B. Chambers, contra.*

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

GOOD, J.

This is an action against the surety on a guaranty bond, to recover damages caused by the principal's alleged breach of a construction contract. Defendant had judgment, and plaintiff has appealed.

Plaintiff let to W. H. Pearce & Company a contract to construct a high pressure steam pipe line, extending from the state's heating and power plant, located on the University campus in Lincoln, to the state capitol, for the purpose of furnishing heat to the capitol building. The state employed two firms of engineers, one located in Lincoln and the other in Kansas City, the latter known as consulting engineers, and entered into contracts with these engineering companies to prepare plans, specifications and details for the construction and installation of the pipe line and for the superintending of such construction by said engineers. These engineering companies prepared plans, specifications and details for the pipe line. Public notice was given to prospective bidders and proposals received from such bidders for the construction of the pipe line. The contract was awarded to Pearce & Company, hereinafter referred to as the contractor. The contract required the contractor to give a bond for the faithful performance of the contract, according to plans

and specifications, under the supervision of the state's engineers. The contractor, with defendant as surety, executed such a bond. The contract provided that the notice to bidders, the proposal of the successful bidder, the plans, specifications, details and the bond of the surety company should all constitute a part of the contract.

The contract required installation of a steel pipe line, part of which should be 10 inches in diameter and the remainder 8 inches. The 10-inch part of the pipe line was to be installed in a tunnel extending from the heating plant a distance of several hundred feet, and from thence an 8-inch steel pipe in a conduit which would extend to the capitol building. The contract provided for expansion joints at the points designated on the blue prints, and also provided for manholes at each expansion joint in the conduit. It further provided that the expansion joints should be of Ferrosteel, extra heavy pattern, and provided for not more than 5-inch expansion at each joint. It also provided that in the tunnel the 10-inch pipe should be anchored to the wall of the tunnel, and that anchors should be placed at each expansion joint and midway between the expansion joints. There was also a general provision that the pipe line should be suitable for carrying steam at a pressure of 250 pounds to the square inch and superheat of 150 degrees.

The state charged in its petition that the expansion joints were not of extra heavy pattern and were not suitable and safe for carrying steam at 250 pounds pressure and 150 degrees superheat; that the anchors were insufficient; that insufficient expansion was provided for; that the expansion joints should either have been placed closer together, or a greater expansion provided for, in each joint, and alleged other shortcomings, which we need not mention. Defendant answered, alleging that its principal, the contractor, had fully and completely performed its contract, according to the terms and specifications; that the contract provided for the work to be performed under direction and supervision of the plaintiff's engi-

neers; that they had approved all the work and materials furnished; had made monthly estimates which had been paid, and, on the completion of the work, had made a final estimate and approved the work as a completed whole, and that plaintiff had paid therefor.

Plaintiff claims that the court committed prejudicial error in admitting, over objection, evidence of tests, made by experts, of certain materials similar to some of those used in the construction of the pipe line, because the tests were made of materials that were not manufactured or fabricated at the same time as those used in the pipe line. The evidence shows that the tests were made of materials, manufactured by the same foundry, of like ingredients, in the same proportion, and under a similar condition to those that were used in the pipe line. We are cited to no authority holding that such tests are not competent, and, since they were of materials of the same character, in all respects, as those used by the contractor, we fail to perceive why the evidence was not admissible. Evidence of tests of tensile strength of similar materials to those in controversy and made under like conditions is competent as tending to prove the tensile strength of materials actually used by the contractor.

Plaintiff complains because, over objection, the court received evidence to the effect that the state's engineers were daily on the job during the construction of the pipe line, inspecting and superintending the work done and materials used, and that such engineers approved the material and work. The contract provided for such inspection and supervision and empowered the state's engineers to reject any and all material and any work that did not meet the contract requirements. There is no charge that the engineers acted in bad faith, or were negligent in the performance of their duties. They were standing in the place of and acting for the state, and their approval of the work and material tends to sustain the allegations of defendant's answer that the work was performed in all respects according to the terms and conditions of the contract.

Where a contract for the construction of a steam pipe line makes the engineers of the owner supervising agents, with power to reject any material or work that does not comply with the terms of the contract, and authorizes the engineers to approve and issue final certificate, such certificate of approval by the engineers constitutes at least *prima facie* evidence that the work has been performed according to the contract. *Freygang v. Vera Cruz & P. R. Co.*, 154 Fed. 640; *Jefferson Hotel Co. v. Brumbaugh*, 168 Fed. 867; *Brownwell Improvement Co. v. Critchfield*, 197 Ill. 61.

Plaintiff argues that the court erred in admitting certain evidence of what it terms preliminary negotiations between the state and the contractor, prior to the execution of the contract. There are certain provisions of the contract that are inconsistent with each other, and technical terms are used, concerning whose meaning engineering experts differ. With respect to the contradictory terms of the contract, in one or two instances, the conversations of the parties immediately prior to entering into the contract tend to show which of the inconsistent provisions was intended to be followed, and where there was ambiguity in the contract, evidence was admissible to show what the parties intended.

Parol evidence is admissible to show the meaning of technical terms in a written contract. 13 C. J. 532. A written instrument is open to explanation by parol evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous. 22 C. J. 1174, 1175. Such evidence is admitted, not for the purpose of contradicting the terms of the contract, but for ascertaining and giving effect to the true intent of the parties.

In *Myers v. Persson*, 94 Neb. 467, it was held: "Ambiguity in a written instrument may be explained by oral testimony showing the mutual understanding of the parties." See, also, *In re Estate of Enyart*, 100 Neb. 337.

Plaintiff complains of the giving of a number of in-

structions. The principal complaint in this respect relates to submitting to the jury the interpretation and meaning of the contract in certain respects. It is contended that the construction and meaning of the contract was exclusively for the court and should not have been submitted to the jury. It may be conceded that it is a general rule that the construction or interpretation of a written instrument belongs to the court and is, ordinarily, not for the jury to determine, but there are exceptions. Where there are contradictions in the written instrument itself, where there are ambiguities, and where the evidence relating to these ambiguities and to the contradictory provisions is in conflict, the interpretation to be given the contract in this respect becomes a question of fact and one that is properly submitted to the jury.

Where a technical term is used in a contract, and expert witnesses differ as to its meaning and what it implies, and the evidence relating thereto is in conflict, then the matter becomes a question of fact for the jury. Under the state of facts disclosed by the record, the instructions of which plaintiff complains were properly given.

Much stress is laid upon a provision of the contract that the pipe line should be suitable for carrying steam at 250 pounds pressure to the square inch and superheat of 150 degrees. It is contended that this is a warranty that the pipe line, when completed, will be suitable for such purpose. It is a rule that, where there are general and special provisions in a contract, relating to the same thing, the special will control over the general provisions, and, if the contract is fulfilled according to the special provisions, the contractor has fully complied with the terms of his contract. Whether the pipe line, as designed by plaintiff's engineers, and the specific material required and manner of construction were sufficient were questions on which the contractor was not required to pass judgment. Its duty was to perform and fulfil the contract according to the specific terms and directions therein.

It is contended that the expansion joints should have been of cast steel and that Ferrosteel was not suitable and did not possess the tensile strength to safely carry steam at the stipulated pressure and temperature. The contract, in express terms, provided that the expansion joints should be of Ferrosteel. The evidence of defendant tends to show that they were made of Ferrosteel, and that they were sufficiently heavy and possessed the tensile strength to carry the steam at the designated pressure and temperature. In any event, the contract prepared by plaintiff's engineers designated Ferrosteel as the material for the expansion joints. The contractor was required to furnish that material and not something better.

Where plans and specifications for an improvement are prepared by engineers of the owner, who are to inspect and supervise the construction and see to it that materials are furnished and work performed in accordance with the specifications, ordinarily the contractor is not liable for the sufficiency of the specifications, but only for the skill with which he performs the work and the soundness of the materials used by him. 6 R. C. L. 868, sec. 254; 9 C. J. 745, 746; *Bush v. Jones*, 144 Fed. 942; *Bentley v. State*, 73 Wis. 416.

In the case of *Friederick v. County of Redwood*, 153 Minn. 450, it was said: "Where a contractor makes an absolute and unqualified contract to construct a building or perform a given undertaking, it is the general, and perhaps universal, rule that he assumes the risks attending the performance of the contract, and must repair and make good any injury or defect which occurs or develops before the completed work has been delivered to the other party. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from the prescribed plans and specifications even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free

from defects, or withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part."

In *Reinhart Construction Co. v. Baltimore,* 157 Md. 420, it was said: "Generally, when a contract prescribed materials chosen entirely by the owner or engineer, and the contractor has no choice in respect to them, the contract cannot be construed to impose on the contractor an undertaking that the materials chosen will meet the demands to be made upon them. *United States v. Spearin,* 248 U. S. 132, 136; *Bentley v. State,* 73 Wis. 416; *Southgate v. Sanford & Brooks Co.,* 147 Va. 554. Even a general guaranty of good condition during a period subsequent to completion has been construed not to include liability for mistake or miscalculation in an architect's plans. * * * It is not an intention that would be expected, or be reasonably inferred from a general guaranty of work to be done." See, also, *Oklahoma City v. Derr,* 109 Okla. 192; *Louisiana Ship Bldg. Co. v. Bing Dampskibsaktieselskab,* 158 La. 548.

In *Tide Water Bldg. Co. v. Hammond,* 129 N. Y. Supp. 355, it was held that a building contractor, guaranteeing a roof to be water-tight, was not bound to do more than the specifications required to make it so. To the same effect are *Harlow & Co. v. Borough of Homestead,* 194 Pa. St. 57; *Adams v. Tri-City Amusement Co.,* 124 Va. 473; *Morse, Williams & Co. v. Puffer,* 182 Mass. 423; *Filbert v. City of Philadelphia,* 181 Pa. St. 530; *MacKnight Flintic Stone Co. v. The Mayor,* 160 N. Y. 72.

Plaintiff contends that the expansion joints should have provided for a greater expansion, or that there should have been more joints. The specifications in the contract indicate just how many and where the expansion joints should be placed, and provide for an expansion of not

to exceed five inches for each joint. In this respect, the contractor complied with the terms of the contract. If the expansion for each joint was insufficient, or if there should have been more expansion joints placed in the line, this was not the fault of the contractor. It was the defect in the plans and specifications, provided by plaintiff's engineers. However, the evidence on behalf of defendant tends to show that the expansion provided for was sufficient to meet the requirements of the desired operating conditions.

Plaintiff also contends that the anchors were not extra heavy and did not comply with the specifications. The contract provided that the anchors should be of Crescent type, extra heavy pattern. The evidence tends to show that the Crescent type anchor is manufactured by only one company, and that it has three different patterns for such work, known as light, standard and extra heavy pattern, and that the anchors used were Crescent type and extra heavy pattern, and strictly complied with the terms of the contract.

It is contended that the pipe line was not suitable for operation, because tie rods, or limiting bolts, were not installed over the expansion joints. It is a sufficient answer in this respect to say that the specifications and details did not call for such rods or bolts, and the contractor was not required to install other devices than those provided for in the contract.

The contractor completed the pipe line about the 1st of February, 1930. The north end of this pipe line was to reach to, or possibly into, the plaintiff's power and heating plant. At the time of the completion of the pipe line only the footings for the wall of the plant building had been laid. The north expansion joint in the pipe line was within about 20 feet of where the south wall of the plant building would be. One joint of pipe, 20 or 22 feet long, with a sleeve bolted to one end, was required to complete the full length of the pipe line. The end with the sleeve was inserted in the expansion joint, and the other was held by a chain loop, passing under the joint

of pipe, and both ends of the chain fastened to an I beam in the top of the tunnel. About six months after the completion of the pipe line, the plant wall had been constructed, the steam headers and steam pipes in the building installed, and a connection made between the steam pipe in the building and the pipe line by welding the two together. This was done by another contractor, who installed the part of the heating plant within the building. After this connection was made, an anchor was bolted to the wall of the tunnel a few feet from the power house wall, to which anchor a wire cable was fastened, extending through a thimble in the wall, around another steam pipe, back through the thimble, and fastened to the anchor by means of a turn buckle and hook. About September 6, 1930, when steam was first turned into the pipe line, with 250 pounds pressure, the hook on the turn buckle broke, permitting the cable to slack and the steam pipe to be pushed out of the expansion joint. Plaintiff insists that it was the duty of the contractor to provide for this anchor, and that the anchor so provided was defective and insufficient.

The plans and specifications did not require the contractor to install an anchor between the last expansion joint and the power house wall. The evidence as to who did install the anchor, whether it was done by the contractor for the pipe line or by the contractor for installing the heating plant within the building, is in conflict. The question of any liability for the faulty or defective cable anchor is, in the final analysis, a question of fact, like most of the other questions presented by the record, and concerning which the evidence is in conflict. The issues of fact were, in our opinion, fairly submitted to the jury. It is a well-recognized rule that the verdict of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong.

Our attention has not been called to any place in the record disclosing error prejudicial to the plaintiff. Judgment

AFFIRMED.

AMANDA EMERY, APPELLANT, V. MIDWEST AMUSEMENT & REALTY COMPANY, APPELLEE.

FILED JUNE 9, 1933. No. 28530.

1. **Public Places of Amusement: DUTY OF PROPRIETORS.** "One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises generally; he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care." *Welsh v. Jefferson County Agricultural Society*, 121 Neb. 166.
2. ———: ———. "The proprietor of a place of public amusement is required to use ordinary or reasonable care to put and keep the premises, appliances, and amusement devices in a reasonably safe condition for persons attending; and if he fails to perform his duty in this regard, a patron who is injured in consequence thereof is entitled to recover for the injury sustained." 62 C. J. 863.
3. ———: ———. In determining whether premises, devoted to the giving of plays, moving pictures and other like form of entertainment, during which the auditoriums thereof must be substantially dark, are reasonably safe, regard must be had to the fact that the public come and go at any time, and that the proprietor should anticipate that they may arrive or depart when the lights are down or "off." To meet this situation the care required of him should be commensurate with the danger.
4. ———: NEGLIGENCE: QUESTION FOR JURY. The evidence in the instant case discloses a transaction about which, in view of the rule announced, reasonable men might entertain an honest difference of opinion. We are therefore unable to say as a matter of law that the maintenance in this theater at the time of the accident of an unlighted step-off was not negligence, but are constrained to the view that the question should have been submitted to the jury.

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

Mothersead & York, for appellant.

Wright & Wright, contra.

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

EBERLY, J.

Action for personal injuries occasioned by a fall in the balcony of a theater occupied by defendant, and in which at the time such alleged injuries were received a public motion picture entertainment was being presented by it.

In substance it is charged that because of, and due to, carelessness and negligence of defendant in failing to have lights in this balcony, thereby causing intense darkness therein, the plaintiff, while proceeding to her intended seat therein with due care, stepped onto an unlighted stairway without knowing the same was in close proximity to her, and thereby fell, receiving as a result the injuries complained of.

The answer admits the corporate capacity of defendant, the ownership and operation of the theater by it, and the physical surroundings which constituted the *locus in quo;* denies the occurrence of the accident and the infliction of the injuries complained of and the negligence alleged; and affirmatively alleges that at the times mentioned in plaintiff's petition the theater was adequately lighted, the seat and aisle lights were burning, and any injuries to plaintiff, if any there were, at the time and place alleged by her, were caused wholly by the carelessness and negligence of plaintiff herself.

Plaintiff filed a general denial as her reply to the defendant's answer.

Trial to a jury resulted in a verdict directed by the court for defendant. Plaintiff appeals.

Under the record the sole question presented for review is the sufficiency of the evidence to entitle plaintiff to have her cause submitted to the trial jury for determination. The question thus stated is further narrowed by the fact that under the evidence introduced, for the purpose of this determination, the occurrence of an accident at the time and place alleged by plaintiff, causing substantial injuries to plaintiff as alleged, must be deemed adequately established. Therefore, it remains for this court to determine whether the proof discloses that this accident

was due to actionable negligence on the part of defendant, and, if so, whether the facts so proved are such that reasonable minds could come to no other conclusion than that plaintiff was guilty of more than slight negligence in comparison with the negligence of the defendant.

It appears that this balcony was equipped with rows of seats arranged in tiers rising from front to rear. Access to these was by a series of steps descending from the rear to the front of the balcony. The plan of the theater included adequate lighting by use of artificial lights. A part of this system was composed of aisle lights, or small hooded lamps, placed in the aisles at the end of the seats, which, when lighted, illuminated the steps, and the light so confined and concentrated downward was evidently intended to, and did when "on," assure the safety of the footing of the patrons in passing to and from their seats in the balcony. It seems that entrance to this balcony from the lower story was by a stairs, from the head of which it was necessary to proceed either to the right or left along the rear of a row of seats (or a guard-rail) to steps descending from the rear to the front of this gallery. On the day in question plaintiff, accompanied by her daughter, passed through the front entrance to the theater. There admission tickets for which compensation had been paid were delivered and taken up by the representative of the defendant thus engaged in the performance of these duties. Evidently with his knowledge they turned and entered the passageway to the stairs leading to the balcony. This was a place in common use by those attending the entertainments. Nothing was said to them, nor was any warning given them by the servants of the defendant, of the conditions then prevailing on the balcony. On passing through the doors at the head of the stairs, they found themselves enshrouded in darkness. However, the performance was then going on and pictures were being thrown on the screen. It would seem doubtful whether this situation would, under the conditions that may be said to almost universally ob-

tain in entertainments of this kind, be such as to challenge the attention of plaintiff to possible concealed dangers to which she might be exposed. Patrons of "movies," it may be said, usually sit in comparative darkness while the pictures are thrown on the screen. This condition is not only common, but apparently adds to the quality of the entertainment. Besides, in the instant case, it is disclosed affirmatively in the evidence that the plaintiff and her daughter then knew of the hooded lights and the purpose these lights served; knew that the light therefrom, due to their construction, was concentrated and cast upon the floor for the purpose of illuminating the steps which they would have to pass down to arrive at their intended seats. With such lights "on," as they were obviously intended to be at the time of this accident, the complete safety of plaintiff's footing was assured. Indeed, the only place of possible existing danger in the darkness then prevailing, so far as can be gathered from the evidence, was a "step-off" in the route passed over by plaintiff, created by the presence of the descending steps. Plaintiff, followed by her daughter, in the darkness, turned to the left after passing through the door at the head of the stairs, and in the proper and intended passageway "felt her way along" the back of the seats or guard-rail, expecting, when she arrived where the stairs went down, the aisle lights would be "on" and she could see the well-illuminated steps. There was no usher to direct her, and when she arrived at the stairway the aisle lights, on the presence of which she was relying, were not "on." We are also satisfied that the circumstances disclosed in the evidence fully establish that there was a "step down" where plaintiff stepped into the unlighted aisle, and thus caused her fall and resulted in her injuries.

As to the subject of this action this court has adopted the view: "One who operates a place of public amusement or entertainment is held to a stricter accountability for injuries to patrons than owners of private premises

generally; he is not the insurer of the safety of patrons, but owes to them only what, under the particular circumstances, amounts to ordinary and reasonable care." *Welsh v. Jefferson County Agricultural Society,* 121 Neb. 166.

So, too, the approved rule appears to be: "Ordinary or reasonable care on the part of a proprietor of a theater or moving picture theater to keep the premises in a reasonably safe condition requires the exercise of reasonable care in lighting aisles, stairways, etc.; and this is such lighting as an ordinarily prudent person would have furnished under the same or similar circumstances, that is to say, taking into consideration the purpose for which the theater was used and having due regard for the safety of patrons. * * * It has been held that it cannot be said as a matter of law that the maintenance in a moving picture show, sufficiently darkened for the purposes of the exhibition, of a platform on which seats are arranged several inches above the aisle without lighting the place at which a step-off occurs is or is not negligence, but the question is one for the determination of the jury. And in an action for injuries sustained by reason of alleged negligence of a moving picture proprietor in failing sufficiently to light a stairway, it has been held a question for the jury to determine whether the lighting was sufficient to make the premises as reasonably safe as was consistent with the practical operation of the theater." 62 C. J. 869, 870.

It has been said: "In determining whether the premises are reasonably safe, regard must be had to the fact that the public come and go at any time, and that the proprietor should anticipate that they may arrive or depart when the lights are down, and to meet this situation the care required of him should be commensurate with the danger. The matter being one about which reasonable men might entertain an honest difference of opinion, we are unable to say as a matter of law that maintenance in the theater of an unlighted step-off of four or five inches was not negligence, but are constrained to the view that

the question should have been submitted to the jury." *Magruder v. Columbia Amusement Co.,* 218 Ky. 761.

Also, "Places in which plays, moving pictures and certain other forms of entertainment are given must be made substantially dark during the exhibition. But it is a matter of common knowledge that it is the practice of the proprietors of theaters and moving picture establishments to protect patrons against this necessary darkness by equipping ushers with flash lights and requiring the ushers to assist the patrons when they enter such a place of entertainment when it is dark. The law required this defendant to do nothing unreasonable. Reasonable protection to plaintiff under all the circumstances is the measure of its responsibility. Whether it performed its duty was a jury question." *Rutherford v. Academy of Music,* 87 Pa. Super. Ct. 355.

In *Branch v. Klatt,* 165 Mich. 666, in a case involving many features identical with the instant controversy, the plaintiff fell and was injured in a theater building, while passing down a flight of improperly lighted steps and through a dark passageway. On the ground of contributory negligence the circuit court directed a verdict against her. This judgment the supreme court of that state reversed on the principle that "A person may presume that the owner of a theater has discharged his duty of having the premises and exits in a reasonably safe condition as to lights and construction, so that patrons may safely pass through a darkened passageway or exit in leaving the theater."

The proper rule appears to be: "The proprietor of a place of public amusement is required to use ordinary or reasonable care to put and keep the premises, appliances, and amusement devices in a reasonably safe condition for persons attending; and if he fails to perform his duty in this regard, a patron who is injured in consequence thereof is entitled to recover for the injury sustained. The foregoing doctrine has been applied in respect of * * * aisles." 62 C. J. 863.

See, also, *Bennetts v. Silver Bow Amusement Co.*, 65 Mont. 340; *Poppleston v. Pantages Minneapolis Theater Co.*, 175 Minn. 153; *Barrett v. Van Duzee*, 139 Minn. 351; *Central Amusement Co. v. Van Nostran*, 85 Ind. App. 476; *Levy v. Israelite House of David*, 216 Mich. 373; *Gibbons v. Balaban & Katz Corporation*, 242 Ill. App. 524; *Dondero v. Tenant Motion Picture Co.*, 94 N. J. Law, 483.

In this jurisdiction we are committed to the view that the question of contributory negligence should always be submitted to the jury, where there is evidence touching the same, under proper instructions, unless the evidence of contributory negligence is undisputed, or of such a nature that reasonable men could not draw diverse conclusions from the same. *Tempel v. Proffitt*, 122 Neb. 249; *Wiegand v. Lincoln Traction Co.*, 121 Neb. 130; *McLean v. Omaha & Council Bluffs Railway & Bridge Co.*, 72 Neb. 450; *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446; *Kroger v. Gordon Fireproof Warehouse & Van Co.*, 107 Neb. 439; *Casey v. Ford Motor Co.*, 108 Neb. 352; *Allen v. Omaha & S. I. R. Co.*, 115 Neb. 221.

In the light of the authorities above referred to, we are constrained to the view that the evidence in the record in the instant case is sufficient, if believed, to sustain the conclusion that the defendant was guilty of actionable negligence in failing to provide proper lighting, which was the proximate cause of plaintiff's injuries; and that the question of contributory negligence was a question of fact for the jury under proper instructions, and not one of law to be determined by the court.

It follows that the district court erred in directing a verdict for the defendant.

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

REVERSED.

RETAIL MERCHANTS SERVICE, APPELLANT, V. JOHN BAUER & COMPANY ET AL., APPELLEES.

FILED JUNE 9, 1933. No. 28354.

1. **Estoppel.** Defendant pleading facts sufficient to constitute estoppel will be given benefit of defense, although not formally pleaded.
2. **Corporations: ESTOPPEL.** One who contracts with a corporation, as such, so that his contract is an admission of corporate existence is estopped to deny incorporation as a defense to an action on the contract.
3. ———: ———. One who contracts with a corporation, not as such, but later recognizes and deals with it as such, is estopped to deny corporate existence.
4. ———: ———. An estoppel cannot be based upon ambiguous facts, equivocal and capable of two constructions, which are just as consistent with the existence of a partnership or the trade-name of an individual as with a corporation.
5. ———: ———. Section 24-221, Comp. St. 1929, providing that any person sued on a contract made with a corporation shall not be permitted to set up the want of legal organization in defense to such action, is not applicable or controlling, since there is no evidence of a contract with a corporation.

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

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

A. L. Tidd, contra.

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

DAY, J.

This is an action to recover damages for breach of contract. It is now before the court on a motion for rehearing.

The plaintiff alleged in his petition that it was a corporation; the answer denied corporate existence, and no reply was filed. There was no evidence in the record to support the allegation, and, both parties moving for a directed verdict, the trial judge dismissed the action.

The former opinion, which appears at 124 Neb. 360, affirmed the judgment of the trial court.

In the opinion, it is suggested that the plaintiff could not avail itself of the fact that defendant had contracted with it, to meet the issue of its corporate existence, unless an estoppel is pleaded. This is attacked in the motion for rehearing due to the fact that appellant places a very restricted construction on the language used. In *City Nat. Bank of Hastings v. Thomas,* 46 Neb. 861, we find: "A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." This rule has been followed in *Seng v. Payne,* 87 Neb. 812, and *Smith v. Liberty Life Ins. Co.,* 118 Neb. 557. The plaintiff urges that its claim against the defendant arises out of a written contract between them, and that defendant is estopped to deny plaintiff's corporate existence. The plaintiff pleaded the written contract and defendant's answer admits the execution of the contract. This is a sufficient pleading of the estoppel relied upon, as required by former opinion, if sufficient in law.

But does the fact that defendant entered into a written contract with plaintiff estop defendant from denying that plaintiff is a corporation? There is no evidence of corporate existence, and there is no recital in the written contract or anything in the course of dealing which would show an admission or recognition of incorporation. The general rule applicable is given by various authorities.

7 R. C. L. 107, sec. 82, states: "One must contract or deal with a company as a corporation before he can be estopped from denying its corporate existence, and it is held that the legal corporate existence of a company is not admitted from the mere fact that one dealing with it has, in a contract with the company, designated it by a name appropriate to a corporate body, unless it is distinctly stated in the contract that it is an incorporated company."

14 C. J. 240, says: "It is well settled of course that, to warrant holding a person estopped from denying the existence of an alleged corporation because he has contracted or otherwise dealt with it as a corporation, his contract or dealing must have been such as to show an admission or recognition of the legal corporate character of the association. * * * A man cannot be so estopped by acts which are just as consistent with the existence of an unincorporated association as of one incorporated, for 'estoppels never arise from ambiguous facts; they must be established by those which are unequivocal, and not susceptible of two constructions.'"

In 8 Fletcher, Cyclopedia Corporations (Perm. ed.) p. 245, sec. 3910, we also find this enlightening and comprehensive discussion of the rule: "Contracting or dealing with an association as a corporation raises an estoppel to deny its corporate existence. Subject to the limitations and exceptions already noted (none of which are applicable to this case), it is well settled, barring a contrary rule in one state (Maryland), that a person who contracts or otherwise deals with a body of men as a corporation thereby admits that they are a corporation, and is estopped to deny their incorporation, in an action against him based upon or arising out of such contract or course of dealing. In some of the decisions it is said that the courts, in this class of cases, really proceed upon a rule of evidence rather than upon the strict doctrine of estoppel, as it would appear that they have treated the contract with a party by a name implying a corporation really as evidence of the existence of a corporation, more than as an estoppel to disprove such fact, and that it is more correct to say that the party contracting with the corporation will be considered as having admitted its corporate existence rather than that he cannot deny it. And a number of courts have held that the making of the contract with the corporation as such is *prima facie* evidence of the existence of the corporation, and that no further proof of that fact is necessary in an action there-

on until such proof is rebutted, although the contrary has been held to be true where there is nothing in an instrument executed to a company which describes or refers to it as a corporation or in any way intimates that it is one."

The decisions supporting this rule are so unanimously in accord that we do not cite the numerous cases, which may be obtained by reference to the authorities cited or to the digest. However, it will be helpful to review a few of our authorities, especially those cited by appellant.

In accord with the general rule, one who contracts with a corporation, as such, so that his contract is an admission of corporate existence is estopped to deny incorporation as a defense to an action on the contract. *American Gas Construction Co. v. Lisco,* 122 Neb. 607, and cases cited therein.

It has also been held that one who contracts with a corporation, not as such, but later recognizes and deals with it as such, is estopped to deny corporate existence. *Societe Titanor v. Paxton & Vierling Iron Works,* 124 Neb. 570.

An estoppel cannot be based upon ambiguous facts, equivocal and capable of two constructions, which are just as consistent with the existence of a partnership or the trade-name of an individual as with a corporation. The name of plaintiff, "Retail Merchants Service," who was a party to the contract, is such a name. There is no recital of corporate existence in the contract, which admits corporate existence. Indeed, the record leaves one without any information as to the nature of the plaintiff. A partnership or an individual using a trade-name would be as sound an inference as a corporation.

Section 24-221, Comp. St. 1929, providing that any person sued on a contract made with a corporation shall not be permitted to set up the want of legal organization in defense to such action, is not applicable or controlling since there is no evidence of a contract with a corporation.

The appellant places great stress, as an authority, upon

Armsby Co. v. Raymond Bros.-Clarke Co., 90 Neb. 553. It is not clear from the opinion whether the contract was with plaintiff as a corporation. The facts in this connection are meager, but it is certain that the controlling question was whether failure to domesticate a foreign corporation before doing business in Nebraska rendered it incapable to sue. It was held that the foreign corporation was presumed to have complied with the law. We fail to see any applicability of this opinion to the case at bar.

Another case cited, *Union Pacific Lodge v. Bankers Surety Co.*, 79 Neb. 801, was an action on a fidelity bond indemnifying plaintiff from loss by larceny or embezzlement by its officers. It was urged that petition did not show legal capacity to sue. It is not evident that it was denied by answer. Defendant had entered into a legal contract assuming this liability. It was held to be estopped to deny plaintiff's legal capacity. The discussion is not comprehensive and in no wise conflicts with our views herein announced.

We adhere to our former judgment.

AFFIRMED.

HARLAN COUNTY, APPELLEE, V. GUY THOMPSON ET AL., APPELLANTS.

FILED JUNE 9, 1933. No. 28546.

1. Trial. The right to reopen a case and introduce further testimony, after both sides have rested, is within the sound discretion of the trial court, and the court's refusal to reopen the case some seventeen days after both sides have rested and joined in a motion for a directed verdict is not an abuse of discretion.
2. APPEAL. "Questions not presented to nor passed upon by the trial court will not, ordinarily, on appeal to the supreme court, be considered." *Lancaster County v. Graham*, 120 Neb. 785.
3. Taxation. "While in a general sense the word taxes includes special assessments, and special assessments are made under the taxing power, yet there is a clear distinction between the

two; special assessments are a peculiar class of taxes which are laid upon property benefited according to some equitable rule, while taxes, as generally understood, mean the burdens imposed by the government for state, county, city, township or school district purposes; in other words, the money necessary to defray the expenses of government." *Ittner v. Robinson*, 35 Neb. 133.

4. ———: An action based on section 77-1921, Comp. St. 1929, cannot be brought to enforce the collection of taxes in the nature of special assessments.

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

J. G. Thompson, for appellants.

Shelburn & Russell, contra.

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

MESSMORE, District Judge.

Appellee herein, plaintiff below, recovered a judgment in the district court for Harlan county against defendants below, appellants herein, in the sum of $568.39, from which judgment appellants appeal.

Plaintiff based its action on section 77-1921, Comp. St. 1929, setting forth the location of the real estate and building thereon in question, the amount of general and special taxes due Harlan county and the city of Alma, that said taxes were duly levied by the proper taxing bodies and were delinquent, that special assessments amounted to $244.57 for sewer construction and $462.90 for paving construction, with general taxes of $46, plus accrued interest, also that a tax lien existed against said premises in favor of one Mabel O. Shelburn in the sum of $314.21, a lien prior to the taxes, general and special, above set out, and that the building on the premises was destroyed by defendants and praying for recovery in the sum of $753.47.

To the petition defendants demurred, setting up a de-

fect of parties plaintiff, that plaintiff had no capacity to sue, a misjoinder of causes of action, and that the petition did not state a cause of action, which demurrer was submitted and overruled.

Defendants then answered, setting forth the same subject-matter as contained in the demurrer, and further denying the allegations of the petition not specifically admitted; admitted they had a quitclaim deed for the premises; denied specifically the amounts alleged in the petition were duly and legally assessed against said premises; alleged further that the building located on the premises in question was old and dilapidated, in a bad state of preservation and repair and in a dangerous condition, could not be rented and was not worth tearing down; that all the materials formerly in the building were then on the premises and had no intrinsic value.

To the answer plaintiff filed its reply, denying all new matter set up therein.

On April 11, 1932, under the issues joined, as hereinbefore set forth, trial was begun to a jury. When plaintiff rested its case, defendants moved for an instructed verdict, plaintiff joining in with a motion in its favor. The jury were then discharged and the case continued for argument at a subsequent date. The evidence of plaintiff on the trial went almost exclusively to the proposition of the amount of taxes, special and general, levied against said premises, as set out in its petition.

On April 27, 1932, defendants filed a motion to withdraw their motion for a directed verdict heretofore made and to offer proof in support of their answer, which motion was denied. They then offered to prove that the building on said premises was of no value and not usable for any purpose, that its materials were still on the premises, that standing it was dangerous and was worth more torn down. A further offer of proof was made through O. E. Shelburn that he tried to buy the property of E. J. Schrack, its former owner, and that he offered him $25 for a quitclaim deed therefor.

The above offers of proof were objected to as incompetent, irrelevant and immaterial, with the special objections that the case had been submitted to the court on demurrer to plaintiff's evidence, in which plaintiff had joined issue, that the jury had been discharged and the case submitted to the court on the evidence taken at the former sitting of the court, which objections were sustained.

Defendants filed their motion for a new trial, setting forth the same subject-matter as contained in their demurrer, and assigning as error the fact that the court would not reopen the case to permit them to offer evidence in support of their answer, and the further general statutory grounds for a new trial, and in addition thereto set out in said motion two new issues not theretofore raised by the pleadings nor in the argument, nor does anything in the record disclose that the lower court had the opportunity to pass upon the two new issues so raised. Paragraph 2 of the motion is that "plaintiff did not through its proper officers authorize the bringing of said suit." Paragraph 10 of the motion is "that the section of the statute under which this action was brought and on which the court relied in making its findings, to wit, section 77-1921, Comp. St. 1929, is unconstitutional and void and that said section deprives litigants of their constitutional rights." Defendants rely on all the errors assigned in the motion for a new trial, paragraphs 1 to 10, inclusive.

There is practically no dispute as to the facts in this case. It is presumably presented on two divergent theories. There is no dispute as to what has been done in so far as the record discloses. The building was torn down by defendants and they admit it. Plaintiff claims that the statute fixes the liability as against these defendants. Defendants' theory, although the record does not disclose it, except under the offer of proof subsequent to the time of joining in the motion for a directed verdict, is that the measure of damages must necessarily be in the reduction in the value of the property to satisfy any tax

lien against it, and the further proposition that the action cannot be maintained by and on behalf of the county without a prior authorization of the county board.

The statute seems clear of interpretation and is not ambiguous in any respect, being a clear pronouncement, as indicated by its language, to wit: "It shall be unlawful for any person to tear down or remove any building situated on any real estate while there are any delinquent taxes unpaid thereon. Any person offending shall be guilty of a misdemeanor, and upon conviction thereof * * * and shall moreover be liable to the county in a civil action for the amount of all delinquent taxes on such real estate. The lien of such taxes shall follow and adhere to such building or the materials thereof wherever situate." The statute also imposes the duty on the county treasurer, upon learning that such a building has been torn down or removed, to issue a distress warrant for the amount of delinquent taxes on such real estate and to follow such building material and levy upon the same as personal property to satisfy such taxes. In this case the evidence does not disclose that the treasurer did issue such a distress warrant.

The tax lien of Mabel O. Shelburn was not and is not a part of plaintiff's action, as she was not made a party to said action, and the judgment of the district court ignored her tax lien as set forth in the petition, which was proper for the reason heretofore given.

The first assignment of error to reckon with is whether or not the district court erred in refusing defendants permission to reopen their case and introduce evidence some 17 days after the motion for a directed verdict had been joined in by the parties hereto. In view of the record and the statute as heretofore set out, we hold that the trial court did not abuse its discretion in refusing defendants such right. We recognize that trial courts are generally agreeable in receiving all the evidence and points of law that will necessarily assist and aid them in arriving at proper findings and judgments; but, under

the circumstances as they appear in this case and in the offers to prove, we are convinced that the trial court in this instance did not abuse its discretion.

The issues raised in the motion for a new trial, as indicated by paragraphs 2 and 10 thereof, should have been presented to the trial court, and the trial court should have had an opportunity to pass on these matters of seeming importance to defendants. In analyzing the motion for a new trial, in paragraph 10 thereof, it is apparently obvious that the pleader arrived at the conclusion that the act is unconstitutional, setting forth no specific reason. There is nothing to show that the matter was argued before the lower court on that point.

The authority of the county attorney to maintain the proceeding, not being questioned in the pleadings, would be presumed, even if the statute required the approval of the county board. *Missouri P. R. Co. v. Fox,* 56 Neb. 746.

"Questions not presented to nor passed upon by the trial court will not, ordinarily, on appeal to the supreme court, be considered." *Lancaster County v. Graham,* 120 Neb. 785.

This court held in *Ittner v. Robinson,* 35 Neb. 133: "While in a general sense the word taxes includes special assessments, and special assessments are made under the taxing power, yet there is a clear distinction between the two; special assessments are a peculiar class of taxes which are laid upon property benefited according to some equitable rule, while taxes, as generally understood, mean the burdens imposed by the government for state, county, city, township or school district purposes; in other words, the money necessary to defray the expenses of government."

Further, quoting from the same opinion, *Ittner v. Robinson, supra*: "It will be conceded that the power to levy special assessments is derived from the taxing power of the government, but the word 'taxes' without more is not generally understood to include assessments."

Therefore, under this authority, we hold that the statute

under which Harlan county predicated its action refers to general taxes as distinguished from special assessments for the reasons given in the case above cited.

The judgment of the district court shall stand affirmed in so far as the judgment for general taxes is concerned, and modified to the extent that all taxes as against the property in question in the nature of special assessments be deducted from said judgment.

AFFIRMED AS MODIFIED.

MERGENTHALER LINOTYPE COMPANY, APPELLANT, V. JAMES J. MCNAMEE ET AL., APPELLEES.

FILED JUNE 16, 1933. No. 28528.

1. **Schools and School Districts: TUITION.** A school giving instruction in the manner of operating a linotype machine, in spelling and in English comes within the terms of sections 62-1708 and 62-1710, Comp. St. 1929, and is required to furnish to the makers a copy of a note received for tuition in such school; otherwise, the note is void.
2. **Appeal.** The constitutionality of a statute cannot ordinarily be raised for the first time in the appellate court. It should be presented by pleadings, or in some other manner, in the trial court.

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

Davis & Vogeltanz, for appellant.

Hardenbrook & Misko, contra.

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

GOSS, C. J.

Plaintiff appeals from a judgment based on an instructed verdict for defendants McNamee. The cause of action was grounded upon a note, negotiable in form, signed by defendants James J. McNamee and Mike McNamee, son and father, in favor of "The Ord Linotype School, Irl D. Tolen, Owner," for $1,163.50, dated No-

vember 20, 1929, due on demand, duly indorsed by Irl D. Tolen to plaintiff, who thus became the owner of it. The Ord Linotype School was a trade-name under which Tolen operated. There was judgment against Tolen, from which he did not appeal.

The McNamees pleaded (among other things alleged) and proved that the note was executed and delivered by them as makers and was received by the payee for tuition of James J. McNamee as a student in the Ord Linotype School; that at no time was a copy of the note delivered to either maker; and they alleged that said tuition note was void. This is the ground upon which the finding and judgment of the district court appear to be based, as indicated by the remarks and rulings of the court shown in the bill of exceptions.

In support of the allegation that the note is void, appellees rely upon sections 62-1708 and 62-1710, Comp. St. 1929. The first section declares: "It shall be unlawful for any proprietor, officer, agent or representative of any business college, or the business or commercial department of any school doing business within the state of Nebraska, or without the state when operating or soliciting within the state, to contract for or receive for tuition or scholarship a negotiable note or negotiable contract, except the said negotiable note or notes or negotiable contract shall have written or printed prominently and legibly and in bold type across the face thereof and above the signatures thereto, the words 'negotiable note given for tuition,' if a note, or the words 'negotiable contract note given for tuition and scholarship,' if a contract, and unless a copy of said instrument shall be delivered to the makers thereof at the time of signing the same." The other section provides: "Any note or contract taken by any business college, or the business or commercial department or any other school or by their agents or representatives, for tuition or scholarships, without first having complied with all of the provisions of this act (62-1708, 62-1709) shall be void."

The note is on a printed form devised by "The Ord Linotype School, Irl D. Tolen, Owner," which name of such payee is printed in bold Roman capitals. Across the top are printed, also in Roman capitals, the words "Negotiable note given for tuition," as if intended in compliance with the call of section 62-1708. Each defendant McNamee testified he received no copy of the note. Mr. Tolen testified he made a practice of giving a copy to the maker, but did not remember this particular instance and therefore would not say positively that he gave a copy to either of the makers.

Assuming the validity of the act, the only question for consideration is whether the school comes within the terms of the act. The evidence shows that McNamee and other students were taught not only the mechanical operation of linotype machines but received instructions also in the subjects of spelling and the proper use of words in the English language. The argument of the plaintiff is to the effect that this does not bring its assignor within the meaning of the legislature in the statutes quoted. Modern business has so many branches that a legislature could not well catalogue its branches or the subjects to be taught in order to constitute a business college. The test is whether the Ord Linotype School is of the kind as evidenced by its character, conduct and purpose as to make it a business college or school within the contemplation of the legislature, keeping in mind the evident intent of the legislature to regulate those which "contract for or receive for tuition or scholarship a negotiable note." It is admitted that the note was received for tuition. The word "business" was evidently employed by the legislature in a popular and legal sense, making it applicable to any college or school giving instruction designed to fit its students to follow some particular employment as a means of livelihood or gain. A definition of the word given by Webster's New International Dictionary is "Any particular occupation or employment habitually engaged in, esp. for livelihood or gain." In

Still College and Infirmary v. Morris, 93 Neb. 328, the word "business" as used in section 42-203, Comp. St. 1929, relating to the right of a married woman to carry on trade or business, was so interpreted, the court saying: "The word 'business' is evidently used in this statute in a popular and legal sense, making it applicable to any particular employment, occupation, or profession, followed as a means of livelihood. Black, Law Dictionary; Webster's New International Dictionary; *Goddard v. Chaffee,* 2 Allen (Mass.) 395; * * * *Trustees of Columbia College v. Lynch,* 47 How. Pr. (N. Y.) 273; *Beickler v. Guenther,* 121 Ia. 419."

Taking into consideration the mischief intended to be remedied by the legislature, and the nature and purpose of the school, we are of the opinion from the evidence that the Ord Linotype School comes under the prohibition of the statute. It was a business college or school with its scope limited to one department of business instruction, by availing themselves of which its students expected to be fitted to earn a livelihood as linotype operators. A business college is one which teaches one or more of those specific branches of human endeavor intended to be used in an occupation as a means of livelihood. A school giving instruction in the manner of operating a linotype machine, in spelling and in English comes within the terms of sections 62-1708 and 62-1710, Comp. St. 1929, and is required to furnish to the makers a copy of a note received for tuition in such school; otherwise, the note is void.

Appellant undertakes to raise in this court the question of the constitutionality of the act relating to notes given for tuition in business colleges. This is a court of review. This question was not presented to the district court either in the pleadings or in the evidence received or tendered at the trial. The unconstitutionality of a statute cannot ordinarily be raised for the first time in the appellate court. It should be presented by pleadings, or in some other manner, in the trial court. *Pill v. State,* 43

Neb. 23; *Clearwater Bank v. Kurkonski*, 45 Neb. 1; *Batty v. City of Hastings*, 69 Neb. 511; *Farmers State Bank v. Nelson*, 116 Neb. 541; *McBride v. Taylor*, 117 Neb. 381. Under the circumstances, we decline to pass upon the constitutionality of the act involved.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF ELIZABETH BLACK.
JESSIE C. ROBINSON, APPELLEE, V. A. C. WITTERA, ADMINISTRATOR, APPELLANT.

FILED JUNE 16, 1933. No. 28543.

1. **Appeal.** Upon appeal, the admission of incompetent evidence at the trial below is immaterial in a case tried to the district court without a jury, if the judgment is supported by sufficient competent evidence.
2. **Account Stated.** "The rendering of an account between parties and agreeing upon the amount due as appearing therefrom will support an action for the balance thereby shown without an express promise to pay." *Hendrix v. Kirkpatrick*, 48 Neb. 670.
3. ———. An account stated implies a promise by the debtor to pay the agreed amount of debt owing to the creditor.
4. ———. An account stated may have items on one side only and two items may be sufficient for the purposes of the agreement.
5. ———. An account stated need not be in writing.
6. ———. The creditor in a valid account stated may recover thereon without pleading and proving the original items of the indebtedness.
7. **Limitation of Actions: ACCOUNT STATED.** The statute of limitations begins to run against a valid account stated when the parties to it agree upon the amount due from one to the other, but does not bar an action thereon by continuing to run against original items of the indebtedness.
8. **Account Stated.** In absence of fraud or mistake, the parties to an account enumerating unpaid debts may mutually exercise the contractual right to agree on the sum due from one to the other and thus extinguish the original items for the purposes of an action on the account stated.
9. **Statute of Frauds.** An oral agreement wholly performed by one of the parties within a year *held* not void under the statute of frauds.

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

Warren Pratt, for appellant.

George A. Munro, contra.

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

ROSE, J.

In the county court of Buffalo county, Jessie C. Robinson, creditor, presented a claim March 18, 1931, for $929.80 in the form of an account stated against the estate of her deceased mother, Elizabeth Black, debtor; A. C. Wittera, administrator. The account was stated February 1, 1927, and the time for the payment of the entire debt was then extended to February 1, 1930, without interest. The account enumerated three items—September 27, 1926, cash, $385; September 30, 1926, check for taxes, $244.80; February 1, 1927, cash, $300; total, $929.80. Objections to the claim and answers to the petition contained the following defenses: Each item a gift and demurrable; no memorandum in writing signed by debtor; general denial; barred by statute of limitations; void under statute of frauds. The county court allowed the claim in full. The administrator appealed to the district court where a jury was waived. Upon a trial of the issues there, judgment was rendered in favor of the creditor for $929.80 with interest from February 1, 1930, to the date of the decision, or for $1,075.70. The administrator appealed to the supreme court.

Upon appeal, the admission of incompetent evidence below is immaterial in a case tried to the district court without a jury, if the judgment is supported by sufficient evidence properly admitted. In reviewing the judgment herein assailed as erroneous, therefore, rulings on evidence will be disregarded and admissible evidence alone considered.

Uncontradicted, competent testimony of two qualified

witnesses not impeached was sufficient to prove the following summarized facts: February 1, 1927, Madelene West and Helena Hanson, witnesses, called upon Elizabeth Black at the home of her daughter, Jessie C. Robinson, creditor, and claimant, in Santa Monica, California. Then and there, in presence of the daughter and the callers named, the mother said she had borrowed money from her daughter at different times and wanted each of the callers to copy on something that could be kept for a record the amounts she had written on a pad of paper. She gave them the three items already described and said she had borrowed from her daughter $385 September 27, 1926, $244.80 for taxes September 30, 1926, and was then, February 1, 1927, borrowing $300. Each of the callers wrote these items on a slip of paper not signed. The time for payment of the entire amount due was extended for three years without interest, or until February 1, 1930. Mother and daughter agreed to these terms. The daughter at the time turned over to her mother $300 in bills. There is no proof that any or all the loans were gifts. The evidence outlined proved an account stated, which has been defined as "an agreement between persons who have had previous dealings determining the amount due by reason of such transactions." It implies a promise by the debtor to pay the debt. *Hendrix v. Kirkpatrick,* 48 Neb. 670.

An account stated may have items on one side only and two items may be sufficient for the purposes of the agreement. *Kock v. Bonitz,* 4 Daly (N. Y.) 117; *Cobb v. Arundell,* 26 Wis. 553. An account stated need not be in writing. *Watkins v. Ford,* 69 Mich. 357. The signing of an instrument was not necessary. *Brown v. Vandyke,* 8 N. J. Eq. 795; *Willis v. Jernegan,* 2 Atk. (Eng.) 249. The creditor was not required to plead or prove the items composing the account stated. 1 R. C. L. 219, 220, secs. 19, 21. By pleading and proving more than was necessary to make a case, the account stated was not destroyed as a binding obligation showing the amount due the cred-

itor. Immaterial allegations could have been treated as surplusage. Proof of single items in the account stated was not prejudicial to the estate.

Was the action on the account stated barred by the statute of limitations? It is argued that the debt incurred September 27, 1926, and the debt incurred September 30, 1926, were outlawed when the claim was filed in the county court March 18, 1931. In support of this position, reference is made to the statute barring actions on oral contracts after four years and requiring the written acknowledgment of a debt to preserve the remedy at law thereon beyond that period. Comp. St. 1929, secs. 20-206, 20-216. The position thus taken is untenable for the following reasons: An account stated, as already explained, creates a new cause of action in which pleading and proof of the original items of indebtedness are unnecessary. *McKinster v. Hitchcock,* 19 Neb. 100; 1 R. C. L. 219, 220, secs. 19, 21. "The simple rendering of an account between the parties and agreeing upon the amount due are sufficient facts on which to maintain an action." *Claire v. Claire,* 10 Neb. 54; *Hendrix v. Kirkpatrick,* 48 Neb. 670. The statute barring actions after four years runs from the date of the account stated, unless the time for payment is extended by agreement. 1 R. C. L. 219, sec. 18. In the present instance the date of the account stated was February 1, 1927, and the debt was payable by agreement three years thence, or February 1, 1930. Under the statute cited, the cause of action on the account stated would not be barred before February 1, 1934. The claim was filed March 18, 1931. The statute requiring written acknowledgment of a debt to preserve the right to sue on it, after expiration of the four-year period for commencing an action thereon, might have been applicable to the original items, except for the merger in the new agreement, but did not bar the account stated. 37 C. J. 771. The statute of limitations begins to run against a valid account stated when the parties to it agree upon the amount due from one to the

other, but does not bar an action thereon by continuing to run against original items merged in the total indebtedness. In absence of fraud or mistake, the parties mutually exercised the contractual right to agree on the sum of the unpaid debts that were due from one to the other. Thereafter the items composing the account stated had no independent existence for the purposes of the present cause of action. This feature of the defense pleaded is therefore without merit.

It is further argued as a defense that payment was not to be made within a year, that there was no written memorandum of the agreement, and that, therefore, the account stated was void under the statute of frauds. Comp. St. 1929, sec. 36-202. By the account stated the debtor got the benefit of full performance by the creditor within a year. The time of payment was extended three years without interest. Though the debt was due when the account was stated, the debtor had the creditor's money with the privilege of retaining it three years. The only unperformed obligation was payment by the debtor. There was full performance by the creditor within a year. Oral agreements wholly performed on one side within a year are not void under the statute of frauds. *Kendall v. Garneau*, 55 Neb. 403; *Griffin v. Bankers Realty Investment Co.*, 105 Neb. 419. There was no meritorious defense to the cause of action pleaded and proved by the creditor.

AFFIRMED.

EDWARD HOOK, APPELLEE, V. ADOLPH KEMPF, SR., ET AL., APPELLANTS.

FILED JUNE 16, 1933. No. 28560.

1. Appeal. Evidential facts and facts which are properly inferable therefrom may be regarded as proved in considering on appeal assigned error in the overruling of a motion by defendant for a nonsuit.

2. **Automobiles: NEGLIGENCE.** Driving an automobile in the center of a public bridge 16 feet wide, which is in a safe condition for travel from one side to the other, thus forcing the driver of an approaching automobile to run his car against a railing to prevent the two vehicles from colliding, is evidence of negligence.
3. ———. Evidence that there are two steel wheel treads on which automobiles may run through the center of a public bridge 16 feet wide, which is in a safe condition for travel from one side to the other, does not prove a one-way drive as a matter of law.
4. ———: LAW OF THE ROAD. Where two automobiles going in opposite directions approach a bridge on a public highway, it is the duty of each driver to keep on the right of the center, if the bridge is a safe two-way drive, their rights and duties being equal, though one reaches the bridge before the other.
5. ———: NEGLIGENCE: QUESTION FOR THE JURY. Issue of defendant's negligence in driving an automobile in the center of a safe, two-way public bridge in front of an approaching automobile in plain sight, *held* to present a question for the jury.

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

Courtright, Sidner, Lee & Gunderson, for appellants.

Cook & Cook, contra.

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

ROSE, J.

This is an action to recover $10,000 in damages for personal injuries. Defendants were charged with causing the injuries by negligence in driving an automobile in the center of a public bridge, thus crowding plaintiff, who was approaching in an automobile from the opposite direction, against a railing in order to prevent the two vehicles from colliding. The action was defended on the ground that defendants, without negligence, drove in the center of a one-way bridge, as they had a right to do, having reached the bridge first, and that the car in which plaintiff was riding was negligently driven into the rail-

ing and that this was the cause of his injuries. After the evidence had all been adduced on both sides, the district court overruled a motion to direct a verdict in favor of defendants and submitted the issues to the jury. There was a verdict in favor of plaintiff for $700. From a judgment therefor defendants appealed.

The question presented by the appeal is raised by assignments of error directed to the failure of the trial court to instruct a verdict in favor of defendants. In this connection it was argued at length that defendants were crossing a ravine on a one-way bridge on which there was no other vehicle at the time; that they were first to reach the bridge; that two steel treads for wheels of automobiles in the center of the bridge ran lengthwise thereon from one end to the other; that defendants had a right to follow these treads through the center of the bridge; that their car crossed it without touching the other car, which ran into a railing, causing the injuries of which plaintiff complains; that these facts were shown by uncontradicted evidence and that therefore a nonsuit should have been entered. Consideration of other evidence is necessary to a proper disposition of the appeal. The position of defendants is untenable unless the bridge was a one-way road on which defendants had a right to travel in the center, having been first to enter upon it.

On a graveled highway running south from Dodge, plaintiff and defendants approached the bridge from opposite ends and reached it at very nearly the same time, defendants first by perhaps less than a second. The occupants of each car had seen the other coming on a straight, unobstructed road for a considerable distance beyond the bridge which was on a level with the highway. Plaintiff was going south in a Pontiac sedan at a speed estimated at 10 to 15 miles an hour, which was slackened somewhat near the bridge. Defendants were traveling north in a Ford sedan going 25 or 35 miles an hour in the center of the road and the speed was increased near the bridge. The Ford sedan swerved to the right

or east when leaving the bridge and missed the Pontiac car as it struck the north end of the railing on the opposite side. The record contains evidence of these facts and they are accepted as true for the purposes of the assignment that the trial court erred in failing to direct a verdict in favor of defendants. There was also evidence from which the jury were free to infer the following facts: The bridge was only 40 feet long and 16 feet and three inches wide between the railings at the sides. The entire floor of the bridge was in a safe condition for travel from one end to the other. It was used for travel from one side to the other. There was plenty of room for the two cars to pass with ample space for safety between. Trucks had safely passed each other on it. By use, plaintiff was familiar with the bridge. The jury could reasonably infer from the evidence that the driver of the Pontiac, upon approaching the bridge, assumed, without negligence, that the Ford would turn to the right of the center, permitting him to pass, and that instantly, in the emergency, he accepted the desperate alternative of striking the railing in order to avoid a collision with the other car, perhaps saving the lives of defendants.

Defendants' use of the entire bridge to the exclusion of plaintiff was evidence of negligence for the consideration of the jury. Evidence of treads on a floor 16 feet wide did not prove the exclusive right of defendants to the center of the bridge until they crossed it. It was practically as wide as the graveled roadway leading to it. The entire floor of the bridge was intended for public use. Plaintiff had the same right thereon as defendants, though arriving an instant later. The use of the bridge by one driver implied due respect for the equal rights of the other. Defendants did not point out a statute or a rule of law indicating that a public bridge 16 feet wide is a one-way drive. It is a matter of common knowledge that many pavements on country highways where automobiles pass each other constantly are not over 16 feet wide. It was fairly inferable from the evidence that

plaintiff would not have been hurt, if defendants had kept on their own side of the bridge, and that their negligence in failing to do so was the proximate cause of his injuries. There was nothing in the record to justify a finding that plaintiff, as a matter of law, was guilty of such negligence as precluded him from recovering damages from defendants. There was no error in the failure to direct a verdict for defendants. The judgment is amply supported by the evidence.

AFFIRMED.

CARRIE KUDRNA, ADMINISTRATRIX, APPELLANT, V. SARPY COUNTY, APPELLEE.

FILED JUNE 16, 1933. No. 28290.

1. **Automobiles**: INJURY ON HIGHWAY: LIABILITY OF COUNTY. When the traveled portion of a highway is maintained in a proper condition by a county, such county is not liable in damages where a person, negligently riding on the running board of a car, is fatally injured by being thrown therefrom against a snowplow parked some distance off the highway as the car, in negotiating a turn, deviated from the traveled track.
2. **Negligence**: INJURY: PROXIMATE CAUSE. "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish*, 100 Neb. 844.
3. ———: APPEAL: DISCHARGE OF JURY. It is not error for the court to discharge a jury, in an action for damages alleged to have been caused by the negligence of a defendant, when the proofs clearly disclose contributory negligence on the part of the injured person to such a degree that reasonable minds cannot find therefrom that such contributory negligence is slight and the negligence of the defendant gross in comparison therewith.

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

O'Brien & Powers and *Grenville P. North*, for appellant.

Ralph J. Nickerson and *Patrick & Smith*, *contra.*

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

DEAN, J.

Carrie Kudrna, plaintiff, as administratrix of the estate of her deceased daughter, Ruby Kudrna, brought this action against the county of Sarpy, Mabel Storm, and Roy Downen, defendants, to recover damages which she alleges she sustained by reason of the death of her daughter who at the time was 19 years of age. It is alleged that, on or about July 26, 1931, the decedent, while riding on the running board of an automobile owned by Downen and operated by Mabel Storm, came in contact with a road grader negligently concealed in the weeds upon the highway and that the deceased thereby sustained injuries resulting in her death. After the opening statements of counsel, the action was dismissed as to defendants Storm and Downen, and, at the conclusion of the evidence and upon motion of the county, the jury were discharged and the action was dismissed as against the county.

As grounds for reversal, the plaintiff relies mainly upon the alleged fact that the court erred in discharging the jury and dismissing the action.

In respect of the events leading up to the tragedy, the record fairly discloses that, on or about 7 o'clock on the evening of July 26, 1931, Ruby Kudrna, accompanied by Mabel Storm, met Eddie Sterkel and Roy Downen, pursuant to a previous agreement between the parties, at a point in Omaha. In the course of the evening the parties proceeded to the home of a friend, where it appears that each of them indulged in a glass of beer. Subsequently, they rode about for some time and, about 10:30 or 11 o'clock, they stopped at a school house near Papillion. The boys had with them a mixture of whiskey and soda pop, but it does not appear that any of them, except Downen, imbibed much, if any, of the liquor, and that the liquor was all poured out about midnight. About 1:30 or 2 o'clock, Downen threw away the car keys and

they were not found until about 4:30 or 5 o'clock in the morning. The young people then drove away, stopping for a short time at a filling station for water, and again at a point near a bridge where the boys left the car. It is disclosed that, as a prank, the girls drove away from the boys, with Mabel Storm at the wheel of the car; that she had never before driven alone; and that such fact was known to Ruby.

It appears that some difficulty was encountered in turning the car, and that Ruby thereupon got out and assisted in starting the motor and, in spite of the request of Mabel Storm that she ride inside the car, she persisted in standing on the running board for the return trip to the young men. In descending the hill, the car was driven at the rate of 20 to 25 miles an hour, and it is apparent that Mabel, in negotiating the turn in the road that led to the bridge a short distance beyond, became excited when the brake failed to stop the car. It was at this point that the snow plow, or grader, is alleged to have been left on or near the highway and with which it is alleged Ruby came in contact as the car turned the corner.

The evidence of Mabel Storm is to the effect that she did not know exactly the point where Ruby fell from the running board. The evidence of Sterkel does not clearly show that he actually saw her fall from the car, but he testified that, as the car rounded the corner, Ruby's right leg was sticking out from the running board, and that he saw her coming from the weeds into which she had been thrown and that she fell over in the road. When asked whether Ruby fell from the side of the car as it turned the corner or whether she was scraped off by the plow, Downen answered that, to the best of his knowledge, she must have fallen off, and that she apparently lost her grip on the car as it swung around the corner; that he could see her head and hand protruding over the automobile as she stood on the running board and that she shouted to him; that the car missed the corner from three to five feet, and that the tracks indicated that it missed the plow about a foot and a half or two feet.

One witness testified that he was awakened by the honking of a horn; that he saw the car with the two girls immediately before the accident, and that it was going from 25 to 40 miles an hour; that Ruby was "hollering" and waving her hands above the top of the car as she stood on the running board. Another witness, whose property adjoins the highway, testified that the tracks indicated that the car had made a wide swing at the corner; and that such tracks were approximately two and a half feet from the snow plow, running parallel thereto until they reached a tree. Another testified that the car showed skid marks off the traveled portion of the road and onto the grassy part toward the plow, and that the width between the plow and the traveled portion of the highway was approximately 9 feet, and there is also evidence that the track was about a foot from the plow and that the plow was several feet off the highway. The evidence of another witness was that the plow was visible over weeds growing around it; that the tracks indicated that the car left the traveled portion of the road and went over the fill, but came no closer than 18 inches to the plow. Several members of the coroner's jury examined the scene, and one testified that the tracks were three feet from the nearest corner of the plow, and that it was about four feet from the plow to the traveled portion of the road.

The rule is stated that a county is not required to keep its highways in condition fit for travel for their entire statutory width; its duty being discharged if a width sufficient for travel is kept in proper condition. *Howard v. Flathead Independent Telephone Co.*, 49 Mont. 197. See, also, 5 Thompson, Negligence (2d ed.) sec. 6008; *Moran v. Palmer*, 162 Mass. 196; *Carey v. Hubbardston*, 172 Mass. 106; *Hall v. Wakefield*, 184 Mass. 147. A county has sufficiently discharged its duty when the traveled portion of a highway is maintained in a proper condition, and such county is not liable in damages when a person, negligently riding on the running board of a car,

is fatally injured by being thrown against a snow plow parked some distance off the highway when the car, in negotiating a turn, deviated from the traveled track.

The plow, parked as it was off the traveled highway, was not of itself sufficient to cause injury. The sole and proximate cause of the fatal injury was the negligence of the decedent in placing herself in a position of danger. "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred." *Spratlen v. Ish,* 100 Neb. 844. It was not error for the court to discharge the jury, when the proofs clearly disclosed contributory negligence on the part of the decedent to such a degree that reasonable minds could not find therefrom that such contributory negligence is slight and the negligence of the defendant gross in comparison therewith. *Johnson v. City of Omaha,* 108 Neb. 481. The evidence of the eyewitnesses nowhere discloses that the foot of the decedent was caught on the plow, nor that contact with the plow caused her to be thrown against it, as contended by the plaintiff. It plainly appears that she was thrown from the car as it swung around the corner. We conclude that no right of recovery has been proved. The judgment is

AFFIRMED.

EARL W. JENSEN, APPELLEE, V. LINCOLN HAIL INSURANCE COMPANY, APPELLANT.

FILED JUNE 16, 1933. No. 28492.

1. Insurance: CONTRACT. When an assessment hail insurance company is organized under the laws of this state, the provisions of the statute authorizing its organization, the articles of incorporation, the by-laws of the company, the application for membership, and the policy issued thereon constitute the contract between the company and the assured.
2. ———: ———: CONSTRUCTION. "Courts will construe policies of insurance more strongly against the party by whom

the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interest, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338.

3. ———: ———: DIVISIBILITY. "A policy of insurance in which the sum thereof is stated in the aggregate, but further expressed in a specific amount on each several designated portions of the insured property, is not an entire and indivisible contract, but as to each division of the property it is entire, though there may be included in a division several articles." *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260.
4. ———: ———: CONSTRUCTION. "A condition or provision of such a policy will not be construed as applicable to the property considered as a whole, but as operative and of force relative to each separated portion or division thereof." *Home Fire Ins. Co. v. Bernstein*, 55 Neb. 260.
5. **Compromise and Settlement.** "A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration." *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463.
6. **Insurance: LOSS: RECEIPT.** In the absence of terms in an insurance contract which expressly or by necessary implication require the assured to execute a receipt in full on being paid a loss covered by such insurance, the making of such receipt in full cannot be lawfully exacted by the insurer.
7. **Accord and Satisfaction.** As to the defense of accord and satisfaction, this case is ruled by *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831.
8. **Evidence** examined, and *held* sufficient to support the judgment of the district court.

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

Burkett, Wilson, Brown, Wilson & Van Kirk, for appellant.

Roland V. Rodman and *John H. Kuns, contra.*

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

EBERLY, J.

This is an action at law by plaintiff Jensen against the defendant, an insurance company incorporated under the

assessment hail insurance law of Nebraska, to recover the sum of $285 and interest, alleged to be the unpaid balance due under the terms of the policy for a hail loss sustained by assured and "adjusted by the parties" in the sum of $1,825. The defendant company admits the issuance of the policy; that plaintiff suffered a partial loss of the crops insured by hail; "that due notice thereof was given; and that said loss was duly adjusted and agreed upon between the parties hereto in the sum of $1,825;" alleges complete payment thereof by the cancelation of plaintiff's premium note in the sum of $599.20, the payment of $690.80 in cash, and the deduction of the sum of $535, to which credit defendant claims it was entitled by virtue of a "ten per cent. deductible hail loss clause" which, in the form of a "rider," was attached to and constituted a part of the policy in suit; and that, further, plaintiff is estopped by having accepted and cashed the check of $690.80 containing an indorsement on the back thereof reciting in effect that it constituted payment in full of the balance of loss in suit. To this answer plaintiff for reply filed a general denial. A trial resulted in recovery by plaintiff as prayed. From the order overruling its motion for a new trial, defendant appeals.

Thus, we have in effect two questions for our determination, viz., the proper construction of the policy in suit, and the question of plaintiff's estoppel.

This instrument in suit provides: "The Lincoln Hail Insurance Company does insure plaintiff to the amount of $5,350 against all direct loss or damage by hail to growing crops on land not to exceed the amount specified in the insured's application," which is copied on the face of the policy. This included 535 acres of wheat composed of five tracts of various sizes, situated in three sections, and in five governmental subdivisions. In the policy there is specified for each tract a separate and distinct amount of insurance. It appears that the hail damage in suit was confined to two of the five separate tracts of wheat in-

sured. The two tracts thus sustaining damage were separately insured under the terms of the policy, in separate amounts, which aggregate $2,500.

The policy also recites that it "is made and accepted subject to the foregoing stipulations and conditions and to the conditions printed on the back hereof, which are hereby specifically referred to and made a part hereof."

Among the "conditions" thus incorporated by reference is section 21 of the by-laws printed on the back of the policy. This section includes the following:

"All losses shall be adjusted by regularly appointed adjusters of the company on the basis of the percentage of the loss sustained to the insurance carried, but in no case shall the company be liable for more than the actual amount of loss sustained. * * * But in no event shall this company be liable for any loss unless the loss or damage by hail equals or exceeds five per cent. of the total amount of insurance herein applying to the particular crop or portion thereof so damaged."

The undisputed evidence is that, in soliciting this as well as other insurance generally, the crop on each separate tract of land was treated as a separate insurance risk. It was separately valued, and a specific amount of coverage was assigned to it. Thus, the "gross premium" stated in the policy was in fact merely the aggregate of the premiums due for risks insured. And so also, under the language referred to, excluding the terms of the rider, it fairly appears that the liability of the company to respond in damages was to be determined by the application of the 5 per cent. clause to each separate tract, and without reference to the percentage of damage sustained by the aggregate crops covered by the policy.

But it is disclosed that, by an agreement of the parties, a rider was attached to the policy. It provides in part:

"Application for ten per cent. deductible hail loss clause. I hereby request that there be attached to and made a part of the hail policy to be issued to me by the

Lincoln Hail Insurance Company, Lincoln, Nebraska (application for which to the amount of $5,350 is made by me this day) the following deductible liability clause, to wit: 'The assured having elected to pay a reduced premium upon the policy to which this rider is attached, by accepting said policy, agrees that the company shall not be liable for any loss or damage by hail to any crop or crops insured, unless the amount of the loss or damage shall exceed ten per cent. of the total amount of insurance provided for in the policy to which this rider is attached, and in event of loss or damage the company's liability therefor shall be reduced by an amount equivalent to ten per cent. of the total amount of said insurance provided for in this policy,' " etc.

This rider also contains the following stipulation:

"This rider shall not modify, qualify or change any of the terms and conditions of said policy except that it shall lessen the liability of the company as herein stated."

It is important, in view of the terms of the rider quoted, to first determine whether the completed contract, resulting from its attachment to the original instrument, now constituted an "entire contract" or is to be regarded as a "divisible contract."

In 14 R. C. L. 939, sec. 114, it is stated: "There may be said to be three distinct rules on this question, each having the support of respectable authority. One rule, which has considerable support, is that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire. The courts of a number of other states have laid down the rule that, where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire. There is still another line of cases which take a middle ground between the extreme doctrines

above stated, and hold that the question of the severability of the contract in such cases depends upon the nature of the risk—i. e., that where the property is so situated that the risk on one item cannot be affected without affecting the risk of the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable."

This jurisdiction is committed to the view expressed by the second rule. *State Ins. Co. v. Schreck,* 27 Neb. 527; *German Ins. Co. v. Fairbank,* 32 Neb. 750; *Phenix Ins. Co. v. Grimes,* 33 Neb. 340.

In *Home Fire Ins. Co. v. Bernstein,* 55 Neb. 260, we again announced the doctrine:

"A policy of insurance in which the sum thereof is stated in the aggregate, but further expressed in a specific amount on each several designated portions of the insured property, is not an entire and indivisible contract, but as to each division of the property it is entire, though there may be included in a division several articles.

"A condition or provision of such a policy will not be construed as applicable to the property considered as a whole, but as operative and of force relative to each separated portion or division thereof."

Also, in determining the true import of the controlling language of the policy in suit, it will be remembered that this court has frequently announced as a guiding principle of construction that "Courts will construe policies of insurance more strongly against the party by whom the contract has been drafted, and who has had the time and opportunity to select, with care and ingenuity, and with a view to its own interest, the language in which the contract is couched." *Connecticut Fire Ins. Co. v. Jeary,* 60 Neb. 338.

See, also, *Modern Woodmen of America v. Wilson,* 76 Neb. 344; *Farmers Union Grain Co. v. United States*

Fidelity & Guaranty Co., 109 Neb. 142, 148; *Coad v. London Assurance Corporation*, 119 Neb. 188, 190; *Woodring v. Commercial Casualty Ins. Co.*, 122 Neb. 734.

In view of the authorities discussed and cited, it is quite obvious that the provisions of the policy in suit, including as part thereof the "ten per cent. deductible hail loss clause," still express a specific amount of insurance on each designated tract of wheat. The general nature of the insurance contract has not been changed by the attachment of the "rider." The last named instrument expressly provides that it "shall not modify, qualify or change any of the terms and conditions of said policy except that it shall lessen the liability of the company as herein stated." As it was a "divisible policy" before the attachment of the "rider," in view of the language quoted it must remain a "divisible policy" thereafter. It would follow that such expressions in the "rider" as, "unless the amount of the loss or damage shall exceed ten per cent. of the total amount of insurance provided for in the policy to which this rider is attached," will not be construed as applicable to the insured property as a whole, as would be required in the case of an "entire and indivisible contract," but rather as provisions "operative and of force relative to each separated portion or division thereof" (*Home Fire Ins. Co. v. Bernstein, supra,*) which is imperative as the contract now construed is a "divisible contract." In short, with the deductible clause attached, the payable losses must be determined and computed on the basis of a "divisible contract." Therefore, the defendant was entitled, under the 10 per cent. deductible clause, to credit for, and to deduct to the extent of, $250 and no more.

The defendant further contends that, even though $285 was not paid, to which the plaintiff was entitled, the payment by it of a less amount than actually due was effective, under the facts disclosed, to cancel all claims under the insurance contract.

The unquestioned rule in this jurisdiction appears to be: "A debt will not be extinguished by the payment of a less sum than the amount actually due, unless based upon a new and sufficient consideration." *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463. See, also, *McIntosh v. Johnson*, 51 Neb. 33; *Canadian Fish Co. v. McShane*, 80 Neb. 551; *Schreier v. Griffin*, 104 Neb. 722.

To meet this situation appellant relies on its defenses of accord and satisfaction, and estoppel, which it pleaded affirmatively in its answer. The burden of proof as to these defenses is necessarily imposed on the insurance company.

The determinative question is whether this burden has been successfully carried, in view of all the circumstances appearing in the record. It appears from the policy in suit that the company involved herein is organized under the assessment hail insurance law of Nebraska, some of the pertinent provisions of which are carried in section 44-912, Comp. St. 1929, as supplemented and modified by other provisions of the Nebraska Insurance Code. It is obvious, therefore, that the statute authorizing its organization, the articles of incorporation, the by-laws duly enacted, the application for insurance, and the policy, together constitute the contract controlling between the parties to this litigation. *Morgan v. Hog Raisers Mutual Ins. Co.*, 62 Neb. 446; *Farmers Mutual Ins. Co. v. Kinney*, 64 Neb. 808; *Sharpe v. Grand Lodge, A. O. U. W.*, 108 Neb. 193.

A damage to the property covered by this hail insurance in the sum of $1,825 is not controverted. It must indeed be deemed liquidated, for it was, under the terms of the insurance contract, admittedly "adjusted" at that amount by an "adjuster" sent out by the insurance company for that purpose, which adjustment appears to have been duly approved. *Treat v. Price*, 47 Neb. 875. An "adjuster" or "insurance adjuster" is a person, copartner-

ship or corporation who undertakes to ascertain and report the actual loss to the subject-matter of insurance due to the hazard insured against. Evidence in the record affords ample proof that the adjustment thus made was approved by the defendant.

Exhibit G, introduced in evidence by the defendant, discloses that on June 23, 1930, the adjuster and claimant agreed in writing that the total amount of the hail loss suffered was $1,825. This instrument also contains an interlineation of the words, "less 10 per cent. deductible, $535." Obviously this line in the original instrument, and also in the duplicate, has been subject to erasures, which evidently were not explained to the satisfaction of the trial court, and as to which the plaintiff in effect testified that the words last quoted were, unknown to him, inserted after the instrument had received his signature.

At a later time a further agreement appears to have been made by the parties by which the insurance company was authorized to deduct from the loss as adjusted the amount unpaid on a premium note executed by plaintiff and in insurer's possession.

On or about September 23, 1930, at a time when there were no matters in present dispute between the assured and the insurance company, the latter mailed to the former a check in the sum of $690.80. Upon the face of this instrument appears the words, "loss check." The signature, "Lincoln Hail Insurance Company, by ————————, Treasurer," appears as part of the printed form, and is completed by the written signature. On the back of this instrument at the top appears, as part of the printed blank, "Loss check for," followed by typewritten words, "Balance of loss on policy 4794 for 1930, less amount of premium paid and deducted claim No. 281." Following these typewritten words appears as a printed part of the blank form the word "charge." Still approximately three inches below the printed indorsement appear the printed words, evidently a part of the original form, "The indorse-

ment of the payee to be a receipt and release in full of account as written above," and, also, "payee indorse here," followed by a blank for his signature. It is admitted that the payee, with his pen, struck out the words constituting the "receipt and release in full" and then signed the blank provided for indorsement. In that form it was transmitted to and paid by the drawee bank, and so far as the present record discloses, no objection or protest was made by the insurance company to this bank on receipt by it of the returned check at the conclusion of the course of business outlined.

The form of this instrument suggests formal compliance by the defendant with the requirements of section 44-912, Comp. St. 1929. This section provides, in part: "All such associations shall deposit in some bank or banks fifty per cent. of all the assessments or premiums received from its members or policyholders, which deposit shall be drawn from said bank for the payment of losses only, and by check or order issued by the treasurer of such association. Each check or order shall designate the name of the policyholder for whose benefit the money is drawn, and shall give the number of his policy." This statutory language, considered as an intrinsic element of the controlling contract, in view of the facts existing at the date of the issuing of this "loss check," suggests the applicability of the maxim, viz., *"Expressio unius est exclusio alterius."*

Waiving the discussion of the application of this maxim to the terms of this insurance contract as we have heretofore defined it, it is obvious that this compact is conclusive as between the parties as to omissions as well as to matters expressed. As there is no affirmative provision therein which expressly or by necessary implication requires the execution of a receipt in full by the assured on payment of a loss under the terms of the policy, no such requirement may be lawfully exacted. The demand for a "receipt in full" relied upon in the instant case was

wholly unsupported by the agreement or by authority of law. 23 Am. & Eng. Ency. of Law (2d ed.) 979; 62 C. J. 677; *Baird v. Union Mutual Life Ins. Co.*, 104 Neb. 352.

So, too, no authority under the contract existed to require the assured to employ the indorsement embodied in the blank form printed on the back of the "loss check." Besides, it appears that this check as actually indorsed by the plaintiff was paid by the drawee bank, and the evidence justifies the assumption that its return from the drawee bank was accepted by the insurance company. Then, too, the money thus remitted actually reached the person whom the drawer intended should receive it. It is obvious that what the payee did in completing his indorsement thereon was strictly within his rights, and was wholly insufficient to raise an estoppel under the facts disclosed. *Federal Land Bank v. Omaha Nat. Bank*, 118 Neb. 489.

As to the defense of accord and satisfaction, we are impressed with the view that the contentions of defendant are foreclosed, and that on this point the present case is ruled by the principles announced in *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831. See, also, *Canadian Fish Co. v. McShane*, 80 Neb. 551.

It follows that the judgment of the district court is right, is sustained by sufficient evidence, and is

AFFIRMED.

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

FILED JUNE 16, 1933. No. 28711.

1. **Judges:** JURISDICTION AT CHAMBERS. Suit for accounting brought by depositor on behalf of himself and all depositors of insolvent state bank against receiver, officers, and members of guaranty fund commission, and secretary of department of trade and commerce, is a proceeding in connection with insolvency, liquidation, or reorganization of bank, and, as such, district judge has jurisdiction at chambers to perform official

acts with same effect as in open court. Comp. St. 1929, sec. 8-191.

2. **Statutes**: REPEAL. Statute not repealed by implication unless repugnance is plain and unavoidable.
3. ———. All statutes relating to same subject are considered as parts of homogeneous system and later statutes are considered as supplementary to preceding enactments on same subject.
4. ———: CONSTRUCTION. Statutes relating to same subject, although enacted at different times, are *in pari materia* and should be construed together.
5. **Judgment**: VACATION AFTER TERM. Plaintiff who seeks vacation of judgment after term at which it was rendered must allege and prove that he has valid cause of action; and to entitle him to relief court must adjudge that such cause of action is *prima facie* valid.
6. ———: ———: REENTRY. Where trial court after term vacates a judgment against plaintiff and immediately reenters same judgment on the same record, there is no adjudication that plaintiff has a cause of action that is *prima facie* valid.
7. **Appeal**: TIME. The legislature having power to limit the time within which an appeal must be taken, it is essential to the jurisdiction of this court that it be taken within that time limit.
8. ———: ———: POWER OF COURT. Trial court has no inherent power, directly or indirectly, to extend time for taking appeal.
9. ———: ———: ———. Where statutes provide that an appeal must be perfected by filing transcript in supreme court, which must contain certificate that cost bond has been given, trial court has no power to extend time indirectly by vacating decree after term and reentering the same judgment. Comp. St. 1929, secs. 20-1912, 20-1914.
10. **Banks and Banking**: GUARANTY FUND COMMISSION. Members of guaranty fund commission were public officers vested with quasi judicial functions, requiring judgment and discretion. Laws 1925, ch. 30.
11. ———: ———: LIABILITY FOR OFFICIAL ACTS. "Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption." 22 R. C. L. 485, sec. 163.

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

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

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

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

DAY, J.

This is a suit for an accounting brought by Morrill county as a depositor of the Bridgeport bank, on its own behalf and on behalf of all other depositors similarly situated, against the members and agents of the guaranty fund commission of the state of Nebraska. The guaranty fund commission took possession of the assets and business of the Bridgeport bank on the 15th day of May, 1925, and ran it as a going concern until the 8th of September, 1927, during which period new deposits were solicited and accepted, new loans were made, the bank's paper was discounted, deposits were withdrawn, and all the functions of a bank were performed. It is alleged by the plaintiff that, while the bank was so operated, a large amount of deposits were withdrawn, creating an unlawful preference between depositors, the amount of which is unknown to plaintiff and only ascertainable by an accounting. The plaintiff further alleges that, during this period of operation by the guaranty fund commission, certain set-offs were permitted, and moneys, which were in fact loans and therefore general claims, were withdrawn, and that the bank was, in fact, unlawfully liquidated while unlawfully operated as a going concern.

The gist of the action pleaded by plaintiff is summarized in the petition as follows: "That by reason of the

foregoing facts the assets of said bank placed in charge of the defendants who were members, officers and agents of the guaranty fund commission * * * have become exhausted and depleted in a sum in excess of $300,000, which sum, had said assets been properly conserved and legally administered, would have been available to the discharge of the indebtedness of said bank to this plaintiff and all other depositors and creditors similarly situated." The trial court found in favor of defendants and entered a decree in conformity to its finding, from which plaintiff appeals.

This is the second appeal filed in this case. The first appeal was taken from a decree entered February 9, 1932, and a motion for new trial, filed within three days, was overruled May 9, 1932. Defendants filed motion to dismiss this appeal for that no cost bond had been filed and no cash deposit to cover costs or supersedeas bond had been filed as required by section 20-1914, Comp. St. 1929. It appearing from the transcript that no cost bond had been filed within 90 days from the final order, as provided by statute, in conformity to the rule announced by this court in *Greb v. Hansen,* 123 Neb. 426, the former appeal was dismissed September 26, 1932, for lack of jurisdiction.

On August 29, 1932, during the May, 1932, term of court, the trial judge in Morrill county, not at the county seat but at Bayard, set aside the order of May 9, 1932, overruling motion for new trial, and the motion was again submitted to him and overruled. Later, on September 14, 1932, the court at Bridgeport, the county seat of Morrill county, again set aside the order of May 9, 1932, overruling the motion for new trial and, on reconsideration, the motion was again overruled. Thereafter, on September 26, 1932, the plaintiff's attorneys claim they learned for the first time that the decree of February 9, 1932, had been signed by the trial judge at chambers in Gering, Scotts Bluff county, and was sent to the clerk of

the district court at Bridgeport, who entered it on the journal, showing that it had been signed by the judge at chambers at Gering, Nebraska. At that time plaintiff filed a motion that the decree of February 9, 1932, be held to be void and be set aside on the sole ground that the decree was signed by the trial judge at chambers in Gering, Nebraska, instead of in open court at Bridgeport, Nebraska, and that the motion for new trial be withdrawn and all orders relative thereto be expunged from the record. Upon October 8, 1932, a regular day of the May term, the court sustained the motion and reentered the same decree, and overruled plaintiff's motion for new trial, filed the same day. This appeal was taken from the decree and order overruling motion for new trial entered October 8, 1932.

The appellees, except Bliss, filed a motion in this court to dismiss this second appeal for that the transcript was not filed in this court within three months from the rendition of a final judgment; that it is an appeal from a judgment entered October 8, 1932, which decree is identical with one dated February 9, 1932, except the date, from which an appeal was dismissed; and that the reentry of the judgment on October 8, 1932, was for the sole purpose of extending the statutory time for perfecting an appeal to this court. This motion to dismiss the appeal was argued before this court and ruling thereon reserved until the case was submitted upon the merits. It demands our consideration first. As heretofore noted, the original decree in this case was signed by the trial judge at chambers at Gering, Scotts Bluff county, and transmitted to the clerk of the district court for Morrill county. Did this render the decree void?

The judges of the various district courts, as such, have no inherent authority at chambers except such as they are expressly given by law. The Constitution provides: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." Const. art. V, sec. 23.

By section 27-317, Comp. St. 1929, the legislature has conferred certain powers upon district judges at chambers, which section however did not authorize the act of the trial judge in signing the decree in this case. However, section 8-191, Comp. St. 1929, specifically provides that, in such a case as this, a judge of the district court at chambers shall have jurisdiction to perform certain judicial acts. This is a suit for an accounting brought by the plaintiff on behalf of himself and all depositors of the defunct Bridgeport bank to recover alleged losses of the bank while run by the guaranty fund commission. This money, if recovered, would have to be distributed among the depositors of said bank. The receiver is a party to this action. It involves the administration of this bank from the time when it was discovered to be insolvent, and, as such, it comes within the statute. Section 8-191, Comp. St. 1929, provides as follows: "In any proceeding in connection with the insolvency, liquidation or reorganization of a bank, a judge of the district court shall have jurisdiction in any county in the judicial district for which he was elected to perform any official act in the manner and with the same effect as he might in the county in which the matter arose, or to which it may have been transferred, and he may perform any such act in chambers with the same effect as in open court." In this connection, see *State v. Neligh State Bank*, 116 Neb. 858. This suit is a proceeding in connection with the insolvency, liquidation, or reorganization of a bank, and, as such, jurisdiction was conferred by the statute upon the district judge at chambers to perform official acts in the manner and with the same effect he might in the county in which it arose.

But the appellant argues if the legislature by the enactment of section 8-191, Comp. St. 1929, intended to amend section 27-317, Comp. St. 1929, then such enactment would be unconstitutional, because the title of the act was not broad enough to include such an amendment. How-

ever, section 8-191, Comp. St. 1929, is not amendatory of section 27-317, Comp. St. 1929, but an independent act which confers a jurisdiction upon judges of district courts at chambers in addition to others under the constitutional provision heretofore quoted. This court has definitely passed upon this question. What now appears as section 20-1531, Comp. St. 1929, relating to the confirmation of a judicial sale, was amended in 1875 by adding a proviso that the judge of the district court might confirm a mortgage foreclosure sale under certain conditions at vacation. Laws 1875, p. 38. In 1885 this court was required to decide whether this statute authorizing the confirmation of sales in vacation was repealed by the passage of what is now section 27-317, Comp. St. 1929, without later amendments, which took effect March 1, 1879. The argument of Judge Maxwell so aptly meets the contention of the appellant that we quote it with the omission of supporting authorities.

"It is evident, however, that there is no repugnancy between the several provisions. A statute will not be repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. * * * In this case, there is no repugnancy between the statutes, and the earlier one is not repealed by the later." *Lawson v. Gibson,* 18 Neb. 137. To the same effect is *Beatrice Paper Co. v. Beloit Iron Works,* 46 Neb. 900. Applying the rule to this case and paraphrasing the language, section 8-191, Comp. St. 1929, does not amend section 27-317, Comp. St. 1929, by implication or otherwise, because the provisions are not repugnant, and they must be construed together. Statutes relating to the same subject, although enacted at different times, are *in pari materia* and should be construed together. *State v. Omaha Elevator Co.,* 75 Neb. 637; 25 R. C. L. 1067, sec. 292. 2 Lewis' Sutherland, Statutory Construction, 844, gives the rule: "Statutes which are not inconsistent with one another, and which relate to the same subject-matter,

are *in pari materia,* and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Acts *in pari materia* should be construed together and so as to harmonize and give effect to their various provisions." *Rohrer v. Hastings Brewing Co.,* 83 Neb. 111; *Board of Commissioners v. Aetna Life Ins. Co.,* 90 Fed. 222; *State v. Gerhardt,* 145 Ind. 439; *Scarangello v. Pacione,* 126 N. Y. Supp. 714; *Village of North Fargo v. City of Fargo,* 49 N. Dak. 597. A statute will not be construed as repealing by implication an earlier statute, unless there is a plain and unavoidable repugnance. In *State v. Omaha Elevator Co.,* 75 Neb. 637, we held: "All statutes upon the same general subject are to be regarded as part of one system, and later statutes are to be considered as supplementary or complementary to those preceding them on the same subject." Section 8-191, Comp. St. 1929, is an independent act and deals with the same general subject as section 27-317, Comp. St. 1929, and is not amendatory but supplementary and complementary to it.

It therefore follows that, since the trial judge was authorized by statute to sign the decree in the case at bar at chambers, said decree entered February 9, 1932, was a valid one. Now, the vacation of the decree on October 8, 1932, was solely on the ground that, since it was rendered and signed at chambers, it was null and void. A valid judgment can only be vacated after the term it was rendered on the application of plaintiff after it is adjudged that there is a valid cause of action. Comp. St. 1929, sec. 20-2005. It is not sufficient that the petition state a cause, as contended by appellant, but applicant must allege and prove a valid cause of action. *Bond v. Wycoff,* 42 Neb. 214. And in *Gilbert v. Marrow,* 54 Neb. 77, it was held: "A party who seeks the vacation of a judgment after the term at which it was rendered must allege and prove that he has a valid cause of action or defense, and

to entitle him to relief the court must adjudge that such cause of action or defense is *prima facie* valid." But there was no such adjudication in this case. The trial court erroneously found the decree null and void for that it was signed at chambers in another county. It was after the term at which it was rendered. The same judgment was forthwith, without further testimony, immediately reentered, the same decree with the exception that the date was changed.

It is obvious from the history of this case that the purpose in vacating the original decree and reentering the same decree was to extend the time for perfecting an appeal. The legislature has general power to fix the time limit for taking an appeal, and having prescribed such time, the trial court has no power to extend the time directly or indirectly.

In 2 R. C. L. 104, sec. 80, it is said: "The legislature has general power to prescribe the time within which writs of error may be sued out or appeals taken, and it is essential to the jurisdiction of the appellate court that the proceeding be taken within the time limited, and the trial court has no inherent power to extend the time, either directly or indirectly. Thus, where an appeal has not been taken within the required time, the court has no power indirectly to extend the time for appealing by vacating, for such purpose, the judgment, order or decree, and entering it as of a later date."

In 3 C. J. 1070, it is said: "An extension of time cannot be made indirectly by repeating the judgment, order, or decree, by an amendment or modification not changing its legal effect, by a motion to vacate the same, *by vacating and reentering or refiling it as of a more recent date.*" (Italics ours.)

In *Chicago & N. W. R. Co. v. Big Bend Drainage District,* 208 Pac. 872 (29 Wyo. 50) it was held: "An attempt of the court to reinvest a right of appeal that has been lost by lapse of the time allowed by Comp. St. 1920,

sec. 6402, by vacating the order appealed from and reentering it under a later date is improper, and the appeal will be dismissed; there being no claim of fraud or mistake in the original entry of the order."

In *Philbrock v. Home Drilling Co.*, 117 Okla. 266, it was held: "The trial court cannot extend time for appeal by vacating the order or decree, and reentering it as of a more recent date."

In *Credit Co. v. Arkansas Central R. Co.*, 128 U. S. 258, it was said: "The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter."

The statutes of Nebraska prescribe the time within which an appeal may be taken to this court, and it is essential to the jurisdiction that the appeal be prosecuted within the time limit (Comp. St. 1929, sec. 20-1912), by filing a transcript within three months (*Frazier v. Alexander*, 111 Neb. 294), which shall contain a certificate that a cost bond has been given (Comp. St. 1929, sec. 20-1914; *Greb v. Hansen*, 123 Neb. 426). And the trial court has no power to extend the time either directly or indirectly. In such a case, where an appeal has not been taken in time, or where a cost bond has not been filed within time, the court has no power indirectly to extend the time for appeal by vacating after term, for such purpose, a valid judgment, and reentering it as of a later date. Since this represents an unwarranted effort to extend the time of appeal from the judgment of February 9, 1932, the appeal is dismissed.

Since all the appellees did not join in the motion to dismiss, a brief discussion of the merits of plaintiff's contention will be proper. The defendant Bliss was, during a part of the time involved in this case, secretary of the

department of trade and commerce of the state of Nebraska, and, as such, an *ex officio* member of the guaranty fund commission. The other defendants were either members of the commission or its agents. The defendants were public officers of the state of Nebraska or their employees. The state has control, supervision and inspection of all state banks. The guaranty fund commission was in charge of the Bridgeport bank under the provisions of the law as public officers. The cases cited by the appellant do not negative this proposition. The commission was created by law and appointments to it were made by the governor with the consent of the senate. They were required to take the oath required of county officers, give bond for faithful performance of the duties, and an assessment was levied upon state banks under the police power to pay the expenses and compensation of the commission. We have held that suits against the bank while in charge of the commission were not suits against the state. In an opinion by Redick, District Judge, we said: "The commission is an agent appointed by the state to take charge of and manage the business of the defendant corporation." *Svoboda v. Snyder State Bank*, 117 Neb. 431. "The department of trade and commerce and the guaranty fund commission were created by statute as governmental agencies of the state and as trustees for the beneficial owners of trust funds coming into the custody of such agencies." *Bliss v. Continental Nat. Bank*, 120 Neb. 568. Some decisions have referred to the state banking department as trustee of a trust fund. There is nothing inconsistent with a public official and a trustee. But in the case of the guaranty fund commission we had public officials exercising the control of the state over the quasi public business of banking.

The authority by which the defendants took possession of the Bridgeport state bank and operated it was conferred upon them as members of the guaranty fund commission by section 1, ch. 30, Laws 1925: "Whenever it

shall appear to the department of trade and commerce, from any examination or report provided for by this article, that the capital of any corporation transacting a banking business under this article is impaired, * * * such department may forthwith take possession of the property and business of such bank, and place it in charge of the guaranty fund commission, who shall thereafter conduct the affairs of said bank, and who shall retain possession of all money, rights, credits, assets and property of every description belonging to such bank, as against any mesne or final process issued by any court against such bank or corporation whose property has been taken, and may retain such possession for a sufficient time to make an examination of its affairs, and dispose thereof as provided by law. Any attachment lien against such property, acquired within thirty days next preceding the taking of such possession, shall be thereby released and dissolved." This statute was construed in *Metropolitan Savings Bank & Trust Co. v. Farmers State Bank,* 20 Fed. (2d) 775, wherein it was held the commission was required to determine within a reasonable time whether to operate bank as "going concern" under section 4, ch. 30, Laws 1925, or to liquidate it through section 5 of the same law. In its determination of the future fate of a bank, the commission exercised its discretion and judgment. Quoting from the opinion of *Metropolitan Savings Bank & Trust Co. v. Farmers State Bank,* 20 Fed. (2d) 775: "In our view, the plain meaning of this provision is that, when the commission first takes charge and possession of a bank, it is merely preliminary, for the purpose of making an examination and 'disposing of the bank as provided by law,' which means that the commission must, within a reasonable time, make its choice whether to operate it 'as a going concern' or to liquidate it through a receivership. During this preliminary phase, while determining which course to adopt, the commission is empowered to hold possession of the money and property of

the bank, 'as against any mesne or final process issued by any court.' "

The commission was directed in its duties by statute. Section 4, ch. 30, Laws 1925, provides: "Upon taking possession of the property and business of any bank, the guaranty fund commission may take charge and control of the property and business of such bank and open and manage it as a going concern, without regard to its solvency, and through employees, perform all duties and acts of the officers and directors of such bank while managing the same, and all salaries * * * in connection therewith shall be paid by the bank. The operation of the bank by the guaranty fund commission shall in no manner relieve or diminish the obligations of the stockholders under the laws of this state, or in any manner absolve the owners of such stock or the officers or directors of any liability under the civil or criminal laws of the state. If the guaranty fund commission shall determine that it is impossible to preserve such institution as a going concern, then the commission shall proceed to liquidate such bank as by law provided: Provided, the district court of the district in which such bank is located, may, upon application of any judgment creditor after a period of three months from the taking over of said bank by the guaranty fund commission, order the commission to close said bank, and liquidate the same as provided by law."

In the last cited opinion, it was said: "The status of the banking corporation while being operated by the commission as a 'going concern' differs completely from the status of a bank in receivership. In the latter case the bank is in process of liquidation, either by judicial action or by virtue of statutory authority. In the former case the bank continues in business as usual, receiving deposits, paying checks drawn against it, making new loans, renewing old ones, assuming new liabilities, discharging old ones and in every way carrying on its business in the usual manner and with the right to do everything exactly

as it could have done before it was put under the management of the commission. The statute in question puts no limitation whatever on the term 'going concern.'" We have cited with approval and followed this decision since *Svoboda v. Snyder State Bank,* 117 Neb. 431, was decided. The legislature created the guaranty fund commission for the purpose of protecting and safeguarding the depositors' guaranty fund. The commission was given the power to determine whether an attempt should be made to restore a bank to solvency or whether it should be liquidated. In the determination, the commission performed a quasi judicial duty. The commission had three months, unhampered, to make this decision; after that, the plaintiff in this case, or any interested party, could have terminated the control of the commission by court action. There is no evidence that the plaintiff ever availed itself of this remedy. In fact, the inference may well be drawn that the plaintiff was well content to continue the plan until in time it was demonstrated that the bank could not be restored to solvency. There is no evidence that the defendants' acts were prompted by wilfulness, malice or corruption. The scheme whereby the guaranty fund commission was to operate insolvent banks as going concerns was devised, as stated in the law, for protecting and safeguarding the depositors' guaranty fund. The commission operated this bank at a time when bankers, depositors, and these defendants were still of the opinion that the fund could still pay all claims of depositors in full. The guaranty fund commission was a part of the general scheme of protecting bank deposits by a guaranty fund and when said fund became depleted and hopelessly unable to function the commission could not perform the impossible. Possibly, if the effects could have been foreseen, the judgment of the commission would have been different. However, it was not seriously challenged at the time, and no depositor availed himself of the remedy provided by section 4, ch. 30, Laws 1925, by invoking the

power of the district court to secure an order requiring the commission to close said bank and liquidate the same as provided by law. It is a fair inference, we believe, that the depositors, including the plaintiff, relied, not upon the solvency of the bank, not upon the ability of the commission to restore it to solvency, but rather upon the depositors' guaranty fund to pay their claims. Their mistake of judgment was the same mistake as that of the defendants.

The bank was not operated in violation of law. It was open for business and all the money withdrawn and transactions of the bank were in the usual and ordinary course of banking business. The deposits shrunk, it is true, but it is equally true of all banks during this period. It is also true that some depositors withdrew their deposits. But the bank was open for business, and depositors had a right to such withdrawals. Looking backward, with the benefit of subsequent experience, one may say that the loss might have been less had the bank been liquidated at once. But it is doubtful if the plaintiff, its attorneys, or any depositor thought so at the time. The guaranty fund commission did not think so.

But are the defendants liable for an honest mistake of judgment? They were public officers, and, as such, not liable for mistakes of law or of fact while acting in good faith. The general rule is stated in 22 R. C. L. 485, sec. 163, as follows: "Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption. This immunity from civil liability for a mistake in judgment extends to errors in the determination both of law and of fact. Therefore where the question of his liability is in-

volved, it is not material whether he used reasonable care in ascertaining the facts on which his judgment was founded. As regards errors of law he is equally protected when he adopts a mistaken construction of an act of congress or a state statute, or when he misunderstands the common law."

The trial court filed an able opinion in this case, to which we are indebted for a careful and helpful analysis of the case. After careful and painstaking consideration, we reach the same conclusion. It is, therefore, ordered that the appeal be dismissed.

APPEAL DISMISSED.

SAM W. GOLDFEIN ET AL., APPELLEES, V. CONTINENTAL INSURANCE COMPANY, APPELLANT.

FILED JUNE 16, 1933. No. 28567.

1. **Principal and Agent.** In establishing agency, it is necessary to take into consideration the facts and circumstances in the case, the relations of the parties, what they did, their usual course of dealing, what instructions were given, if any, the conduct of the parties generally, and the nature of the transaction.
2. **Words and Phrases:** "IMPLIED." The word "implied" is used in law as contrasted with "express;" that is, where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties.
3. **Principal and Agent:** AGENCY: AUTHORITY. An agency may arise by implication from acts done by the agent with the consent or acquiescence of the principal; likewise, the scope of his authority may be so determined and defined. Evidence of a course of dealing by the agent, sanctioned by his principal, is one of the generally recognized modes of showing the extent of the agency.
4. ———: ———. An agency may be implied from the recognition or acquiescence of the alleged principal as to previous acts done in its behalf by the alleged agent, especially if the agent has repeatedly been permitted to perform acts like the one in question; and where there is a controverted issue of

fact on this proposition, it is proper to submit the case to the jury.

5. ———: ———: AUTHORITY. "When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and entrusted to the agent under similar circumstances." *First Nat. Bank of Wilber v. Ridpath*, 47 Neb. 96.

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

Wells, Martin, Lane & Offutt, for appellant.

George W. Dittrick, Jack Koenigstein and *Hugh J. Boyle, contra.*

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

MESSMORE, District Judge.

This is an appeal from the judgment entered in an action in the district court for Madison county on a fire insurance policy issued by appellant, defendant below, to appellees, plaintiffs below, under an adjustment of a fire loss sustained by plaintiffs, alleged to have been made by one Frank A. Sucha, plaintiffs alleging that the said Sucha was the duly authorized agent of the company to adjust said loss, and praying for the amount of the adjustment of the loss so made by the said Sucha.

Defendant answered, denying the allegations of the petition, and expressly denying that the said Sucha had any authority to act for it in any adjustment, appraisal or investigation of the loss in question, or that he did or attempted to bind defendant by any of his acts or had authority to waive any of the provisions of said policy of insurance. Other defenses were alleged, which need not be considered here.

At the trial the court limited the issues: First, as to

whether or not an adjustment had been made by Sucha, and, second, whether or not Sucha was an authorized agent of defendant company so that it would be bound by the adjustment.

Plaintiffs' evidence considered for the purposes of this opinion follows: Plaintiff Sam W. Goldfein testified he was acquainted with one Elmer Graham, of Creston, Nebraska, who was in the insurance business; that he had several policies of fire insurance which Graham had written for him, which were set out in the record and the amounts of said policies; that after the fire loss occurred he notified Graham of its occurrence; that the witness and Graham met at the bank, where witness took the policies out of the box and checked them over with Graham, who said he had notified all the companies he represented; that later Graham brought Sucha to witness' store and introduced him; that the policies were delivered to Sucha, who made a memorandum of them, and who, with Rosa Goldfein, one of the plaintiffs, proceeded to adjust the loss and arrive at a figure and adjustment; that Sucha made proofs of loss on all policies except one, including proof of loss under the policy issued by defendant company.

Frank A. Sucha testified that he had worked for the defendant company for a period of 9 years up to about 1928; that subsequently he went into business as an independent adjuster and had adjusted losses for the defendant company, having on occasions adjusted losses for it while on the ground and without prior authorization from it; that in every instance the company had accepted the proofs of loss, except in the instant case.

Mr. Graham testified that he represented several of the companies in which plaintiffs had insurance and had written insurance for them, but not in the defendant company; that he had blanks and was authorized as a soliciting agent of the company, but was not authorized to make adjustments and had merely introduced Sucha to plaintiffs, Sam W. and Rosa Goldfein, as an adjuster.

The evidence further shows that a Mr. C. A. Lederer, agent of the defendant company at Norfolk, Nebraska, and who issued the policy in controversy, had been notified of the fire loss immediately after its occurrence.

For the defendant the witness E. L. Crellin, state agent for it, having charge of the state of Nebraska both in sales and adjustments of insurance losses, testified that every adjustment in so far as Sucha was concerned was a separate assignment; that Sucha had handled certain adjustments for the company since he had become an independent adjuster; that if an adjuster heard of a loss where the company was involved, before making an investigation, he called the company's office by telephone or came to the office or wired, asking that he represent the company on that particular claim; that he did not give Sucha, either orally or in writing, authority to adjust any claims except those expressly or specifically assigned to him; that certain adjusters, including Sucha, had made adjustments in cases where property had been destroyed or damaged by a tornado in a locality without express or direct authorization from the company, but that, however, fire losses were not adjusted in this manner; that he had no knowledge of Sucha investigating the loss in question prior to the time the company received proof of loss in this case from him, and the company was not aware of the fire until Sucha had submitted such proof of loss, which was returned immediately to him, and that the company did not ratify his adjustment nor pay him for any adjustment he made in the matter; that Graham did not write the policy and had no authority to make adjustments but was merely a soliciting agent; that Sucha had adjusted a mercantile loss for the company in one instance, which was a total loss. On cross-examination the witness testified that he had a conversation with Sucha relative to the loss in question; that one of the objections was that the loss was too high; that Sucha was mistaken when he testified that he had adjusted similar losses for

the company. The record does not disclose any other objection by the witness to Sucha's alleged adjustment.

P. E. Nelson testified for the company, stating that he was an adjuster for the Western Adjustment & Inspection Company which adjusted losses for fire insurance companies, representing 200 companies and having adjusted some 3,600 losses; that no custom existed which permitted an adjuster, without previous authority, to accept proofs of loss or make adjustments for insurance companies in Nebraska, and that in each instance the adjuster obtained authority in regard to each loss. While appellant in its brief mentions certain evidence related by this witness in the county court, this evidence is not part of the record in the district court. On cross-examination he testified that he knew nothing about any dealing between Sucha and the defendant company nor whether the custom applied to Sucha's dealing with that company.

Graham testified for the company that he did not write the policy in question and had nothing to do with the company in so far as this policy was concerned and did not know there was such a policy on the stock of goods; that he had no discussion with plaintiff Sam W. Goldfein about the defendant company's policy; that he notified the National Security, and its representative said he would get in touch with the other companies; that Sucha introduced himself to the witness and stated he was an adjuster for the Goldfein loss, but did not mention the defendant company in any particular; that witness called Mr. Sam W. Goldfein and told him the adjuster was there and wanted to see him at the bank, and when Goldfein arrived there witness introduced Sucha to him; that after some conversation the two of them, Sucha and Goldfein, left for Goldfein's store; that witness visited with another party some two doors from the Goldfein store and then started for that place when Sucha and Goldfein came out; that Goldfein stated to witness that things were satisfactory and all right; that Sucha and Goldfein then went back

to the bank, witness following, and when witness got there the papers were being fixed up; that he paid no particular attention to the matter because it was not any of his business.

There was other evidence that Sucha had taken all the policies of the Goldfeins except one to his office in Omaha, had checked them over there and returned them; also evidence to the effect that plaintiffs were permitted by the alleged adjusters, Sucha and Graham, to reopen their store after the adjustment of the loss had been made by Sucha.

Appellant moved for a directed verdict and tendered an instruction thereon, which was overruled.

Appellant contends that the apparent authority of the agent is to be determined by the acts of the principal, and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct has created the apparent authority; that the doctrine of apparent or ostensible authority is merely one application of the law of estoppel, the elements of which must be pleaded and proved, and that appellees concede that estoppel is not a part of this action.

Several authorities are cited under this proposition of law, among them being *Oberne v. Burke,* 30 Neb. 581, where it was held: "A principal is bound equally by the authority which he actually gives, and by that which, by his own act, he appears to give." Further: "The apparent authority of an agent which will bind a principal is such authority as an agent appears to have by reason of the actual authority which he has or which he exercises with the knowledge and ratification of the principal."

It is contended further by appellant that appellees have taken the position of implied agency and concede that appellees' definition of implied agency is correct, that is, that

an implied agency is an actual agency and is a fact to be proved by deduction and inference from other facts; that the word "actual" in this sense means a real and existing agency; that the fact must first be established that Sucha was the actual agent, that is, the real and existing agent of defendant company, and before Sucha could have adjusted this loss it was necessary for the company to know of the loss and to employ him to represent the company in its behalf in adjusting such loss, and, further, that plaintiffs, Sam W. and Rosa Goldfein, did not know that Sucha duly represented the company as an adjuster and that the evidence does not support any actual agency; further, that Sucha did not know that the defendant company had a policy with the Goldfeins until he arrived on the premises and had gone over these policies and found the company's policy among the others, and, having such policy, proceeded to adjust the loss and send proof of loss to the company, and that the company was not bound to accept such proof of loss under the circumstances.

Appellees contend that this is a case of implied agency. The word "implied" is used in law as contrasted with "express;" that is, where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties. 2 Bouvier, Law Dictionary, 1510.

On the question of agency, it is necessary to take into consideration the facts and circumstances in the case, the relations of the parties, what they did, their usual course of dealing, what instructions were given, if any, the conduct of the parties generally, and the nature of the transaction.

"An agency may also be implied from the recognition or acquiescence of the alleged principal as to acts done in his behalf by the alleged agent, especially if the agent has repeatedly been permitted to perform acts like the one in question." 2 C. J. 443.

Sucha testified that he had adjusted losses for the defendant company without express authority, and that he had submitted proofs of loss to the company which were accepted by it and which were settled and paid and Sucha paid for his services. The witness Crellin qualifiedly denied this. That makes a controverted issue of fact on this proposition.

In *Gambrill v. Brown Hotel Co.*, 11 Colo. App. 529, it was held: "It was not necessary that there should be direct and positive proof of express authority, but it might be established by circumstances. An agency may arise by implication from acts done by the agent with the consent or acquiescence of the principal; likewise the scope of his authority may be so determined and defined. * * * Evidence of a course of dealing by the agent sanctioned by his principal is one of the generally recognized modes of showing the extent of the agency."

In *Anderson v. Johnson,* 74 Minn. 171, it was held: "Rule applied that a single act of an assumed agent, and a recognition of his authority by his principal, may be sufficient to prove his authority to do similar acts."

"When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and entrusted to the agent under similar circumstances." *First Nat. Bank of Wilber v. Ridpath,* 47 Neb. 96.

Quoting further from the same opinion, we find this language: "The exercise of such authority in past transactions known to the principal tends to prove that in the particular transaction in question the agent possessed actual authority, there being no special instructions."

We have examined instruction No. 6, to which appellant objects, and noted the objections made thereto, but find that there is no prejudicial error in the instruction,

and that it covers the question of agency in so far as the same is pertinent to the issues as defined by the lower court.

The lower court allowed certain attorney's fees in this case to appellees' attorneys, which they admit in their brief cannot be taxed as costs in this case. Therefore such allowance to them is denied.

We must conclude that whether or not Sucha was the agent of the defendant company at the time he made the adjustment of the loss sustained by plaintiffs under the policy of fire insurance in question was a question of fact for the jury to determine, that the question was submitted under proper instructions and the law applicable to the case, and the jury having decided such question in favor of plaintiffs, they being the constitutional triers of fact, the jury's verdict is conclusive. The judgment of the lower court is reversed as to allowance of attorney's fees and otherwise it is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. THURSTON STATE BANK: E. H. LUIKART, RECEIVER, APPELLANT, HEINRICH JOHNSEN ET AL., APPELLEES.

FILED JUNE 16, 1933. No. 28570.

Banks and Banking: INSOLVENCY: PRIORITIES. Persons held by this court to be subrogated to the rights of the United States to priority of payment as preferred creditors generally have no prior right to payment in full of their claim from the fund raised by stockholders' liability created by section 7, art. XII of the Constitution of the state of Nebraska. The Constitution gives no preference to any creditor or class of creditors in payment of claims out of said fund.

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

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

Howard Saxton and *John E. Eidam, contra.*

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

MESSMORE, District Judge.

This is an appeal from the district court for Thurston county, in which an order was entered directing payment of the claims of the interveners, Heinrich Johnsen and John F. Krusemark, in full and prior to other creditors from the fund collected by the receiver for stockholders' liability in the Thurston State Bank as claims for money due the United States, on a deposit, to whose rights said interveners, who were sureties on the depositary bond, were subrogated.

This court in *State v. Thurston State Bank*, 121 Neb. 407, held: "The priority rights of the United States, when the conditions specified in section 3466, Rev. St. U. S., come into existence, cannot be impaired or superseded by a state law." And further: "When no intervening equity bars subrogation, a surety on a bond given by a state bank to secure a deposit of money by the United States is subrogated to the rights of the United States to priority of payment to the extent that such surety has paid such deposit."

The evidence in the case is mostly by stipulation and there is no apparent dispute as to the facts. When the Thurston State Bank became insolvent on January 12, 1928, there was on deposit in it $14,250 belonging to the United States, it being money deposited by the Indian agent for the Indian wards of the government. Johnsen and Krusemark were sureties for the Thurston State Bank on this deposit, and they paid the indebtedness in part and were subrogated, according to the findings of this court and as set out above, to the rights of the United States to the extent of such payment made by them. After the assets of the bank had been exhausted and payment made of the prior claims of the United States and of Johnsen and Krusemark, there still remained owing to interveners $1,606.80, with interest, as subrogees of the

United States. The receiver had collected a sum on the double liability of the stockholders and was holding it for distribution *pro rata* among all the creditors of the bank. Interveners then brought suit to compel the payment of the remainder of their claim in full out of the stockholders' liability fund before any distribution was made to the other creditors.

Appellees agree with the statement in reference to the evidence, with the exception that there is still about $975.24 withheld contrary to the decree, and contend that the receiver has on hand or may have on hand, if he will obey the decree of the district court and collect them, certain funds derived from the double liability of the stockholders, which should first be applied as the district court ordered them to be applied, namely, so far as necessary to pay interveners' prior and preferred claim. The receiver refused so to apply said funds, and appellees herein filed a motion in the district court for Thurston county to require said receiver to show cause why such funds should not be so applied. A showing was made before the court, and, as stated, an order was entered on May 24, 1932, requiring the receiver to pay, first, the sum due and owing appellees, and hence this appeal. Appellees contend that they are entitled to be paid in full as subrogees of the United States first and ahead of all other creditors pursuant to federal law.

The principal assignment of error is that the court erred in ordering the claim of interveners to be paid in full out of the funds collected by the receiver from the constitutional double liability of the stockholders of the failed bank. Therefore, the question put before this court concerns the construction of the federal statute, section 3466, U. S. Rev. St., which provides: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the

United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

It might be well to state the Nebraska constitutional provision pertinent to this case: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to any amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder, and all banking corporations shall publish quarterly statements under oath of their assets and liabilities." Const. art. XII, sec. 7.

This court in the case of *State v. Citizens State Bank*, 118 Neb. 337, held: "The liability of stockholders created by section 7, art. XII, of the Constitution, is for the benefit of all creditors of the bank against all who are stockholders when the creditor's claim accrues. The Constitution gives no preference to any creditor or class of creditors. All are on an equal footing, limited by the constitutional provision that the stockholder is liable only to those creditors whose claims accrue while he is such stockholder." And further, in the same case, it was held: "The constitutional double liability of stockholders of a state bank is not an asset of the bank, but is for the security of the bank's creditors."

In *Rogers v. Selleck*, 117 Neb. 569, it was held: "The double liability imposed by the Constitution upon stockholders of a state bank inures to the benefit of unpaid creditors of the bank, and not to the bank in its corporate capacity." And further: "In effect the constitutional provision imposing a double liability upon stockholders of a state bank requires them, in connection with their subscription for stock, to make contributions to a trust fund

for the benefit of unpaid creditors in the event of insolvency, and the action to enforce their obligations must be prosecuted by one creditor for the benefit of all, or by the receiver."

It will be noted that the decisions set out above hold that the stockholders' liability fund is a trust fund specifically stated to be such for the benefit of the creditors generally, and the decisions of this court, in interpreting the constitutional provisions above set forth, have been to place all creditors on an equal footing, and have determined that this fund is not an asset of the bank, but a trust fund created in the event of insolvency of the corporation itself; that it is a distinct fund, and not a part of the corporation, and inures to the benefit of the creditors generally.

There is no conflict upon the interpretation of the federal statute nor of the section of the Nebraska Constitution cited. The first requirement for the attachment of this priority is the insolvency of the person or corporation from whom money is due the United States. The insolvent debtor in this case is the Thurston State Bank, but the persons from whom the money is being collected, of whom the United States is now a creditor, are the solvent stockholders of said bank. The first condition necessary for the operation of the statute is lacking.

There is another condition of the statute which is wholly lacking. The rule followed by all federal courts in applying this statute is that it is enforcible only against one who has title to the property of the insolvent. The receiver as an arm of the court may be the collecting and disbursing agent for these creditors, but neither he nor the insolvent whose estate he administers ever has title to the fund derived from the stock liability in such a fashion as to permit the United States to demand priority of payment from such a fund, for the reason that title to this fund, which has been declared to be a trust fund, is vested in all the creditors alike. The receiver merely

brings the action as authorized, to collect the double liability.

While there are many interesting questions and distinctions set forth in appellees' brief, we cannot sustain their theory in this case, in view of the holdings of this court, determining that the stockholders' liability fund is not an asset of the bank, but is a trust fund, and that all creditors of the bank participate therein on an equal footing. Therefore, the remainder of the claim due appellees must take its regular order, together with all other creditors of the bank, *pro rata,* from the stockholders' liability fund.

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

REVERSED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, ET AL., RELATORS, V. ORA O. MARSH, RESPONDENT.

FILED JUNE 27, 1933. No. 28732.

1. **Quo Warranto.** *Quo warranto,* or a proceeding in the nature thereof, lies only against one who is in possession and user of the office, or who has been admitted thereto.
2. ———. An information in the nature of *quo warranto* is only employed to test the actual right to an office, not to afford relief against misconduct.
3. ———. If acts of misconduct charged are declared by statute to work a forfeiture of his office, judgment of ouster may be given against such officer for breach of his official duty.
4. **Counties and County Officers:** COUNTY TREASURER. The office of county treasurer is an office of trust and profit, under the laws of the state of Nebraska.
5. ———: ———. He is a collector and a custodian of public money, within the intent and meaning of section 2, art. XV of the Constitution of Nebraska.
6. ———: ———: DEFALCATION. The provision, found in section 2, art XV of the Constitution, providing that an officer who is in default is not eligible to hold any office of trust or profit, requires sufficient proof of such wilful misconduct that the intent to misappropriate the trust funds in his hands as county treasurer is fairly inferable therefrom.

Original proceeding in *quo warranto* by the state on relation of the attorney general, and another, to oust respondent from the office of county treasurer. *Judgment of ouster.*

Paul F. Good, Attorney General, William H. Wright and *J. H. Falloon,* for relators.

Frank N. Prout, D. D. Reavis and *John C. Mullen, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

PAINE, J.

This is an original application in the nature of *quo warranto* to oust respondent from the office of county treasurer of Richardson county, Nebraska, on the ground that he is ineligible to hold such office, within the meaning of section 2, art. XV of the Constitution of Nebraska, which provides: "Any person who is in default as collector and custodian of public money or property shall not be eligible to any office of trust or profit under the Constitution or laws of this state."

An information in *quo warranto* was filed in this court by the state of Nebraska, upon the relation of Paul F. Good, attorney general, and J. H. Falloon, county attorney of Richardson county, Nebraska, relators, as plaintiffs, against Ora O. Marsh, respondent, as defendant. Leave to docket same was granted by all of the members of this court signing the praecipe. A summons was thereupon issued, and served by the sheriff of Richardson county; an answer was filed, asking that the information in *quo warranto* be dismissed, whereupon a stipulation was entered into by each of the parties, and filed in this court March 21, 1933, by which each party consented to the immediate appointment of a referee, and, subject to the approval of this court, suggested that Donald C. Gallagher be ap-

pointed as such referee, which was duly ordered by this court. An amended answer was filed, and a reply thereto, and upon May 16, 1933, the referee filed his report in this court, and the same came on for hearing upon the objections to the report of the referee, setting out that the information in *quo warranto* does not charge that the defendant knowingly, wilfully, intentionally, or corruptly took any money at any time from Richardson county, and that the report is not sustained by competent evidence or sufficient evidence, and that the report is contrary to the law and the evidence, and is conflicting and contradictory in its terms. Each party having filed briefs herein, an oral argument was made to the court, and the same is now submitted for an opinion.

The referee, in his findings of fact, sets out that Ora O. Marsh was elected county treasurer of Richardson county in November of 1926, and reelected in November, 1930, which last term began upon January 8, 1931, on which date he was short $860, which amount he had converted to his own use from the funds of Richardson county, and was then in default in said amount; that an audit was made, under direction of the county board, and upon January 26, 1931, he was found to be short $620, and by another audit of his books it was found that upon December 31, 1931, he was short $480, which amount had been converted to his own personal use, without any authority therefor.

The referee further finds that the said defendant issued license No. 19-49 for his own automobile in the year 1930, and has never paid nor accounted therefor.

The referee further finds, from the evidence given before him by the defendant, that he was a persistent borrower from the county funds in his hands, and sought to justify and excuse the taking of these funds on the ground that he believed himself entitled to retain five cents for the issuance by his office of each automobile license, basing his contention upon a law amended by the legislature in

1925, being section 60-325, Comp. St. 1929. Upon June 19, 1931, this court filed an opinion in the case of *Wayne County v. Steele,* 121 Neb. 438, which provided that county treasurers were not personally entitled to said fee of five cents, yet after such decision defendant continued to take money from the cash fund of his office, and attempted to justify or excuse his practice in so doing because of his unfortunate financial condition and personal necessities.

To make clear the exact manner in which the defendant took out money for his own use, we find that volume 3 of the records in the case at bar is made up of exhibits Nos. 1 to 441, each of which consists of a yellow memorandum paper about 8½ inches wide by 7 inches in length. These exhibits are all written in lead-pencil except one, and according to the testimony of Vern H. Shier, the bookkeeper in the county treasurer's office for many years, are the only records in the office which give in detail the items which made up the daily cash balance according to the cash book. All of the books, receipts, and records of every kind required to be kept in a county treasurer's office were accurately kept, as shown by the various audits made of the office, and the only record of the shortage in the office was shown on these 441 exhibits, being the separate daily work sheets, showing what the cash consisted of each particular night, itemizing the total amounts in each coin from one cent to one dollar, and in currency, and also giving the checks and cash items, and on each one of the daily lists the first name appearing on the left-hand side is the name "Marsh," with the amount due from him, as, for instance, on exhibit 263, November 12, 1931, the items carried that day were $725 due from Marsh, $14 due from Bowers, and $12 due from Mobley, the last two being upon checks of friends which had been turned down, and which he carried for months as cash items. No attempt was made to conceal the shortage from the employees in the office.

It is further shown that Mr. Marsh, his deputy, and the bookkeeper, sometimes all three helped in making out this daily work sheet of the cash; at other times it was entirely made out by any one of the three persons in the office who closed up that particular night. The first line under cash items for each of these 441 exhibits gives the exact amount of the shortage for that day of Mr. Marsh; it being considered by the two employees that this item was in the nature of an I-O-U. Exhibit No. 1 is for January 2, 1931, and shows that he owed that night $765. The next day he owed $825, and on January 7, the night before he took office for his last term, he owed $850. On January 8, the first day of his new term, he owed $860, and from January 12, 1931, to January 21, inclusive, he owed $870. It is contended that toward the last of some months the shortage would run rather high, while the first few days of the month it would sometimes show that he owed a smaller amount, due to the fact that he would put in his salary check. Running over these 441 daily work sheets, one is found to be as low as $40, under date of March 31, 1931, and the last one, being exhibit 441, for June 14, 1932, shows that he owed $160, and at the close of business upon each one of these 441 nights the defendant, Marsh, owed some definite amount to the county, which he had so taken and converted to his own use out of the public funds entrusted to him in his official capacity.

The defendant, upon the witness-stand, denied that he was a defaulter, and testified that he had never concealed the fact that he was taking money, yet he had never notified the members of the county board of this fact, nor did his books, or the records required to be kept in his office, show that he was continually taking out money, for the books balanced, and only when an auditor would count the cash would he discover the shortage.

The defendant filed an affidavit, exhibit F, duly sworn to upon April 6, 1931, in which affidavit he stated that the money, being the five-cent fee on each license, had all been

returned to the county; yet, when we examine exhibit No. 77, being the work sheet for the cash on hand Saturday night, April 4, 1931, it shows that he owed $255, taken out of the county funds, and the work sheet at the close of business on Monday, April 6, 1931, shows that the defendant, Marsh, owed $260 on that date, and owed the same amount for the next two days, and that from April 9 to April 14, inclusive, the amount stood at $265. These facts, in connection with his affidavit, clearly show that he did conceal the taking of these funds, and endeavored to deceive the county board in relation thereto.

An audit was made of the defendant's books as county treasurer, as of the date December 31, 1931, showing $480 shortage, and, upon examination before the referee, the defendant was asked whether the $480 was in the cash drawer that night, and he admitted it was not, and admitted it was not in any bank depository, and then he was asked definitely where this $480 was, and made answer: "That is my business."

The evidence taken by the referee is clear and convincing that the defendant kept taking money out of the cash drawer of his office, and returning part of the same from time to time, and that the amounts taken bore no relation to the fee of five cents on licenses issued by him, which he claimed to warrant him in retaining funds, and that, after this court decided that such claim was groundless, he continued to appropriate to his own use, from the trust funds in his possession, the same as before.

The referee finds that such conduct on the part of the defendant was wrongful, wilful, and done with the intent to misappropriate the money of Richardson county, Nebraska. An examination of the bill of exceptions in this case discloses that the findings of fact made by the referee are clearly supported by the evidence and exhibits in the case.

1. Section 20-21,112, Comp. St. 1929, provides that an information in *quo warranto* may be filed against any per-

son unlawfully holding or exercising any public office within the state, and sections 20-21,115 to 20-21,123 provide for the pleadings, trial, and judgment of ouster.

The defendant insists that the information comes too late, for that, if brought at all, it must have been brought before defendant Marsh assumed the duties of the office of county treasurer on January 8, 1931. In this the defendant is in error, for *quo warranto,* or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, or who has been admitted thereto. *State v. Huller,* 23 N. M. 306, 1 A. L. R. 170.

"*Quo warranto* will lie only when the party proceeded against is either a *de facto* or *de jure* officer in possession of the office, and an office that is vacant is in possession of no one. * * * *Quo warranto* will not lie before the beginning of the term of office." 22 R. C. L. 663, sec. 5.

2, 3. Section 618, High's Extraordinary Legal Remedies (3d ed.), holds that the information in the nature of *quo warranto* is only employed to test the actual right to an office, and that it can afford no relief for official misconduct, but if the acts of misconduct charged are declared by statute to work a forfeiture of his office, an information will lie, and judgment of ouster may be given against the officer upon the ground of such misconduct or breach of official duty.

In *Ames v. Kansas,* 111 U. S. 449, 28 L. Ed. 482, it states: "The original common-law writ of *quo warranto* was a civil writ, at the suit of the crown, and not a criminal prosecution. *Rex v. Marsden,* 3 Burr. 1812, 1817. It was in the nature of a writ of right by the king against one who usurped or claimed franchises or liberties, to inquire by what right he claimed them, * * * and the first process was summons. * * * This writ, however, fell into disuse in England centuries ago, and its place was supplied by an information in the nature of a *quo warranto,* which, in its origin, was 'a criminal method of prosecution, as well to punish the usurper by a fine for the

usurpation of the franchise, as to oust him, or seize it for the crown.' 3 Bl. Com. 263. Long before our revolution, however, it lost its character as a criminal proceeding in everything except form, and was 'applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor; the fine being nominal only.'" See 22 R. C. L. 657, sec. 2; *State v. Sengstacken,* 61 Or. 455, Ann. Cas. 1914B, 230; *Attorney General v. Sullivan,* 163 Mass. 446, 28 L. R. A. 455; 22 R. C. L. 713, sec. 40.

4, 5. The office of county treasurer is an office of trust and profit under the laws of the state of Nebraska. He is a collector and a custodian of public money, within the intent and meaning of section 2, art. XV of the Constitution of Nebraska. The manifest purpose of such section is to secure honest and faithful service from such officials by providing that those who are faithless to their trust, by becoming defaulters, shall not be eligible to any office of trust or profit under the Constitution or laws of this state.

In the case of *State v. Donahue,* 91 Neb. 311, it was set out clearly in the dissenting opinion therein that the word "wilfully" has a different meaning from the definition of that word as used in criminal law to describe a felonious act, and does not mean that the conduct of the officer to justify his removal must be prompted by some evil intent or legal malice, and, further, that a statute establishing a method of removing a public officer for wilful failure to enforce the law should be liberally construed, with a view to suppressing the mischief which made the legislation necessary, and a construction which would weaken the effect of the statute should be avoided. *Hiatt v. Tomlinson,* 100 Neb. 51; *State v. Farley,* 123 Neb. 687; *State v. Moores,* 56 Neb. 1; *Kane v. People,* 4 Neb. 509.

6. The provision, found in section 2, art. XV of the Constitution, that an officer who is in default is not eligible to hold any office of trust or profit, requires proof

of such wilful misconduct that the intent to misappropriate the trust funds in his hands as county treasurer is fairly inferable therefrom.

It is unlawful for a county treasurer to remove any part of the county funds out of the vault of the county treasurer's office except for the payment of warrants legally drawn, or for the purpose of depositing the same in a regularly selected bank depository for county funds, and when a county treasurer personally borrows public moneys in his possession as custodian thereof, then such county treasurer is in default as a collector and custodian of public money within the meaning and intent of the provision of the Constitution.

In concluding his report, the referee finds: "The defendant, as county treasurer, who has knowingly and intentionally appropriated money to his own use from the cash funds in his possession as custodian thereof for the county; who has knowingly, intentionally and wilfully published a false report of the financial condition of his office; who has knowingly, wilfully and intentionally issued to himself an automobile license plate, without paying or accounting to the treasury for the fee therefor, is in default as a collector and custodian of public money, within the meaning of section 2, art. XV of the Constitution, and is ineligible to hold the office of county treasurer."

The findings and recommendations of the referee are approved, and judgment entered accordingly.

JUDGMENT OF OUSTER.

VINCENT JOSEPH BORDEAU V. STATE OF NEBRASKA.

FILED JULY 3, 1933. No. 28691.

1. Criminal Law: RIGHT TO COUNSEL: WAIVER. "In a criminal prosecution, defendant's right to counsel may be waived." *Smythe v. State*, 124 Neb. 267.
2. ———: FINDING OF FACT: REVIEW. A decision of fact, submitted to the trial court by affidavits, will not ordinarily be set aside on review unless unsupported by the evidence or clearly wrong.

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

J. J. Thomas and *Herbert W. Baird,* for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, EBERLY, DAY and PAINE, JJ., and CHASE and TEWELL, District Judges.

GOSS, C. J.

Plaintiff in error, hereinafter called defendant, on October 17, 1930, pleaded guilty to an information charging murder in the second degree. On November 3, 1930, he was sentenced and committed to 25 years in the penitentiary, beginning as of the date of his plea. March 7, 1931, during the same term of the district court, he filed a motion to vacate the judgment so as to permit him to withdraw the plea and to plead not guilty. The motion was heard and submitted upon affidavits and was taken under advisement January 9, 1932. On September 13, 1932, the district court denied the motion. From this judgment defendant brought proceedings in error.

The information laid the act on October 16, 1930, and charged that the defendant "unlawfully, maliciously, feloniously and purposely, but without premeditation and deliberation, stabbed Jaffa (Jack) Workman with an ice pick and as a result thereof he died on the 16th day of October, 1930; defendant thus committed murder in the second degree." This charge contained the essential elements of murder in the second degree. Comp. St. 1929, sec. 28-402.

We expressly do not decide but leave out of view the question, and any discussion, of the jurisdiction of the district court to reopen its former judgment thus applied for by defendant. Proceeding here as if the jurisdiction existed, we examine the record to ascertain and decide

whether the court erred in its judgment on the merits of defendant's claims of error. These are, in substance, that the court erred: (1) In finding murder in the second degree rather than manslaughter; (2) in abuse of discretion by refusing to set aside the plea of guilty and to permit defendant to present a defense; (3) in that the findings and judgment are not sustained by sufficient evidence; and (4) in that the findings and judgment are contrary to law.

Defendant was born in Galveston, Texas, July 30, 1902, as shown by the affidavit of his mother. He was educated in the public schools and had one year in college. He was employed by the Sante Fe Railway from September 3, 1918, to April 20, 1930, first as a yard clerk and later as switchman and engine foreman. The last three years his wages approximated $200 a month. Until his marriage he lived at home. He was a dutiful son, an energetic worker, and a law-abiding young man. The evidence shows that, until the present trouble arose, his record is clear. October 2, 1929, he married Pearl Epp, a native of Nebraska. She had been married, had a young son, but had been divorced. They had met at an evening party at Galveston Beach. A month or so later he met her on the street and she informed him of the necessity of an operation for appendicitis. He arranged for her operation and frequently visited her during her convalescence in the hospital. Thereafter he learned that she had been an inmate of a house of ill fame, but upon her recovery she secured employment in a store. He married her and obtained possession of her son, to whom he was greatly attached. Owing to his want of employment, his wife and son returned to her people in Aurora, Nebraska, early in May, 1930, and he followed the latter part of that month looking for railway employment, left for Dodge City, Kansas, June 21 and worked until July 18 for the Sante Fe as a brakeman; then went to Pueblo, where he worked until August 18 as a laborer on the construction of a railroad

ice platform; he gave up this employment and went to Seward, Nebraska, on receipt of a letter from his wife that a pipe line was being laid, but on arrival found work suspended for want of pipe, so he returned to Pueblo and went to other places in search of work; he went back to Seward October 1 and obtained employment laying pipe at David City; he worked half a day on October 15 and all of the 16th at David City. It was the evening of October 16, 1930, the homicide occurred.

Late in July, 1930, defendant's wife came to Seward and worked in the Sunshine Inn. Defendant came there first on the 18th of August, 1930, and was in and out several times looking for work. But about October 1, 1930, he returned to Seward and remained until the tragedy, living with his wife and her boy. Before he went to Seward his wife had roomed with a young woman who appears from the evidence to have been a prostitute. Defendant caused them to separate. When defendant returned to Seward the last time the boy told him his mother had been "playing around" with Jack Workman. The evidence indicates that she, too, had been rather openly practicing her former profession for hire and that she was infatuated with Workman, who had become her illicit lover. Workman was a burly bootlegger, who appears to have been a menace to society at every point at which he contacted it. When defendant returned from work the evening of October 16 he did not find his wife at home. He learned that she and Workman had been consorting during the day; that they were drinking and behaving in a disorderly manner, and that Workman had made threats against defendant and against C. A. Naylor, proprietor of a restaurant. Defendant and Naylor were seeking to reach the chief of police to have Workman arrested for their protection. Defendant hunted for his wife and shortly after 9 o'clock in the evening found Workman at a gas filling station. Defendant had armed himself with an ice pick obtained at Naylor's restaurant

for use in his defense if in an extremity. Defendant's affidavit states that Workman was searching for something in the side pocket of his car. Defendant approached him and asked for his wife. Workman swore at him and struck at defendant, denying the presence of his wife. Defendant defended himself with his fists. Workman retreated to the car and appeared to be getting a weapon from the pocket of the rear door. Defendant saw Workman draw a hammer from the left-hand car pocket. He advanced toward defendant, who struck him with his ice pick, of which wound he later died.

The evidence shows that on the night of October 16, 1930, defendant was questioned by the county attorney and made answers in writing, after having been fully advised as to his immunity. On the morning of October 17, 1930, he was taken to the county court for his preliminary hearing. He was offered an opportunity to consult counsel and was informed that he would be furnished counsel if he so desired. He asked if he might act as his own attorney and did so. He was bound over to the district court. He immediately requested the county attorney to explain to him the different degrees of homicide, which was done. He offered to plead guilty to manslaughter, if the county attorney would charge that offense. The county attorney refused on the ground that he thought the facts indicated at least second degree murder. Later that day defendant told the county attorney he would plead guilty to murder in the second degree, if so charged. When he was so charged and was brought before the district court to be arraigned, the court very carefully and methodically explained to him his right to have counsel (either of his own or appointed by the court) and all other rights afforded him by law, including the nature of the charge and the penalties. He told the court he had not been influenced by promises or coercion or in any other manner in reaching this decision to plead guilty. Upon acceptance of such a plea, the court told defendant

he could have any one he desired talk to the court and that a full investigation would be made before sentence. Defendant was unusually well advised of and protected as to his legal rights. He was competent to refuse and did refuse counsel. It was not the duty of the court to force counsel upon him. 16 C. J. 823. "In a criminal prosecution, defendant's right to counsel may be waived. The trial in a criminal prosecution may proceed without counsel for a mentally competent defendant who failed to employ an attorney and rejected the offer of the court to provide one for him." *Smythe v. State*, 124 Neb. 267.

Defendant is a young man of more than ordinary intelligence, education and poise. He conducted himself right well in the matter of the hearings. While one of his gentlemanly training and instincts would be more disturbed mentally than an habitual criminal, yet it seems he was capable of making his choice whether to plead guilty or to take a good chance of acquittal on the ground of self-defense. Defendant waived his right to an attorney. If he had not previously indicated a willingness to plead guilty to murder in the second degree, an information might have been filed by the county attorney charging murder in the first degree, with a possibility for that extreme offense.

A decision of fact, submitted to the trial court by affidavits, will not ordinarily be set aside on review unless unsupported by the evidence or clearly wrong. We are of the opinion that the findings and judgment of the district court were sustained by the evidence and were not contrary to law, that there was evidence justifying the finding of murder in the second degree, and that the district court did not abuse its discretion in refusing to set aside the plea of guilty and to permit a defense and trial by jury on the merits.

The cause does not come before us for review in such a form as to empower a reduction of the sentence as excessive, under the authority given this court in section

29-2308, Comp. St. 1929. Therefore, we do not pass upon the length of the sentence imposed. We say this so that the board of pardons may not be embarrassed or deterred by our action if and when the defendant may invoke its powers under chapter 29, art. 26, Comp. St. 1929.

Finding no prejudicial error, the judgment of the district court is

AFFIRMED.

CELESTINE ADAMEK, APPELLANT, V. H. C. TILFORD, APPELLEE.

FILED JULY 3, 1933. No. 28568.

1. Automobiles: NEGLIGENCE: OPERATING AUTOMOBILE IN NIGHTTIME. To the general rule that it is negligence for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps, there are exceptions, where the object is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision.
2. Trial: NONSUIT. Where the evidence in an action at law is insufficient to support a verdict in favor of plaintiff, a nonsuit is not erroneous.

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

Henry F. Pedersen and *John W. Yeager,* for appellant.

Kennedy, Holland & DeLacy, contra.

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

ROSE, J.

This is an action to recover $35,000 in damages for personal injuries alleged to have been caused by the negligence of defendant in running over plaintiff with an automobile in a street in Omaha. In his petition plaintiff pleaded that, after driving from the west on Q street after

dark on the evening of January 24, 1931, he parked his automobile, headed east, parallel with the south curb of Q street near Thirty-ninth street, and that, as he stepped out of his car on the left or north side, an unknown hit-and-run driver in a speeding automobile brushed him off the running board, throwing him into the street. While he was prostrate on the pavement, defendant, driving another automobile from the west, ran upon and injured him. Plaintiff was pulled out on the north side in front of the rear wheel. Defendant was charged with negligence in the following particulars: Speed so great as to prevent the stopping of his car in time to avoid striking plaintiff; failing to have his car under such control as to avoid the collision; neglecting to turn aside; failing to slacken speed when plaintiff was, or should have been, seen.

In an answer to the petition, defendant denied the negligence charged and pleaded that any injury sustained by plaintiff was the result of his own negligence and that of the hit-and-run driver. The reply to the answer was a general denial.

At the close of plaintiff's testimony, the district court sustained a motion by defendant to excuse the jury and dismiss the action for insufficiency of the evidence to support a verdict against him. Plaintiff appealed.

The question presented by the appeal is: Did plaintiff make a case? The solution depends on the evidence of witnesses who testified in his behalf. In some respects his own testimony is at variance with his petition, but he said in effect that he got out of his own car on the north side of it, intending to walk to a store a few rods farther east on the north side of Q street. The evidence shows without conflict that, while he was lying on the pavement, defendant's car approached from the west and that the front end of it ran over him. Plaintiff was pulled out in front of the rear wheel on the north side of defendant's car not far from the center of Q street south of the en-

trance to Thirty-eighth avenue on the north. There were two disinterested eyewitnesses and both testified on behalf of plaintiff. They were going west at the time on the north side of Q street and observed from the car in which they were riding what occurred. The driver, Irene Ploke, drove about a quarter of a block beyond the scene of the accident, parked on the north side of Q street and hurried to the aid of plaintiff. Her passenger, Anna Recic, *nee* Jeck, was already at the scene, having jumped from the moving car. When near plaintiff, who was lying on the pavement, she screamed at defendant as he approached from the west in his automobile. The testimony of these two eyewitnesses called by plaintiff is harmonious and proves the following facts which bind him: As the speeding car of the hit-and-run driver went by, the body of plaintiff was flung into the air and lit on the pavement where it remained prostrate until struck by defendant's car. Defendant was going slowly, jammed on his brakes upon discovering plaintiff's body and made a sudden stop, the front wheels only passing over plaintiff. As far as could be seen, he did everything he could to avoid striking plaintiff. The night was dark. Automobiles parked along the south side of Q street obscured light from the stores. Plaintiff wore dark clothes. The pavement was wet and it was difficult to see his body in the street, even at close range. It looked like a blotch on the pavement. Both the clothing of plaintiff and the wet street had a dark appearance. Defendant could not see plaintiff until it was too late to turn aside or stop without striking him. The collision was unavoidable. The eyewitnesses could locate plaintiff's body in the street, because they had seen it in the air, as the speeding car went by, and knew there had been an accident. The lamps on defendant's car were shining and the brakes permitted a sudden stop. These facts are shown by direct testimony of plaintiff's own witnesses, or by necessary inferences therefrom. They disprove every allegation of negligence pleaded in the pe-

tition and there is no evidence requiring a different view. On the record made, plaintiff invokes the following doctrine:

"As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." *Roth v. Blomquist,* 117 Neb. 444.

To the general rule, as pointed out in the opinion in the case cited, there are exceptions, where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. The present case is clearly within the exceptions.

The evidence was insufficient to support a verdict in favor of plaintiff and the district court did not err in dismissing the action.

AFFIRMED.

LEE RICHARDSON ET AL., APPELLEES, V. WILLIAM J. BRAHAM ET AL., APPELLANTS.

FILED JULY 3, 1933. No. 28719.

1. **Schools and School Districts:** BOARDS OF EDUCATION: POWERS. Boards of education are vested with power to adopt reasonable rules and regulations.
2. ———: ———: EXERCISE OF POWERS: MOTIVE. The motives prompting members of a board of education in exercising, within reasonable limits, the power committed to them in the interest of the public are immaterial.
3. ———: ———: RULES AND REGULATIONS: VALIDITY. Power to act and reasonableness of action are proper tests of the validity of rules and regulations enacted by a board of education.
4. ———: ———: ———: ———. A rule or regulation, adopted by a school board, will not be held invalid on the ground that it is unreasonable and arbitrary, or that it invades private rights, unless the evidence of such facts is clear and satisfactory.

5. ———: PUBLIC SCHOOLS: CONTROL OF PUPILS. During school hours, general education and the control of pupils who attend public schools are in the hands of school boards, superintendents, principals and teachers and this control extends to health, proper surroundings, necessary discipline, promotion of morality, and other wholesome influences, while parental authority is temporarily superseded.
6. ———: BOARDS OF EDUCATION: SESSIONS: CONTROL OF PUPILS. A board of education, having power to make rules and regulations for the conduct and management of public schools, may provide for one session daily and forbid pupils to leave the campus during school hours.

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

E. H. Evans and *Urban Simon,* for appellants.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

ROSE, J.

This is a suit for an injunction to prevent the board of education, the superintendent and the principal of the senior high school in the North Platte district from enforcing the following regulation:

"Be It Resolved, That the senior high school be and is a one-session school with a lunch period of not more than 25 minutes, and that no students be permitted to leave the school grounds between 9 a. m. and 3:05 p. m., except such students as live quite close to the high school building, and whose parents request in writing that they be permitted to go home for lunch."

This regulation was adopted by the school board September 5, 1932, and by its order was enforced for a time by the superintendent and principal of the school. Plaintiffs are parents of pupils.

Prior to the adoption of the regulation, Cora Haffner conducted a cafeteria adjacent to the school grounds and it

was patronized by some of the pupils. For the accommodation of pupils generally, the school district operated a cafeteria in the high school building. A city zoning ordinance prevented other business enterprises near the school grounds which were located a considerable distance from the business district of North Platte.

The principal grounds on which the injunction was sought may be summarized thus: Mismanagement of high school cafeteria; meals not warm; food not properly prepared; denial of requests to permit pupils to leave school grounds for noon lunch; interference with prerogative of parents to prescribe diet and select food for their children; enforcing patronage of high school cafeteria and boycotting Haffner cafeteria; want of power to make the regulation.

The allowance of an injunction was resisted on the grounds that the adoption of the regulation was a proper and valid exercise of administrative power to control the public high school, the high school property and the pupils in the interests of public education, public health, public morals and public welfare generally, while the pupils are under the care and subject to the jurisdiction of the board of education, the superintendent, principal and teachers.

The district court held that the regulation was void and rendered a decree enjoining the enforcement thereof. Defendants appealed.

The validity of the regulation is the question presented by the appeal. Much of the testimony adduced at the trial was directed to the motives of the school directors who adopted the resolution quoted. As a general rule the motives that prompt state lawmakers, city councilmen and members of administrative bodies, such as school boards, in exercising within reasonable limits power committed to them in the interests of the public, are immaterial. Power to act and reasonableness of action are proper tests of the validity of laws, ordinances and regulations. Promptings of politics or partisanship in the enactment of a statute

are not sufficient grounds for judicial interference with an act of the legislature. *State v. Moores,* 55 Neb. 480, 520. Courts do not ordinarily inquire into the motives of a city council in exercising discretionary power. *Enders v. Friday,* 78 Neb. 510. To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts must be clear and satisfactory. *State v. Withnell,* 91 Neb. 101. A regulation by a school board is analogous to an ordinance and is tested by the same general principles. 24 R. C. L. 574, sec. 22. The wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body. 56 C. J. 342.

The power of the school board to adopt rules and regulations was conferred by statute. The legislature had authority to bestow upon that body control and discretion in the owership and use of school property. *Brooks v. Elder,* 108 Neb. 761. The legislature authorized the organization of the school district of North Platte with all the usual powers of a body corporate for public purposes, including the right to hold and control property for school purposes. The school is under the direction and control of the board of education. The school board has power to make rules and regulations, subject to the provisions of the law. Comp. St. 1929, secs. 79-2501, 79-2502, 79-2507. It has been held that parents may make for a child a reasonable selection from a prescribed course of studies. *State v. School District,* 31 Neb. 552; *State v. Ferguson,* 95 Neb. 63. There is also precedent to the effect that a law forbidding the teaching of any modern language, except English, in any private, denominational, parochial or public school, to any child in a class below the eighth grade, is void. *Meyer v. Nebraska,* 262 U. S. 390. During school hours, however, general education and the control of pupils who attend public schools are in the hands of school boards, superintendents, principals and teachers.

This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded. Cafeterias are recognized adjuncts to public high schools. Some pupils come long distances and cannot return to their homes for noon meals. Resort of pupils to public eating places in business districts of a city beyond both parental care and the control of teachers may mar the work and defeat to some extent the purposes of public education.

The evidence will not sustain a finding that food furnished at the school cafeteria did not conform to proper standards of food or diet for pupils. Children residing near the school grounds were permitted to return to their homes for their noon meals. Other pupils were not prevented from bringing food from home or from eating in the school building. The evidence does not prove that the regulation was unreasonable or arbitrary or harmful as enforced. A lawful regulation in the interests of the public may lessen the profits of private enterprises and decrease the value of property devoted thereto. A zoning ordinance may have that effect. *City of Lincoln v. Foss,* 119 Neb. 666. This doctrine is too well settled to require extended discussion. The cafeteria adjoining the high school grounds, though properly conducted, does not have a vested right to the patronage of high school pupils.

While there may be some diversity of judicial opinion on the subject, the better view seems to be that a board of education having power to make rules and regulations for the conduct and management of public schools may provide for one session daily and forbid pupils to leave the campus during school hours. *Flory v. Smith,* 145 Va. 164, 48 A. L. R. 654; *Christian v. Jones,* 211 Ala. 161, 32 A. L. R. 1340. The regulation under consideration does not go that far but permits pupils residing near the high school to take their noon meal at home. For the reasons stated, plaintiffs did not make a case for an injunction. The

judgment of the district court is reversed and the suit dismissed.

REVERSED AND DISMISSED.

CORA HAFFNER, APPELLEE, V. WILLIAM J. BRAHAM ET AL., APPELLANTS.

FILED JULY 3, 1933. No. 28720.

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

E. H. Evans and *Urban Simon,* for appellants.

Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Frank H. Woodland, amicus curiæ.

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

ROSE, J.

This is a companion case to *Richardson v. Braham* (No. 28719) *ante,* p. 142, decided at the present term of court.

In this action plaintiff, the owner of a cafeteria located near the senior high school building in North Platte, seeks to enjoin the enforcement of the same rules and regulations that were involved in No. 28719. The validity of those rules and regulations was passed upon in that action and requires no further consideration in this cause.

For the reasons given in the former case, the injunction granted by the district court in this case is vacated, the judgment of the district court reversed, and the suit dismissed.

REVERSED AND DISMISSED.

GRAND ISLAND TRUST COMPANY, APPELLEE, V. JOLLY F. SNELL ET AL., APPELLANTS.

FILED JULY 3, 1933. No. 28566.

1. Wills: "DISTRIBUTION OF ESTATE." The term "distribution of an estate" ordinarily has reference to personalty and not to realty.
2. ———: "BEQUEATH." The word "bequeath" is ordinarily used in reference to personalty.
3. ———: RESTRICTION ON ALIENATION OR INCUMBRANCE. Intent of testator to restrict the power of devisee to alien or incumber devised realty must be clearly and unequivocally expressed in the will.
4. ———: CONSTRUCTION. Courts will not resort to unnatural or strained construction of the language used in a will to create such a restriction.

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

Sullivan & Wilson and *Field, Ricketts & Ricketts*, for appellants.

Squires, Johnson & Johnson and *Prince & Prince, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS and TEWELL, District Judges.

GOOD, J.

Defendants have appealed from a decree in favor of plaintiff in an action for foreclosure of a real estate mortgage. The petition is in the usual form. Defendants admit the execution of the mortgage and, as a defense, allege that the mortgage created no lien on the realty in question, because the will, under which they acquired title, prohibited the devisees from mortgaging the premises prior to January 1, 1938. In its reply plaintiff alleges that the restrictions on the right to incumber the premises expired in 1926, prior to the execution of the mortgage in controversy; also that defendants, by reason of their rep-

resentations and covenants, are estopped now from denying the validity of the mortgage lien.

The facts are not in dispute. Title to the mortgaged premises was acquired by defendants Jolly F. and William B. Snell under the will of their father, James W. Snell. In 1911 James W. Snell executed a will which contained certain provisions respecting the payment of debts, funeral charges and the like, followed by this clause: "Fifth. All the rest and residue of my property, real and personal, after the payment of the obligations in Articles First, Second and Third herein, I give, devise and bequeath in equal shares to my sons Jolly F. Snell and William B. Snell, provided, however, that said sons nor either of them shall have any power, right or authority to sell, contract to sell, mortgage, assign, transfer or incumber or otherwise affect the title or possession of any real estate passing under this instrument prior to September fifth, 1926, except to lease for a term of not exceeding one year at a time, and all attempted transfers or liens prior to said date shall be absolutely void and of no effect and shall not affect the title or possession to any of said real estate."

In 1923 James W. Snell executed a codicil to said will which contained the following provisions:

"It is my will and request that the time to distribute my estate be extended from September 5, 1926, to January 1st, 1938.

"That in the case of the death of my son William B. Snell at any time before the complete distribution of this estate, without issue, his undistributed share is hereby bequeathed to Jolly F. Snell, if alive, and if not alive, to his next of kin."

James W. Snell departed this life in 1924, and the will and codicil were duly admitted to probate. The mortgage in question was executed and dated in 1929.

Defendants concede that, unless the provision of the codicil operates to extend to 1938 the term of the restriction against mortgaging the realty, the mortgage is a

valid lien upon the real estate, but they earnestly contend that the language used in the codicil is sufficient to indicate the purpose and intent of James W. Snell to extend the restriction against the power to mortgage or alien the real estate to January 1, 1938. They argue that, because of the reference to the date, September 5, 1926, that being the termination of the restrictive period fixed in the will, it shows the purpose and intent of the testator to continue the restriction until the later date.

On the other hand, plaintiff contends that the term used in the codicil, "distribute my estate," has reference only to personal property, since realty is never distributed, and that the language used is inapplicable to real estate. It is unquestionably the rule that in legal nomenclature the term "distribution of an estate" ordinarily has reference to personalty and not to realty. *In re Creighton,* 12 Neb. 280; *Williams v. Stonestreet,* 3 Rand. (Va.) 559, 561; *Smith v. Lurty,* 107 Va. 548; *Beard v. Lofton,* 102 Ind. 408.

There is the further provision in the codicil, "his undistributed share is hereby bequeathed." The word "bequeathed" is ordinarily used in reference to personalty, and a disposition of realty in a will is termed a devise, while a disposition of personalty is termed a bequest. 40 Cyc. 994. It is clear that, if testator had reference to personal property in the provisions of his codicil, then it would not affect the lien of the mortgage in this case. But, conceding that testator may have meant by the term "distribute my estate" to have referred to the realty, can it be possible that the term "distribute" can embrace and be construed to mean lack of power to mortgage or alien? To so hold would be an unnatural and strained construction. If testator had reference to his realty in the codicil, it seems more likely that he used the word "distribute" in the sense of division, and where the realty is devised in equal shares to two persons, they take as tenants in common, and neither acquires the whole title to any particular part of the realty until division or partition.

We are of the opinion that the term used in the codicil, indicating the intent of the testator, was to refer to the question of the division or partition of the realty, rather than to extend any restriction against the power to alien or incumber. Intent of a testator to restrict the power of devisee to alien or incumber devised realty must be clearly and unequivocally expressed in the will. Courts will not resort to unnatural or strained construction of the language used in a will to create such a restriction. 2 Devlin, Real Estate (3d ed.) sec. 970, and cases therein cited. We are clearly of the opinion that the language used in the codicil does not operate to extend the term of the restricted period mentioned in the will.

The restriction in the will proper, if valid, did not extend beyond the date therein fixed, namely, September 5, 1926. The mortgage in controversy was executed subsequent to that date and is unaffected by the restriction in the will.

The conclusion thus reached is decisive of the appeal, and it is unnecessary to consider other questions argued and briefed.

The record is free from error. Judgment

AFFIRMED.

JACK FLEISHMAN, APPELLEE, V. VERNON L. ARMSTRONG, APPELLANT: MERLE L. ARMSTRONG, INTERVENER, APPELLANT.

FILED JULY 3, 1933. No. 28584.

1. Appeal: INCONSISTENT CONTENTIONS. One who enforces a judgment rendered by trial court, which is a part of a decree favorable to him, cannot urge a reversal of another part of decree unfavorable, where to do so might result in inconsistent findings on the same evidence.
2. ———: ———. One cannot enforce and collect by execution a portion of an indivisible decree and prosecute an appeal as to portions unfavorable to him. 3 C. J. 679.

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

H. E. Kuppinger, for appellants.

Jack Marer, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

DAY, J.

Plaintiff brought suit to enjoin the defendant from interfering with him in the operation of the business known as the Crystal Cleaners. The wife of defendant filed a petition of intervention, alleging that the Crystal Cleaners was a partnership formed by her husband, the defendant, and plaintiff's father, and her husband had transferred his interest to her and plaintiff had succeeded his father and that she and plaintiff were then partners. The intervener also alleged that she was doing a wholesale cleaning business and had done work for the Crystal Cleaners, for which she asked compensation as well as an accounting of the partnership business and property. The defendant in his answer alleged that he had no interest in the Crystal Cleaners, since he had transferred his interest to the intervener.

The trial court found generally in favor of the plaintiff and granted the relief requested and found in favor of the intervener and against the plaintiff for the amount due the intervener for wholesale cleaning. From the decree, the defendant and the intervener appeal.

This case arose out of a partnership originally formed by B. Fleishman and defendant, Vernon L. Armstrong. Jack Fleishman succeeded to the interest of B. Fleishman, his father. Armstrong signed an agreement to transfer his interest in the partnership to Jack Fleishman. It is now contended by Armstrong and his wife, the intervener herein, that he previously transferred his interest to his

wife. This suit was filed as a result of the activities of the defendant, Vernon L. Armstrong, in connection with the business. About January 5, 1932, the parties divided the profits and defendant signed an agreement to sell his interest in the partnership to Jack Fleishman. The defendant now asserts that at this time he had nothing to sell, since he had previously, in November, transferred his interest to his wife. However, the defendant did, after January 5, 1932, visit the place of business and interfere with plaintiff and his management of such business. As an example, defendant went into the place of business and took clothes to his wife's cleaning plant and then did not return them until forced to do so, to the detriment and inconvenience of plaintiff and his customers. He denies this in his answer but admits it in his testimony. In his testimony, he justifies it by the fact that he was still a partner, although he also testified that his wife was the partner. We reach the conclusion from the answer and his testimony, inconsistent as it is, that defendant was not a partner. He had transferred his interest either to his wife or to plaintiff. His interference was unwarranted unless as agent for his wife, the intervener, which was suggested by his attorney in the oral argument before the court, although neither the pleading nor evidence of the defendant suggests justification of his conduct on this ground.

Merle L. Armstrong, wife of defendant, Vernon L. Armstrong, the intervener, alleged that she had succeeded to the interest of her husband and was a partner in the Crystal Cleaners and asked for an accounting. She also alleged that she ran the Leavenworth Cleaners and under this trade-name did wholesale cleaning, that she did cleaning for the Crystal Cleaners, which was worth $97.95. Judgment for this amount was by the decree rendered against plaintiff in favor of intervener. The intervener, thereafter, caused execution to issue and collected the amount of this judgment. This was a part of the

decree in her favor and she appealed from only the part of the decree unfavorable. But the whole decree, including this judgment, was based upon the finding that there was no partnership between the plaintiff and the intervener. The intervener, by the enforcement of the personal judgment against Jack Fleishman and by acceptance thereof, cannot now urge in this court that the finding of the trial court was in error, since to do so would be inconsistent with her action as a judgment creditor. For this court to find that a partnership existed upon the same evidence upon which a judgment was rendered upon the theory that a partnership did not exist would be inconsistent. One who enforces a judgment rendered by trial court, which is a part of a decree favorable to him, cannot urge a reversal of another part of decree unfavorable, where to do so might result in inconsistent findings on the same evidence. *McKee v. Goodrich,* 84 Neb. 479; *Male v. Harlan,* 12 S. Dak. 627. One cannot enforce and collect by execution a portion of an indivisible decree and prosecute an appeal as to portions unfavorable to him. 3 C. J. 679. This principle finds support in *Young v. Rohrbough,* 86 Neb. 279; *Mansfield v. Farmers State Bank,* 112 Neb. 583; *Chicago, St. P., M. & O. R. Co. v. McManigal,* 73 Neb. 580.

Since the intervener is foreclosed to assert in this court her contention that she was a partner of plaintiff, it necessarily follows that the conduct of the defendant cannot be justified upon the ground that he was acting as the agent of intervener. Accordingly, the judgment is

AFFIRMED.

BANK OF AXTELL, APPELLEE, V. ARTHUR G. JOHNSON, APPELLANT.

FILED JULY 3, 1933. No. 28561.

1. Appeal: INSTRUCTIONS. "A judgment will not be reversed upon appeal because of the giving of an indefinite or incomplete instruction, unless the party complaining offered and

requested a more definite instruction, or it appears from the whole record that the jury may have been misled by the instruction given." *State Bank of Bladen v. Strickler*, 103 Neb. 490.

2. Trial: INTEREST. The trial court should either amend the verdict or calculate interest and cover the amount thereof in the judgment, where it appears from the pleadings and verdict that plaintiff is entitled to interest and the jury have omitted it from their verdict.

APPEAL from the district court for Kearney county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed in part, and reversed in part.*

Stiner & Boslaugh, Carrico & Carrico and *Edmund P. Nuss*, for appellant.

J. L. McPheely, Burkett, Wilson, Brown, Wilson & Van Kirk and *C. P. Anderbery, contra.*

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

MESSMORE, District Judge.

This is an appeal from the district court for Kearney county by appellant, Arthur G. Johnson, one of the defendants in the court below.

The petition of plaintiff is in the usual form and contains three causes of action on promissory notes, one for $188, one for $1,000 and one for $4,600.

The separate answer of defendant Arthur G. Johnson admits the signing of the $188 note and the $4,600 note; alleges that he signed said notes after defendant Eddie H. Johnson had signed and delivered said notes to plaintiff; that the same were signed without consideration to him and therefore void; alleges that he signed the notes upon the representations of the president of plaintiff bank; that the principal on said notes was indebted to said bank in the sums represented thereby; that he believed and relied on said representations, but since the signing of said notes has learned that said representations were not true and were made with the purpose and intent of deceiving

this defendant and of obtaining his signature thereto; alleges further that he does not have sufficient knowledge as to whether or not his codefendant, Eddie H. Johnson, has paid the notes mentioned in plaintiff's petition and demands strict proof thereof, and denies each and every allegation contained in the petition not specifically admitted.

Plaintiff by reply denies each and every allegation of said answer; alleges that said defendant Arthur G. Johnson signed said notes set forth in paragraphs 1 and 3 of the petition, the $188 note and the $4,600 note, at the request of defendant Eddie H. Johnson, and that he signed said notes as surety.

The jury returned a verdict against the defendant Arthur G. Johnson in the amount of $4,788, the court having theretofore directed a verdict against the defendant Eddie H. Johnson, submitting only to the jury the alleged liability of defendant Arthur G. Johnson on said notes.

The evidence of plaintiff went to the history of the notes in suit and the signing of same by appellant. The $4,600 note had been renewed on several occasions in the past eight or nine years and at each time the old note had been marked paid and surrendered, so the particular note in controversy stands as a renewal note.

An alleged conversation appears in plaintiff's evidence, as related by A. G. Warren, principal witness for plaintiff, wherein Arthur G. Johnson said: "'Mr. Warren, I would pay the notes if I had the money; I know Brother Ed hasn't the money and I would pay it if I had the money.' I said, 'I will loan you the money and take a mortgage on the farm.' We agreed and I made out the mortgage and notes. Then he (Arthur G. Johnson) said, 'Hold the mortgage and notes a few days.'"

The witness further testified: "He came in a few days later and we talked the matter over and I said that we should close this up, and he said that we might as well. I

went that afternoon to Minden to record the papers and I offered him those notes, and he said, 'No; you keep them.' I took the mortgage and filed it for record. The next morning he came in, Arthur G. Johnson, with another party and wanted to call it off. I said, 'All right, I will call to the county clerk and tell him not to record it.' We both went up there and got the papers and gave them back."

To continue: "What did he tell you about going back on the deal afterwards? A. He said if he took the notes and gave me a mortgage he would have to sue his brother and he didn't want to. He said, 'The better way is for you to sue us both, and when you get a judgment I will pay it, but I don't want to sue my brother.'" "Q. What conversation did you have with the defendant Arthur Johnson as to why he didn't want to take the three notes and hold them against his brother, if anything was said along that line? * * * A. He said he didn't want to sue his brother; he preferred to have the bank sue them both and after the bank gets a judgment he would pay it." There also developed in the evidence the following: "What was the occasion of Arthur G. Johnson signing that $6,000 note, if you recall? (This later developed into the $4,600 note in suit after payments had been made thereon.) A. The banking department of the state of Nebraska sends out their examiner with instructions under the banking laws of the state of Nebraska and he examines every note in this case, and prior to that time he made objections to our loaning money to Ed Johnson without some security. I asked him what he would require, and he said, 'Either get a signer with a property statement or chattel security.' I took it up with both Arthur and Ed and the agreement was made that Arthur would sign the note." The witness testified to a conversation had with appellant in the bank as follows: "I explained to him that the banking department would not allow us to loan so much money without security, and that I had offered to take security

through property, but he wouldn't give it, and then I said, 'The department said if you would sign a statement, give a property statement and you boys go on the note together we will carry you.' Q. What did he say? A. He said he would do it."

The evidence of appellant is that his brother Eddie had never talked to him about signing the $4,600 note, but that Mr. Warren told him the banking department demanded his signature; that he received nothing from the bank at that time for signing the note, nor at any other time, and practically verified the conversations related by Mr. Warren, as set out in the record.

Appellant's evidence as an accommodation signer was to the effect that he did not receive any benefit or consideration, directly or indirectly, by way of the transaction of which the note was a part; that the $4,600 note was not signed by him at the time Eddie H. Johnson signed it; that it was without the prior knowledge, consent or procurement of the maker thereof, Eddie H. Johnson, and that no agreement or understanding existed between all the parties, the creditor, the principal and the surety, that the surety should sign as such.

The only assignment of error is to instruction No. 3, and the part thereof objected to is as follows: "If there was no such agreement in this case and if the defendant Arthur G. Johnson attached his signature to the notes in suit only as a matter of accommodation to the bank to enable it to make a showing which would satisfy the bank examiner as to that paper, and without the prior knowledge, consent or procurement of the defendant Ed H. Johnson, then Arthur G. Johnson would not be liable as surety in this case." The court in the first part of this instruction, to which no objection is made, correctly stated the law upon the question of suretyship, which informed the jury as follows: "Upon the question of suretyship you are instructed that one signing as surety for another becomes liable for the debt by reason of his promise to

pay the same and by reason of the giving of credit to the principal maker on account thereof. It is not necessary in such cases in order to fix the liability of the surety that there should be any special or separate consideration or value passing to the surety for the signing of the note. The value consists in the extension of the credit to the principal maker for whom the surety signs. Neither is it necessary in order to make the contract binding on the surety that it should be signed at the same time or at the same place by him and the principal. It is necessary, however, that there be an agreement and understanding between all the parties, the creditor, the principal and the surety, that the surety shall sign as such; and the actual signing may be done at the same time or at different times to suit the convenience of the parties."

Appellant's contention is that the part of the instruction objected to shows that in order to return a verdict for him the jury could return a verdict in his behalf only (1) "if there was no such agreement in this case;" (2) "if the defendant Arthur G. Johnson attached his signature to the notes in suit" (a) "only as a matter of accommodation to the bank to enable it to make a showing which would satisfy the bank examiner as to that paper; and (b) without the prior knowledge, consent or acquiescence of the defendant Ed. H. Johnson." And that before the jury under such an instruction could find for the appellant it was tantamount to telling the jury that appellant must prove, or there must exist, three separate and distinct defenses, when in reality any one of the following findings by the jury under a correct instruction would be sufficient to defeat plaintiff's action: (1) If the jury should find there was no such agreement of suretyship as indicated by the instruction; (2) or, on the other hand, if the jury should find from the evidence appellant signed only as a matter of accommodation to the bank to enable it to make a showing which would satisfy the examiner, and that appellant received nothing, directly or indirectly, by way of

the transaction; (3) or signed without the prior knowledge, consent or acquiescence of Eddie H. Johnson, the maker of the notes. It is contended that the conjunction "and" places the three defenses together as one, which is erroneous.

The evidence of appellant was founded on the proposition of suretyship and that he was an accommodation surety. The court, in the instruction objected to, does not tell the jury that they could only return a verdict for appellant in the event they found all the facts recited to be true, nor does the court, in the language of the instruction complained of, say to the jury, in substance or otherwise, that the jury must find the existence of all the facts recited as a condition precedent to a verdict for appellant. The instruction, while technically incomplete, is not prejudicial and the jury were not misled thereby. The evidence as presented by appellant, which goes exclusively to the proposition set forth in such instruction, was not so complicated but that the jury could understand the full purport of appellant's contentions, and neither were the witnesses so great in number but what the matter could be easily understood. If there was no such agreement as claimed by appellee for the signing of said notes by appellant and appellant did sign them, as testified to by appellant and his brother, without prior knowledge, consent or procurement of defendant Eddie H. Johnson, but merely to satisfy the bank examiner, then appellant was not liable as surety.

The instruction could have been more complete, but this court is committed to the rule that, where an instruction is free from error prejudicial to the substantial rights of appellant, such instruction will not be disturbed. The supreme court will disregard any error or defect in instructions given, or error in the failure or refusal to give instructions requested, where the same do not affect the substantial rights of the parties. *In re Estate of Noren,* 119 Neb. 653.

In *Culver v. Union P. R. Co.*, 112 Neb. 441, it was held: "Where no instructions are tendered to the trial court by a party who afterwards appeals and assigns error in certain instructions, this court will not examine the charge with such a critical mind as where the trial judge has had the benefit of the views of the appellant as to the proper legal principles applicable by the tender of instructions on the points involved." No instruction was tendered by appellant herein on his theory now presented to this court, but he presents merely a criticism of the lower court's one instruction which covered the essential points in this case as portrayed by his answer and by the evidence.

"A judgment will not be reversed upon appeal because of the giving of an indefinite or incomplete instruction, unless the party complaining offered and requested a more definite instruction, or it appears from the whole record that the jury may have been misled by the instruction given." *State Bank of Bladen v. Strickler*, 103 Neb. 490.

Appellee after the verdict filed a motion to have the trial judge compute the interest and add the amount thereof to the verdict in so far as the $4,600 note was concerned, which motion the court overruled. Appellee cross-appeals, alleging that the motion should have been sustained and the trial court should have added the interest as requested. Appellee did not file a motion for a new trial. While it would have been more advisable, when the mistake was noted, to have sent the jury back to complete the verdict, or if counsel for appellee had been diligent the error might have been corrected in time, which is, of course, the better practice, it is obvious from the verdict that the jury intended to render a verdict in favor of plaintiff on the $4,600 note, for it is not contended that this note did not draw interest nor that interest should not have been added; naturally, interest would follow. The court would not necessarily have to resort to the evidence to perform this act. While this is a function of the jury, the jury failed to complete its act properly.

In *Calnon v. Fidelity-Phenix Fire Ins. Co.*, 114 Neb. 194, it was held: "Where, from the verdict and the pleadings, as in this case, it appears that, if plaintiff is entitled to recover at all he is entitled to recover interest, the court should make the computation and cover the amount of interest in the judgment."

And, further, quoting from the same case: "Upon presentation of the motion to include interest, the court was empowered to do either one of two things: (a) Amend the verdict by adding interest and including it in the amount of the judgment rendered thereon; or (b) make the computation and cover the amount of interest in the judgment without any amendment to the verdict whatsoever. The latter seems to be indicated by this court as proper practice in such cases."

In *Wiruth v. Lashmett*, 85 Neb. 286, in referring to the proposition in that case involved in this one, it was held: "It is probably true that, had the action been founded upon the promissory notes referred to in the verdict, the court could have made the computation of interest and entered judgment for the correct amount and the judgment have been legal." However, taking that as a basis, this court has definitely held in the case of *Calnon v. Fidelity-Phenix Fire Ins. Co., supra,* that the lower court should make the computation of interest and add that amount to the judgment.

For the reasons stated, the judgment entered in this cause in favor of plaintiff for the sum of $4,788 is affirmed subject to be corrected by the addition of interest to be computed by the trial court, and the judgment of the district court overruling the application of plaintiff for the inclusion of interest is reversed and the cause remanded to the district court for further proceedings in compliance with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

JAMES C. FLANNIGAN V. STATE OF NEBRASKA.

FILED JULY 7, 1933. No. 28504.

Evidence and record examined. Judgment affirmed.

ERROR to the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

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

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

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

GOSS, C. J.

On September 22, 1931, an information was filed containing eleven counts, charging John M. Flannigan, described as president and agent, and James C. Flannigan, described as vice-president and agent, of the Citizens Bank of Stuart, with receiving certain described deposits while the bank was insolvent. Comp. St. 1929, sec. 8-147. Before the parties were arraigned the state dismissed as to counts one and four. Defendants pleaded not guilty, went to trial on December 7, 1931, and the trial continued each week-day until December 18, when the cause was submitted to the jury. On December 20, the jury, not being able to agree, were discharged. Later, the defendants demanded and were allowed separate trials. This trial of defendant James C. Flannigan began February 15, 1932, and continued each week-day until February 26, when it ended with a verdict of guilty on each of the nine counts. Motion for a new trial was overruled March 22, 1932, and this defendant was sentenced to the penitentiary on each count for not less than five nor more than ten years, the sentences to run concurrently. Defendant brought these proceedings in error.

The plea necessitated proofs that the bank was insolvent. This resulted in a voluminous record. There are

79 assignments of error, of which 26 are discussed in the brief of plaintiff in error, hereinafter referred to as defendant. We shall discuss, as briefly as we find ourselves able, those we think merit attention, but without following their order in the briefs. We are handicapped by the frequent failure of counsel on both sides to comply with that phase of rule 13 requiring reference to the pages of the bill of exceptions where may be found the evidence applicable to the point presented.

The most important inquiry is as to the solvency of the bank when the deposits referred to in the information were received. The first of these deposits was received November 14, 1930, and the last on November 26, 1930. The bank was closed on December 1, 1930. The bank's capital was $50,000 and its surplus $12,500, according to weekly statements made by the bank to the department beginning in July and ending in October, 1930. According to these weekly statements the resources continually stood at upwards of $500,000 and the deposits stood continually at about $60,000 less. The state's accountant testified that, as of November 14, 1930, the books showed assets $455,173.79 and liabilities $397,281.38. He testifies to the assets and liabilities on dates of other deposits charged in the information and his testimony shows that, as of December 1, 1930, the books showed total assets of $368,295.69 and liabilities $322,551.20. He testified as to items that constituted the book assets and there was testimony by witnesses on both sides as to the values of particular items. There was evidence from which the jury might find that notes carried as assets were entirely worthless and real estate assets were worth very much less than the amount for which the bank carried them on its books. The total difference between book value and real value of the assets might well have been found by the jury at upwards of $150,000 at the time of the particular deposits. This was a question for the jury, in whose finding of guilt against defendant inhered a finding that the bank

was insolvent. There was ample evidence that the deposits so charged were received when the bank was insolvent and that defendant had knowledge of the deposits and of the insolvency. The verdict is sustained by the evidence. Barring errors, the judgment must stand.

Misconduct is charged against the county attorney occurring during his examination of a prospective juror and against the judge for what he said in the colloquy. On account of the importance attached to it by defendant, we quote from the record:

"Q. Now, would the fact that you were a witness for Jack McAllister in a contempt case growing out of a prior trial of this case, and the further fact that McAllister was found guilty—

"Mr. Harrington: Objects as improper, misconduct upon the part of the county attorney, and for the further reason that it is an improper statement, and is not a true statement of fact; there is no conviction until the case is finally determined by the supreme court, and the supreme court has held that many times.

"Mr. Cronin: He just went to jail a few minutes ago.

"Mr. Harrington: Objects as improper on the part of the county attorney, and misconduct on his part, and prejudicial to the defendant.

"The Court: Sustained; and the jurors who are to remain and try this case will absolutely disregard it.

"Mr. Cronin: We will not be permitted to go into that matter at all, your honor?

"Mr. Harrington: Objects as an improper statement and misconduct on the part of the county attorney.

"The Court: Sustained; I will not permit you to go into that matter any further than we have gone."

It is unlikely that the fact of the McAllister conviction for contempt would, in the circumstances, be unknown to the members of the jury panel. Whatever the effect of the county attorney's words, it was promptly offset by the instruction of the court to disregard them. Miscon-

duct is attributed to the judge because of the last five words quoted above. This in no sense approved the action of the county attorney as far as he had gone, as defendant argues. The court had just emphatically disapproved it, and should not be held down to those niceties of oral expression implied in the criticism of these isolated words.

Coupled with the foregoing, it is complained by defendant that the court took unusual precaution to segregate the jury from outside influence, even to the extent of having their letters censored and examined by the court each morning. These were matters for the court. The record does not show an abuse of discretion in either the doing or the manner in which this was done by the court.

Error is assigned and argued as to the conduct of Mr. Stalmaster, special counsel and prosecutor for the state, in his opening statement to the jury and the words of the court in ruling on objections thereto. One item of the assets of the bank related to what is called the Sixberry land. Mr. Stalmaster told the jury this item was carried on the books of the bank at $2,400, and that the prosecutor would show the actual value of the land by folks who live in the neighborhood, who are impartial and "who have no interest in this lawsuit." Objection was made to the prosecution arguing the case, whereupon the record shows the following:

"Mr. Harrington: Objects to counsel arguing the case.

"The Court: That is not arguing the case.

"Mr. Harrington: Talking about the kind of men they are and all that?

"The Court: They are citizens of the neighborhood and have no interest. Go on."

It is strongly urged in the briefs, and was vehemently argued at the bar, that this last quoted statement of the court indorsed the witnesses for the state as to the "value of the assets of the bank including the land," and "doomed the defendant." While the comment of the court might better have been omitted, we must take it in its setting.

It is clear that the court did not apply it to witnesses other than as to the item of the Sixberry land and was attempting to make clear to counsel what the prosecutor had implied—that these neighborhood witnesses to be produced would have no financial interest in the lawsuit and that it was "not arguing this case" for the prosecutor to tell the jury in his opening statement what kind of witnesses he intended to produce. Later the court gave the jury a conventional instruction on the credibility of the witnesses and told them that this was a question exclusively for the jury to determine. Moreover, this item complained of refers only to testimony as to the Sixberry land, which the bank carried as assets at a valuation of $2,400, which the state's witnesses valued at $1,400, and defendant's witnesses valued at $3,200. No prejudicial error appears in this assignment.

Error is assigned because, in his argument to the jury, the special prosecutor stated to the jury that the evidence showed that John M. Flannigan had stolen $21,000 of the bank's money in what was known as the Jamison deal and that defendant knew all about it, but that the court refused, on objection and request, to caution the prosecutor and to admonish the jury to disregard it; that the court in this connection refused to call the reporter from an adjoining room to make the record, to avoid the necessity of making it by affidavit on this and other occasions during the argument. We find enough evidence to justify an argument that John M. Flannigan profited personally in the matter and that defendant had knowledge of it. The reason for the judge not calling the reporter is that the reporter was writing the instructions of the court in the early part of the argument. At any rate, the objection and ruling of the court were preserved by affidavit. Later the reporter was secured and made the record for defendant as to other parts of the argument. So far as these objections go they do not appear to have resulted in prejudicial error.

In the opening statement the prosecutor outlined briefly what he expected to prove in relation to the connection of John M. Flannigan with an undivided interest in what was called the Brewer land carried by the bank at about $11,000, which the prosecutor states he would show "was not worth what they put it in for; it was only to settle John M. Flannigan's lawsuit." Frankly, the statement about the lawsuit is incoherent to the writer and we do not understand what significance it had. Perhaps the jury did. If so, and if it was erroneous, it was cured by what followed. In his closing argument, it appears from the affidavit of the county attorney, relating to the Brewer land, the special prosecutor pointed out to the jury "that evidence to support his (opening) statement was wholly lacking and should be by the jury entirely disregarded." In his instructions to the jury the court told them to take into consideration all the evidence bearing upon the guilt or innocence of the defendant; and that "the evidence is not what counsel on either side said to you in their opening statements that they expected the testimony to show." In the argument to the jury the special prosecutor discussed the testimony of Joe Juracek, a witness for the state, as to an attempt by defendant to procure the witness to bribe a juror just prior to the first trial. There is evidence to show that defendant personally and through Harry Kopp did attempt to use Juracek to bribe a juror. This is the same type of charge growing out of the same attempt for which Kopp was convicted of contempt of court. His sentence was affirmed in this court February 14, 1933. *Kopp v. State,* 124 Neb. 363. On the present trial Juracek testified that defendant solicited him to buy one Rosenkrans, one of the parties summoned for jury service on the first trial, to hang the jury, promising the witness $25 and offering to pay Rosenkrans $25 and maybe he would double it. The court correctly overruled the objection to this testimony. It was admissible because defendant was directly connected with the attempt to

corrupt the juror. 16 C. J. 556, sec. 1076. The special prosecutor was authorized to argue the testimony to the jury.

On direct examination John M. Flannigan testified on behalf of his brother, among other things, that his own salary from the bank was $150 a month and that he never had drawn more; that his brother received the same salary. On cross-examination he was confronted with the income tax returns of the bank for 1929, signed and sworn to by him, showing his salary in 1928 to have been $3,550. While the witness testified that there must be some mistake in the schedule and that he drew only $1,800 a year, yet the testimony, objected to on his behalf, was allowed to stand, and is now claimed to have been erroneously admitted. It was entirely proper to cross-examine him on this subject on which he was examined by his own counsel and to confront him with what he had said on the same subject in the income tax report made or approved by him. The purpose was to impeach his credibility. That this evidence did not come from the records of the bank or that it came from the income tax report furnished to the state by the internal revenue department did not make the admission of the testimony erroneous.

During the trial defendant sought to prove the situation of the banks with which he formerly discounted his notes, but on objection by the state that this was immaterial defendant was not permitted to answer. In the colloquy between counsel for defense and the court, the latter stated that he had been quite liberal and the defense had introduced in evidence quite a number of things that the court questioned "whether they are material or not." Counsel thereupon requested the court to point out anything that was immaterial, and the court answered "anything that I have admitted the jury can consider; that is all now; go on." This incident is characterized in the brief of defendant as "the most flagrant

example" of the prejudicial conduct and remarks of the court with which counsel for defendant say they were "harassed and embarrassed" during the examination of defendant. The particular ruling excluding the evidence was not erroneous. The court did not say that he had admitted any immaterial testimony, merely that he questioned whether he had not been too liberal, but ended by saying that the jury might consider anything which had been admitted. The point mainly stressed is that the court here and elsewhere was urging defendant's counsel to hasten along, with the intimation to a tired jury that too much time was being consumed in the trial and that this discredited defendant's case. None knew better than the jury that the state consumed approximately twice the time the defense took. So this argument would imply that the desire of the court for speedy action discredited the state to a greater extent than defendant.

All through the consideration of this case we have to keep in mind that counsel and court are human. They were men before they became officials of the court; and the aggressiveness of counsel on both sides as well as the forcefulness of the trial court resulted in clashes of will and in expression which have to be considered in the light of these known and manifested characteristics. The jury would sense these things and make due appraisal of them perhaps even more readily than a reviewing court.

There are other assignments of lesser importance, charging errors during the taking of evidence, which we have examined, but which we do not think merit extension of this opinion.

Defendant assigns as error the refusal to give his requested instruction as to knowledge of insolvency of the bank, the gist of which is that defense must have "had actual notice of its insolvency," meaning "an actual guilty knowledge, and not lack of knowledge from negligence, carelessness or lack of business judgment or overconfidence on the part of the defendant." The court adequate-

ly instructed on the subject when, in defining the elements, he required proof beyond a reasonable doubt that defendant "knew when said deposits were received and accepted into said bank that said bank was insolvent;" and said in the next instruction:

"To know a thing or have knowledge of it is an impression of the mind, the state of being aware, and this may be acquired in numerous ways and from many sources. It is usually obtained from a variety of facts and circumstances. Generally speaking, when it is said a person has knowledge of a given condition, it is meant that his relation to it, his association with it, his control over it, and his direction to it are such as to give him actual information concerning it."

Moreover, the refused instruction would put a premium upon and emphasize the lack of business judgment or the overconfidence of agents of banks, as if they might be permitted to receive all deposits irrespective of the obligation to be informed as to the likelihood of ever being able to repay them. Such an instruction would have a tendency to mislead the jury and was properly refused.

Other errors are assigned as to instructions given and instructions requested and refused. These have been examined. To discuss them separately would unduly extend an already long opinion. Suffice it to say that in each instance the court either correctly instructed the jury on the necessary point or the requested instruction contained some features that justified its refusal. Surveying the whole case, we are of the opinion that the judgment of the district court was right. It is

AFFIRMED.

HARRIET LOUISE MULLEN, APPELLEE, V. CITY OF HASTINGS, APPELLANT.

FILED JULY 7, 1933. No. 28703.

1. **Master and Servant.** In workmen's compensation cases the supreme court now hear the same *de novo*.
2. ———: WORKMEN'S COMPENSATION: BURDEN OF PROOF. The burden of proof is upon the plaintiff to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment.
3. ———: ———: PROOF. Awards of compensation cannot be based upon possibilities or probabilities merely, but must be based on sufficient evidence showing that the workman suffered his disability because of an injury arising out of and in the course of his employment.
4. ———: ———: ———. When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the claimant for compensation, and such proof must amount to something more than mere guess.
5. **Evidence** examined, and *held* insufficient to prove that claimant's deceased suffered a compensable injury.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed and dismissed.*

Kennedy, Holland & DeLacy, Stiner & Boslaugh and *Edmund P. Nuss*, for appellant.

R. O. Canaday, contra.

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

EBERLY, J.

This is a proceeding instituted by Harriet Louise Mullen, widow of Harley Mullen, deceased, under the workmen's compensation law. Comp. St. 1929, secs. 48-101 *et seq.* Upon trial in the district court for Adams county, judgment was entered for the plaintiff. Defendant city appeals.

The deceased, approximately 49 years of age, was employed as a member of the fire department of the defend-

ant, city of Hastings, and was on duty as such at the time of his death. About 10 o'clock p. m. on June 17, 1931, this fire department had been summoned to Ingleside, Nebraska, by the discovery of a fire in some farm buildings of the state hospital situated at that place. The deceased, as a member of this department, as operator and mechanic in charge of what is referred to in the evidence as the "fire truck and pumper," in pursuance of the duties of his employment, proceeded to the scene of this fire. On arrival of this apparatus it was ultimately placed within 20 feet of a lagoon and approximately four blocks east of the burning building. A suction pump, being a part of the equipment of the "fire truck and pumper," was placed in the waters of the lagoon, and two lines of hose connected with the "pumper" were laid toward the burning buildings, and from this source the transmitting of water to the fire was commenced. Shortly after this pumping started, one of these lines of hose burst at a point approximately 1,100 feet west of the "fire truck and pumper." Immediately after this occurrence Harley Mullen, who had just previously been engaged in operating the "pumper," was found lying on the ground, in close proximity to this machine, dying, if not dead. One witness testified that he saw Harley Mullen as this operator was falling from the pumper. But it was nighttime and the vicinity of this machine was not well illumined at this moment. Neither this witness, nor in fact any other person, is able to tell us what happened at the pumper, if anything, to cause this fall. Immediate investigation of this machine thereafter disclosed no signs of an accident. It remained in good condition except that it had "choked down."

Within three hours after the death of Harley Mullen an autopsy was performed on his body. The results of this constitute practically the entire basis of the conflicting claims of the plaintiff and defendant in this litigation.

So far as objective symptoms or evidence disclosed by this examination of this body are concerned, they may,

for the purposes of this case, be limited to the following:

"There are superficial contusions on the left temporal region and on the left malar bone, extending down over the left cheek. There is also a contusion on the lateral left palpebral cleft, and a slight contusion over the right eyebrow. Palpation of the skull reveals nothing remarkable. The bones feel smooth and solid. * * * Examination of the nose is negative excepting perhaps a few abrasions on the nasal tip. * * * Palpation of the heart reveals an apex that deviates to the left to the midclavicular line. The left ventricle of this heart is firm, not flabby; and death took place with this heart in systole. The right auricle is slightly dilated and contains blood, but the dilatation does not extend past the right sternal border. * * * Opening of the pericardial cavity shows a pericardial sac of normal thickness. The pericardial wall inside is smooth and contains a few centimeters of fluid, but this is of normal quantity. The epicardium is covered with a good layer of fat, the fat increasing as it goes toward the auricles. The heart is of normal size, is not roughened to the palpating finger, and inspection reveals nothing remarkable. * * * An incision was made through the scalp transversely over the vertex. The anterior flap of the scalp was peeled forward and loosened to the supraorbital ridges. The contusion over the frontal bone shows slightly on the epicranium manifested as small hemorrhagic areas. No fracture is palpable or visible. The posterior flap of the scalp was peeled backward to the external occipital protuberance. No contusions or fractures are palpable or visible. The cranial osseous cap was removed with a saw. The cerebrum was inspected and no abnormal changes were visible. The blood vessels and color were normal. No areas of hemorrhage were seen. The brain was lifted and the anterior and middle fossæ were palpated and inspected. These were free from blood or bloody extravasations. No fracture or pathology was seen. The tentorium was split lateralward, releasing the

cerebellum. No fracture or any abnormality was found in the posterior fossa. Numerous sections were made through the hemispheres and their nuclei, but no hemorrhagic areas or pathology was visible. * * * Sections of the cerebellum show nothing remarkable. * * * The pathological diagnosis is as follows: Healed pulmonary tuberculosis. Chronic pericholecystitis. Heart in strong systole. The immediate cause of this man's death was perhaps some physical or even emotional stimulation that produced the *post-mortem* systole of the heart."

The physician performing the *post mortem,* called as a witness by plaintiff, testified in part as follows:

"By contusion we mean either a slight hemorrhage or a bluishness of tissue, which may be involving the second layer of skin." Further, that while personally he had never seen it, medical authorities record cases where contusions in the region where found on this body have caused death without causing lesions in the brain, or leaving any trace in the brain itself, and without a fracture of the skull. In these cases the contusion might not be greater than presented here.

The examination of this witness also included the following:

"Q. Now you examined the heart, and your findings show that it was in systole. Will you tell the court what that means? A. It means that the heart is in contraction. * * * Q. And that was the only unusual feature you found about the heart, was it? A. The only unusual feature about the heart; yes. Q. What was your conclusion then as to the cause of this man's death, Doctor? A. Well, I did not arrive at any particular conclusion as to this man's immediate death, as far as I could determine by the autopsy. * * * Q. You have had cases, have you not, Doctor, in an autopsy where one was conducted, where the cause of death could not be determined? A. It couldn't be determined; yes. Q. And the same might be true of Mr. Mullen here? A. That is possible. Q. Well,

as far as you could determine anything, you put it into your report at the time that you made it? A. Yes, sir. Q. Your report stated your conclusions on that? A. Yes."

The assistant in performing this *post mortem,* a licensed physician of seventeen years' experience, also testified with reference to the "bruises," and stated that in performing the autopsy he noted a contusion on the left side of Mullen's head, which was probably an inch and a half or two inches across; that it was a reddened area on the left side slightly over the eye and down on the cheek; that it was evidently caused by a fall; that he would say that these bruises in the region where found on Mullen's head could not be sufficient to produce death without leaving lesions on the brain or affecting the skull.

In a careful reading of plaintiff's evidence, we are unable to find any simple, direct statement, in substance or effect, either that Mullen did not die from natural causes, wholly unconnected with the performance of his duties; or that he died from some external means connected with, or caused by, or arising out of his employment; or that in their opinion the force causing the bruises on his face caused his death. This conclusion necessarily includes statements involving the terms "may," "possibly," or "perhaps."

Plaintiff's evidence in the trial court presented two theories to support her recovery, viz.: First, at the moment of the bursting of the hose a solid stream of water issuing from the rent came in contact with an electrical wire charged with 110 volts, and, together with the water confined in the remainder of the line of hose, formed a conductor over or through which the electric current came in contact with the deceased, causing his electrocution; second, that the bruises on his face evidence the application of a force which caused his death.

We are convinced by the evidence in the record that at the time the hose burst there was no current whatever on

the lines with which the escaping water came in contact, and that electrical current or electrical shock in no manner caused or contributed to the death.

On the other hand, we have the testimony of defendant's expert, a licensed physician of good standing, who, though not present at the autopsy, made a superficial examination of the body after death. He noticed a contusion or abrasion about the supraorbital region and the cheek, and across the nose. He described it as having the appearance of what is known as a brush bruise or a scuffing of the skin and flesh about that region. Further, that taking into consideration all the findings of the autopsy report, in connection with the observation he made, there was nothing on which he could base a conclusion as to the cause of death; and that it is just as possible that Harley Mullen died a natural death as a death resulting from an accident.

These conclusions were sustained by the evidence of a second expert testifying for the defendant, and indeed there appears to be no substantial contradiction thereof by plaintiff's witnesses.

It is also quite apparent that while we have evidence in the record that the deceased, at the time he left home on the evening of his death, "was in fine health, good and jolly disposition, and everything," we find no affirmative evidence as to the then condition of his face, where the bruises were discovered some four or five hours later, either when he left home or immediately prior to his departure for the fire. There is no evidence of any force applied to the left side of the head prior to his fall from the "pumper." Whether the bruises were on his face when he started to fall, or appeared only from and after contact with the ground at the conclusion of the fall, the evidence is silent; and whether he died as he started to fall, or died as a result of it, the evidence does not inform us. Considered as a normal man, neither the bruises nor the fall would ordinarily cause his death. Thus we have

here a death, so far as this cause is concerned, surrounded by mystery. Under such circumstances the applicable principle appears to be:

"Where an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death was an accident arising out of his employment rests upon the administratrix, and such proof must amount to something more than mere guess." *Bloomington, D. & C. R. Co. v. Industrial Board,* 276 Ill. 454.

In this jurisdiction we are required to try compensation cases *de novo.* Comp. St. 1929, sec. 48-137; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121; *Southern Surety Co. v. Parmely,* 121 Neb. 146; *Siedlik v. Swift & Co.,* 122 Neb. 99; *Bergantzel v. Union Transfer Co.,* 124 Neb. 200; *Stone v. Thomson Co.,* 124 Neb. 181.

We are also committed to the view that the burden of proof is on the party bringing suit for death of an employee to prove by a preponderance of the evidence that the personal injury causing such death was caused by an accident arising out of and in the course of the deceased's employment. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526; *Bartlett v. Eaton,* 123 Neb. 599; *Townsend v. Loeffelbein,* 123 Neb. 791; *Uribe v. Woods Bros. Construction Co.,* 124 Neb. 243.

In this class of cases this tribunal is bound by the principle that awards of compensation cannot be based on possibilities or probabilities. *Bartlett v. Eaton,* 123 Neb. 599; *Townsend v. Loeffelbein,* 123 Neb. 791.

We have before us, it is clear, a claim supported, if at all, only by "possibilities and probabilities."

It follows that the district court erred in awarding judgment for the claimant. This judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

IN RE ESTATE OF MARTIN MCDERMOTT. JOHN F. MCDERMOTT, APPELLANT, V. STEPHEN W. MCDERMOTT ET AL., APPELLEES.

FILED JULY 7, 1933. No. 28576.

1. **Trial.** Trial judge is not required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless that evidence would support a verdict.
2. **Bastards.** A child born at any time during lawful wedlock is presumed to be legitimate.
3. ———. But slighter proof should be required to repel the presumption of legitimacy where there is antenuptial conception.
4. ———. The law is not willing that a person shall be declared a bastard merely because no act of intercourse is proved to have occurred between husband and wife at about the time of pregnancy; the proof must go further, and show impossibility of access.

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

Beeler, Crosby & Baskins, for appellant.

George N. Gibbs, George B. Dent, Jr., Halligan, Beatty & Halligan and *Milton C. Murphy, contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

PAINE, J.

From a judgment entered upon a directed verdict, finding that the appellant is not an heir at law of Martin McDermott, and is not entitled to inherit from his estate, the appellant appeals, and for reversal alleges nine errors. Three relate to the refusal to admit evidence; the others set out that the court erred in sustaining motion for directed verdict, the same being contrary to the law and to the evidence.

Martin McDermott died intestate in Lincoln county, Nebraska, December 31, 1930, and left surviving him a widow (from his second marriage) and three sons,

Stephen W. McDermott, Elbert T. McDermott, and Alfred F. McDermott. Under the law, the widow would ordinarily receive one-fourth of the estate and the three sons each four-sixteenths of the estate. On June 19, 1931, John F. McDermott, the appellant, filed his application in the county court to be declared to be an heir, alleging that he was an illegitimate son of said Martin McDermott and Martha Griffiths, and was born on March 1, 1901, and that on December 7, 1930, the said Martin McDermott made written acknowledgment that he was his father.

After trial in the county court, judgment was entered in accordance with the application of said John F. Mcdermott, finding him to be an heir at law, and entitled to three-sixteenths of said estate. Upon appeal to the district court, this finding was reversed, and a judgment was entered directing the jury to find against the contentions of said John F. McDermott.

Martha Griffiths, the mother of the appellant, married the appellee, Stephen W. McDermott, December 19, 1900, the appellant being conceived out of wedlock, but born in wedlock March 1, 1901. No other children were born to this union, and, after living together for about four years, they were divorced in 1906, and each afterwards remarried. The appellant lived constantly with his mother until her death in 1915, and in his application for a marriage license, when 19 years of age, swore under oath that Stephen W. McDermott was his father. After the death of his mother he worked for different people, and occasionally worked for his grandfather, Martin McDermott, whom he is attempting in this action to prove to have been his natural father, but he never made his home with him.

In July, 1927, Martin McDermott was placed under the guardianship of E. E. Kugler, a banker, who was, after the death of Martin McDermott, also appointed administrator of his estate. Appellant was a customer of Kugler's bank. Martin McDermott had several strokes, one

in 1930, and his mental and physical condition became increasingly more serious. At times he was locked in his room at nights, for he had a habit of hooking his cane around any piece of furniture and pulling it over, and they were afraid he would do that to the stove. After August, 1930, he was not able to leave his bed, and his wife remained with him night and day, taking good care of him, until his death upon December 31, 1930.

The appellant, in an attempt to comply with section 30-109, Comp. St. 1929, and also with the rules announced in the case of *In re Estate of Winslow*, 115 Neb. 553, on December 7, 1930, some 24 days before the death of Martin McDermott, brought to his bedside a paper, exhibit A, reading as follows: "Wellfleet, Nebr. I hereby acknowledge myself to be the father of John F. McDermott;" and said Martin McDermott made some large, shapeless scrawls over said paper. Then three men signed their names thereto as witnesses. The first was the said E. E. Kugler, who testified that he did not know what Martin McDermott's mental condition was at the time, or whether he knew what the paper was that he was signing. E. C. McGuire, the second witness, was the stepson of Martin McDermott, and testified that they propped him up on pillows, and he tried to sign with a pen, but could not, and then he made some marks with a pencil, and that the old man seemed to know what he was doing. The third witness, Judson Burrows, was a brother-in-law of Martin McDermott, who had known him over a long period of years, and testified that he saw him from December 5 to December 9, 1930, and that only once during that time did he appear to recognize him; that, at the time the instrument was placed before Martin McDermott, they had to raise his hand up to the paper; that he was helpless, and that he did not know anything; that when the paper was read to him he did not even smile; that he could not talk; that he could not see any expression on his face that indicated that he knew anything about what they were read-

ing to him; that they raised him up in bed; that he could not raise his hand up, it was down to his side; that they had to raise his hand up and put it on the paper; that he could make only a sort of a mark; that he started his pencil down there and then he went up there; his hand went, but he did not know where he was going. Mr. Burrows was then asked whether he believed that Martin McDermott knew what he was doing when he signed the paper, and his reply was: "I told them then and after it was signed, he didn't know what he was doing. * * * I tried to impress on the men that he wasn't capable or able to."

At the close of the plaintiff's evidence, the defendants made a motion for an instructed verdict, setting out that exhibit A is insufficient as an acknowledgment in writing, under section 30-109, Comp. St. 1929, and is of no force and effect whatever. Defendants also insisted in their motion that the petitioner had wholly failed to prove that said Stephen W. McDermott did not have access to the said Martha Griffiths prior to the date of their marriage, and failed to prove that Stephen W. McDermott was impotent, and further objected to exhibit A as being of no force and effect for the reason that the acknowledgment required by section 30-109, Comp. St. 1929, must relate to and refer to an illegitimate child; and thereupon the court made the following ruling: "It seems to the court's mind that, in this case, there is not sufficient evidence to permit exhibit A to be put into the record or to proceed further. The plaintiff has failed to establish a case and the court will so instruct the jury."

1. "A trial judge is no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in proceeding to find a verdict in favor of the party introducing such evidence." *Weed v. Chicago, St. P., M. & O. R. Co.*, 5 Neb. (Unof.) 623. See *Brown v.*

Swift & Co., 91 Neb. 532; *Chicago, R. I. & P. R. Co. v. Sporer*, 69 Neb. 8; *Iowa Hog & Cattle Powder Co. v. Ford*, 87 Neb. 708.

"The action of a trial court in withdrawing a cause of action from the consideration of the jury will not be held erroneous on account of the reason given therefor by the court, if the withdrawal is proper for any reason." *Kohler v. Hughbanks*, 79 Neb. 320. See *Longnecker v. Longnecker*, 90 Neb. 784.

2. A child born at any time during lawful wedlock is presumed to be legitimate, but this presumption may be rebutted by evidence that the husband was impotent, or that he did not have access. *Schmidt v. State*, 110 Neb. 504; *Dennison v. Page*, 29 Pa. St. 420, 72 Am. Dec. 644, 649.

It is contended by the appellee that the words "illegitimate" and "father," as used in section 30-109, Comp. St. 1929, have, by common law and the law of this state, a well-defined meaning: "Illegitimate" means begotten and born out of wedlock; "father" means natural father. And it has been held that the presumption of legitimacy is not weakened by proof of the fact that the child was conceived before the marriage of its mother, for it is founded upon the supposition that such child was begotten by the man who subsequently became its mother's husband. 3 R. C. L. 726, 730; *State v. Ferguson*, 187 Ia. 1073, 8 A. L. R. 426; 1 Jones, Blue Book of Evidence, p. 450.

3. But it is held to be the better rule that, while the law presumes every child legitimate which is born in lawful wedlock, still there is, and should be, a difference between postnuptial and antenuptial conception; in the latter, slighter proof should be required to repel the presumption of legitimacy arising from marriage. *Wright v. Hicks*, 15 Ga. 160, 171, 60 Am. Dec. 687; *Kennedy v. State*, 117 Ark. 113; *Wallace v. Wallace*, 137 Ia. 37, 126 Am. St. Rep. 253, 15 Ann. Cas. 761, 14 L. R. A. n. s. 544; 3 R. C. L. 730, note. See, also, 126 Am. St. Rep. 273, note; 7 C. J. 940.

4. It has generally been held, under the so-called Lord Mansfield rule, that a husband or wife is incompetent to testify as to the husband's nonaccess in a bastardy or other proceeding, where such testimony would tend to bastardize, or prove a child conceived after marriage to be illegitimate. This rule is founded on the theory that such evidence should be excluded on the grounds of decency, morality, and public policy. *Craven v. Selway*, 246 N. W. (Ia.) 821.

The law is not willing that a person shall be declared a bastard to suit the whims or purposes of any one, nor upon evidence merely that no actual act of intercourse is proved to have occurred between husband and wife at or about the time of becoming pregnant. The proof must be such as to show the impossibility of access, and this the evidence fails to prove. *Boulden v. McIntire*, 119 Ind. 574, 12 Am. St. Rep. 453; *Powell v. State*, 84 Ohio St. 165.

In the case at bar, John F. McDermott, appellant, attempts to prove his illegitimacy for the purpose of sharing directly in his grandfather's estate. He had the burden of proving, first, that he was illegitimate; second, that his grandfather, Martin McDermott, was actually his illegitimate father; and, third, to prove that said Martin McDermott recognized the appellant as his illegitimate child, in accordance with section 30-109, Comp. St. 1929.

To bastardize himself, the appellant was required to show that there was no such access as could have enabled Stephen W. McDermott to be his father. This he failed to do, for while he offered evidence to show that his grandfather, Martin McDermott, might have had connection with his mother before her marriage, still the evidence discloses that Stephen W. McDermott, whom she married, was also present at times at the home of his future wife, and at one time took her to a dance and did not return until the next morning about 10 o'clock, and this was also prior to the time that he married her.

It is also held that no one should be allowed by incompe-

tent evidence to malign the character of his mother. The facts rebutting the presumption of legitimacy of a child born in wedlock must be established by clear, satisfactory, convincing, and competent evidence, and the trial court held that such evidence had not been produced in this case, and found that John F. McDermott was not an heir at law of Martin McDermott, deceased, and was not entitled to inherit from his estate, and, finding these facts to be true, the trial court reached the opinion that the competency, weight, and character of the evidence submitted was not sufficient to support a verdict in favor of the appellant. Finding no prejudicial error in the record, the judgment of the district court is hereby

AFFIRMED.

W. H. KENNEDY, ADMINISTRATOR, APPELLANT, V. N. E. NELSON, APPELLEE: ANNA JARL ET AL., INTERVENERS, APPELLANTS: BETHPHAGE INNER MISSION ET AL., INTERVENERS, APPELLEES.

FILED JULY 7, 1933. No. 28582.

1. Gifts: DELIVERY. "A person having property may give the same in his lifetime directly to the donee, or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death." *Tyrrell v. Judson*, 112 Neb. 393.
2. ———: ———. Delivery of property to a third person as agent or trustee for the use of the donee, and not as agent of the donor, under such circumstances as indicate that the donor relinquishes all dominion and control over the property, is a sufficient delivery to complete the gift.
3. ———. The subsequent possession of a gift by the donor, while it calls for an explanation of the transaction, is not necessarily incompatible with the donee's dominion over the property and will not necessarily operate to make the gift ineffectual.
4. ———. Where a lady, eighty-five years of age, was ill and developed an attack of pneumonia during which she made a gift of her property, and thereafter her illness continued and

she died within two months of the same affliction which she had at the time of the transaction in question, a gift made in contemplation of death was not revoked.

5. **Deeds:** DELIVERY. "If a grantor deposit a deed with a third person, without power of revocation or recall by the grantor, and with directions that it be held until the grantor's death and then put upon record by the holder, this is a sufficient delivery and will be effectual to pass the title to the grantee." *Dunlap v. Marnell*, 95 Neb. 535.

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

R. O. Canaday, J. H. Robb and *A. C. Swenson*, for appellants.

G. L. Godfrey, J. L. McPheely and *C. P. Anderbery, contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

BEGLEY, District Judge.

This is an action brought by W. H. Kennedy, administrator of the estate of Anna C. Johnson, deceased, to set aside a deed, and asking to be awarded the possession of, or accounting for, certain property which belonged to Anna C. Johnson in her lifetime. He is also joined in this demand by Anna Jarl and Elna Wennberg, interveners.

The appellee, N. E. Nelson, claims the estate as trustee under the terms of a gift made by said deceased prior to her death. In this position he is joined by the Bethphage Inner Mission and the Christian Orphans' Home as interveners and appellees. The trial court found for appellees and the plaintiff and interveners have appealed.

On March 5, 1929, Anna C. Johnson was ill; she was of the age of eighty-five years and apparently developing an attack of pneumonia. Being advised that her illness was critical, she, for the purpose of making the arrangements which she desired as to her property, sent for Mr. G. L. Godfrey, an attorney and friend, who came to her home

for the purpose of advising her and assisting in making the necessary provisions for the disposition of her property. Mr. Godfrey was accompanied by his wife, and there were also present at the residence, at this time, the defendant, N. E. Nelson, and Mrs. Ellis, a nurse. At this time Mrs. Johnson executed a deed to N. E. Nelson and delivered same to G. L. Godfrey to be delivered to N. E. Nelson after her death. She also assigned and transferred to said Nelson a note for $4,000 and other notes, and a certain certificate of deposit, and as evidence of the same executed the following instrument:

"Know all men by these presents that I have deeded this day to N. E. Nelson my home place by warranty deed and delivered to G. L. Godfrey to be delivered to N. E. Nelson after my death. I have also assigned and transferred to the said N. E. Nelson a note for Four Thousand Dollars ($4,000), dated Sept. 9th, 1924, and due in one year, signed by Oscar M. Nelson and N. E. Nelson. I also authorize and empower N. E. Nelson to collect any and all certificates of deposit in any and all banks payable to me, and also to collect any and all notes payable to me and signed by any persons whomsoever.

"In consideration of the foregoing the said N. E. Nelson is to sell and convert as soon as conveniently may be, without sacrifice and pay One Thousand crowns to my niece, Anna, the only one there, and the remainder of Two Thousand Dollars to Missions in Sweden, well known to N. E. Nelson and Five Hundred Dollars each to the four children of my sister, Kate or Mrs. N. E. Nelson.

"After my funeral expenses and debts are paid, whatever remains he is to distribute to the Bethphage Mission near Axtel and Orphans' Home near Holdrege.

"Witness: G. L. Godfrey.

"Anna C. Johnson."

The transactions took place in a room at the bedside of Mrs. Johnson. When they were concluded Mr. Godfrey gathered up the documents, taking with him the deed, the

certificate of deposit, and the above named instrument, but through an oversight did not take with him the notes. After the departure of Godfrey, a niece, Mary Nelson, observed the notes there, gathered them up and replaced them in the handbag of Mrs. Johnson, which was the place from which she obtained them in the first instance. The notes remained there until after the death of Mrs. Johnson, and it is shown that she saw them several times, but nothing was said or done about them. The deceased remained at her home for approximately one month, attended by a nurse, then became somewhat convalescent and was taken to her brother's home and got so that she could occasionally be up from her bed in the house and at the table, but died May 11, 1929, approximately two months after the transactions which are here in question. Upon her death Godfrey and Nelson recorded the deed, cashed the certificate of deposit; Nelson took possession of the notes and proceeded in the payment of sickness and funeral expenses and toward the distribution of the funds in accordance with the provisions of the written document, including the payment of one thousand crowns to Anna Jarl, appellant herein.

There is some allegation in the pleadings that the deceased was of unsound mind and not capable of understanding the transactions and the nature or extent of her property or what was being done with it, but the evidence is to the contrary and conclusively shows that at the time the deceased was of sound mind and capable of understanding the transaction.

The appellants base their contention for reversal upon the following propositions: (1) That there was no intention on the part of the donor to make a present gift of the property; (2) that there was no sufficient delivery on the part of the donor to make the transaction a valid gift *causa mortis*; (3) the gift was revoked by the subsequent recovery of Mrs. Johnson; (4) the title to the real estate did not pass under the deed of March 5.

Considering proposition one, we find the deed is in the regular form of a warranty deed. It contains no conditions and makes no reference to any extraneous matter whatever. In considering the written instrument, it states specifically that the donor has deeded this day to N. E. Nelson and that she has assigned and transferred to him a note and authorized him to collect any and all certificates of deposit and all notes and then proceeds to specifically direct what shall be done with the proceeds when collected. The notes were indorsed in the regular manner and the indorsement of all the other instruments was the same. There is no suggestion of any condition or power either in the written instrument or in the testimony at the trial. The notes, about which delivery is complained, were retained by an oversight of Mr. Godfrey, and not by any act of the donor. They were regularly indorsed and transferred on the backs and the written instrument also refers to them.

In *Tyrrell v. Judson*, 112 Neb. 393, it was held: "A person having property may give the same in his lifetime directly to the donee, or by any suitable declaration to a third person for the use of the donee, authorizing such person to make delivery of the subject of the gift after the donor's death."

On the second proposition presented, that there was no sufficient delivery on the part of the donor to make the transaction a valid gift *causa mortis*, it is argued that G. L. Godfrey was the agent of the donor and that delivery of the papers to him with instructions to deliver them to Nelson after the donor's death was insufficient to constitute a gift *causa mortis*. It may be admitted that if Godfrey was the agent of the donor then delivery to him would not constitute a gift, but there is no evidence of any agency between the donor and Godfrey. She parted with all possession and dominion over the papers. The person to whom the delivery is made is presumed, in the absence of a contrary showing, to be the trustee of the donee. *Varley v. Sims*, 100 Minn. 331.

"Delivery of property to a third person as agent or trustee, for the use of the donee, and not as agent of the donor, under such circumstances as indicate that the donor relinquishes all dominion and control over the property, is a sufficient delivery to complete the gift." 28 C. J. 640.

It is also argued that because the notes were, by oversight, left in the possession of the donor after the assignment and delivery to Godfrey, the gift was ineffectual. "It is not necessary that the donee should retain the property in his possession after delivery to him. The subsequent possession by the donor, while it may in some cases tend to throw suspicion upon the transaction as being in fraud of creditors, and calls for an explanation, is not necessarily incompatible with the donee's dominion over the property, and will not necessarily operate to make the gift ineffectual." 28 C. J. 641. See *Garrison v. Union Trust Co.*, 164 Mich. 345; *In re Estate of La Grange*, 191 Ia. 129.

As to the third proposition, that the gift was revoked by the subsequent recovery of Mrs. Johnson, the facts are that this lady, eighty-five years of age, was ill; she was thought by her physician to be developing an attack of pneumonia, and this brought about the transaction which is under consideration. Her illness continued and she was attended by a nurse for approximately four weeks; became somewhat convalescent; was removed to her brother's home, where she continued apparently, during a short time, to be on the road to recovery so far as to enable her to be out of bed at intervals, but within approximately two months after the onset of this attack she died. The evidence discloses that she died of the same illness which she had at the time of the transaction in question. In view of the completeness of the transactions, her advanced age and the character of her illness, we do not think it can be said that there was such a recovery as would operate to revoke the gift.

As to the fourth proposition, as to the title of the real estate passing under the deed of March 5, it was held in *Dunlap v. Marnell,* 95 Neb. 535: "If a grantor deposit a deed with a third person, without power of revocation or recall by the grantor, and with directions that it be held until the grantor's death and then put upon record by the holder, this is a sufficient delivery and will be effectual to pass the title to the grantee, even though he had no knowledge of the execution of the deed."

We therefore conclude that, under the facts in this case and under the terms of the written instrument, there was a valid gift *causa mortis.* The deceased knew what she wanted to do with her property. She secured competent advice, she adopted the method that was suggested to her, and her intent and purpose were clear.

The judgment of the district court is

AFFIRMED.

LOUIS MLADY ET AL., APPELLANTS, V. KNOX COUNTY ET AL., APPELLEES.

FILED JULY 7, 1933. No. 28579.

1. **Statutes:** CONSTRUCTION. The intention and meaning of the legislature in enacting a law must primarily be determined from the language used.
2. **Highways:** ESTABLISHMENT. Sections 39-153 to 39-157, Comp. St. 1929, relating to establishment of a public highway on affidavit of owner of real estate shut out from all public highways, *held* not inconsistent with general road law and not to provide exclusive method so as to prevent proceeding under general road law.

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

H. F. Barnhart and *Richard Steele,* for appellants.

Arthur L. Burbridge and *W. A. Meserve, contra.*

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

LANDIS, District Judge.

This is an action for an injunction to prevent the county of Knox from opening a road over the premises of the plaintiffs. From a decree denying the relief, plaintiffs appeal to this court.

The precise question appellants raise is that sections 39-153 to 39-157, inclusive, Comp. St. 1929, specify the only manner in which a road of necessity to isolated real estate can be opened or established by the county board.

Chapter 39, art. 1, Comp. St. 1929, provides for the establishment of public roads. Section 39-101, Comp. St. 1929, gives the power to the county board to establish roads as provided in article 1. One way is section 39-104: "Any person desiring the establishment * * * of a public road shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established." Provisions are made as to how to proceed under this section.

Another way is by section 39-136: "Public roads may be established without the appointment of a commissioner (county surveyor), provided the written consent of all the owners of the land to be used for that purpose be first filed in the county clerk's office."

Also there is section 39-153: "When any person shall present to the county board of any county an affidavit satisfying them that he is the owner of real estate (describing the same) within said county, and that the same is shut out from all public highways, other than a waterway, by being surrounded on all sides by real estate belonging to other persons, or by such real estate and by water, that he is unable to purchase from any of said persons the right of way over or through the same to a public highway, or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, the county board shall appoint a time and place for hearing said matter, which

hearing shall be after ten days and within thirty days of the receipt of said affidavit." Section 39-155: "The county board shall then in their discretion proceed to lay out a public highway of not more than three nor less than two rods in width, to such real estate."

It was stipulated that appellees "have no other public highway leading out from their land except the road in question." The county surveyor's plat of the road, exhibit 1, shows that it starts near station 3 of road number 7 and ends on a half-section line. No affidavit, as provided by section 39-153, *supra,* was filed. Appellants concede that if the general road law applies this road was properly established thereunder. However, they contend that, since sections 39-153 to 39-157, *supra,* were enacted subsequent to the general road law, they provide the exclusive way to establish this road.

The intention and meaning of the legislature in enacting sections 39-153 to 39-157, inclusive, must primarily be determined from the language used. They are plain, unambiguous and convey a clear and definite meaning as to one way to get a public road to isolated real estate. These sections are not inconsistent with the general road law. Nothing appears in them which makes the way prescribed exclusive. To depart from the plain meaning and intent expressed by the words of sections 39-153 to 39-157, *supra,* and hold that they set out an exclusive way to get a road to isolated real estate would be to alter the statute, to legislate and not to interpret. These sections provide one way to establish a public road to isolated real estate but not the exclusive way.

The decision of necessity or expediency of establishing a public road is committed exclusively to county boards. Whether the opening of a road will be for the public benefit is within the reasonable discretion of the county board to determine. The authority so granted is administrative in its character and its exercise, when pursued within the limitations of the law, is not subject to judicial review.

Otto v. Conroy, 76 Neb. 517; *Throener v. Board of Supervisors of Cuming County*, 82 Neb. 453; *Stone v. City of Nebraska City*, 84 Neb. 789; *Cummins v. Sheridan County*, 95 Neb. 459.

The instant road was established under the general road law of the state by the county board of Knox county; every jurisdictional step provided by law was complied with and we find the same a valid public road. Hence, the decree of the trial court denying an injunction to the appellants is correct, and is

AFFIRMED.

IN RE ESTATE OF DANIEL SLATTERY. MARIE JOSEPHINE SLATTERY, APPELLEE, V. MARY MACKEY ET AL., APPELLANTS.

FILED JULY 7, 1933. No. 28573.

1. Wills: PROBATE: BURDEN OF PROOF. "A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form." *In re Estate of Strelow*, 117 Neb. 168.
2. ———: CONTEST: DIRECTION OF VERDICT. "If in a case contesting a will on the ground of mental incompetency and undue influence, the evidence is insufficient to sustain a verdict upon either of these issues in favor of the contestants, the trial court should withdraw these issues from the jury and direct a verdict." *In re Estate of Bayer*, 119 Neb. 191.
3. Appeal. It is the general rule that a judgment will not be reversed on the ground of an erroneous ruling that is not prejudicial to the complaining party.

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

Allen G. Fisher, Frank A. Barrett and *Charles A. Fisher*, for appellants.

A. L. Schnurr, W. E. Mumby, E. D. Crites and *F. A. Crites, contra.*

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

MESSMORE, District Judge.

This is an appeal from a decree entered in the district court for Sioux county in a will contest, wherein the court below directed a verdict against appellants, contestants below, and in favor of appellee, proponent below.

A petition was filed for the probate of the will of Daniel Slattery, deceased, in the county court of Sioux county and said will was admitted to probate in that court. On appeal a petition was filed for the probate thereof in the district court, in which court contestants objected to said petition and moved to strike the same for the reason that proponent failed to plead the testamentary capacity of the deceased at the time of making the will in question. The district court sustained said motion and permitted proponent to amend the petition by interlineation as follows: "That at the time of making, attesting and publishing of said will, said Daniel Slattery was sane, of sound and disposing mind, memory and understanding, mentally capable of making a will and testament, over the age of twenty-one years and under no restraint whatever."

One of the errors assigned on appeal to this court is that the petition for probate of the will, filed in the county court, did not contain language alleging that the testator was sane, of sound and disposing memory and understanding and mentally capable of making a will and testament, together with the fact that there was no order for notice of probate.

Contestants appeared by an attorney in fact and filed objections to the admission of the will to probate in the county court, but in no paragraph of said objections was objection made to the probate of said will on the grounds mentioned nor because the order for probate was lacking. In the district court these questions were raised for the first time by motion to strike and the court permitted proponent to amend her petition, as hereinbefore set out.

The county court is the court of original jurisdiction

in all matters pertaining to the probate of wills. Const. art. V, sec. 16.

It was held in *In re Estate of Strelow*, 117 Neb. 168, as follows: "A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form."

The place to have attacked the petition for probate was in the county court, and no doubt objections to its insufficiency would have been sustained and proponent would then have had the opportunity to amend and insert the proper allegations. However, the mental capacity of testator to make the will in question was made a direct issue by contestants and the evidence adduced was based almost entirely on the question of his mental capacity. It is a general rule that a judgment will not be reversed on the ground of an erroneous ruling that is not prejudicial to the complaining party.

Proponent offered the necessary evidence to make a *prima facie* case. Owing to the nature of contestants' answer, they were obligated to prove, to establish their case, evidence of undue influence and that the testator was not mentally competent to make the will in question.

The evidence shows that testator was the recipient of a one-fifth interest in the estate of Michael Slattery, his brother, which consisted of $108,515.72 in money and 73,000 shares of stock in a mine owned by the said Michael Slattery in Idaho at the time of his death, testator's interest to be held in trust by James Slattery, another brother of testator. Testator died January 27, 1931, leaving a will dated February 21, 1929, in which proponent, wife of testator, was named the sole devisee and legatee and executrix thereof. Proponent introduced evidence of the circumstances under which the will was made, that two wills were made at the same time and of the same nature by testator and his wife, and that at the time of making his will the testator appeared to be

in normal condition and able to transact ordinary business. Contestants, by several witnesses, showed that testator during his lifetime was addicted to the use of intoxicating liquors, that on several occasions he was said to have been in a drunken condition, that he had an appetite and fondness for intoxicating liquors and on more than one occasion he was brought into court to be dealt with for the possession of intoxicating liquors and drunkenness and was paroled by the court. However, the record is lacking in evidence to show that at the time the will was made or before, or at any time, the use of such liquors had impaired the mentality of the testator to such an extent that he did not know the character and extent of his property, the natural objects of his bounty and the purposes of his devise and bequest. There was nothing to show that the will was unfair; the brothers and sisters of testator had received an equal amount from Michael Slattery's estate, the same source from which testator had received the property devised and bequeathed under his will.

It is unnecessary to set out the evidence in detail in this opinion, for it is obvious from reading the same that it is insufficient to establish a controverted issue of fact to be submitted to the jury under the holdings of this court.

In reference to the condition of mind and as to the mental capacity of the testator to make a will, this court has established the following rule: "The mental capacity of a testator is tested by the state of his mind at the time he executed his will. In the contest of a will on the ground of incompetency, it does not necessarily follow as a matter of law from proof of temporary mental infirmities before and after the testamentary date that the jury should be permitted to pass on the state of testator's mind at that time, in absence of proof that there was then a mental disturbance." *In re Estate of Laflin*, 108 Neb. 298. See *In re Estate of Kubat*, 109 Neb. 671.

"Where a will is contested because it is alleged that

it was procured by undue influence, the burden is upon the contestants to establish by proof, or by fair inference to be drawn from facts proved, that there was undue influence, which induced the testator to dispose of his property contrary to his intention. In such a case, suspicion or supposition of undue influence is not sufficient either to require the submission of the question to the jury, or to sustain a verdict.

"If in a case contesting a will on the ground of mental incompetency and undue influence, the evidence is insufficient to sustain a verdict upon either of these issues in favor of the contestants, the trial court should withdraw these issues from the jury and direct a verdict." *In re Estate of Bayer,* 119 Neb. 191.

"Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own." *In re Estate of Stuckey,* 105 Neb. 641.

Objections were made to the admission of nonexpert testimony as to the mental condition of testator, which objections were in part sustained. The rule has been established in *Lamb v. Lynch,* 56 Neb. 135, as follows: "Nonexpert witnesses can be permitted to express opinions as to the sanity or insanity of a person only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of mental condition is based."

In *Carter v. Gahagen,* 102 Neb. 404, it was held: "Where a nonexpert witness testifies to the unsoundness of mind of a testatrix, he must relate the particular acts and conduct of such testatrix upon which his conclusion is based."

We are of the opinion that the trial court adhered to the rules of evidence so announced in ruling on this line of testimony and that no error resulted therefrom.

It must be conceded that where the mental capacity exists to make a will and no undue influence is exerted, a man has the legal right to dispose of his property as

he sees fit, except as restricted by law, and it is our opinion, after reading the record and the decisions announced, that the trial court was right in directing a verdict in this case in favor of proponent. The other objections raised by contestants are without merit.

AFFIRMED.

DIONICIO HERNANDEZ, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED JULY 12, 1933. No. 28513.

1. **Banks and Banking**: NATIONAL BANKS: SAVINGS DEPARTMENT. "A deposit of funds in the savings department of a national bank, upon an agreement for repayment with interest at a stipulated rate, creates the relation of debtor and creditor between the depositor and the bank, and not that of trustee and *cestui que trust*." *State v. National Banks*, 75 N. H. 27.
2. ———: ———: ———. A national bank, with reference to the business carried on in its savings department, is not to be deemed a "savings bank," and is not carrying on a "savings bank" business in the technical sense of these terms.
3. ———: ———: ———: PAYMENT OF DEPOSIT. In the instant case, in view of the record presented, assuming the validity of a by-law or rule providing as to withdrawals of deposits in the savings department of a national bank that "the possession of the pass-book shall be sufficient authority to the bank to warrant any deposit or payment made and entered therein," the language quoted must be deemd qualified by the force of the requirement, in force and effect a by-law or rule duly adopted, that the presentation of such pass-book for withdrawal of deposits shall be accompanied by a valid "savings department receipt" to which the genuine or authorized signature of the depositor shall be affixed.
4. ———: ———: CONTRACTS AS TO LIABILITY OF OFFICERS. The business of a national bank is affected by a public interest, carried on for a public purpose and for the promotion of public good. Public policy will not permit such an institution to contract against liability for the negligence of its officers and agents.
5. ———: ———. The trial court having by its instructions imposed upon the plaintiff the burden of proving that the de-

fendant bank, through its employees and agents, was guilty of negligence in paying out the moneys in controversy on forged "savings department receipts," a verdict for plaintiff having been returned thereon which is supported by sufficient evidence in the record, no error prejudicial to the defendant bank appears.

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

Finlayson, Burke & McKie, for appellant.

Shotwell, Monsky, Grodinsky & Vance, Henry J. Beal and *Harry B. Cohen, contra.*

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

EBERLY, J.

This is an action at law by Dionicio Hernandez against the First National Bank of Omaha for the recovery of certain moneys deposited by him in the "savings department" of the defendant bank. Without setting forth the pleadings of the parties, it may be said that the making of the deposits by the plaintiff is admitted as alleged, and as its defense, in substance, defendant tenders a plea of payment made in good faith, without negligence, and in strict accord with the special terms of the written contract of deposit. Upon this issue there was a trial to a jury resulting in a verdict and judgment for the plaintiff. From the order of the trial court overruling its motion for a new trial, the defendant appeals.

The evidence discloses that the plaintiff, Dionicio Hernandez, is a Mexican. His knowledge of English is limited and he testified with the aid of an interpreter. In December, 1926, he was desirous of opening a "savings account." He appealed for assistance to a Mrs. C. F. Secord, then a social welfare worker among his countrymen of Omaha, and who could speak Spanish. She suggested opening an account with the defendant bank. Hernandez turned over to her two checks of $500 each for this

purpose. Mrs. Secord then obtained from the bank the usual signature card, which Hernandez executed by signing thereon, in his own handwriting, "Dionicio Hernandez," under and following the words: "I hereby agree to the by-laws, rules and regulations governing the savings department of First National Bank of Omaha, Omaha, Nebraska." At this time Hernandez also gave Mrs. Secord an additional $70 which, together with the two checks theretofore received, was on December 23, 1926, deposited with the defendant bank. The savings account was then opened in plaintiff's name, as he had requested, the bank having been informed that he was the real depositor, and was making use of the services of Mrs. Secord to transact the business of opening this account in his behalf. The usual savings book (referred to ordinarily as the pass-book) was accordingly made up by the defendant, showing a deposit of $1,070, and delivered to Mrs. Secord, who in turn transmitted it to plaintiff. In this pass-book are printed, "Rules Governing Savings Deposits," one of which is: "The pass-book shall be the voucher of the depositor, and the possession of the pass-book shall be sufficient authority to the bank to warrant any deposit or payment made and entered therein."

Thereafter plaintiff made additional deposits in said account until the same aggregated $4,460.28. In each instance the sum of money intended for deposit was by plaintiff given to Mrs. Secord, and she transmitted it to the bank, together with the pass-book, in which proper entries were made by defendant's officers. It also appears that, later during the transaction of this business, Mrs. Secord obtained this "pass-book" from Hernandez upon the pretense that the safe-keeping of the same would be thereby promoted, and thereafter she kept continuous possession of the same. She then, in violation of the confidence bestowed, made use of this "pass-book," in connection with forged receipts, to withdraw sums of money at different times from this savings account, unlawfully and without authority. These sums of money so with-

drawn by her ultimately totaled $3,382.31. The evidence discloses that she then absconded.

Officers of the defendant bank, as witnesses, detailed at length the manner and method of the business transacted by this "savings department." They testify that the rule as to possession of pass-book authorizing payment was in force during the entire period of the transactions involved in the instant case; that in making withdrawals from the deposits, in addition to the presentation of the pass-book, it was necessary to present a "savings department receipt," made upon blanks furnished by the bank, and executed by the depositor setting forth the amount of money paid. This "savings department receipt" on its face also contained the words, "pass-book must accompany this receipt." These bank officers further testified that in each of the payments by the bank which is here the subject of litigation the pass-book was presented with a receipt, and payment was made thereon by the proper officer of the defendant; that the signature card is employed, not only for the purpose of expressing in writing the formal agreement of the depositor to the "by-laws, rules and regulations," but also for identifying the account and the signature of the customer; that this signature card is kept on file in the paying teller's cage to enable the teller to determine whether or not any instruments presented to him purporting to be signed by the owners of savings accounts, including the savings bank receipts, bear the genuine signatures of such owners; that these cards are kept directly behind the paying tellers of this department, where they are quickly available for use at all times, and that it is the duty of these officers to compare signatures on withdrawal receipts with the signatures on the signature cards. After examining each of the forged receipts on which, in connection with the pass-book, the withdrawals in suit were made, their testimony is that "under study" there appears to be a "marked" or "probable" dissimilarity between the signature on the signature card and the signature on each

of the forged receipts. No witnesses testify that the questioned signatures are genuine.

The evidence of the paying teller who made most, if not all, of the payments in litigation, in substance, is that she at all times knew that plaintiff was a man, and the actual depositor, though she had never seen him; that she recognized Mrs. Secord as his agent, bringing in the pass-book and making deposits, and also bringing in the book, and, in connection with the "savings department receipts" purporting to have been executed by Hernandez in person, making the withdrawals in suit; that, while the first three or four receipts presented in Hernandez's behalf, which included all the savings bank receipts on which his genuine signatures appear, were probably compared by her with the signature card, thereafter, "knowing Mrs. Secord well enough," such comparison probably was not made.

Plaintiff's expert witness testimony, practically uncontradicted, must be deemed sufficient to establish that all the questioned savings department receipts were forgeries. These original instruments were introduced in evidence and submitted to the trial jury, together with the admittedly genuine signature of plaintiff.

Among other provisions contained in the "Rules Governing Savings Deposits" printed in plaintiff's pass-book are those providing for the regular crediting of interest on deposits made at certain times and at definite rates, and for withdrawal of deposits with interest accrued thereon, in whole or in part, subject to certain notice, at the option of the depositor, at any time desired.

On the discovery of the fact of the unauthorized withdrawals from his account, plaintiff instituted this action.

The bank contends that a by-law of a savings bank that it will stand exonerated for any payment which it makes upon presentation of, and entry in, a depositor's pass-book, in all events where the person presenting the pass-book is rightfully in possession of it, is a valid regulation; further, that such is the legal effect of the rule

printed in plaintiff's pass-book, and its terms, in view of the facts of this case, afford the bank a complete defense in this action.

It is obvious, however, that, while we are here concerned with a "savings account," the "savings department" of the defendant bank may not be considered a "savings bank." In a savings bank, "the depositors are the bank, the trustees and officers are their agents for receiving and loaning their money; and the profits belong to the depositors, even though a statute limits the rate of dividends payable by the bank and provides for the accumulation of a surplus as a contingent fund." 2 Morse, Banks and Banking (6th ed.) 1288. See, also, 7 C. J. 851. Neither is the name "savings department" of any force in determining the legal relations of the parties to this litigation.

"Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing (unless it produces actual harm to a depositor by misleading him without his fault); and in such a bank a deposit creates the relation of debtor and creditor, and the depositor has no lien or trust in the bonds in which the money he deposits is invested, as is the case in a savings bank, even though the bank officers promise to hold the bonds for his benefit; such a lien can only be created by mortgage or pledge. A by-law authorizing a savings deposit to be withdrawn after giving due notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment; otherwise he would have to await the maturity of the note on which his money is loaned." 2 Morse, Banks and Banking (6th ed.) 1291.

"A deposit of funds in the savings department of a national bank, upon an agreement for repayment with interest at a stipulated rate, creates the relation of debtor and creditor between the depositor and the bank, and not that of trustee and *cestui que trust*." *State v.*

National Banks, 75 N. H. 27. See, also, 7 C. J. 851. The defendant is therefore not to be deemed a "savings bank," and while having savings accounts, it is not carrying on a "savings bank" business in the true sense of that term. *State v. National Banks,* 75 N. H. 27.

It may be conceded that the defendant, as a national bank, is by statute vested with the power "to make contracts, * * * to prescribe, by its board of directors, by-laws * * * regulating the manner in which its stock shall be transferred * * * its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed. * * * To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; * * * by receiving deposits," etc. 1 Mason's U. S. Code, Ann. p. 597. While the statute quoted, for the purpose of this case, may be deemed to confer ample power on the defendant to adopt the rule on which it relies, and to enter into the contract here in suit, still other provisions specify that this bank shall hold and maintain with the federal reserve bank an actual net balance equal to, and not less than, a "named" per centum of the aggregate amount of deposits, of which "savings accounts" are a part. 1 Mason's U. S. Code, Ann. p. 645. Federal laws do not require segregation of such savings deposits, either for identification, safe-keeping, or for investment. The contract in suit is therefore not to be deemed the contract of a savings bank, but rather the contract of a national bank, and the fundamental relation created thereby is solely the relation of debtor and creditor.

"The difference between the two systems as outlined above should be constantly borne in mind, as they account for some of the apparent inconsistencies and conflicts in the authorities." 7 C. J. 852.

As a national bank, defendant is subject to the well-settled general rule: "A bank is bound to know the signatures of its depositors, and the payment of a forged check, however skilfully executed, cannot be deb-

ited against the depositor if he is wholly free from neglect or fault. And it makes no difference that the forgery was committed by a confidential clerk of the depositor, who by his position had unusual facilities for perpetrating the fraud and imposing the forged paper upon the bank." 3 R. C. L. 546, sec. 174. See, also, 7 C. J. 683.

So, too, it is a universal custom of banks to require a written order for the payment of a depositor's funds. Indeed, an oral demand for repayment is insufficient. 7 C. J. 673.

Custom, however, also recognizes a formal receipt duly executed by the drawer and accepted by the drawee bank, as an appropriate substitute for a technical check as between these parties. In the present case all payments in controversy were admittedly made upon forged receipts. Therefore, the rule above quoted is controlling here, unless the "by-laws, rules and regulations" to which plaintiff agreed in writing secure immunity for defendant.

Furthermore, we are dealing with a business affected by a public interest, carried on for a public purpose for the promotion of public good. *State v. Nebraska State Bank,* 124 Neb. 449. It would seem against public policy to permit a bank under these circumstances to contract against liability for the negligence of its officers and agents. 13 C. J. 491; *Zuplkoff v. Charleston Nat. Bank,* 77 W. Va. 621.

In view of the evidence as an entirety, this court is inclined to the view that the depositor's contract with the defendant bank in the instant case embraced in substance, not only the rule heretofore quoted, but also the further provision that no withdrawal should be made save and except in connection with the presentation of the pass-book, accompanied by a valid "savings department receipt" to which the genuine or authorized signature of the depositor was affixed.

The adoption of these "rules" by the formal action of the board of directors of this institution is not shown. Neither does the evidence contain the "by-laws" and "reg-

ulations" which, together with the "rules and regulations governing the savings department of First National Bank of Omaha," plaintiff "agreed to" by executing the "signature card." The words quoted imply the existence of what the bill of exceptions does not include, and the absence of which is not explained.

We are not suggesting that the presence of this evidence is indispensable in view of the condition of the present record, but are calling attention to the fact that this court is limited, in part at least, to secondary evidence to determine the real contract between the parties.

But even if we assume that we are here dealing with a "savings bank" in the true sense of that term, or that under the facts in this case the "savings bank rule" is applicable and controlling, still the defendant may not be relieved from liability.

In 3 Michie, Banks and Banking, sec. 301 (4), it is stated: "The by-laws or rules of savings banks usually contain a provision intended to protect the bank from liability for payments made to one who has wrongfully obtained possession of, and who presents at the bank, a pass-book belonging to a depositor, and it is customary to print such rules in the pass-book. While these by-laws and rules are somewhat variant in phraseology, there is in substance and legal effect much similarity between them. One of these by-laws or rules that is commonly printed in the pass-book provides that all payments to persons producing the pass-book shall be valid payments to discharge the bank. It has been held that such a by-law or rule, or one of similar import, will not prevent a recovery by a depositor whose pass-book has been stolen, or obtained from him by fraud, and the deposit in whole or in part withdrawn, unless the bank used ordinary care in making the payment."

"By-laws of a savings bank, which require the presentation of the deposit book, or due notice to the bank in case of the loss of the book, as conditions precedent to payment to the depositor, or upon his written order,

are reasonable conditions and become a part of the contract between the bank and the depositor, when brought to the notice of the latter.

"When in such case the bank makes payment on presentation of the deposit or pass-book, not to the depositor in person, but upon what purports to be a written order by him and which turns out to be a forgery, the bank is at least bound to act in good faith and to exercise reasonable care with the view to avoid payment to a person who is not lawfully entitled to receive payment; and if in such case it does not so act in good faith and exercise reasonable care, it will be liable to pay again to the rightful owner of the deposit." *Hough Avenue Savings & Banking Co. v. Andersson*, 78 Ohio St. 341.

"A rule of a savings bank that the institution will not be responsible for loss sustained by payment to a stranger, when the depositor has not given notice of loss of his book, since the officers of the institution may be unable to identify every depositor transacting business at the bank, does not relieve the officers of the bank from the exercise of reasonable care to protect the interests of the depositor, and prevent loss to him by payment to a person not entitled to it." *Ladd v. Augusta Savings Bank*, 58 L. R. A. 288 (96 Me. 510).

"A by-law of a savings bank, that it will not be responsible for loss sustained by the payment of a book on presentation when the depositor has not given notice of his book's being lost or stolen, does not relieve the bank from the duty of exercising good faith and due care." *Brown v. Merrimack River Savings Bank*, 67 N. H. 549.

See, also, *Appleby v. Erie County Savings Bank*, 62 N. Y. 12; *Kummel v. Germania Savings Bank*, 127 N. Y. 488; *Wegner v. Second Ward Savings Bank*, 76 Wis. 242; *Koutsis v. Zion's Savings Bank & Trust Co.*, 63 Utah, 254; *Chase v. Waterbury Savings Bank*, 77 Conn. 295; *Ninoff v. Hazel Green State Bank*, 174 Wis. 560; *Zuplkoff v. Charleston Nat. Bank*, 77 W. Va. 621.

Thus, the authorities generally support the proposition that, in an action by a depositor against a savings bank on forged withdrawal slips, the negligence of the depositor as to the manner of handling the pass-book is not involved; the issue being whether or not the bank exercised reasonable care and diligence by paying out the money on forged withdrawal slips to one other than the real depositor. 3 R. C. L. 708, sec. 340; *Brown v. Merrimack River Savings Bank*, 67 N. H. 549; *Chase v. Waterbury Savings Bank*, 77 Conn. 295.

As to the application of this principle where a strictly debtor and creditor relation is involved, see *Wussow v. Badger State Bank*, 204 Wis. 467; *Union Tool Co. v. Farmers & Merchants Nat. Bank*, 192 Cal. 40; *National Dredging Co. v. Farmers Bank*, 6 Penn. (Del.) 580.

In the instant case the trial court, in its instructions to the jury imposed upon the plaintiff the burden of proving by a preponderance of the evidence that the defendant bank, through its employees, was guilty of negligence in paying out the moneys in controversy on forged "savings department receipts." The correctness of this instruction is questioned by appellee. *Noah v. Bowery Savings Bank*, 225 N. Y. 284; *Chase v. Waterbury Savings Bank*, 77 Conn. 295. However, the appellee having presented no cross-appeal, this question is not properly presented by the record, and may not be decided.

From a careful consideration of all the evidence, this court is convinced that, if the rule applicable to savings banks, as contended for by appellant, is to be accepted as controlling, the trial court properly submitted the question of the negligence of the employees of the bank to the jury. The form of this instruction was possibly more favorable to the defendant than it was entitled to, even under the savings bank rule. As this issue was submitted, the determination thereof made by the jury finds ample support in the testimony. It follows that the defendant could not have been prejudiced by the instruction of which it complains.

The judgment of the trial court is correct, and is

AFFIRMED.

AGNES STEWART, GUARDIAN, APPELLANT, V. FRANK HERTEN, GUARDIAN, ET AL., APPELLEES.

FILED JULY 12, 1933. No. 28539.

1. **Amicus Curiæ.** "One may, as *amicus curiæ*, suggest the action of the court in any matter in which the court may proceed of its own motion." 2 C. J. 1323.
2. **Appeal:** JURISDICTION. "Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceedings." 15 C. J. 852.
3. **Courts:** COUNTY COURTS: JURISDICTION. County courts of this state are courts of record, having exclusive original jurisdiction of minors, residents of their respective counties, the appointment and removal of guardians of such, the settlement of their accounts, and the giving of directions relative to the management, investment, and disposition of the property of their minor wards.
4. ———: JURISDICTION. Where exclusive jurisdiction of a subject-matter is conferred on county courts, and where relief sought in an action pertaining thereto but instituted in a district court is such that the county court under these powers so conferred is authorized to grant it, the district court will be deemed to have no original jurisdiction in the premises.
5. ———: ———: DECLARATORY JUDGMENTS ACT. The enactment of the uniform declaratory judgments act will not be construed as supplementary to or supplanting existing statutes, nor in any manner modifying, impairing, or restricting the powers otherwise vested in county courts.
6. **Action:** DECLARATORY JUDGMENT. Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand.
7. **Courts.** Under the facts presented in the instant case, the powers vested in the county court are ample to afford complete and prompt relief, and its jurisdiction thereof being in effect made original and exclusive by law, the subject-matter of this action is necessarily excluded from the original jurisdiction of the district court.

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

Anson H. Bigelow and *Robert G. Fuhrman,* for appellant.

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

Crossman, Munger & Barton, Kennedy, Holland & De Lacy and *Ralph E. Svoboda, amici curiæ.*

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

EBERLY, J.

Practically as the sole matter of agreement between the parties to this litigation they unite in the conclusion that the proceedings here presented for review were had under the provisions of the "Uniform Declaratory Judgments Act." Comp. St. 1929, secs. 20-21,140 to 20-21,155.

It appears that Charles F. Herten died on January 29, 1931, a resident of Thurston county, Nebraska, leaving a last will. This instrument was duly admitted to probate in the county of his residence. The executors therein named thereupon qualified and entered upon the discharge of their duties, though the administration of said estate has not yet been fully completed. In this will the testator designated as guardians of his minor children, Robert B. Herten, a son, and Marilyn J. Herten, a daughter, the deceased's brother, Frank Herten, who will hereinafter be referred to as defendant, and his sister, Agnes Stewart, who will be hereafter referred to as plaintiff. Both qualified. At the date of the entry of the final order herein appealed from, there was in the possession of the executors, ready to be delivered to them as guardians and available for investment, the sum of $45,602.03.

It also appears that, after qualification as guardians, proceedings were commenced in the county court for Thurston county relating to the care and investment of the funds of these wards. Both plaintiff and defendant were participating therein in a manner which obviously evidences their fundamental disagreements and antagonisms.

While these proceedings were still pending, on December 5, 1931, Agnes Stewart, as joint guardian, filed in the district court for Thurston county a petition in equity. This, in effect, was an original independent action ostensibly invoking the provisions of the uniform declaratory judgments act. The relief sought by her was that a separate unified guardianship of the minor children be authorized and directed; that the guardian, to be appointed for this purpose, should be a corporation as described in her petition; that the investment of the funds of the wards be limited to certain specified forms of property set out by her; and also prayed for general relief. Issues were formed by the amended answer and cross-petition of Frank Herten, as guardian, and the reply of plaintiff.

So far as the purpose of this case is concerned, it may be said that the district court, upon hearing duly had, after making full findings of fact, entered its judgment removing the joint guardians of the minors from their offices, and appointing as their successor a trustee who, upon giving a prescribed bond, was directed to take over the entire estate of the wards, manage it, and invest the cash portion thereof as directed in this decree.

Plaintiff thereupon appealed.

The controlling question presented by the record is the question of jurisdiction of the district court to make the final order appealed from. This question is not raised by the parties to this action. However, it is presented in a brief by *amici curiæ*. This brief was filed by leave of court.

It would seem obvious that "One may, as *amicus curiæ*, suggest the action of the court in any matter in which the court may proceed of its own motion." 2 C. J. 1323.

"Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying proceedings, dismissing the action, or otherwise notic-

ing the defect, at any stage of the proceedings." 15 C. J. 852.

See, also, *Radil v. Sawyer*, 85 Neb. 235; *Lynn v. Kearney County*, 121 Neb. 122; *In re Estate of Hansen*, 117 Neb. 551; *In re Estate of Frerichs*, 120 Neb. 462; *Taylor v. Haverford Township*, 299 Pa. St. 402.

Prior to the enactment of our uniform declaratory judgments act in 1929, it would seem beyond cavil that our county courts were vested with exclusive original jurisdiction over all the questions involved in and determined by the decree from which plaintiff has appealed. In this connection the following provisions of our Constitution, and laws passed pursuant thereto, pertaining to the subject of guardian and ward, are pertinent.

"County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, * * * appointment of guardians, and settlement of their accounts." Const. art. V, sec. 16.

By statute it was provided: "The county court shall have exclusive jurisdiction of * * * the guardianship of minors." Comp. St. 1929, sec. 27-503.

So, also: "The county courts in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other moneys in his hands in real estate, or in any other manner that shall be most for the interest of all concerned therein; and the court may make such further orders and give such directions as the case may require for managing, investing and disposing of the estate and effects in the hands of the guardians." Comp. St. 1929, sec. 38-506.

In the construction of the foregoing provisions, this court has long been committed to the view that the appointment and removal of guardians, and the control and

direction of the investment of the funds of minors by their guardians, are within the original jurisdiction of the county court. *In re Estate of O'Brien,* 80 Neb. 125; *Seward v. Danaher,* 105 Neb. 787; *In re Connor,* 93 Neb. 118; *Crooker v. Smith,* 47 Neb. 102. See, also, 28 C. J. 1139; *Scammon v. Pearson,* 79 N. H. 213; *Barrett v. Cady,* 78 N. H. 60.

So, also, where exclusive original jurisdiction of a subject-matter is conferred on the county court, and where the relief sought by an action is such as the county court in the exercise of its original jurisdiction might grant, we are committed to the view that the district court has no original jurisdiction in the premises. It is authorized to act upon such subjects of action only when its appellate powers are properly invoked. *Reischick v. Rieger,* 68 Neb. 348; *In re Estate of Ramp,* 113 Neb. 3. See, also, *Lee v. Lee,* 55 Ala. 590; *Ames v. Ames,* 148 Ill. 321.

Our uniform declaratory judgments act was passed and approved April 24, 1929. It was enacted substantially in the form as approved by the National Conference of Commissioners in 1922. In terms employed, this legislation neither purports to repeal or modify any of the legislation heretofore referred to, nor to restate any of the principles of law promulgated in the cases cited herein. It would seem obvious that, construed as an independent act, complete within itself, the purpose of this act is not to supplement or supplant existing statutes. *McCalmont v. McCalmont,* 93 Pa. Super. Ct. 203. Indeed, on the contrary, a similar act adopted in Pennsylvania in 1923, prior to enactment of the Nebraska statute, was before the courts of that state in that year, and it was there determined that a proceeding for a declaratory judgment will not be entertained where the point involved can be as well and speedily determined in an ordinary proceeding open to the parties; that the remedy given by the uniform declaratory judgments act "is an unusual one, provided for the purpose of having issues speedily determined, which otherwise would be delayed, to the possible injury of those inter-

ested, if they were compelled to await the ordinary course of judicial proceedings. No other substantial reason existed for the passage of the statute, and hence, where, as here, there was no necessity for resorting to it, it should not have been employed." *List's Estate,* 283 Pa. St. 255. This principle so announced has met the almost unanimous approbation of the courts of the several states whose legislatures have adopted this enactment.

It may now be fairly said to be a uniform rule of construction in these states that proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided for the character of case in hand. *Kariher's Petition,* 284 Pa. St. 455; *Leafgreen v. La Bar,* 293 Pa. St. 263; *Ladner v. Siegel,* 294 Pa. St. 368; *Taylor v. Haverford Township,* 299 Pa. St. 402; *Sterrett's Estate,* 300 Pa. St. 116; *Appeal of Kimmell,* 96 Pa. Super. Ct. 488; Comp. St. 1929, sec. 38-506; *James v. Alderton Dock Yards,* 256 N. Y. 298; *Lisbon Village District v. Lisbon,* 85 N. H. 173; *Moore v. Louisville Hydro-Electric Co.,* 226 Ky. 20; *McFarland v. Crenshaw,* 160 Tenn. 170; *Trustees of Columbia University v. Kalvin,* 235 N. Y. Supp. 4; *Estate of Loughlin,* 103 Pa. Super. Ct. 409; *Goldberg & Sons v. Gilet Bldg. Corporation,* 237 N. Y. Supp. 258; *Dempsey's Estate,* 288 Pa. St. 458; *Tanner v. Boynton Lumber Co.,* 98 N. J. Eq. 85; *Mutrie v. Alexander,* 23 Ont. Law Rep. 396; *New York & O. R. Co. v. Township of Cornwall,* 29 Ont. Law Rep. 522; *Union Trust Co. v. Goerke Co.,* 103 N. J. Eq. 159; *Village of Grosse Pointe Shores v. Ayres,* 254 Mich. 58; *Washington-Detroit Theatre Co. v. Moore,* 249 Mich. 673; 68 A. L. R. 119, note.

Under the principle announced by these cases, it is equally obvious that none of the existing powers of the county courts were in any degree modified, impaired, or restricted by the legislative adoption of our uniform declaratory judgments act.

We are also of the opinion that consent of parties in the instant case is insufficient to confer jurisdiction where

otherwise none would exist or could be exercised. *Garden City News v. Hurst,* 129 Kan. 365.

Under the situation here presented, there can be no question but what the powers vested in the county court are ample to afford complete and prompt relief in the instant case, and the subject-matter of the action was necessarily excluded from the original jurisdiction of the district court.

It is obvious, in view of the principles announced in the precedents cited, that exclusive original jurisdiction over the subject-matter involved in this litigation having been conferred in no uncertain terms upon county courts, the attempt of the district court, in the exercise of original jurisdiction, to remove guardians duly appointed by the county court, and replace the same by a trustee, with directions to the latter to take over the property of the minors involved, to manage, invest and control it under the directions of the district court, is unwarranted in law, in contravention of the statutes controlling, and wholly unsupported by the terms of the uniform declaratory judgments act.

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

REVERSED AND DISMISSED.

MARION D. WRIGHT, APPELLANT, V. SALVATION ARMY, APPELLEE.

FILED JULY 12, 1933. No. 28578.

1. **Charitable Institution: NEGLIGENCE: LIABILITY.** Where a person enters the building of a charitable institution at its invitation for the purpose of conducting a business transaction with the officers and employee of said institution and not for the purpose of charity, said institution is liable for injuries caused by negligence for failure to keep the premises in a reasonably safe condition.

2. **Negligence: LIABILITY TO INVITEES.** The liability of the owner of the premises to an invitee who enters thereon is only co-

extensive with the invitation, and when the limits of the invitation are exceeded the invitation ceases, and the duty of the owner is only that of abstaining from acts wilfully injurious.

3. ———: ———. One who walks into an open elevator shaft, on premises with which he is familiar, without looking to see whether the elevator had been moved, is guilty of gross contributory negligence and cannot recover for injuries thereby sustained.

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

A. M. Morrissey and *James H. Hanley,* for appellant.

Emmet L. Murphy and *Harry W. Shackelford, contra.*

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

BEGLEY, District Judge.

This is an action brought by Marion D. Wright against the Salvation Army to recover damages for personal injuries, alleged to have been sustained by the plaintiff through the negligence of the defendant when he fell through an unguarded elevator shaft in the four-story brick building owned, operated and controlled by defendant in the city of Omaha.

The answer of the defendant admitted its corporate existence; its ownership of the building; alleged that it is a religious and charitable corporation, and charged defendant with contributory negligence.

At the close of the testimony in the trial court, the defendant filed a motion for a directed verdict on the ground that defendant is exclusively a religious and charitable institution and that at the time of the injury the plaintiff was a direct participant in and beneficiary of the defendant's charitable activities; that the plaintiff was guilty of contributory negligence which was, as a matter of law, more than slight as compared with any negligence of the defendant, and that the plaintiff was not an invitee but a mere trespasser on the premises of the defendant, which motion was overruled, and the jury

returned a verdict for the plaintiff for fifteen hundred dollars.

A motion for a new trial was filed, and the court thereafter, being of the opinion that it erred in overruling the motion of the defendant for a dismissal of the cause of action or a directed verdict on its own motion vacated said judgment, and the verdict of the jury was set aside, and the court then sustained the motion of the defendant, made at the close of all of the testimony. The cause was dismissed with prejudice, from which order and judgment the plaintiff has appealed.

The evidence discloses that the defendant, a religious and charitable corporation, was the owner of a four-story brick building located at the northeast corner of Thirteenth street and Capitol avenue, in the city of Omaha. The defendant maintained a workingmen's hotel in said building, and said hotel lobby, together with its private office and certain storage rooms in the conduct of its charitable and religious work, were on the ground floor. The building faced the west, where a door opened into a hall or vestibule next to the private office and then a private passageway led toward the east where a rag room was situated where the defendant gathered rags for sale and also paper for baling in a baling room. To the north of this passageway and west of the rag room, in a small compartment walled on the east and west sides, was a hydraulic elevator, used for hoisting material from the basement to the first floor. This elevator stood plumb with the floor and had no guard or side rails.

The plaintiff was a rug weaver in the city of Omaha, and in September, 1931, went to the defendant's place of business and arranged to purchase old clothing and rags to use in his rug weaving business. Commandant Case, in charge of the defendant's business, took the plaintiff to the back part of the building on the first floor, in what is called the rag room, and told him to select such material as he desired. The plaintiff, desiring to select certain rags, asked permission to select the same

himself, and it was agreed that he was to do so and have them weighed by the clerk in his office and pay the clerk five cents a pound therefor. He was invited by Commandant Case to come back again and make further selections and pay accordingly. This he did on several occasions, always being escorted to the rag room by the commandant or other employees by the south passageway. On October 14, 1931, the plaintiff returned for more rags and, instead of going to the office to notify the commandant, entered the building and went to the back part thereof, but instead of going through the straight passageway, he walked around the elevator partition to the north, then entered the elevator compartment and came back again over to the elevator to the south, then east and entered the rag room immediately north. In going to the rag room, the plaintiff, after passing over the elevator, disconnected an electric light bulb and took the same to the rag room in order to secure better light. In returning from the rag room he took the same general direction as in coming in, and in passing through the elevator space he fell down the shaft from which the elevator had been removed to the basement by an employee. The part of the building in which the elevator and rag room and baling room were situated was not open to the public nor was the public permitted in that part of the building. There were signs displayed on the building about the elevator marked, "danger" and "elevator," and it is also shown that the elevator hoisting made a noise when it came from the first floor to the basement; that the attendant always shouted, "elevator up," and that there was a light in the basement which showed through the elevator shaft.

It is argued that the defendant, being an eleemosynary corporation, is not liable to the plaintiff, but the evidence shows that the plaintiff was not a recipient of the institution's charity but was dealing with the defendant for gain, and therefore the defendant was responsible for the negligence of its servants and agents as in cases of the

ordinary business corporation. 13 R. C. L. 948, sec. 12; *Marble v. Nicholas Senn Hospital Ass'n,* 102 Neb. 343.

It is undisputed that the defendant was not, at the time plaintiff was injured, in the business of selling rags at retail and the portions of the building which included the rag and baling rooms and the elevator shaft were not open to the public. Plaintiff testified that, on the occasion when he was given permission to go to the rag room and pick out the rags he wished to purchase, he was personally conducted from the office back to the rag room by Commandant Case. He admits that on that occasion Commandant Case conducted him through the passageway or opening south of the west wall of the elevator corridor. He does not claim that he had ever been given permission to cross the elevator or to use any other route in going to and from the rag room, yet on the date in question he not only deviated from that route, and had gone around to the shipping room and across the elevator, but that at the time he fell into the elevator shaft, he was attempting to leave the building through the north door. He claims that the reason he deviated from the designated route and across the elevator in going into the rag room was that there were boxes obstructing the south passageway when he went in, but he does not know whether the same was obstructed when he left the rag room and started to go through the north door and walk into the lighted elevator shaft. His reason for taking that route also was that it was more light that way than any other way because he had, without permission, removed the light in the room west of the elevator and taken it with him to the rag room.

This case does not come within the ordinary rule applicable to store-keepers where the merchant, in opening his premises to the public, impliedly invites the public to come into the premises to inspect and purchase the goods. In this case, the plaintiff was the only invitee and his invitation was limited. He had never been either invited or given permission to wander at will about the defend-

ant's premises, nor had he ever been told that he could either enter or leave through the north doorway. He had been conducted from the front office to the rag room by a fixed route and had he followed that route on this occasion he would not have been hurt. His injury occurred when he exceeded his invitation and attempted to go where he had no permission to go.

In *Wilkinson v. Webb-Carter Shoe Co.*, 57 S. Dak. 458, the court said: "In so far as the occupancy of the hall is concerned, plaintiff was in the position of an invitee, but the liability of the owner of the premises to an invitee who enters thereon is only coextensive with his invitation, and, when the limits of the invitation are exceeded, his duty to the invitee is only that of abstaining from acts wilfully injurious. *Gavin v. O'Connor*, 99 N. J. Law, 162, 30 A. L. R. 1383. Plaintiff was an invitee in the hall, but he sustained no injuries while remaining in the hall. It was when he went beyond the hall that he was injured. Carter, the owner of the premises, was required to abstain from wilfully doing anything that was injurious to one lawfully using the hall. But maintaining a doorway leading to the elevator without having the same labeled or any warning notice on or near the door was not doing anything wilfully injurious to those using the hall."

In *Collins v. Sprague's Benson Pharmacy*, 124 Neb. 210, the court said: "Mere permission of an owner, allowing customers to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation. The law does not penalize good nature, or indifference, nor does permission ripen into right."

If the south passageway was either wholly or partly blocked when plaintiff went into the building, this did not constitute an implied invitation for him to back up and use some other route. Rather it was an implied revocation of his permission and it was his duty to go to the office and secure from some one in authority, either the removal of the obstruction or permission to use some other route.

On the question of plaintiff's contributory negligence, it is admitted that on both the north and south ends of the west wall of the elevator shaft there were conspicuous signs reading, "Danger, elevator." If the plaintiff had used the south passageway he would have to pass directly by one of these signs. If he went around the north passageway and across the elevator he would have to pass both of them. The elevator itself was a warning of danger. When moved, it made a noise loud enough to be heard in distant parts of the building, and while in the rag room the plaintiff was within two or three feet of the elevator. The employee who moved the elevator from the first floor to the basement, immediately before the accident, called out in a loud voice, "elevator." There were on the east wall of the building, south of the elevator, four windows which would direct at least some light on the elevator and shaft. The light in the basement was burning and, according to the testimony, illuminated the elevator shaft. The plaintiff disregarded danger signs that he should have seen; walked from the rag room out into a lighted room and, without paying the slightest attention to his surroundings or taking any precautions for his own safety, walked into an illuminated elevator shaft which he could plainly have seen, and did so immediately after a warning had been given, which he could have heard had he listened, that the elevator was coming down.

Under such circumstances the plaintiff was guilty of gross negligence and the court did not err in directing a verdict upon this ground. *Sodomka v. Cudahy Packing Co.*, 101 Neb. 446; *Rice v. Goodspeed Real Estate Co.*, 254 Mich. 49.

The judgment of the district court is therefore

AFFIRMED.

PARSONS OIL COMPANY, APPELLANT, V. WILLIAM SCHLITT, JR., APPELLEE.

FILED JULY 12, 1933. No. 28758.

1. **Master and Servant: INJURY TO EMPLOYEE: BURDEN OF PROOF.** Where an injured employee seeks to recover compensation under the workmen's compensation act of the state of Nebraska, the burden is upon the employee to prove by a preponderance of the evidence the facts entitling him to recover.
2. **Evidence** examined, *held*, the employee has failed to sustain the burden of proof sufficient to support a recovery.

APPEAL from the district court for Adams county: LOUIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Charles E. Bruckman and *L. S. Dunmire*, for appellant.

L. A. Sprague and *Bernard McNeny, contra.*

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

CHASE, District Judge.

This is a proceeding brought by an employee to recover compensation under the workmen's compensation statute. The facts may be narrated as follows: The appellee, who is the employee, sustained an injury while in the employment of the appellant, who will be hereinafter termed the employer, on December 5, 1930, while working as a filling station attendant in the city of Hastings, Nebraska. The basis of the injury claimed was that he suffered a sprain of his right ankle by turning the same inward on a cement curbing near the filling station which was elevated about two inches above the general platform. On March 4, 1931, the employee filed a petition before the compensation commissioner of the state of Nebraska against the employer and his surety company, claiming that he had suffered compensable injury arising out of and in the course of his employment. On May 6, 1931, hearing was had before the compensation commissioner and the final award was made on the 26th of June, 1931,

in which it was found that the employee had received an injury to his right ankle causing sprain to the same in the course of and arising out of his employment, and as a result thereof the employee was entitled to receive from the employer the sum of $12 each week for a period of 21 weeks, starting the 12th day of December, 1930, and ending on the 7th day of May, 1931, except the week of April 14, for which week the employee was entitled only to the sum of $6.50, making a total of $186.50, adding an additional $60 which had been previously paid, making the total amount of compensation recoverable by the employee the sum of $246.50, which was paid and received by the employee. No appeal was taken by either party from that award.

On September 8, 1931, the employee commenced another action before the compensation commissioner for an additional award, alleging that the sprain and injury to his ankle which he received on December 5, 1930, had continuously grown worse, and due to no subsequent outside aggravation his disability was greatly increased; that on January 28, 1932, a hearing thereon was had before the compensation commissioner, and the employee was allowed additional award of $7.20 a week for 300 weeks as temporary partial disability. From that award the employer appealed to the district court, and on October 12, 1932, the appeal was heard in the district court, and on January 27, 1933, the district court found that on December 5, 1930, the employee sustained an injury in the course of and arising out of his employment with his employer to his right foot and ankle; that the employee was entitled to recover from his employer the sum of $7.20 a week for 150 weeks, commencing the 5th day of September, 1931, and entered judgment. From this judgment the employer presents the record to this court for review.

The employer bases his claim for reversal upon two propositions: First, that the employee has not sustained the burden of proof necessary in cases of this character; second, that the original award, made before the com-

pensation commissioner, unappealed from and accepted, is final and not subject to readjustment.

As to the first proposition, it becomes necessary to review quite carefully the evidence upon which the trial court made its finding. The employee testified in substance that he had never received any additional injury to his ankle since the one he received at the filling station and that after he had received his first award his ankle continued to grow worse. The shoe that he had been wearing upon the injured foot was offered in evidence to support his contention and from an examination thereof it appears that the posterior portion of the heel of the shoe was mostly worn away. He offers Doctor Uridel as the only other witness to prove his case. Doctor Uridel testified that he never knew the employee and met him first on the day before the trial of this case in the district court, which was October 11, 1932; that the employee came to his office, and that he took an X-ray picture of his foot and ankle, which was taken about 21 months after the alleged injury, and that in his opinion the X-ray plate disclosed a fracture of the second metatarsal bone of the right foot which produced a loosening of the small bones and the resulting flattening of the arch. He also testified that such a condition was not necessarily the result of a direct trauma, but it could occur from violent muscular contraction independent of direct trauma. The witness testified also that he knew nothing about the cause of the injury except what he learned from the employee himself.

The employer produced Doctors Hahn and Calbraith. Doctor Hahn, a very eminent X-ray specialist, whose profession is now altogether confined to X-ray work, testified that he treated the employee shortly after the accident for injury to the foot and examined him then to find if there were any fractures, took X-ray pictures of both anterior, posterior and lateral views and found no fractures of any of the bones of the foot or ankle. Doctor Hahn also testified, after examining the X-ray plate

offered in evidence by the employee, taken by Doctor Uridel the day before the trial, that the plate disclosed no fractures, that in reading the plate at the point where Doctor Uridel testified there appeared a fracture, Doctor Hahn testified that the mark claimed by Doctor Uridel as a fracture was merely the joint itself and a mere overlapping of the head of the metatarsal bone.

Doctor Calbraith testified that he first met the employee when he came to his office for treatment on February 18, 1931, which was approximately 18 months before Doctor Uridel ever saw the employee. Doctor Calbraith testified that at the time he treated him he found a sprained ankle and injury to the external ligament of the ankle, the ankle was somewhat enlarged, but the enlargement was due to nature's ordinary repairing processes. Doctor Calbraith also interpreted the X-ray plates taken by Doctor Uridel and stated it was a very poor picture, but he could not discover any evidences from the plate of a fracture to the metatarsal bone.

The employer also offered testimony by himself and other employees of the filling station that in a conversation had with the employee he stated to these witnesses that he had suffered an additional sprain to his ankle after the first injury by slipping upon the sidewalk.

It also appears from the record that the employee, after having been dismissed by the employer, worked for a number of other persons over various periods of time drawing full compensation therefor.

At the trial in the lower court, the employee seems to base his claim upon the fact that there was a fracture of the metatarsal bone at the time the first compensation was paid which was then undisclosed. This court on a number of occasions in cases of this character has held that the burden of proving compensable injuries by a preponderance of the evidence is cast upon the employee, and unless he properly sustains this burden he cannot recover. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526; *Bartlett v. Eaton,* 123 Neb. 599.

It will be observed that two prominent physicians testified in opposition to Doctor Uridel and interpreted the X-ray plates taken by Doctor Uridel. Both testified that even that plate does not disclose any fracture of the metatarsal bone, and Doctor Hahn, an X-ray expert, shows that the crack, or fissure, that Doctor Uridel claims is a fracture is nothing more than the overlapping of the bones at the metatarsal joint. Unless the employee has sustained the burden of proof of establishing the fact that the nature and extent of his injury were not ascertained before the original award; that the true nature and extent of his injury were not ascertained before the original award; that the true nature and condition of his injury could not reasonably have been discovered, then he must fail in his appeal. The only evidence in support of his claim for additional compensation is that he is now suffering from a fracture of the metatarsal bone and this fracture at the time of his original award was not discovered or contemplated. In this action he must recover, if at all, upon the theory that he has sustained the burden of proof of that particular and important fact. From the evidence we cannot conclude that the employee claims that the sprain upon which his original award was based has constantly grown worse. He seems to have departed from that theory, and bases his claim upon an injury entirely different in character. The effect of the testimony is that his condition has grown worse, not because the sprain to his ankle grew worse, but because there is and has been since his injury a fracture of the metatarsal bone that was not discovered at the time of the hearing upon his original application under which an award was made and fully paid.

The employee has not established by a preponderance of the evidence that he is now suffering from an injury which was latent and undiscovered at the time of the first hearing. On the contrary, the evidence in fact quite satisfactorily discloses that the employee is not suffering from a fracture of the metatarsal bone, but that at no time during the period of his injury has he ever sustained

such. Such being the state of the record, a decision of any other proposition raised becomes wholly unnecessary.

Because of the facts disclosed in the record, we conclude that the employee has not established by a preponderance of the evidence that he is suffering from the injury claimed by him. In view of the foregoing, the judgment is reversed and the proceeding dismissed.

REVERSED AND DISMISSED.

STATE. EX REL. ALFRED G. BROWN ET AL., APPELLEES, V. FLOYD C. TAYLOR, COUNTY TREASURER, APPELLANT.

FILED JULY 12, 1933. No. 28841.

1. Waters: IRRIGATION DISTRICTS: REFINANCING BONDS: PAYMENT. Refinancing bonds and coupons of an irrigation district issued pursuant to sections 46-178 to 46-190, Comp. St. 1929, when due and funds are available for that purpose on presentment, are payable by the county treasurer of the county in which the district was organized in the order of their presentment by the holders thereof.
2. ———: ———: ———: ———: DEMAND. Where holders of bonds or coupons, issued pursuant to sections 46-178 to 46-190, Comp. St. 1929, present same, when due, to the county treasurer of the county in which the irrigation district was organized, for payment and are refused payment for want of funds, such presentment and demand for payment is not a continuing demand entitling demandants to priority of payment over holders of bonds and coupons who subsequently present the same for payment when funds are available for the payment thereof.
3. Mandamus. Where, as in this case, there is a clear legal right to a peremptory writ of mandamus, the right to have such writ granted will not be defeated on the mere claim of the respondent that disorder and confusion will result therefrom, there being no facts in the record supporting such claim.

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

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

Ritchie, Swenson & Arey and *Wright & Wright, contra.*

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

HASTINGS, District Judge.

The relators, owners of 58 coupons issued by the Farmers Irrigation District of Scotts Bluff and Morrill counties, dated January 1, 1926, due and payable January 1, 1933, attached to and representing interest upon certain bonds of said district, issued under authority of sections 46-178 to 46-190, Comp. St. 1929, made application to the district court for Scotts Bluff county for a writ of mandamus to compel the respondent, as county treasurer of said county, to pay said coupons, and an alternative writ was issued. Upon respondent making return thereto, a peremptory writ of mandamus was allowed. Respondent appeals.

The case was heard upon the petition of relators, the alternative writ, and the return of the respondent thereto.

The facts are not in dispute and, as far as these are pertinent to the issues involved, are: That relators are owners of 58 interest coupons due and payable on January 1, 1933, upon certain refinancing bonds of the district; that the relators presented said coupons to the county treasurer and demanded payment thereof on the 7th day of April, 1933; that at that time the respondent, as treasurer, had in his possession, in the special bond fund of the district, money sufficient to pay each and all of said interest coupons on presentation; that the respondent, as treasurer, refused to pay said coupons out of the funds available for the purpose; that the coupons presented by relators are but a small number of the interest coupons attached to an issue of bonds of said district, issued under authority of sections 46-178 to 46-190, Comp. St. 1929; that there were attached to each of said bonds coupons representing the interest to become due upon said bonds July 1, 1932, and January 1, 1933; that prior to April 7, 1933, and after July 1, 1932, the owners and holders of a large number of said coupons,

aggregating an amount over $23,000, which were due on July 1, 1932, presented same to the respondent at his office and demanded payment thereof, and that prior to April 7, 1933, and after January 1, 1933, the owners and holders of a large number of said interest coupons which became due January 1, 1933, aggregating an amount over $38,000, presented the same to respondent at his office and demanded payment thereof; that on each occasion when said interest coupons were so presented and payment demanded as aforesaid, respondent had not sufficient moneys in said special bond fund of said district for their payment, and he indorsed upon each of said coupons the following words: "Presented and not paid for want of funds. Registered. Interest at 6 per cent.," and dated and signed each such indorsement and assigned thereto and noted thereon a registration number, and at the same time made a record in the coupon register of said district, a book kept by him for that purpose, of the registration numbers of said coupons, the date of registration, the name and address of the owners and holders thereof, the number of the coupons, the date of the coupons and the amount of the coupons; and after presentation and registration of each of said coupons, respondent returned the coupons to the owners thereof; that as moneys came into the special bond fund of said district respondent notified the owners and holders of said coupons in the order of their registration and called them for payment; that a small number of said coupons have been called and paid; that there are coupons registered in the manner aforesaid and not yet paid in an amount far in excess of the moneys in the special bond fund on April 7, 1933.

On these facts respondent alleged that it was his duty to apply said moneys in the special bond fund, at the time relators presented their coupons, in payment of said registered coupons in the order of their registration; that the presentation and demand for payment of the coupons registered by him constitute a presentation and continuing demand of payment by the several owners and holders thereof, prior in point of time to the presentation and

demand of relators, and that it was the duty of respondent to pay said moneys in said special bond fund upon the interest coupons in the order of their presentation and registration.

It is the contention of counsel for the respondent that the judgment is contrary to law.

The first contention is that under the law of Nebraska it is the duty of the treasurer to register coupons of irrigation districts when presented and not paid for want of funds, and to pay them in the order of such registration when money comes into the bond fund.

Two classes or kinds of bonds are provided for in chapter 46, Comp. St. 1929, which embraces the statutes relating to irrigation.

One class of bonds is construction bonds and is defined in sections 46-113 to 46-116, Comp. St. 1929, which apply only to bonds issued for the purpose of raising money for the construction or purchase of works or other property, and providing that such bonds shall not be issued for more than the actual estimated cost of ditches or purchase of ditches or cost of construction work, all as contained in its general plan of operation, as well as the first year's interest upon such bonds.

The second class of bonds is provided for in sections 46-178 to 46-190, Comp. St. 1929, which relate to the issuance of refinancing bonds. It is provided that this class of bonds may be issued (1) "In consideration of the discharge of judgments held against it" (section 46-179); (2) "in consideration of the * * * cancelation of its outstanding bonds" (section 46-180); (3) "in consideration of the surrender and cancelation of its outstanding notes and/or warrants" (section 46-181).

Sections 46-178 to 46-190, Comp. St. 1929, under which the bonds and coupons in question were issued, contain no provision whatever for the registration of such bonds and coupons on presentment and which are not paid for want of available funds.

This is frankly conceded by counsel for respondent in their brief. To support their contention counsel urge that

section 46-113 is applicable to bonds issued under sections 46-178 to 46-190.

The part of section 46-113 relied upon by respondent provides:

"The secretary shall keep a record of the bonds sold, their number, date of sale, the prices received, and the name of the purchaser: * * * and provided, further, such district by a majority vote may provide and authorize the payment of interest at a rate not exceeding six per cent. per annum on any or all due and unpaid interest coupons attached to valid and outstanding bonds of such district heretofore or hereafter issued and sold, from the date of registration of such interest coupons for payment or if previously registered, then from the date of such election to pay such interest, until paid. Such question may be submitted at any general or special election of the district by ballot * * * and if a majority of the ballots cast on such proposition shall be in favor thereof the board of directors shall declare the same adopted and the funds to pay such interest shall be estimated and included in the levy for the bond fund of such irrigation district as provided by law. Thereafter, upon the presentation of any bond with coupons attached, or any detached coupons of such bonds, upon which interest is payable under the provisions of this article, the treasurer shall stamp or write on such coupons, 'bears interest at ———per cent. per annum from the registration for payment (or if previously registered for payment, then from date of election to pay interest).

" '_____

" 'County Treasurer.' "

Coupons issued under that section and defaulted do not draw interest unless the voters, at an election called for that purpose, have authorized such payment, and then draw interest only from the time the coupons are registered and the required indorsement made thereon. The date of the registration simply determines the time from which interest shall run. It contains no provision that

coupons registered thereunder shall be paid in the order of their registration. That section 46-113 has no application to coupons issued under the provisions of sections 46-178 to 46-190 is emphasized by the fact that section 46-183 provides:

"The bonds issued in pursuance to this act shall mature in not exceeding fifty (50) years, shall bear interest at not exceeding six per cent. (6%) per annum, payable semiannually, and may be subject to redemption before maturity at par and accrued interest at the option of the district on such terms and subject to such limitations as may be provided, and shall be in such denominations and form, with or without interest coupons, and be executed in such manner as may be provided. In case default shall be made in the payment of interest, such interest shall bear interest at the same rate as the principal."

Under that section bonds may be issued with or without coupons. Where coupons are issued, these bear interest from the date of default, without any special election or registration being required to fix the date from which these bear interest. It is clear therefore there is nothing in the statutes which provides for or authorizes the registration of defaulted interest coupons issued pursuant to sections 46-178 to 46-190, Comp. St. 1929. We are not left in doubt as to the order of the payment of coupons and bonds issued under chapter 46, as section 46-124 provides:

"Upon the presentation of the coupons and bonds due at the office of the treasurer of the county in which the district was originally organized it shall be his duty to pay the same from the bond funds."

Under that provision it is made the duty of the treasurer, when funds are available, to pay coupons then due upon presentment.

Counsel for respondent, however, contend that the holders of coupons, other than relators, having presented coupons held by them prior to the time of the presentation by relators of their coupons, and when there were no funds available to pay them in the special bond fund,

and having been refused payment for want of funds, such presentation and demand by the holders was a continuing demand, entitling them to priority of payment when sufficient funds become available.

We have been cited to no cases supporting such contention. In fact, counsel for respondent, in their brief, admit that after diligent search they have been unable to find any. They further concede in their brief that the courts that have passed upon the question hold adversely to their contention.

In *Meyer v. Widber,* 58 Pac. 532 (126 Cal. 252), it is held:

"It is no defense to mandamus to compel payment of a bond that other bondholders had made prior demands, which had been refused for want of funds, as the prior demandants did not thus acquire any right of priority of payment out of the fund."

In *State v. Livingston,* 104 Fla. 33, an original proceeding in mandamus in the supreme court of Florida whereby the relator, the holder of matured and unpaid interest coupons of bonds of the city of Homestead in that state, sought to compel respondents, the mayor and councilmen of said municipality, to pay said coupons out of funds available for that purpose. It was held:

"Mere demand by a holder of a city's coupons or bonds, insisting on payment out of available funds on hand applicable for their discharge, gives a right of action to enforce payment by legal proceedings if the demand is refused, but does not give the demandant a preferred claim against the fund out of which the payment would be ordered to be made. The institution of legal proceedings becomes the controlling factor in determining priorities between different demandants, when payment has been refused, and it is to the vigilant claimant who first seeks the mandate of the courts to enforce his claim that priority of payment must be awarded."

Other cases in point are *Shelley v. St. Charles County Court,* 21 Fed. 699; *State v. Grand River Drainage District,* 330 Mo. 360; *Meyer v. Porter,* 65 Cal. 67.

It is clear that prior demandants who had presented their coupons and made demand for payment at a time when there were no funds available for that purpose acquired thereby no right of priority over the relators. The relators presented their coupons and demanded payment at a time when funds were available for that purpose and, upon refusal of the respondent to make payment, promptly sought the mandate of the courts to compel the performance of a duty enjoined upon respondent by law.

It is next contended by counsel for respondent that, even if relators have a clear legal right to a peremptory writ of mandamus, such right would not warrant the granting of a peremptory writ if disorder and confusion would result therefrom.

The case of *State v. Barstler*, 122 Neb. 167, is cited in support of said contention. The rule announced in that case has no application to the facts in this case. In the instant case, there are no facts in the record showing or tending to show that the granting of the writ will result in disorder and confusion. Furthermore, the respondent in his return to the alternative writ did not allege, as a reason justifying him in his refusal to make payment of the coupons presented to him by relators, that disorder and confusion would result therefrom. The contention that disorder and confusion will result from the sustaining of the action of the trial court is purely imaginary and has no foundation in fact.

The plan adopted by the respondent, of registering bonds and coupons when presented to him for payment and of paying them in the order in which they were registered, may have been the most sensible and orderly way, but the legislature having otherwise fixed the order in which the bonds or coupons should be paid, the respondent had no power to enlarge thereon. It was the duty of the respondent under the law, when he had funds available, to pay bonds or coupons due in the order of their presentment to him for payment.

The return made by respondent presents no legal rea-

son which justifies his refusal to pay the coupons presented to him for payment by relators. The judgment is therefore

AFFIRMED.

STATE, EX REL. C. A. RANDALL, MEMBER OF NEBRASKA STATE RAILWAY COMMISSION, RELATOR, V. GEORGE E. HALL, TREASURER OF THE STATE OF NEBRASKA, RESPONDENT.

FILED JULY 20, 1933. No. 28902.

1. **Mandamus**: PLEADINGS. In mandamus proceedings, under section 20-2164, Comp. St. 1929, no pleading is authorized other than the writ and the answer.
2. **Parties**: INTERVENTION. Intervention in an action should be denied to any person who does not have a direct legal interest in the subject-matter of the litigation.
3. **Constitutional Law**: CONSTRUCTION. Constitutional provisions, relating to the same subject-matter, should be construed together, with a view to giving effect to each provision if possible.
4. ———: ———. Where each of two constitutional provisions, relating to the same subject-matter, may be enforced without violating the other, they are not repugnant nor inconsistent.
5. ———: DIVISION OF GOVERNMENTAL POWERS. Our system of government distributes the powers between three coordinate departments, the legislative, the executive, and the judicial, each of which derives its power directly from the people, and is responsible to them.
6. ———: SALARIES: LEGISLATIVE RESTRICTIONS. The Constitution gives to the legislature the power to increase or decrease the salaries of state officers, provided it acts within constitutional limitations.
7. ———: ———: ———. The constitutional prohibition against changing the salary of such officer during his term of office, as found in section 19, art. III of our Constitution, is explicit and unambiguous.
8. **States**: OFFICIAL SALARIES: CONSTITUTIONAL LAW. Senate File No. 52, enacted at the 1933 session of the legislature, is in conflict with section 19, art. III of the state Constitution, in so far as it purports to change the salary of state railway commissioner during his term of office.

Original proceeding in mandamus by the state, on relation of C. A. Randall, state railway commissioner, to compel respondent, as state treasurer, to countersign and pay a salary warrant. *Writ allowed.*

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

Ralph P. Wilson, contra.

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

PER CURIAM.

Writ of mandamus issued in an original action to compel state treasurer to countersign and pay warrant for quarterly salary of a member of the Nebraska state railway commission.

C. A. Randall, a member of the Nebraska state railway commission, filed original application in this court for a writ of mandamus to compel the state treasurer to countersign and pay his warrant for his salary for the quarter ending June 30, 1933, alleging that he was duly elected a member of the Nebraska state railway commission for a term of six years, beginning on January 5, 1929, and on June 13, 1933, the state auditor issued a salary warrant in due form, for the sum of $1,250, to the relator; that the state treasurer failed and refused to countersign said warrant and to pay said warrant out of the public money in the state treasury, there being at all times sufficient money in the treasury to pay said warrant and salary claim. The relator prayed for an order of the court that a writ of mandamus issue to compel the state treasurer to countersign and pay said warrant.

To these allegations the state treasurer, after admitting the facts alleged, set out that Senate File No. 52, duly enacted at the legislative session of 1933, with emergency clause attached, was duly approved by the governor May 2, 1933, and thereupon became effective, and reduced the salary of the relator from $5,000 a year to

$3,400 a year, and that said quarterly salary warrant should be for $850 instead of $1,250, and prayed that the relator be denied a writ of mandamus.

1. The cause came on to be heard, first, on a motion of Barton Green, presented by his attorney, for leave to file a petition of intervention, a copy of which was not attached to his motion. He argued that the taxpayers would not be represented unless he was allowed to intervene.

The attorney general opposed granting leave as requested, asking why, if Mr. Green had a *right* to intervene, did he need to ask *leave* of court? The attorney general contends that the state treasurer not only represents himself in this action, but all taxpayers. He also insists that intervention is not possible in a mandamus proceeding, for the statute limits the pleadings that can be filed in mandamus. Comp. St. 1929, secs. 20-2164, 20-2226.

2. It was also contended by the attorney general that section 20-328, Comp. St. 1929, requires one to have an interest in the matter in litigation to be allowed to intervene, and urged that a decree in this case will not affect Barton Green, except in a remote manner.

In *Buffalo County v. Kearney County*, 83 Neb. 550, certain taxpayers desired to intervene, and this court held:

" 'It is a universal rule of law that no one has any right to intervene in any action unless he has some right to protect, which is not being protected.' Kearney county through its legally constituted authorities was vigorously and ably doing everything that could be done to protect any rights which the defendant might have, and we see no reason why these taxpayers should have incumbered the record by intervention."

In *Danker v. Jacobs*, 79 Neb. 435, it was held, in interpreting the intervention statute: "The interest that entitles a person to intervene must be of such a nature that he will gain or lose by the direct legal operation of the judgment. *Smith v. Gale*, 144 U. S. 509."

"An intervener must plead some direct legal interest in the subject-matter of the litigation; a mere denial of plaintiff's right is insufficient to give him a standing in court." *Moline, Milburn & Stoddard Co. v. Hamilton,* 56 Neb. 132; *Parker v. City of Grand Island,* 115 Neb. 892. See *Kansas & C. P. R. Co. v. Fitzgerald,* 33 Neb. 137; *Latham v. Chicago, B. & Q. R. Co.,* 100 Neb. 173; *Brown v. Brink,* 57 Neb. 606; *La Mesa Lemon Grove & Spring Valley Irrigation District v. Halley,* 195 Cal. 739; *Commercial Nat. Bank v. Robinson,* 66 Okla. 235.

After a recess the court denied leave to intervene, because the proposed intervener has no interest in the subject-matter different from any other taxpayer, or from taxpayers generally, and, second, because there is no charge that the state treasurer is not defending this action in good faith, and, third, the statute specifically allows just two pleadings in mandamus actions of this kind, which implies that others are not proper. However, the court made an order allowing the applicant, Green, 30 minutes to argue the merits of the case as *amicus curiæ,* of which permission he did not avail himself.

3, 4. The answer having admitted the facts set out in the petition, relator filed a motion asking the court to enter judgment on the pleadings. Each of the parties thereupon joined in a motion asking the court to advance the cause for immediate hearing, which was granted, for the reason that the cause was of serious urgency. Said cause and the motion for judgment on the pleadings were thereupon argued to the court at length.

This action must be determined by a consideration of the provisions of our Constitution. Section 3, art. XVII of the Constitution provides, so far as relates to this action: "Until otherwise provided by law the following salaries shall be paid: * * * members of the state railway commission, each $5,000 per annum."

As Senate File No. 52 attempted to diminish the salary provided in the Constitution for members of the state railway commission, we are faced with a provision, which

has long been in our Constitution, to the effect that the compensation of any public officer shall not be increased or diminished during his term of office. This provision was amended and broadened by the constitutional convention of 1920, and the full paragraph is found in section 19, art. III, which now reads as follows: "The legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into nor shall the compensation of any public officer, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof be increased or diminished during his term of office."

These sections of our Constitution together with all other parts thereof, were first passed by the constitutional convention of 1920, and then submitted to the electors of our state at a special election, held September 21, 1920, and legally adopted, and now stand as the Constitution, or foundation law of our state, and are as binding upon all sessions of our legislature as upon the governor of our state and all its courts.

The defendant's counsel, in his brief and also in oral argument, calls to our attention that it has been held that it is not the province of the court to alter by construction an act of the legislature which is free from ambiguity, and clear and explicit in its terms, upon the theory that the legislature made a mistake and did not intend to do that which its language clearly imports. He insists that it is an old principle that, in construing an act of the legislature, all reasonable doubt must be resolved in favor of its constitutionality. *State v. Standard Oil Co.*, 61 Neb. 28; *State v. Heupel*, 114 Neb. 797.

It is elementary that it is not within the province of the courts to annul a legislative act unless its provisions clearly contravene a provision of the Constitution. *Abie State Bank v. Weaver*, 119 Neb. 153.

The defendant's attorney also calls our attention to

the fact that, in the absence of any constitutional prohibition, the legislature may change the amount of compensation of any officer, and the same will apply to officers then in office, as well as to those to be thereafter elected, citing the case of *County of Douglas v. Timme,* 32 Neb. 272, but it is just as clearly stated in the second syllabus of that same case that, where an office is created by the Constitution, the compensation of the officer can neither be increased nor diminished during his term of office.

Respondent refers to section 3, art. XVII of our Constitution, fixing the salaries "until otherwise provided by law," and says this is an express grant of power to the legislature to fix the salaries. This is a strained construction of the law, for the language gives the legislature the power, which otherwise it would not have, to change the salaries of such officers, but such change must not be made in a manner to violate other provisions of the Constitution relating thereto.

Statutes *in pari materia* should be construed together, so as to harmonize and give effect to their various provisions. Therefore, for the sake of clarifying the meaning of the two sections of the Constitution controlling in this case, let us combine them somewhat freely, so that we may construe their provisions together. The two sections would then read somewhat as follows:

"Until otherwise provided by law the following salaries shall be paid: * * * members of the state railway commission, each $5,000 per annum. The legislature shall never grant any extra compensation to any public officer * * * after the services have been rendered * * * nor shall the compensation of any public officer * * * be increased or diminished during his term of office, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof."

In our opinion, this composite rendering of these sections does away with any differences, and with the argument that the legislature may make any change it desires in the salaries of constitutional officers during their term of office.

Constitutional provisions are repugnant to each other only when they cannot be enforced without substantial conflict. Differences must, if possible, be reconciled.

5. The purpose of section 19, art. III of the Constitution, was to establish and maintain the independence of the three branches of the government.

Our system of government distributes the powers between three coordinate departments, the legislative, the executive, and the judicial. Each of these three independent departments derives its power directly from the people, and is responsible to them.

Alexander Hamilton, in the Federalist, No. 78, said: "The executive not only dispenses the honors, but holds the sword of the community: The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated: The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment."

It has been said that the legislative department enacts the laws by which both of the other departments are controlled and bound. The executive has a qualified veto power upon legislative action. Under our plan of government, while the three departments are separate, yet neither can overlook the authority of another department, for all three departments are mutually dependent, which fact guarantees that governmental machinery will run smoothly. The legislature is in many ways the stronger of the three departments, for it has almost unlimited authority to deal with all subjects, being restrained only by the Constitution of our state. The purpose of the Constitution is to prescribe the permanent framework of our system of government and to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted. The people of the state, by adopting

a Constitution, have put it beyond the power of the legislature to pass laws in violation thereof. It has been said many times that the Constitution is unlike a statute of the legislature, in that it is not intended to meet existing conditions, and therefore does not deal with details, but sets out general principles. Woodrow Wilson, in his "Constitutional Government in the United States," said that ours was the only constitutional system balanced and controlled by three such independent departments of government.

James Wilson, one of the signers of the Constitution, and a justice of the United States supreme court, in one of his law lectures said that the independence of each department of our government required that its proceedings should be free from the remotest influence, direct or indirect, of either of the other two departments. Mr. Justice Story said that neither of the departments ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers. 1 Story, Constitution (4th ed.) sec. 530.

6. The provision against increasing or decreasing the salary of a public officer during his term of office has found a place in the Constitutions of many of our states, for it has been demonstrated over and over that, unless the power to change salaries of public officers during their term was taken from the legislature, much of the valuable time of that body would be consumed in so doing. The legislature may increase or decrease the salaries of public officers, and it is at perfect liberty to do so at any session, provided it acts within the constitutional limitations. Among the positive limitations in our Constitution is the one that any increase or decrease of a constitutional officer's salary cannot take effect during that term of office. It is the purpose of this provision of our Constitution that such officers, upon assuming public duties, will receive as compensation for such services the amounts fixed at the time the duties are commenced, and that they will clearly understand that such compensation can-

not be increased during their term of office, nor may it be decreased without conflicting with the clear intent and meaning of the constitutional provision which we are considering.

7. It has been held that the constitutional provision that the compensation of a public officer shall not be increased or diminished during his term of office is explicit and unambiguous. Support for the discussion of the law found herein will be found in these cases: *County of Greenlee v. Laine,* 20 Ariz. 296; *O'Donoghue v. United States,* 289 U. S. 516, *Evans v. Gore,* 253 U. S. 245, 64 L. Ed. 887; *Miles v. Graham,* 268 U. S. 501, 69 L. Ed. 1067; *Elmen v. State Board of Equalization and Assessment,* 120 Neb. 141; *Morrill County v. Bliss, ante,* p. 97; *Hooper Telephone Co. v. Nebraska Telephone Co.,* 96 Neb. 245; *State v. Moores,* 61 Neb. 9.

8. As the members of this court reached a unanimous opinion in the case at bar, the judgment was entered and released at once, as has been done before in a few instances.

Senate File No. 52, enacted at the 1933 session of the legislature, is in conflict with section 19, art. III of the state Constitution, in so far as it purports to change the salary of the state railway commissioner during his term of office.

Therefore, the court finds that relator's compensation for his term of office is wholly unaffected by Senate File No. 52, and that the state treasurer should countersign and pay the said warrant in the amount of $1,250. Writ of mandamus to issue as prayed.

WRIT ALLOWED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. RALSTON STATE BANK, APPELLEE: CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED JULY 20, 1933. No. 28662.

Receivers: ATTORNEY'S FEES. "Reasonable fees for necessary services performed by attorneys for the receiver of an insolvent state bank may be allowed as an expense of the receivership." *State v. First State Bank of Bethany*, 123 Neb. 620.

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

Skiles & Skiles, I. D. Beynon and *Crossman, Munger & Barton,* for appellant.

F. C. Radke, Barlow Nye, Arthur F. Mullen and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

ROSE, J.

In a proceeding in the district court for Douglas county to wind up the affairs of the Ralston State Bank, an insolvent corporation, Clarence G. Bliss, while secretary of the department of trade and commerce, was appointed receiver. July 1, 1931, his authority as receiver was questioned and performance of his duties as such was then interrupted. With the bank in course of liquidation July 8, 1931, E. H. Luikart was appointed secretary of the department of trade and commerce and took the position that his appointment automatically made him receiver instead of Bliss. By judicial order July 18, 1931, Luikart was appointed receiver instead of Bliss, but the latter was not discharged as receiver nor his final report approved until September 18, 1931. This is a controversy between Luikart and Bliss over expenses of attorneys and their fees for services performed for Bliss after his authority to act as receiver had been challenged and during the time occupied by him in making his final report, transferring assets to his successor and procuring his dis-

charge. The same situation exists in five other proceedings to wind up the affairs of insolvent state banks in the fourth judicial district.

For expenses and services in the six cases, Bliss presented a claim for $468.79, one-sixth, or $78.13, to be allocated to each bank and paid as costs of the receivership out of funds in the hands of the receiver. The claim was resisted on the ground that the services of auditors and attorneys connected with the department of trade and commerce were available to Bliss, that the employment of special counsel was unnecessary and that Bliss was not entitled to any allowance for any expenses or fees of attorneys employed by him. The trial court adopted Luikart's theory of the controversy and rejected the entire claim. Bliss appealed.

The questions presented by the appeal were all determined adversely to Luikart, receiver, in *State v. First State Bank of Bethany*, 123 Neb. 620. The record shows that the circumstances in the controversy between the former and the substituted receiver were such as to call for attorneys selected by Bliss to aid him in the discharge of his duties as receiver from the time his authority as such was challenged July 1, 1931, until he was discharged September 18, 1931. The necessity for the professional services of the attorneys employed by Bliss is clear. The reasonableness of the expenses and fees for which he made his claim was shown by uncontradicted evidence, the objection being that he was not entitled to an allowance for any attorneys' fees. The trial court erred in disallowing the claim. The judgment of the district court is therefore reversed and the cause remanded, with directions to allow Bliss the expenses of his attorneys and their fees in the sum of $468.79, in the six cases, and allocate to each $78.13, with annual interest thereon at the rate of 7 per cent. per annum from the date on which the claim was disallowed in the district court and make the allowance an expense of the receivership payable from funds in the hands of the receiver.

REVERSED.

STATE V. BANK OF BENSON, NO. 28663.
STATE V. COMMERCIAL STATE BANK, NO. 28664.
STATE V. SECURITY STATE BANK, NO. 28665.
STATE V. WASHINGTON COUNTY BANK, NO. 28666.
STATE V. FARMERS & MERCHANTS BANK, NO. 28667.

FILED JULY 20, 1933. Nos. 28663-28667.

APPEALS from the district courts for Douglas and Washington counties: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

Skiles & Skiles, I. D. Beynon and *Crossman, Munger & Barton,* for appellants.

F. C. Radke, Barlow Nye, Arthur F. Mullen and *G. E. Price, contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

ROSE, J.

For the reasons stated in the companion case of *State v. Ralston State Bank,* No. 28662, *ante,* p. 245, the judgment in each of the above entitled cases is reversed and the cause is remanded to the district court to enter the judgment directed by the opinion in No. 28662.

REVERSED.

VAN E. PETERSON, RECEIVER, APPELLANT, V. CHARLES B. WAHLQUIST ET AL., APPELLEES.

FILED JULY 20, 1933. No. 28414.

1. **Pleading.** The sufficiency of a petition cannot be raised by incorporating a demurrer in the answer.
2. ———. A petition will be liberally construed when its sufficiency is first attacked by objection to introduction of evidence.
3. **Fraudulent Conveyances: PLEADING.** In a creditor's suit attacking a voluntary conveyance of realty by judgment debtor to wife, the petition may be sufficient without charging fraudulent intent, or fraud, in literal terms, where the facts pleaded are sufficient to show actual fraud.

4. ———: INTENT: PROOF. Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn.
5. ———: ———: PRESUMPTION. One is conclusively presumed to intend the obvious and probable consequences of his voluntary act.
6. ———: BANKS: LIABILITY OF STOCKHOLDERS: CREDITORS. The contingent liability of a bank stockholder for the amount of his stock, when imposed by the Constitution and his subscription contract, makes depositors existing creditors, within the meaning of the rule that a voluntary conveyance of all his property to his wife, without consideration, is fraudulent as to them.
7. ———: ———: ———. Real estate, comprising all the property of a bank stockholder, voluntarily conveyed to his wife, without consideration, when the bank is solvent, may be subjected to the payment of a judgment in favor of bank creditors on his liability to them for the amount of his stock, though the contingent claim for such liability became absolute after the transfers.
8. ———: CONTINGENT LIABILITIES. "A contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute, and whoever has a claim or demand arising out of a preexisting contract, although it it may be contingent, is a creditor whose rights are affected by such conveyances and can avoid them when the contingency happens upon which the claim depends." 27 C. J. 473.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Reversed.*

Butler & James, Stiner & Boslaugh and *Edmund Nuss*, for appellant.

R. O. Canaday and *J. M. Turbyfill, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and BEGLEY and MEYER, District Judges.

GOOD, J.

This is a suit in the nature of a creditor's bill. Van E. Peterson, receiver of the Bank of Commerce at Hastings, is plaintiff and Charles B. Wahlquist and his wife, Estelle B. Wahlquist, are defendants. After the receiver exhausted the assets of the bank in partial payment of its

debts, unpaid claims of creditors aggregated $334,782.21. The debts were incurred while Charles B. Wahlquist owned 37½ shares of the bank's stock, each for $100. On his stockholder's liability to the amount of his stock, which the Constitution and the stock subscription imposed, plaintiff recovered a judgment against him January 20, 1930, for $3,750. Execution on the judgment was issued March 28, 1930, and returned wholly unsatisfied. Beginning March 29, 1923, the wife, through mesne conveyances of all her husband's real estate, without paying him any consideration, acquired the legal title to lot 7 and part of lots 8 to 12, inclusive, block 18, original town of Hastings, as described in the petition. The purpose of this suit is to subject this realty to the payment of the judgment.

This suit was defended on the grounds that the petition did not state facts sufficient to constitute a cause of action against defendants; that fraud was not pleaded; that intent to delay or defraud creditors in collecting their claims was not stated; that the bank was solvent when the husband parted with his title and when he had a right to make a gift to his wife; that his liability as a stockholder was contingent and did not become absolute until long after he transferred his realty in good faith without any fraudulent intent or reason to anticipate the future insolvency of the bank; that plaintiff is not such a creditor as is entitled to subject the realty to the payment of the judgment.

Upon a trial of the cause, the district court found the issues in favor of defendants and dismissed the action. Plaintiff appealed.

To justify the dismissal of the cause, defendants argue that the petition is fatally defective in failing to plead in direct terms active fraud, fraudulent intent and an absolute liability of the stockholder when he parted with title to his real estate. This position does not seem to be tenable. The petition pleads the husband's continuous ownership of the stock from a time earlier than his ex-

ecution of the deeds; his liability as stockholder; his conveyances without consideration; the insolvency of the bank; the insufficiency of assets to pay claims of creditors; the judgment on his liability as a stockholder; the return of an execution wholly unsatisfied; and the wife's title subject to the judgment. The petition alleges also that the husband owned real estate prior to March 29, 1923. The sheriff's return, in connection with other facts pleaded, shows that he had parted with the legal title to all his property before the execution was returned, thus depriving himself of all means to meet his contingent or resulting, absolute obligations to creditors of the bank.

Defendants attempted, by incorporating a demurrer in their answer, to challenge the sufficiency of the petition. Under the Nebraska Code, a demurrer is not a proper part of an answer, and should be disregarded. *Fidelity & Deposit Co. v. Parkinson,* 68 Neb. 319. Defendants further challenge the sufficiency of the petition by objecting to the introduction of any evidence. When first so attacked, the petition should be liberally construed. 49 C. J. 821.

The petition, in literal terms, does not charge fraud or fraudulent intent on the part of the grantor. It does charge that, without consideration, the husband voluntarily conveyed his realty to his wife at a time when he had existing creditors whose claims were subsequently reduced to judgment, execution issued and returned unsatisfied for the want of property whereon to levy.

This court has frequently held that a deed by a debtor to an immediate member of his family is presumptively fraudulent as to existing creditors, and in litigation between him and grantees on that issue the burden is on the vendee to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith,* 123 Neb. 388, and cases therein cited. We think the petition, when liberally construed, states a cause of action, because it states facts which would entitle plaintiff to recover, unless defendants establish the *bona fides* of the transaction by a preponderance of the evidence.

Many of the cases cited and relied upon by defendants are inapplicable. Some relate to attacks made upon conveyances by subsequent creditors; others, where the debtor retained sufficient property at the time of the conveyance to satisfy the claims of then existing creditors; and still others, where the question was as to whether the consideration for the conveyance was adequate. In the instant case, the burden was cast upon defendants of establishing the *bona fides* of the transaction between them.

The record discloses, without dispute, that the conveyances were without consideration; that they included all of the debtor's property, save his bank stock, and that he stripped himself of property out of which the plaintiff could satisfy his claim. Under such circumstances, the conveyances were actually fraudulent as to existing creditors. It is suggested and argued that Mr. Wahlquist had a laudable motive for making the conveyances. The motive, under the circumstances, is not material. Where the obvious and probable consequence of a debtor's voluntary conveyance of his property is to strip himself of his property and render it impossible for his existing creditors to satisfy their claims, he cannot be heard to say that he did not intend to hinder, delay or defraud such creditors. He is conclusively presumed to intend the obvious and probable consequences of his voluntary acts, and where such acts result in preventing existing creditors from satisfying their claims out of his property, it is an actual fraud upon them, which he is conclusively presumed to have intended.

We will now determine whether the contingent liability of a bank stockholder for the amount of his stock, imposed by the Constitution and his subscription contract, makes depositors existing creditors, within the meaning of the rule that a voluntary conveyance of all of his property to his wife, without consideration, is fraudulent as to them. This liability was imposed by the Constitution to protect creditors and to create public confidence

in banks chartered by the state. It is by construction a part of the stockholder's contract of purchase of stock. The bank invited public patronage by reason of that liability. Depositors entrusted their money to the bank in reliance on it. If a stockholder, who enjoys the fruits of his investment in stock while the bank is prosperous, is permitted to escape his stockholder's liability by transferring all his property to his wife without consideration before dividends cease or the bank fails, the purpose of the Constitution and the protection of depositors may be thwarted with impunity. Neither law nor equity sanctions such a method of escaping constitutional or contractual obligations. Every fact essential to the claim of plaintiff, who stands in the shoes of creditors, was conclusively established by undisputed evidence. The record will admit of no other conclusion. Depositors were contingent creditors when the husband's deeds were executed and continuously thereafter, whether the stockholder's liability was constitutional or contractual or both. The rules applicable to the issues and facts have been stated as follows:

"Whoever has a claim or demand on a contract in existence at the time when a fraudulent conveyance is made is a creditor within the meaning of the statute, and the holder of a contingent claim is as fully protected by the statute as one that is absolute. Consequently liability as surety is as clearly within the statute as liability as principal. In cases of contingent liability, the liability, whenever happening, relates back to the date when it was originally incurred." 12 R. C. L. 492, sec. 25.

"Although there is some authority to the contrary and some doubt has been expressed as to the strict applicability of the rule, according to the weight of authority a contingent liability is as fully protected against fraudulent and voluntary conveyances as a claim certain and absolute, and whoever has a claim or demand arising out of a preexisting contract, although it may be contingent, is a creditor whose rights are affected by such conveyances and can avoid them when the contingency happens

upon which the claim depends." 27 C. J. 473. See, also, *Ames v. Dorroh*, 76 Miss. 187, 71 Am. St. Rep. 522; *Alston v. Rowles*, 13 Fla. 117; *Anderson v. Anderson*, 64 Ala. 403; *McLaughlin v. Bank of Potomac*, 7 How. (U. S.) 220, 12 L. Ed. 675; *Johnson v. Rutherford*, 28 N. Dak. 87; *Brownell v. Anderson*, 117 Neb. 652.

For the reasons stated, the conclusion is that plaintiff is entitled to a decree subjecting the real estate hereinbefore described to payment of the judgment in favor of the receiver for $3,750, interest and costs. For the purpose of granting that relief, the judgment below is reversed, and the cause remanded to the district court.

REVERSED.

DOUGLAS COUNTY, APPELLEE, V. BARKER COMPANY ET AL.: MICHAEL P. JORDAN, APPELLANT.

FILED JULY 20, 1933. No. 28529.

1. Appeal. To secure a limited review of an equity case, a motion for a new trial in the court below is not required.
2. Taxation: DECREE: VACATION. Matters embraced in or concluded by a judicial judgment or decree, after the lapse of more than two years from the due entry thereof, may not afford basis of motion to vacate, or of objections to a sheriff's sale made pursuant thereto.
3. ———. The determination that section 77-2039, Comp. St. 1929, was constitutional, as announced in *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, approved.
4. Evidence examined, and *held* to sustain the judgment of confirmation entered in the district court.

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

A. H. Murdock, for appellant.

Henry J. Beal, H. C. Schoening and *C. F. Connolly, contra.*

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

EBERLY, J.

This is an appeal by Michael P. Jordan from an order of confirmation entered in the above entitled cause on April 19, 1932, the same being a tax foreclosure carried on pursuant to section 77-2039, Comp. St. 1929.

The transcript on appeal filed in this court commences with an order of sale issued upon a tax foreclosure proceeding brought by the county of Douglas pursuant to the provisions of sections 77-2039 et seq., Comp. St. 1929. Then follows: "Sheriff's Return To Order Of Sale, Proof Of Publication, Objections To Confirmation of Sale," and motion to set aside the same filed by the appellant; "Motion To Confirm Sale" (by county of Douglas); order of the district court for Douglas county overruling objections and confirming sale, and notice of appeal. Appellant has also filed, as part of his record, a bill of exceptions duly allowed containing evidence presented to the trial court upon the hearing of his objections to confirmation.

Appellee challenges the right of this court to consider the evidence preserved in the bill of exceptions for the reason that appellant filed no motion for a new trial as required by sections 20-1142, 20-1143, and 20-1144, Comp. St. 1929. The cases of *In re Estate of Buder,* 117 Neb. 52, *In re Estate of Swan,* 82 Neb. 742, *Young v. Estate of Young,* 103 Neb. 418, and *Dunham v. Courtnay,* 24 Neb. 627, are cited as supporting this contention.

It is to be observed that the cases cited are law actions, as distinguished from actions in equity. The sections of the statute cited, in identical terms, formed a part of our first Civil Code, originally adopted in 1866. As to the form of the action necessitated by the facts of the present case, the controlling statute is a direction "to foreclose the lien for all taxes then delinquent, in the same manner, except as herein provided, and with like effect as if such lien were a mortgage." Comp. St. 1929, sec. 77-2039.

This procedure necessarily invokes equitable jurisdiction and implies the exercise of equitable powers. In-

deed, it must be deemed an adequate authorization for the maintenance of a suit in equity for the foreclosure of tax liens. *County of Lancaster v. Rush,* 35 Neb. 119; *County of Lancaster v. Trimble,* 34 Neb. 752; *Logan County v. Carnahan,* 66 Neb. 693.

Prior to 1905, under the provisions of section 675 of the Civil Code then existing, an appeal in actions in equity was provided in which no motion for a new trial was necessary. *Swansen v. Swansen,* 12 Neb. 210; *Smith v. Silver,* 58 Neb. 429.

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

Taking up the objections to confirmation of the sale, in the light of the evidence in the record, it must be remembered that, in a mortgage foreclosure, "the only matter settled and adjudicated in the proceedings and order of confirmation is as to the proceedings of the sheriff and those acting under and with him in the levy, appraisement, advertising, making, and returning of said sale." *Best v. Zutavern,* 53 Neb. 619.

"On a motion to vacate a judicial sale, objections to the decree under which such sale was made cannot be considered." *Cox v. Parrotte,* 59 Neb. 701. See, also, *Cochran v. Cochran,* 1 Neb. (Unof.) 508; *Hoover v. Hale,* 56 Neb. 67.

It is quite obvious, under the rule above announced, that appellant's contentions as to the alleged failure of the county treasurer to offer the property for sale for

taxes for three consecutive years before it can be included in a foreclosure action cannot be sustained. The claimed failure of the county treasurer to offer the land at a public tax sale at his office, etc., are matters for consideration, if at all, prior to the entry of the decree of foreclosure and sale. *Logan County v. Carnahan*, 66 Neb. 693. Valid objections to confirmation of sale may not be based thereon.

As to the claim of the unconstitutionality of section 77-2039, Comp. St. 1929, it may be said that, upon the consideration of similar questions, in *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.*, 121 Neb. 493, such section 77-2039 was determined valid and constitutional. With that decision, and the reason on which the same proceeds, we remain content.

We have carefully examined the proceedings of the sheriff in the instant case in carrying out the directions of the order of sale, and find that the same are in all respects regular, in conformity with law, and they are approved.

The record in this case failing to disclose any *bona fide* attempt on the part of appellant to redeem the lands in suit, no question as to the amount of money required for a lawful redemption from this sale is presented by the record for determination.

No error appearing, the action of the trial court in overruling appellant's objections to the sheriff's sale, and in its confirmation of the same, is correct, and is

AFFIRMED.

HAROLD O. WOODS, COUNTY TREASURER, APPELLANT, V. BROWN COUNTY, APPELLEE.*

FILED JULY 20, 1933. No. 28575.

1. **Counties and County Officers: COUNTY TREASURER.** The county treasurer is a ministerial officer only, charged with many duties, and without judicial power to pass on the validity and regularity of the acts and proceedings of other officers.

*Reversed on rehearing. See opinion, p. 692, *post*.

2. ———: ———. All money received by the county treasurer for the use of the county shall be paid out by him only on warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law. Comp. St. 1929, sec. 26-1301.
3. ———: COUNTY BOARD. By statute it is made "unlawful for the county board of any county in this state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent. of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county in excess of the tax levy for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund." Comp. St. 1929, sec. 26-116.
4. ———: COUNTY TREASURER. A county treasurer has no authority to liquidate claims against the county.
5. ———: ———. A county treasurer's duties as to the payment of public money being prescribed by statute, he cannot excuse their discharge in a different manner. He cannot pay out the public funds entrusted to his custody in an unlawful and unauthorized manner, take an assignment of the claim and be reimbursed by the county, and thus do indirectly what the law prohibits him from doing directly.
6. ———: ———. Where a county treasurer undertakes to pay unallowed salary claims against a county from certain sinking funds of the county entrusted to his custody without a legal warrant being issued therefor, said treasurer cannot take assignments of said salary claims, and thereafter file and recover the same as a valid obligation of the county, unless the said sinking funds are reimbursed prior thereto.

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

William Ely, for appellant.

Ben H. Burritt, contra.

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

BEGLEY, District Judge.

This action is an appeal from a judgment of the district court for Brown county, Nebraska, sustaining the action of the county commissioners in the rejection of 216 salary claims against said county.

The evidence is not in dispute and was presented by an agreed stipulation. It shows that the plaintiff is the county treasurer of Brown county, Nebraska, and that the various claims are for salaries due the various county officials of said county from February 1, 1930, to July 21, 1931, and that said salaries as shown by said claims were valid obligations against said county; that some time prior to the month of February, 1930, the condition of the funds of Brown county was such that 85 per cent. of the levy made for the general fund was about to become exhausted and there was no method for the immediate payment of said officers' salaries; that the county treasurer had in his hands a large sum of money in certain sinking funds belonging to the various subdivisions of Brown county. It was arranged by the county treasurer and the board of county commissioners that the said treasurer would take assignments from the various county officers for their salary claims, provided same were duly signed by the said officers and approved by the county board; that he would pay the said claimants the amount of their claims out of the sinking funds in his hands, and that said claims would be allowed by the county board and warrants issued therefor, whenever the proper funds were available; that pursuant to this arrangement salary claims were duly filed by the respective claimants in the office of the county clerk and were approved by the county commissioners as correct, and were respectively assigned by the claimants to the treasurer; the county treasurer thereupon drew his check payable to said claimants for the amount of such claims and retained in his possession a true copy of such claims with such indorsement thereon, and said claims were retained by the county treasurer as cash items for the amount thereof and were

accounted by such county treasurer as cash; that the appellant herein came into office on January 8, 1931, and that at said time the previous treasurer, A. D. Kirkpatrick, held $13,779.48 of said claims as aforesaid, assigned to him, which he delivered to the appellant in lieu of that amount of cash shown to be then in his hands; that said appellant continued to handle said salary claims in the same manner as his predecessor and has continued to account for all of said assigned claims as cash on hand; has accounted to the state auditor of the state of Nebraska for said assigned claims as cash on hand, and no criticism thereof was made by said examiner until the month of June, 1931, when said examiner informed the appellant to discontinue the same, and suggested that a judgment levy be made to pay said claims; that said claims amount at this time to the sum of $22,016.76.

The appellant herein, the county treasurer, filed said assigned claims before the board of county commissioners of Brown county, Nebraska, and on the 3d day of May, 1932, said board rejected and disallowed each and all of said claims. The appellant, the county treasurer, thereafter appealed said action to the district court for Brown county, Nebraska, and the county of Brown filed an answer in which it admitted the correctness of said claims and the assignment thereof to the county treasurer and alleged that same were disallowed by the county board for the reason that the general fund of said county had on said date no funds with which to pay said claims or any of them. A jury was waived and the district court entered judgment for the defendant holding that the transaction constituted a payment of said salary claims, and that the plaintiff, as county treasurer, and his predecessor in office acquired no title, right or ownership in and to said claims and could not maintain this action; that the payment by the plaintiff and his predecessor in office of said salary claims out of sinking funds was an unauthorized act and in violation of the laws of the state

then in force and dismissed the plaintiff's action. The plaintiff, as county treasurer, has appealed to this court.

The appellee has not seen fit to favor us with a brief attempting to set forth any theory on which the judgment of the district court might be sustained. We think that a case involving so important a question of expenditure of public funds, as the one at issue in this case, is deserving of some attention on the part of the county of Brown.

The appellant contends that there was no issue raised in the case in the lower court and he should have had judgment in his favor on his motion to that effect, but we think under the stipulation of facts, upon which the case was heard, that there was sufficient evidence as to the payment of the claims to challenge the attention of the court. The burden was on appellant to show some amount was due him. It must be borne in mind that no claims were filed with the county commissioners and audited by that body and no warrant issued authorizing the payment of the same out of the general fund of the county.

The county treasurer is a ministerial officer only, charged with many duties, and without judicial power to pass on the validity and regularity of the acts and proceedings of other officers. 15 C. J. 511.

Section 26-1301, Comp. St. 1929, provides: "It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him. All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

Section 26-1302, Comp. St. 1929, provides, that when there is not sufficient funds in the treasury to pay the same, all warrants issued by the county board shall, upon being presented for payment, be indorsed by the treasurer,

"not paid for want of funds," and warrants so indorsed shall draw interest from the date of such indorsement. Thus we find that the county treasurer can only pay out money on warrants issued by the county board according to law, and when there is no money in his hands, to indorse the same, "not paid for want of funds."

Section 26-115, Comp. St. 1929, provides: "Upon the allowance of any claim or account against the county, the county board shall direct the county clerk to draw a warrant upon the county treasurer in payment thereof: Such warrant to be signed by the chairman of the county board, except as hereinafter provided, and countersigned by the county clerk, and sealed with the county seal, but the same shall not be delivered to the party until the time for taking an appeal has expired."

Section 26-116, Comp. St. 1929, provides as follows: "It shall be unlawful for the county board of any county in this state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent. of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county in excess of the tax levy for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

Section 26-117, Comp. St. 1929, provides: "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such fund."

Section 26-119, Comp. St. 1929, provides that, before any claim against the county is audited and allowed, the claimant or his agent shall verify the same by affidavit,

and that all claims against the county must be filed with the county clerk.

Section 26-130, Comp. St. 1929, provides: "No county officer * * * shall in any manner, either directly or indirectly, be pecuniarily interested in or receive the benefit of any contracts executed by the county for the furnishing of supplies or any other purpose."

The case of *State v. Scotts Bluff County*, 64 Neb. 419, lays down the rule that the county commissioners must first draw a warrant before money can be paid out by the county treasurer.

In *Citizens Bank v. Williams*, 134 Ga. 312, it was held that a county treasurer has no authority to liquidate claims against the county.

In this case the county treasurer, without the claims having been audited and allowed by the county board, and a warrant drawn, directing him to pay the same out of the general fund of the county, himself attempted to liquidate the claims and to pay the same, not from the general fund which was depleted, but from special sinking funds which he held in his possession for the benefit of various subdivisions of the county. We think this was clearly illegal and without color of authority, and an attempt to exercise independent powers in regard to the payment of claims.

In *State v. McCollough*, 85 Mont. 435, 66 A. L. R. 1033, it was held that a public officer cannot lawfully act as the agent of a person where the private agency comes in conflict with his official duties.

The county treasurer's duty as to the payment of public money being prescribed by statute, he cannot pay out the public funds entrusted to his custody in an unlawful and unauthorized manner, take an assignment of the claim and attempt repayment from the county, unless the said sinking funds are reimbursed prior thereto.

However, we are not concerned with the effect of the treasurer's acts in this case. It is clearly shown that the claims were paid from the county treasury, and as there

is no issue as to the liability of the treasurer to the county, we express no opinion upon this point.

The judgment of the district court is therefore

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. CITY OF AURORA, APPELLEE.

FILED JULY 20, 1933. No. 28806.

1. **Banks and Banking:** PLEDGE OF ASSETS. A state bank can only pledge its assets for the security of deposits when duly authorized so to do by law.
2. ———: ———. Under section 77-2601, Comp. St. 1929, a state bank designated as a depository of public funds belonging to a city of the second class may by contract pledge assets for the security of the deposit, and such contract is binding on all parties thereto.
3. ———: ———. The statute requires that a deposit of public money in a bank shall be a secured deposit subject to negotiation between the bank and the city and the provisions of section 8-140, Comp. St. 1929, do not apply.

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

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

Craft, Edgerton & Fraizer, contra.

Frank A. Anderson, Ross & Sampson, A. W. Storms, Lewis C. Westwood, M. M. Maupin and *Seymour S. Sidner, amici curiæ.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and BEGLEY and MEYER, District Judges.

BEGLEY, District Judge.

This is an appeal by E. H. Luikart, as receiver of the Fidelity State Bank of Aurora, from the judgment of the district court for Hamilton county, by which that court awarded to the defendant, city of Aurora, certain bonds,

assets of the Fidelity State Bank of Aurora, Nebraska, which are now in the possession of the Federal Reserve Bank of Kansas City, Omaha Branch, Omaha, Nebraska. under an alleged pledge agreement for the security of the deposits of the defendant city's funds in the Fidelity State Bank.

The evidence, which is stipulated, shows that the Fidelity State Bank of Aurora is a state bank, chartered to do a commercial banking business in Nebraska. In December, 1930, the city of Aurora, whose city officials are identical with the officers of the bank, entered into a written pledge agreement with the bank whereby certain assets of the bank in the sum of $17,000 were put into the hands of the Federal Reserve Bank of Kansas City, Omaha Branch, which served as custodian of these funds only, to be held to indemnify the city for its deposit in case of loss. The city of Aurora, which is a city of the second class, passed an ordinance requiring a pledge of assets by the bank as security for the deposit of city funds in place of the bond provided by statute and which the Fidelity State Bank was unable to furnish. Both city and bank officials, being the same natural persons, believed in each of their respective separate capacities that they were complying with the law and made no effort to conceal the pledge agreement from the department of trade and commerce, and the department made no objection to the agreement. It is stipulated that it has become the custom for state banks to pledge assets to secure deposits of the funds of cities of the second class and no objection has been made to this practice by the department at any time. This is further evidenced by the fact that some five city attorneys of different cities of the second class in this state have filed separate briefs as *amicus curiæ*, on behalf of the position of the defendant in this case.

On September 23, 1932, the Fidelity State Bank was adjudged insolvent and E. H. Luikart was named its receiver. The city of Aurora had on deposit $29,357.36.

Demand was made upon the Federal Reserve Bank for the securities, both by the receiver and the city. The Federal Reserve Bank still retains the securities pending the settlement of this case, but has filed no brief in the case.

The receiver contends that a state bank has no power to pledge its assets to secure the deposit of a city of the second class, nor has a city power to receive such a pledge; that the pledge agreement was *ultra vires* and void and the bonds held by virtue of it should be restored to the bank. The city of Aurora denied these allegations, contending that the agreement was valid and that the bonds should be delivered to the city.

The question presented is whether the pledge of securities for this deposit was within the powers of the bank and the city and therefore valid.

The courts of this country are not in accord as to whether banks may pledge their assets as securities for deposit of public or private money. This difference of opinion has arisen by reason of the difference of state statutes and a contrariety of economic views in applying the statutes and formulating state policies.

It is admitted that the legislature may, by enactment, provide for the pledging of securities of this nature, and we have a law providing for the pledging of certain security by a bank in cases of state and county deposits and deposits by a city of the first class (Comp. St. 1929, secs. 77-2503, 77-2508, and Comp. St. Supp. 1931, sec. 16-713), but we have no specific statute providing for the pledging of assets by a bank for the security of deposits from cities of the second class, as in the present case.

The appellee relies upon section 77-2601, Comp. St. 1929, as giving sufficient power for the sustaining of the contract in this case. Said section provides: "In all cases in which public moneys, or other funds belonging to the state or to any county, school district, city or municipality thereof, have been deposited or loaned to any person or persons, corporations, bank, copartnership or other firm or association of persons; it shall be lawful for

the officer or officers making such deposit or loan, or his or their successors in office, to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto: Provided, nothing herein contained shall be construed to in any manner affect the liability of any surety or signers of any official bond hereafter given or made in this state."

This statute was enacted in 1879 for the purpose of authorizing the collection by suit of public moneys, loaned or deposited upon contracts by their custodian. *McIntosh v. Johnson,* 51 Neb. 33.

In the case of *State v. First State Bank,* 122 Neb. 109, the bank pledged part of its assets in the form of bonds to secure the deposits of the city treasurer. The bank subsequently closed. The bonds were sold and the proceeds turned over to the city to apply upon its deposit. The general practice of accepting such bonds as a pledge was clearly recognized and approved. The court held: "A city that exacts from a state bank collateral security for deposits, receives the proceeds of the security after insolvency of the bank and presents to the receiver a claim for excess of deposits over such proceeds, is in the class of depositors 'otherwise secured' and not entitled to share the assets of the bank on an equality with depositors in the class 'not otherwise secured,' within the meaning of the statute providing that depositors and holders of exchange in the latter class shall have the first lien, with the exception of taxes."

In *Liberty High School District v. Currie,* 122 Neb. 173, the court said: "This court is committed to the rule that section 77-2601, *supra,* makes valid the contract of a depository bank to indemnify deposit of such public funds as are specified in said section."

In *Bliss v. Mason,* 121 Neb. 484, it was held that said section 77-2601, Comp. St. 1929, authorized a state bank to pledge its assets to indemnify sureties on a depository

bond given by such bank to secure a deposit of county funds.

In *Bliss v. Pathfinder Irrigation District*, 122 Neb. 203, it was held that a bank had no authority to pledge its assets to secure a deposit from an irrigation district which, while a public corporation, was not a municipality and therefore did not come within the terms of said act. The court in that case also examined the state statute and found that outside of section 77-2601 there was no other statute authorizing such pledge. The court held: "It is clear that the legislature intended to deny, and has denied, to state banks the right to pledge their assets to secure deposits, except in those instances where expressly authorized so to do."

This statement would seem to be in conflict with that made in *Bliss v. Mason, supra*: "That a state bank, designated as a depository, may, in the absence of a statute prohibiting it, pledge its assets to secure the deposit of public funds."

The statement in the *Mason* case was not necessary to a decision in that case, but is merely dictum. The statement in the *Pathfinder* case is not entirely accurate, as the legislature has not denied such right to pledge assets.

State banks in this state have only such powers as are given them by statute. These powers, however, may be either express or implied, and the latter class is limited to those powers which are reasonably necessary to carry out those of the former class. No express authority to pledge assets to secure deposits of a city of the second class is found in the banking statute. Officers of a municipality are limited in the control and expenditure of public funds and are sometimes prohibited from entering into certain contracts by statute.

We think a fair statement of the rule would be that banks are only authorized to pledge collateral assets for the security of deposits when authorized to do so by law, and that section 77-2601 authorizes banks to pledge assets for the security of deposits of a city of the second

class by contract, and that such contract is binding on both parties, in the absence of any statute prohibiting the same by either party.

It is argued that the contract is void under section 8-140, Comp. St. 1929, which makes it a felony for any officer or employee of a state bank, directly or indirectly, to give any consideration of value or render any service for, or at the request of, a depositor or any other person as an inducement, in addition to the legal interest, for making or retaining a deposit in the bank, or for any depositor to accept any such inducement. This section was cited in the *Pathfinder* case, but is not applicable to the case at bar.

In this case the city treasurer was bound to deposit the money in the bank. Comp. St. 1929, sec. 17-515. It also requires the bank to make application as a depository and thus the deposit is subject to contract. It is a secured deposit and therefore said section would have no application in this case.

Section 77-2601, above quoted, provides that all contracts for the security or payment of any such moneys or public funds shall be held to be good and lawful contracts, binding on all parties thereto. The contract between the appellant in this case and the city of Aurora was that the bank would pledge certain assets in order to secure the deposit from the city. This was carried out in good faith upon both sides, and under the rule in Nebraska a receiver takes charge of banking affairs where the bank left them, and cannot generally open closed transactions which would conclude the bank if solvent. The receiver of an insolvent bank takes and holds the assets as to liens, rights and liabilities as they existed at the time of his appointment.

In this case the bank has had the benefit of the deposit and the receiver is not now entitled to avoid the contract executed by the bank while solvent, in which the assets of the bank were pledged to secure the deposits of the city. There is no statute prohibiting, either directly or by implication, such a pledge of assets, and under section

77-2601 the contract of the bank to indemnify the deposit of such funds by the pledge of its assets is made valid, and before the receiver is entitled to the recovery of such pledge he must repay to the city the amount of its deposit.

The judgment of the lower court is therefore

AFFIRMED.

RACHEL P. DILLON, APPELLEE, V. SEARS-ROEBUCK COMPANY ET AL., APPELLANTS.

FILED JULY 20, 1933. No. 28583.

1. **False Imprisonment:** BURDEN OF PROOF. To recover in a civil action for false imprisonment, the burden is upon the plaintiff to prove facts and circumstances amounting to an unlawful restraint of her liberty.
2. ———. In a civil action to recover damages for false imprisonment, it must appear there was actual unlawful interference with one's freedom of physical action or locomotion, either by physical contact in which the restrained party's bodily strength is overpowered, or from language or conduct from which the restrained party might possess a reasonable apprehension that any attempt to depart from the obnoxious surroundings would result in some aggression against the physical powers of mobility.
3. ———: FAILURE OF PROOF. Evidence examined and *held* plaintiff has failed to assume the burden of proving facts upon which the action of false imprisonment can be predicated.

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

Ziegler & Dunn, for appellants.

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

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

CHASE, District Judge.

This is an action brought by plaintiff to recover dam-

ages for alleged false imprisonment. The case was tried to a jury, resulting in a verdict in favor of the plaintiff against each defendant in the sum of $3,000, for which judgment was rendered. The defendants prosecute this appeal to this court for reversal of the judgment. Numerous errors are assigned, among which is that the court erred in overruling the separate motions of each defendant for an instructed verdict.

The consideration of this question involves a very careful reading of the record. Space will not permit a detailed statement of the facts herein. Suffice it to say that from the record it appears that the plaintiff, on and prior to the 16th day of July, 1930, was employed by Sears-Roebuck Company in its retail store at Omaha, Nebraska; that on the day previous a customer came to plaintiff, who was working in the brush department, and purchased a paint brush at a price of $1.15, whereupon the plaintiff made the proper record of the purchase on the cash register. A few minutes later the same customer returned, stating that she desired to return the brush and purchase a more expensive one, finally selecting one for $2.25, paying the plaintiff the $1.10 additional. The plaintiff did not place the money in the cash register and did not complete the transaction in compliance with the rules of the store, but in her testimony she states that she laid the $1.10 on the cash register intending later to complete the transaction, and when she returned the money and slip were gone. When she came back from lunch the next day, someone had left word for her to come to the offices on the third floor, which she did. There she met a man, who afterward developed to be Mr. Behr, who was a representative of the Willmark System, a system which is employed by mercantile establishments throughout the United States to check the personnel of department stores, general stores, chain stores and retail stores for knowledge of stock, merchandise, courtesy and honesty of employees; that she went into a room with Mr. Behr, and he shut the door and asked her to explain the transaction of the day before of which

she did not report the $1.10; that she thereafter confessed in a written statement that she had taken the $1.10 with intention to appropriate it for her own uses and was ready to make it good. It also appears that he asked her about her honesty in other ways and she confessed she had been taking about $5 a day over a period of six months, and basing his statement on her own confession, another statement was prepared in which she confessed she was indebted to the store in the sum of $850 due to her misappropriation of her employer's funds during this period of time.

Plaintiff claims while in this office she was restrained of her liberty; that she wanted to call her husband, and Mr. Behr pushed the telephone away and told her if she did not make this statement he would have her arrested and sent to jail; that she was thereby restrained of her liberty and suffered damages thereby.

From the pleadings it is difficult to determine whether this action is one seeking recovery for slander or for false imprisonment, but it seems to have been tried on the theory of an action to recover damages for false imprisonment, and our disposition of the case will be confined to that theory.

The plaintiff in her testimony seeks to repudiate the statements that she made concerning these two transactions, stating that she was compelled to sign them by threat of prosecution and that they were untrue. We have searched the entire record to find any evidence where any person placed his hands upon the plaintiff, or in any manner used any physical force to restrain her liberty, and have found none. Therefore, the only basis upon which the plaintiff could predicate her recovery would be upon the theory that, under the alleged threats she claimed were made to her concerning an arrest, she would be justified in harboring a reasonable apprehension that force would be used to prevent her from leaving the room had she so desired. There is no testimony that either Sellers, the general superintendent, or Mr. Arndt,

the district manager, both of whom are defendants, had anything whatever to do with her making either statement, or made any statement to her about arrest. All this she claims was done by Mr. Behr. Her testimony stands wholly uncorroborated upon that particularly important fact of the case. The witnesses Sellers, Arndt and Behr all testify that all the facts they got concerning the $1.10 transaction, or the transaction involving the $850 statement, they got solely from the plaintiff's own confession, and neither Mr. Behr nor any other witness knew anything about any transactions involved in the $850 until the plaintiff, while in the room with Behr, confessed that she had been appropriating her employer's money during this time. The effect of plaintiff's testimony is that she was compelled by coercion and fear to sign the statements.

While this young woman was but seventeen years of age, she had reached a state of sufficient mental maturity to select a husband for herself, and her conduct would indicate intelligence generally. Her employers testified she was a very competent clerk. It is incredible to one who reads the record that a person of her intelligence would place her name to a written document confessing guilt of a crime when the statements contained therein were wholly untrue, even though she were threatened with arrest upon refusal. It appears further that the door was left open a good part of the time where plaintiff was in the office with Behr; that he went out for several minutes and the witness made no attempt to escape from her alleged imprisonment. It must be borne in mind that the plaintiff then was an employee of Sears-Roebuck Company; that she in writing confessed to an embezzlement of her employer's funds.

The courts quite uniformly adopt the rule that proprietors of business enterprises generally have a right to detain a customer a reasonable length of time to ascertain whether or not such customer has settled for goods being removed from the establishment. The plaintiff's employer

would have such a right under the circumstances of this case. Mere loss of freedom alone cannot constitute imprisonment. Life is attended by numerous limitations upon personal freedom. One who trespasses upon his neighbor's close, without his consent, can be lawfully ejected by the use of such force as is necessary to accomplish the ejectment. True, his freedom is interfered with, but he is not imprisoned. On the other hand, the trespasser would have a legal right to peacefully depart from the premises; but should the neighbor proceed, either by force or by threats from which the trespasser might harbor a reasonable apprehension that should he attempt to depart therefrom he would meet with physical resistance, such conduct on the part of the neighbor would amount to an unlawful restraint and would be actionable. The test is that there not only must be restraint, but such restraint must be exercised by compelling the restrained party to occupy a place within the limits fixed by the restraining party. In order for a restraint to amount to imprisonment, such restraint must be unlawful. There must be some actual interference with one's freedom of physical action or locomotion. This may be accomplished either by physical contact in which the restrained party's bodily strength is overpowered, or from language or gestures from which the restrained party might have a reasonable apprehension that any attempt to depart from the obnoxious surroundings would result in some aggression against his physical powers of mobility. All restraint is not unlawful, and the rule seems to be that only a wrongful restraint can be the basis of an action for false imprisonment.

"The true test seems to be, not the extent of the restraint (where the interference amounts to a restraint), but the lawfulness thereof." 11 R. C. L. 793, sec. 5.

We have carefully reviewed the decisions cited herein and many others, and generally where the courts have allowed recovery under facts similar to those of this case, the restraining party acted oppressively while under a

misapprehension of the real facts, or acted rudely and insolently in utter disregard of the facts.

The other line of cases, where courts allow recovery, is where the restraint occurs by an officer of the law unwarrantedly and wrongfully using his official authority to accomplish the restraint.

"The proprietor of a restaurant may detain a patron, who apparently has not paid for food purchased, a reasonable time to investigate the circumstances." *Jacques v. Childs Dining Hall Co.*, 26 A. L. R. 1329 (244 Mass. 438).

"Unlawful restraint of an individual's personal liberty or freedom of locomotion against his will comes within definition of 'false imprisonment.'" *Fox v. McCurnin*, 218 N. W. 499 (205 Ia. 752).

It will be observed that the right of recovery must be based upon some interference with freedom of locomotion. In *Tobin v. Bell*, 73 App. Div. (N. Y.) 41, a case presenting a situation very similar to the instant case, the court said:

"The verdict is clearly against the weight of the evidence. The plaintiff is unsupported in her story and is contradicted by four witnesses, two of whom are disinterested. While actions of this kind, as a rule, are peculiarly for the jury to determine, yet when the evidence is overwhelmingly against any unlawful detention and tends very strongly to show that the plaintiff was the culprit instead of the defendants, we are impelled to intervene to prevent the defendants being mulcted in damages unjustly."

Here the record shows that plaintiff had confessed in writing to a state of facts constituting a felony. She was very fortunate to escape criminal prosecution, to say nothing of asking a civil court to tax her employer in damages because it sought in a lawful manner to elicit from her facts relating to her criminal conduct. Can it be truthfully said from the testimony presented that the plaintiff possessed a reasonable ground for apprehension

that her liberty would be restrained had she attempted to leave the room? If the plaintiff were seized with such an apprehension, under the facts it would not be a reasonable one. She was told by no one that she could not leave the room, neither did any one attempt to stand in the doorway or to keep her from departing. The fact is, from her own testimony, the manager of the store told her to go home and compose herself and come back the next day. She could expect no more courteous conduct. Mere displeasure or distasteful company in no sense can be made the basis of an action for false imprisonment. The plaintiff made no physical attempt nor exhibited any intention of leaving the room, and all the circumstances indicate that had she done so she would have been able to depart without physical interference. We cannot believe that she had any reasonable ground to fear that force would be resorted to in the event that she undertook to depart. At the request of Mr. Sellers she left the room with the request that she return the next day. She never complied with that request and never came back to the place of employment; the most natural course of conduct for one who had confessed to the misappropriation of money belonging to her employer, and especially where her employer was seeking reimbursement for the defalcation. At the time plaintiff complains of the alleged restraint she was employed by the defendant Sears-Roebuck Company. The interview the employer had with the plaintiff was a highly proper one. It had evidently suspected the plaintiff was misappropriating funds and the only way it could determine the matter was through an interview of this character. This interview brought to light confessions of many more embezzlements than were previously known to her employer. The conduct of the employer in so doing was not improper and should not be, and is not, denounced by the law.

In *Weiler v. Herzfeld-Phillipson Co.*, 189 Wis. 554, which was a case very similar in fact to the case at bar, the court said:

"The sales slips of the plaintiff were brought from the office and carefully scrutinized by Mr. Carter and the plaintiff. This undoubtedly occupied a considerable length of time, but, at any rate, false imprisonment cannot be predicated upon the length of time plaintiff was in the office, in view of the fact that during all of such time she was an employee under compensation. The subject of the interview was a highly proper one, and had a direct bearing upon the relations existing between the parties. It cannot be said that her detention in Mr. Carter's office was unlawful, and the circumstance cannot be held to constitute false imprisonment unless there was something unlawful with reference to the manner of detention. According to plaintiff's own testimony she made no effort to leave the room, except on two occasions, when she arose from her seat and inquired if she might go, and she was told 'No,' to sit down. We discover nothing unlawful or improper in such a response to such an inquiry addressed by an employee to an employer under such circumstances. It may be assumed that plaintiff was not enjoying the interview, and that she desired to be relieved therefrom. However, as long as she remained an employee she was under the directions of her employer, and, if he had not yet completed the interview, it is difficult to find anything improper in his continuance thereof."

To announce a doctrine that a situation such as the one presented by this record is sufficient upon which to predicate an action for false imprisonment and make the employer answerable in damages would not only materially impair the machinery for the ascertainment of truth, but also would greatly interfere with the enforcement of criminal law. Should a police officer or detective or other enforcement officer be held legally answerable in damages each time he attempted to examine one suspected of a crime, it would destroy one of the most effective instruments in the administration of criminal justice.

From the whole record we conclude the interview with the plaintiff from which she claims the false imprison-

ment arose was a very proper and legal interview, and that she was not unlawfully restrained of her liberty. The burden was upon the plaintiff to establish by a preponderance of the evidence facts sufficient to constitute false imprisonment. This she failed to do. No other ground for reversal need be discussed. We hold the court erred in overruling the defendants' motions for a directed verdict, and the judgment is therefore reversed and the cause remanded.

REVERSED.

DAY, J., dissents.

AUGUST WENDT, APPELLEE, V. YANT CONSTRUCTION COMPANY ET AL., APPELLANTS.

FILED JULY 20, 1933. No. 28574.

1. **Abatement.** One who questions jurisdiction by special appearance should specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction.
2. **Explosives.** Owner of dwelling *held* entitled to damages arising from blasting of tree 135 feet distant and which created a sudden vacuum resulting in concussion and vibration.
3. **Damages.** Measure of damages for injuring a building from blasting is the cost of restoring it to its former condition.

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

Crofoot, Fraser, Connolly & Stryker and *James T. English*, for appellants.

D. O. Dwyer and *W. L. Dwyer, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and PAINE, JJ., and LANDIS and MEYER, District Judges.

LANDIS, District Judge.

Plaintiff below, appellee here, instituted this action to recover damages to his house sustained through negligence

in the blasting by dynamite of a tree on the highway, which defendant Yant Construction Company was improving under a road construction contract, having in its employ the defendant John Greer. Verdict was returned in favor of the plaintiff against the defendants, judgment entered thereon, and from an adverse ruling on the motion for new trial defendants appeal.

The first assignment of error is directed to the overruling of the special appearance of the defendant Yant Construction Company, which is as follows:

"Comes now the defendant Yant Construction Company, a corporation, and appears specially herein, for the purpose of objecting to the jurisdiction of the court, and for no other purpose."

No defect or reason why the court did not have jurisdiction is set out. If any issue of jurisdiction was tried thereunder the evidence is not before us in a bill of exceptions. One who questions jurisdiction by a special appearance should specifically point out the defect which it is claimed prevents the court from acquiring jurisdiction. As the record presents no jurisdictional defect upon which the trial court ruled, there is no such question for this court to review. *Freeman v. Burks,* 16 Neb. 328; *Brown v. Goodyear,* 29 Neb. 376; *Bankers Surety Co. v. Town of Holly,* 219 Fed. 96.

Assignments of error two to six, inclusive, are damages allowed excessive, verdict contrary to the evidence and law, not sustained by sufficient evidence, and errors of law occurring at the trial.

The record discloses that appellants were engaged in grading a highway adjacent to land owned by appellee, upon which was a modern dwelling-house of substantial construction. Appellant John Greer was the employee of the Yant Construction Company and in active charge of the construction work. There was a large tree on the highway about 135 feet from the appellee's dwelling-house, which appellants removed by dynamite. As a result of the concussion or vibration caused by the blasting,

appellee's dwelling-house was damaged. The logical analysis of this case comprehends a right to be protected against the particular hazard encountered by some rule of law which appellants' conduct violated thereby causing damages to the appellee. It must be conceded that appellee had a right to the enjoyment of his dwelling-house, which should be protected. The hazard encountered arose from the blasting of a tree 135 feet away which created a sudden vacuum resulting in concussion and vibration.

Appellants contend that appellee is not protected against the hazard because of the rule of law that, where a highway contractor blasts on the roadway under construction in order to adapt it to proper and lawful use, the mode adopted being the usual and practical one, and the work being prosecuted with due care, without negligence, injury resulting to adjacent premises is not actionable. 11 R. C. L. 674, sec. 28.

Appellee claims protection under the rule that one who uses high explosives in excavating so near property of another that the natural and probable result of an explosion will be injury to such property is liable for injuries caused, even by vibration and concussion of air, however high degree of care he may have exercised in their use. 25 C. J. 192.

Absolute liability without regard to fault seems to be generally imposed by the courts wherever there has been an actual invasion of property by rocks or debris from blasting. *Mulchanock v. Whitehall Cement Mfg. Co.*, 253 Pa. St. 262, L. R. A. 1917A, 1015; *Patrick v. Smith*, 75 Wash. 407, 48 L. R. A. n. s. 740.

Some courts distinguish between liability for a common-law trespass occasioned by blasting which projects rocks or debris upon the property of another, and liability for damages arising from concussion, and deny liability for the latter where the blasting itself was conducted at a lawful time and place with due care. *Bessemer Coal, Iron & Land Co. v. Doak*, 152 Ala. 166, 12 L. R. A. n. s. 389; *Gibson v. Womack*, 218 Ky. 626, 51 A. L. R. 773. This

distinction is based on the historical differences between the common-law actions of trespass and case. There is no practical difference between liability occasioned by blasting which projects rocks on another's property or by creating a sudden vacuum and resultant concussion. "The imposition of absolute liability" for one's acts without regard to fault "is not out of accord with any general principles of law," the underlying rule being that if damage is inflicted there ordinarily is liability, in the absence of excuse. *Exner v. Sherman Power Construction Co.*, 54 Fed. (2d) 510. The weight of authority sustains the position that there is no distinction in liability for damage to property from blasting which projects rocks or by concussion. 25 C. J. 192; *Colton v. Onderdonk*, 69 Cal. 155; *Fitzsimons & Connell Co. v. Braun & Fitts*, 199 Ill. 390, 59 L. R. A. 421; *Watson v. Mississippi R. P. Co.*, 174 Ia. 23, L. R. A. 1916D, 101; *Longtin v. Persell*, 30 Mont. 306, 65 L. R. A. 655; *Louden v. City of Cincinnati*, 90 Ohio St. 144, L. R. A. 1915E, 356; *Hickey v. McCabe & Bihler*, 30 R. I. 346, 27 L. R. A. n. s. 425.

We find that appellee had a right to be protected against the particular hazard of concussion and vibration, supported by the rule of law that one who uses dynamite in blasting, so as to cause likelihood of risk to property, is liable, if damage to the property results, whether from direct impact of rock thrown out by the explosion or from concussion. In the instant case the trial court took the position that appellants would not be liable unless they had performed their operations in blasting out the tree near the appellee's house negligently, and submitted the case to the jury upon that theory. There was evidence of negligence in the amount of dynamite used; no warning given of the explosion so that doors and windows of the dwelling could be opened, and availability of another method by using a small amount of dynamite to get rid of dirt and then cutting the roots. The jury had testimony to warrant their verdict on the question of negligence. Certainly the appellants cannot complain that

appellee was required to show more than the rule of law as to liability in this case.

The verdict of $750 rendered by the jury is not excessive considering the evidence offered by the appellee as to the serious damage to the dwelling and the cost to restore the same in as good condition as it was before.

We find that appellee had a right of protection against concussion from blasting, which appellants' conduct violated, causing the damages awarded by the jury. Hence, assignments of error two to six, inclusive, cannot be sustained.

The remaining assignments of error claimed are directed to instructions one, two and four.

Instruction four told the jury that if they found for the plaintiff they should fix his damages at such amount as would restore the house to the same condition as it was before the injury complained of. Appellants claim that instead of "same condition" the word "substantially" should have been used, so as to say "substantially same condition." The measure of damages for injuring a building from blasting is the cost of restoring it to its former condition. When the court instructed the jury that, if they found for the plaintiff, "then you will assess the amount of plaintiff's recovery at such sum as you find to be the reasonable cost of such repairs as will put the plaintiff's house in the same condition as it was immediately preceding the injury," they were correctly and fairly instructed on the measure of damages.

Appellants cannot complain of instructions one and two, as they were more favorable to them than the law requires. Assignments of error on the instructions are without merit.

The record fails to show prejudicial error, and the judgment below is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1933

FIRST TRUST COMPANY OF OMAHA, APPELLANT, V. GLENDALE REALTY COMPANY ET AL., APPELLEES.

FILED SEPTEMBER 22, 1933. No. 28585.

1. **Appeal.** An affidavit used in the hearing on a motion for a deficiency judgment must be preserved in the bill of exceptions to be available in the supreme court.
2. **Evidence** contained in the bill of exceptions considered *de novo*, and *held* to entitle plaintiff to judgment as prayed.
3. **Mortgages: FORECLOSURE: DEFICIENCY JUDGMENT ACT.** It appearing from the transcript that the action to foreclose the mortgage in suit was instituted, decree of foreclosure entered, sale of mortgaged premises made thereunder and confirmed, application for a deficiency judgment made and denied, and appeal from such denial filed in the supreme court, all prior to the passage of House Roll No. 10 relating to deficiency judgments and its approval on April 26, 1933, such act is not for consideration in connection with issues on this appeal.

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

Finlayson, Burke & McKie, for appellant.

Harry Silverman, Shotwell, Monsky, Grodinsky & Vance, G. F. Nye, A. H. Murdock and *Eugene N. Blazer, contra.*

Heard before GOSS, C. J., GOOD, EBERLY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

EBERLY, J.

This is an appeal from a final order of the district court for Douglas county denying an application for a deficiency

judgment against Abe Levey. It was filed in this court on August 18, 1932.

The record discloses that Joe Lapidus and Abe Levey were equal owners of the capital stock of the Glendale Realty Company, a corporation. On July 8, 1925, a loan was obtained from the First Trust Company of Omaha, Nebraska, on certain real estate, the title to which was then in the Glendale Realty Company. This loan was secured by a mortgage executed by that corporation and evidenced by "First mortgage real estate bonds" (or promissory notes) executed likewise by the Glendale Realty Company as a corporation, and to which the individual names of Joe Lapidus and Abe Levey were affixed. It was stipulated at the trial "that the signatures of Abe Levey and Joe Lapidus were placed on said instruments as additional security for the making of said loan."

On December 28, 1925, by a written contract, Abe Levey sold and transferred all his stock in the Glendale Realty Company to Joe Lapidus, who assumed the payments not then matured, secured by the mortgage here in suit, and agreed to "hold second party (Levey) harmless from any and all liability that may ever arise on account of the mortgage and notes heretofore referred to." This mortgage contained a clause empowering the mortgagee, at its option, upon default in payment of principal, interest or taxes, to proceed to foreclose for the entire amount secured.

It appears that the taxes assessed in 1925 and for subsequent years were not paid by Lapidus or the Glendale Realty Company, and that interest and principal notes maturing January 1, 1930, and July 1, 1930, were not paid, and that the suit to foreclose the mortgage was commenced September 2, 1930. A decree of foreclosure and sale was entered in the proceeding on June 2, 1931. A public sale of the mortgaged premises, made pursuant thereto on April 19, 1932, was confirmed on April 30, 1932. The application of the proceeds of sale to the amount due upon the decree left unpaid the sum of $1,153.79, together with interest and costs. A motion for a deficiency judgment for

this amount was filed by the First Trust Company of Omaha on May 12, 1932. The answer and objections to the motion for deficiency judgment presented the defenses of "negligence, delay, laches and lack of diligence," and further charged, in substance, the making of a contract or agreement between the First Trust Company of Omaha and Abe Levey, whereby the former had agreed, shortly after the making of the contract of December 28, 1925, and with full knowledge of the terms thereof, that it would promptly notify Levey of any default occurring in the performance of the mortgage contract; that Levey had relied on the promise, which the trust company had wholly failed to comply with; that more than $5,000 of unpaid taxes had been allowed to accumulate on the mortgaged property, in addition to unpaid instalments of interest and principal; that Joe Lapidus, who until after 1930 was in possession of ample property through which the performance of his agreement could have been enforced, was now wholly insolvent and a bankrupt; and that because of the failure of the trust company to comply with the agreement, and the substantial injustice occasioned thereby to Levey, it was now estopped to maintain its action for a deficiency against that defendant.

The facts thus alleged, if established by competent proof, would apparently, in connection with the claim of equitable estoppel, invoke consideration of the principle of law that "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement, Contracts, sec. 90.

It is obvious that the agreement on the part of the First Trust Company to promptly notify the defendant Levey of any default in carrying out the mortgage contract by the Glendale Realty Company, if made, is vital to the defense to the application for a deficiency judgment. With this alleged agreement eliminated, and the situation pre-

sented by the present record considered even wholly apart from the provisions of the Nebraska negotiable instruments law, the controlling principles would be:

"One who signs a note as surety is liable for the payment thereof precisely to the same extent as his principal." *Kroncke v. Madsen,* 56 Neb. 609.

And, "The mere voluntary forbearance on the part of the creditor, enlarging the time of payment, without consideration, or the mere failure to institute an action against the principal when the debt becomes due, will not alone discharge the surety." *Smith v. Mason,* 44 Neb. 610.

"This is true although by lapse of time remedies may be lost against the principal." *Eickhoff v. Eikenbary,* 52 Neb. 332.

See, also, *Bell v. Walker,* 54 Neb. 222; *Bank of Maywood v. Estate of McAllister,* 56 Neb. 188; *Clark v. Douglas,* 58 Neb. 571.

From the brief of the appellees, we infer that the evidence of this agreement relied upon is contained in an affidavit filed in the district court for Douglas county on May 17, 1932, which, in the form of "additional transcript," was filed in this cause by permission of this court. Assuming, but not determining, the competency of the proof, this instrument, though thereby made a part of the transcript, was not thereby made a part of the bill of exceptions as allowed by the trial judge. At no place in the bill of exceptions filed in this case does it appear that this affidavit, or the evidence contained therein, was offered or received as proof on the hearing of this cause in the district court. The certificate of the trial judge, attached to the present bill of exceptions, imports absolute verity, and its truthfulness may not be assailed collaterally. *Gregory v. Kaar,* 36 Neb. 533; *Phoenix Ins. Co. v. Howe,* 2 Neb. (Unof.) 20. In this state of the record, manifestly the affidavit under consideration, not being embodied in the bill of exceptions as allowed by the trial court, may not be considered here. *Kyle v. Chase,* 14 Neb. 528; *Burke v. Pepper,* 29 Neb. 320; *McCarn v. Cooley,* 30 Neb. 552;

Morsch v. Besack, 52 Neb. 502; *Hartford Fire Ins. Co. v. Corey*, 53 Neb. 209; *Thies v. Thies*, 103 Neb. 499; *Shaw v. Diers Bros. & Co.*, 124 Neb. 119.

It also follows that under the statutes in force on the 12th day of May, 1932, under the facts then before the district court as the same appear in the bill of exceptions, plaintiff was entitled to a deficiency judgment as prayed, and error was committed in refusing the same.

Appellees have by a supplemental brief referred to the provisions of House Roll No. 10 relating to deficiency judgments, approved April 26, 1933, as sustaining the action of the trial court in denying the motion for a deficiency. This enactment was not in force when the final order appealed from was entered in this case, nor when the appeal therefrom was filed in this court. Its validity or invalidity, or force and effect, in view of the circumstances of this case, cannot be properly presented in this proceeding at this time to this tribunal acting solely as a court of review. No issues will ordinarily be considered here except such as were involved in the case presented to the trial judge. *Hanscom v. Meyer*, 61 Neb. 798; *Thompson v. West*, 59 Neb. 677; *Patrick v. National Bank of Commerce*, 63 Neb. 200; *Burrows v. Vanderbergh*, 69 Neb. 43; *Rushton v. Dierks Lumber Co.*, 2 Neb. (Unof.) 563; *Merrill v. Miller*, 2 Neb. (Unof.) 630; *Wolff v. Phelps*, 3 Neb. (Unof.) 511.

It follows that the judgment of the district court should be, and is, reversed and the cause remanded for further proceedings, with directions to permit the introduction of further evidence, if either party so elects.

REVERSED.

WALTER BROWN V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1933. No. 28713.

1. **Criminal Law: EXCLUSION OF TESTIMONY.** It is proper for the trial court to sustain an objection to a question propounded to

a witness when the answer sought to be elicited by such question would amount to a conclusion of fact to be drawn by the jury.

2. ———: REBUTTAL TESTIMONY. In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact, is proper rebuttal testimony.

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

J. F. Fults, J. P. O'Gara and *Arthur E. Perry,* for plaintiff in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

CHASE, District Judge.

The plaintiff in error, Walter Brown, was, with one Leonard Fields, jointly charged with the crime of murder for the slaying of one Wayne Rank. Separate trials were demanded and allowed by the trial court. Both were convicted of murder in the second degree. The plaintiff in error brings the record of his conviction to this court for review.

The facts are substantially as appear from the record in the case of *Fields v. State,* p. 290, *post,* and a number of questions here presented were presented in the *Fields* case. Only such propositions urged for reversal in this case as were not disposed of in the *Fields* case will be discussed herein. The other questions which are identical to the ones raised in the case of *Fields v. State, supra,* have been fully disposed of in that case and the conclusions reached therein are adopted as controlling in this one.

One of the contentions urged for reversal is that the trial court erred in excluding certain testimony of Dr. Copeland on cross-examination. The doctor, having located the point where the bullet entered the body of the de-

ceased as being on the left side just below the crest of the ilium and tracing the same to the point where it came to rest on the right side of the spinal column opposite to where it entered, was then asked the following question: "At what angle would the man that fired the shot have to be, so far as being in front or behind him?" Upon objection the answer to this question was excluded. The court was entirely correct in sustaining this objection. When the doctor had testified to the physical facts concerning the entrance of the bullet into the body and the location where the bullet was found in the body, the particular direction from the deceased the person was standing who fired the shot is a proper conclusion for the jury to draw from the detailed facts. To permit a witness to give his conclusions upon such a state of facts would be invading the province of the jury. Therefore, no error was committed by the trial court in excluding the testimony.

Further complaint is made that evidence was admitted on rebuttal that should have been introduced by the state in its case in chief. The contention is that Leonard Fields, an accomplice of Brown, was called on rebuttal to testify for the first time; that he testified he did not have a rifle; that he did not fire a shot, and thereby left the impression the state intended should be left that the accused fired the shot which resulted in the death of Rank. A resort to the record can leave no dispute on this subject. It is the testimony of Fields that the accused went to the barn to steal gasoline on that night. It will be remembered that the accused in his own testimony admitted that he took a hose and pail and went to the garage on that occasion to get gasoline; that he did not ask the owner of the property for the gasoline but took it without his permission or knowledge, so no prejudice could result from the statement of Fields as to that particular fact. Further, it appears that the accused, in his own testimony, testified that Fields told him that he, Fields, had the rifle and had shot a man at the Smith place. Certainly it would be

rebuttal for the state to show by Fields that he did not have a rifle and did not fire the shot on that occasion. It was proper for the state to introduce rebutting evidence to meet any material fact offered by the accused as a part of his defense. Consequently the trial court committed no error in allowing such testimony.

For reasons herein stated and as stated in *Fields v. State, supra,* the conviction is

AFFIRMED.

LEONARD FIELDS V. STATE OF NEBRASKA.

FILED SEPTEMBER 22, 1933. No. 28787.

1. **Criminal Law**: EVIDENCE: VOLUNTARY STATEMENTS. Voluntary statements made by an accused to officers, while he is under arrest and in custody, tending to show his connection with the commission of the alleged crime, are admissible in evidence against him.
2. **Witnesses**: VOLUNTARY STATEMENTS: STENOGRAPHIC NOTES. It is not error for a trial court to permit a stenographer, who recorded the voluntary statements of the accused in shorthand, to read from the witness-stand the shorthand notes, if such statements, when extended to script or print, would be admissible.
3. **Homicide**: TRIAL: INSTRUCTIONS. Where the proof shows facts and circumstances so potent under which reasonable minds could not differ on the proposition as to whether or not the accused purposely and maliciously committed the homicide, it is not error for the trial court to fail to submit the crime of manslaughter to the jury for consideration.
4. ———: CONSPIRATORS. Where two or more parties combine together to commit any unlawful act and one of such parties by means of a deadly weapon commits a criminal homicide, the homicide is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator of the homicide, as a matter of law, is considered the agent of his associates, and his criminal act is their criminal act.
5. ———: ———. Where two or more persons conspire and combine together to commit an unlawful act, and in the prosecution of such common design one of the confederates commits a felonious homicide, each and all of such conspirators, as a matter of law, are guilty of such homicide.

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

Stevens & Stevens, for plaintiff in error.

Paul F. Good, Attorney General, and *George W. Ayres, contra.*

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

CHASE, District Judge.

Plaintiff in error, Leonard Fields, was, with one Walter Brown, jointly charged with the crime of murder for the slaying of one Wayne Rank. Both defendants demanded separate trials which were allowed by the trial court, and both were convicted of murder in the second degree. The plaintiff in error presents the record of his conviction to this court for review.

The evidence, which, in the main, is without serious dispute, shows that the plaintiff in error (who will be hereinafter termed the accused), together with a man by the name of Walter Brown, whose wife is a cousin of the accused, in the beginning hours of the morning of September 15, 1932, left Brown's home in the town of Arapahoe in an automobile truck owned by Brown on what may be termed a "stealing expedition." According to the statement of the accused, which was admitted in evidence, they went out to steal gasoline. The evidence shows that they prowled about the countryside in the vicinity of the town of Arapahoe for some time, and after having stolen some chickens at one place they finally arrived at the farm home of one Lester Smith about 1:30 or 2 o'clock in the morning. The Smith residence is located on a byroad from the main highway and which road led up to the buildings on the farm. The accused with his confederate drove into the Smith premises past the house and up to a shed which was employed at that time by Smith as a garage, and which was located some distance past the house, then

turned the truck around and drove out of the yard some distance down the roadway where the truck was stopped. Later Smith and his son-in-law, Wayne Rank, the deceased, who had been aroused from their slumbers by the noise of the truck, became suspicious. Smith armed himself with a shotgun and the deceased took a .22 rifle and both went out of the house to the vicinity of the garage where their automobiles were housed. As they approached the garage they saw two men hurrying across the garden patch which was located immediately southeast of the shed. They called to the fleeing parties to halt or they would shoot. This command being disobeyed, both Smith and Rank proceeded to discharge their weapons. The accused testified on the witness-stand, and in a statement received in evidence, that he received several pellets of shot, presumably from the shotgun held by Smith. The fleeing parties disappeared temporarily from sight, whereupon Smith and Rank proceeded to run down the roadway, as they termed it "to head them off." When they arrived approximately 300 feet from where they originally stood when the shots were fired they could observe two men over in a depression or draw near by. The testimony shows the moon was shining very brightly and one could observe the outline of a person for some distance, but it was not light enough to determine the identity of the party. At this point Smith testifies that another shot was fired by a .22 rifle, the bullet therefrom taking effect in the body of Wayne Rank from which he died some days later.

The accused made several statements concerning his whereabouts on the night in question. Two statements were made before a stenographer who took the same in shorthand. He therein admitted that he had gone out on that occasion with Brown on a stealing expedition to steal gas; that they stole some chickens first and then went to the Smith premises for the purpose of stealing gasoline; that they drove into the Smith premises up to a point about where the garage was located, turned the truck around in the dooryard and proceeded down the highway

some 300 feet, where it was stopped. Brown at this point got out of the truck taking with him a pail, a short hose and a .22 rifle. He started toward Smith's garage to get the gasoline. He got the gasoline, which was before the shooting, and poured it into the truck tank. The accused got out and followed him and on the way back to the truck things happened just about as detailed by the witness Smith; that they were using Brown's truck on this occasion.

Other witnesses testified to inspecting the dust in the highway at that point and observing tracks of an automobile truck with dual rear wheels, or double wheels, the outside wheel making a distinct diamond-shaped mark such as is made by a Goodyear tire, while the tires on the inside wheels having been worn smooth, the identifying marks made thereby were very indistinct. When the accused was arrested at Brown's premises in Arapahoe, they found at Brown's home an automobile truck having dual wheels on the rear, the outside tires being little worn and having a distinct diamond tread while the inside ones were worn so smooth as to make little if any marks in the dust. The truck there found was the color and design testified to by Smith of the one he had seen in his farmyard on the morning in question. The accused also admitted that he received several pellets from the discharge of a shotgun on the Smith premises on that morning, and the testimony shows that the undergarments he was wearing at the time of his arrest had distinct stains thereon. The testimony further shows that Walter Brown, after his arrest, took the sheriff to a wooded ravine near the town of Arapahoe in which under some silt and drift he uncovered a .22 rifle which was alleged to have been used on the occasion of the shooting.

The doctor testified that he removed from the body of the deceased, after his death, a small leaden bullet which was testified to by another witness as being the bullet from a .22 cartridge. The doctor testified further that the wound upon the body of the deceased produced his death.

Smith testifies that he heard a shot come from the vicinity of where the two men were in the ravine and that this shot took effect in the body of Wayne Rank and which produced his death. The accused testified that he did not have a weapon or fire a shot, nor did he see or hear Walter Brown fire a shot or hear one fired. As to that important fact the evidence is largely circumstantial.

Several assignments of error have been made, but only four are stressed as being sufficient to justify a reversal. The action of the trial court is assailed for permitting, over the objection of the accused, two witnesses, who are stenographers, to read from their shorthand notes the alleged confessions to officers while he was in their custody, under arrest, claiming they were made while he was under arrest and in the custody of officers without conveying the information to the accused that they might subsequently be used against him.

This court has held on numerous occasions that, after the *corpus delicti* has been sufficiently established, voluntary confessions or statements made by the accused may be admitted in evidence for the purpose of connecting the accused with the commission of the offense. *Ashford v. State,* 36 Neb. 38; *Bode v. State,* 80 Neb. 74; *Fouse v. State,* 83 Neb. 258; *Johnson v. State,* 88 Neb. 565; *Hardin v. State,* 92 Neb. 298; *Witty v. State,* 105 Neb. 411.

In order for confessions or admissions to be admissible, it must be shown that they were voluntary, and unless they are voluntarily made they are inadmissible. This record discloses that each time before any evidence of the confessions was received the state inquired of the witness whether or not such statements were obtained under threats, promises, inducements or intimidating gestures, and each witness, to each question, answered in the negative; and the accused, in his own testimony, did not deny the voluntary character of his statements. Therefore, we must conclude that such statements were voluntarily made by the accused, and, as such, properly admitted.

The accused further contends that to permit the two

young women stenographers who had not extended their shorthand notes to testify upon the witness-stand by reading from their shorthand notes is error. The rules of criminal evidence permit one who overhears a person charged with a criminal offense make a statement or admission against his interest, to testify from memory as to what the witness said. To read a confession or admission, otherwise admissible, from shorthand notes of a stenographer taken down at the time would be infinitely more accurate than for a witness to testify from memory as to statements. The conduct of the witnesses in this record was not a refreshment of their memory as to what was done, but they read from the shorthand record the exact language used by the accused in making such statement. The claim that reversible error was committed in admitting such statements in evidence is wholly untenable.

The accused also claims that the trial court committed error by withdrawing the question of manslaughter from the consideration of the jury. It will be borne in mind that the defendant was convicted of murder in the second degree. On this branch of the case it becomes necessary to analyze the statutes defining murder in the second degree and manslaughter.

Section 28-402, Comp. St. 1929, defines murder in the second degree as follows: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree."

Section 28-403 of the same volume defines manslaughter as follows: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter."

It will be noted that the chief distinction between the crime of murder in the second degree and manslaughter is that in the former the killing must be purposely done, while in the latter if it is unlawfully done it will be sufficient. This record discloses, as has been herein stated,

that this accused with his associate left the automobile truck for the purpose of going to the Smith place to steal gasoline, knowing also that Brown carried in his hand a deadly weapon which could be carried for no other purpose than to be used, if it became necessary, in furtherance of the criminal design; that the shooting occurred on a bright moonlight night and the moonlight was so bright that the outline of a human being could be observed for some distance; that both he and Brown observed two men who later were proved to be Smith and Rank, and Smith and Rank observed two men who later it was developed were Brown and the accused. There is no evidence that any quarrel or altercation arose between the parties and, as light as it was, to take the view that the shot that killed the deceased was fired at random or unintentionally while the slayer was in the commission of some unlawful act would neither be a reasonable nor logical deduction to be drawn from the evidence. If either Brown or the accused pointed the gun at the deceased, or some other person, and purposely fired the gun, then the intent to kill became specific and the elements of the crime of manslaughter would be wholly lacking. This we must conclude from the record to be the mental attitude of the person who fired the fatal shot. Under the statute, one who purposely kills another is guilty of murder. A deadly weapon, intentionally pointed at a human being, which is discharged, and from a wound inflicted thereby death ensues, the only reasonable inference to be drawn is that such killing was purposely and maliciously done, and if deliberation and premeditation are absent, the crime of murder in the second degree is complete.

Manslaughter occurs when death follows without the slayer forming the specific intent or purpose to kill. If the intent or purpose to kill is present, the crime is murder and not manslaughter.

From the state of the whole record as to this contention, it is apparent that reasonable minds could not differ

on the proposition that whoever fired the fatal shot that caused the death of Wayne Rank fired the same purposely and maliciously. Therefore no element of the crime of manslaughter is involved under the practically undisputed evidence of this phase of the case. It might be argued in this connection that positive evidence is wholly lacking that this accused actually participated in firing the shot that resulted in the death of Wayne Rank and therefore he could not be guilty of murder. However, the courts have expressed themselves with almost unanimity as to such contention.

"It is a familiar general rule that when several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine. Applying the principle to the subject under consideration, the courts hold that if several persons combine or conspire to do an unlawful act, and in the prosecution of the common object a culpable homicide results, all are alike criminally responsible. The immediate injury, from which death ensues, is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates. His act is their act, as well as his own; and all are equally criminal." 13 R. C. L. 729, sec. 29.

"Prearrangement is not essential, however, for it suffices that the combination was entered into in an emergency. Nor is it necessary, in order to make a party liable, that he should be actually and immediately present at the commission of the offense. If he cooperates in the execution of the common purpose by watching at a proper distance to prevent surprise, or the like, or if, with the intention of giving assistance, he remains near enough to afford it if the occasion for it should arise, he is constructively present, and is equally guilty with those who are actually present and do the act." 13 R. C. L. 729, sec. 30.

"If the unlawful act agreed to be done is dangerous * * * or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his coconspirators may do in furtherance of the common design. Accordingly, one person may be held liable for the homicidal act of another, where such act results from their combined efforts to commit robbery, burglary, breaking in and stealing, or assault merely." 13 R. C. L. 730, sec. 31.

The record discloses that the accused accompanied Walter Brown on the night in question to assist him in the stealing of gasoline; that they drove to the Smith premises in furtherance of that design; that Brown got out of the truck and went to the garage and the accused followed along close behind to render any assistance that might become necessary in the carrying out of their criminal enterprise; that after the shots were fired the accused ran to the truck, started it up and drove up the road to pick up Brown for the purpose of adding haste to their escape. Such circumstances would make the accused guilty of the crime whether he actually fired the fatal shot or not and under which the court properly withheld from the consideration of the jury the crime of manslaughter.

The accused again complains that the trial court in its instructions committed error in the definition of "malice," wherein the jury were told that malice means a "wilful or corrupt intention of the mind." In the recent case of *Pembrook v. State*, 117 Neb. 759, Judge Thompson in the body of the opinion states that " 'malice,' in its legal sense, denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. It means any wilful or corrupt intention of the mind." It will be observed that this court has held that the very language herein assailed is proper language to be used in the definition of the term "malice."

Therefore, it goes without saying that the complaint of this instruction by the accused is without force.

We have carefully examined the whole record and find the evidence amply sufficient to sustain the conviction, and the same is, therefore,

AFFIRMED.

TODD A. DORAN, APPELLANT, V. NATIONAL SURETY COMPANY, APPELLEE.

FILED SEPTEMBER 22, 1933. No. 28396.

1. **Appeal.** Assignment of error to effect that verdict was the result of passion or prejudice will not be reviewed by appellate court where attention of trial court was not called thereto in motion for new trial.
2. ———. Where jury found generally for defendant on competent conflicting testimony, assignments of error that verdict is not sustained by sufficient evidence and contrary to the evidence will be considered as not well taken.
3. ———. Appellant was without right to complain on appeal of instruction on measure of damages following instructions on such subject submitted by appellant to the trial court.
4. ———. Any error in instruction on measure of damages was without prejudice where the verdict was a general one finding for defendant.
5. ———. Assignment of error in respect to exclusion of testimony will not be considered where appellant's brief does not discuss claim in respect thereto.
6. **Evidence.** Evidence tending to establish separate oral agreement between parties to written contract as to matters upon which the contract was incomplete is admissible if it does not tend to vary or contradict the terms of the same.
7. ———. Promise not specifically included in written contract may be proved by parol where the contract was executed on faith of the promise.

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

Fred C. Foster and *Perry W. Morton*, for appellant.

Hall, Cline & Williams and *Smith, Schall & Sheehan*, *contra.*

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

LANDIS, District Judge.

Plaintiff Todd A. Doran instituted two actions, which were consolidated, upon two bonds of the National Surety Company, defendant. The jury returned a verdict for defendant, separate motions for new trial were filed, overruled, and plaintiff appeals to this court. Plaintiff and defendant below appear as appellant and appellee respectively.

Two bonds were executed by the National Surety Company, appellee, covering the performance of two contracts made by Todd A. Doran, appellant, as owner, and E. L. Lowell, as contractor. These contracts provide for the construction of buildings in Lincoln, Nebraska. Appellant claimed that the contractor, Lowell, failed to perform the provisions of the contracts, and the contractor claimed the owner failed to perform the provisions of the contracts. Each of the contracts was modified by supplemental agreements between appellant and the contractor.

The real issues involved are: (1) The contracts and supplemental contracts, the inducements and considerations for them. (2) What was done under and by virtue of these contracts. (3) Who breached the agreements, appellant or the contractor.

Appellant claims error in assignments one to three, inclusive, that the verdict of the jury was given under the influence of passion or prejudice, not sustained by sufficient evidence, and contrary to the evidence.

Appellant failed to call the attention of the trial court in his motions for new trial of his present claim that the verdict was the result of passion or prejudice. Hence, this assignment of error cannot be reviewed in this court. Even so, we can say from a careful reading of the record that the assignment claiming passion or prejudice is without merit. *Green v. Tierney*, 62 Neb. 561.

The real issue litigated was who breached the contracts.

If the appellant did, he would not be entitled to recover. If the contractor Lowell did, then the appellee as his surety would be liable for the amount of damages sustained by appellant. Appellant's evidence tended to show that he was not obliged to pay the contractor under the supplementary agreements until the work was entirely completed. The evidence upon the part of the appellee showed that the contractor, at the time of the original contracts, was to be paid as mutually agreed by himself and appellant; that the supplementary agreements were executed for the benefit of the appellant and likewise it was intended under these that payments should be made as the work progressed; that appellant did not pay the construction money as the work progressed and thereby it became impossible to continue with the work. Upon conflicting testimony the jury found generally for the appellee, and this verdict is sustained by competent evidence. Assignments of error that the verdict is not sustained by sufficient evidence and contrary to the evidence must be considered as not well taken.

Assignments of error four to nine, inclusive, are made to the instructions of the trial court. Largely the appellant's complaint is that the evidence does not warrant the instructions given. From a reading of the entire record we find such complaint cannot be sustained. The instructions fairly present the issues and are free from prejudicial error.

As to instruction number seventeen on the measure of damages, there can be no ground for complaint, because it follows the instructions on this subject submitted by the appellant to the trial court, besides it was without prejudice since the verdict was a general one finding for the appellee.

Assignments of error ten and eleven are directed to evidence admitted and refused. Appellant's brief does not discuss his claim as to refusal of testimony, and hence assignment of error eleven will not be considered.

Assignment of error ten relates to the evidence of con-

versations between appellant and contractor Lowell as to the payment of the construction money. Appellant makes scant reference in his brief to this claim of error and cites no authorities upon which he relies. Nevertheless we have carefully read the record and noted the objections made to the testimony therein. Appellant's objections to the testimony are under the fundamental rule that parol or extrinsic evidence will not be received to vary or add to the terms of a written agreement. This rule of exclusion, however, has many well-recognized exceptions which limit its effect. Evidence tending to establish a separate oral agreement between the parties to a written contract as to matters upon which the contract is incomplete is admissible if it does not vary or contradict the terms of the same. *Huffman v. Ellis*, 64 Neb. 623. Likewise, a promise not specifically included in a written contract may be proved by parol where the contract was executed on the faith of the promise. *Hecht v. Marsh*, 105 Neb. 502. Considering the limitations on the parol evidence rule created by the well-recognized exceptions, we must hold assignment of error ten without merit.

The issues in this case were properly submitted to the jury and the record is free from prejudicial error.

The judgment of the district court is therefore

AFFIRMED.

JENNIE E. HUFFMAN, APPELLANT, V. GREAT WESTERN SUGAR COMPANY, APPELLEE.

FILED SEPTEMBER 22, 1933. No. 28601.

1. Master and Servant: INJURY TO EMPLOYEE: BURDEN OF PROOF. Compensation claimant has burden to show with reasonable certainty that personal injury was caused to the employee by an accident arising out of and in the course of his employment.
2. ———: ———: AWARD OF COMPENSATION. "Awards for compensation cannot be based upon possibilities or probabilities, but

must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton*, 123 Neb. 599.

3. ———: ———. Plaintiff's evidence examined and found to be insufficient upon which to base an award.

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

Wright & Wright, for appellant.

Mothersead & York, contra.

Heard before GOSS, C. J., ROSE, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

MEYER, District Judge.

This is an action brought under the workmen's compensation act. Herbert Huffman was employed as a warehouseman for the defendant at Scottsbluff. He appeared to be in good health when he went to work on the morning of November 5, 1931. After about 3 o'clock on the afternoon of that day he was testing scales. In doing so, he lifted 40 to 50 one-hundred pound sacks of sugar from the scales to an endless belt conveyor about 18 inches to 2 feet away. He would pull off a sack or two from the scales, then weigh the remainder and adjust the scales to make them balance; the performance was then repeated over and over until 4:30 or 4:45 p. m. His son-in-law, who was working with him, noting shortly after they started that he "looked like he might be fatigued or tired," asked him if he was tired, and he stated "that he felt as if he might have eaten something; that is, he felt heavy or logy." Huffman left work about 4:45 p. m. saying he was tired and thought he would go home early and rest for a party he was to attend that evening.

After reaching home Mrs. Huffman noticed nothing unusual about his condition except that he appeared tired, but she testified that he always appeared tired when he got home from work. He ate a heavy supper, accom-

panied his wife to a social, and there ate some pumpkin pie and drank a cup of coffee, went home about 11 o'clock, and as he was going to bed complained for the first time of his stomach hurting him. His distress increased. Enemas were given him with little results. During the night he started vomiting and his pain increased. At 3 a. m. an osteopath was called, who had charge of the case until the following evening, making several calls. His condition then being critical, a physician was called and an operation performed. About a yard of the small intestine which was found to be twisted and gangrenous was resected. A few days later he died. The doctors said the correct medical term for a twisted bowel is volvulus and the osteopath testified that he died of shock caused by the gangrene of the bowel plus the shock of the operation.

Jennie E. Huffman, wife and dependent of deceased, made claim before the compensation commissioner for compensation, claiming that the strain of lifting the sugar caused his bowel to become twisted, thus causing the gangrene which in turn caused his death. The claim was disallowed, whereupon plaintiff appealed to the district court, and upon hearing held in that court, at the close of the testimony of the claimant, upon motion of the defendant, the case was dismissed. Plaintiff appealed.

Was plaintiff's evidence sufficient to establish that deceased's illness and subsequent death were caused by an accident arising out of and in the course of his employment? The evidence is not persuasive.

The doctors differ in their evidence as to the condition of the intestine at the time of the operation and the physician's testimony is at odds with the hospital report. On cross-examination he says the report is his, but that it is wrong. Both testify that volvulus may be produced by a severe catharsis, fecal impaction, constipation, a severe strain or other causes; that thrombosis or embolism would produce gangrene, and that if Huffman had suffered a thrombosis after he went to bed that night it

could have produced gangrene exactly to the same extent as was found; that the history did not indicate thrombosis or embolism; however, due to the seriousness of the matter, no time was taken for exact exploring. In answering a hypothetical question the osteopath testified that in his opinion the bowel pathology was caused by strain of lifting the sugar. The physician in answering a hypothetical question said: "I can state this, I can give my opinion as to it." "My opinion is that, if this man was straining himself when these symptoms occurred, that was the beginning of his trouble and the responsibility rests there." The answer assumes that Huffman was straining himself and also assumes the presence of the symptoms mentioned in the question at the time of straining, while the only symptoms included in the hypothetical question were symptoms that occurred some eight or nine hours after Huffman was lifting the sacks of sugar.

Both doctors testify that, if there was a strain sufficient to produce a condition such as Huffman's, the first indication of such condition would be distress, discomfort and pain. Huffman did not complain of pain before 11 o'clock that night. The osteopath testified that the effect of a volvulus amounting to a complete twisting of the bowel would be a very severe pain and immediate rigidity and shock, immediate prostration; if sufficient to cut off the nerve impulses and blood, gangrene would set in immediately, and that one cannot have gangrene long without temperature. The evidence shows Huffman had only developed one degree of temperature by the next noon, and no rigidity until the middle of the afternoon.

The doctors also say that, after Huffman's bowel was folded on itself or started to twist, it tightened down gradually. However, the osteopath later says that in his opinion the bowel was in the same position at the time he quit work as at the time of the operation, and that at the time of the operation it was twisted sufficiently to cut off the blood supply completely. He also says it is

all a matter of conjecture with him as to what caused the bowel to be in that position. On redirect he says: "Conjecture in this instance is a matter of our best judgment. We cannot see what is going on in there, we cannot X-ray a bowel like that; the best diagnostician can only conjecture."

It is needless to recite more of the evidence. We have examined all of it carefully and it fails to carry that conviction upon which a judgment of a court should rest. Money ought not be transferred from one party's pocket to that of another upon evidence of such doubtful import.

If the doctors by their testimony mean to imply that the ordinary exertion incident to the handling of the sugar caused the bowel pathology testified to, we fail to find in the evidence satisfactory explanation of, or sufficient foundation for, such inference. If they mean to say that, while lifting the sugar Huffman strained himself and that the strain caused the twist in the bowel, such evidence is insufficient upon which to base an award, for there is no proof that he strained himself, unless it be argued that volvulus may be caused by strain, and since Huffman had a volvulus that he strained himself.

"If an inference favorable to the applicant can only be reached by speculation or conjecture, then the applicant cannot recover." *De Bruler v. City of Bayard,* 124 Neb. 566.

"Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton,* 123 Neb. 599.

In this case the burden was upon the claimant to show with reasonable certainty that personal injury was caused to the employee by an accident arising out of and in the course of his employment. She must remove the case beyond the realm of speculation and conjecture. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526.

Upon consideration of the evidence, we are of the

opinion that the plaintiff has failed to show that Huffman's condition was caused by an accident arising out of and in the course of his employment by the defendant. The judgment of the district court is

AFFIRMED.

HENRY GOOD, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED SEPTEMBER 22, 1933. No. 28762.

1. **Master and Servant**: INJURY TO EMPLOYEE. When an employee is engaged to work upon a public street in his master's business and is there injured, while engaged in such employment, by a missile intentionally thrown at him by another, without provocation from the employee, such injury arises from a risk of the street that is such as to cause it to arise out of and in the course of his employment.
2. **Evidence** examined and held to make a finding of total permanent disability proper.

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

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

Frost, Hammes & Nimtz, contra.

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE, LOVEL S. HASTINGS and TEWELL, District Judges.

TEWELL, District Judge.

This action was brought under the provisions of the workmen's compensation act. From a decree of the district court for Douglas county awarding compensation to the plaintiff, Henry Good, hereinafter called appellee, the city of Omaha, hereinafter called appellant, appeals.

On the afternoon of April 1, 1932, appellee, an employee of appellant city, was riding upon and operating for and in the appellant city a street grader that was

being drawn by a tractor eastward on Spaulding street, which extends from east to west, at a point thereon immediately east of Thirty-sixth street. The tractor was being operated by one Harold Wiggs. The tractor and grader passed two boys and a girl who were on their way home from school and who were near the south edge of Spaulding street.

The appellee testifies that, when the grader had gone to a point a short distance east of the boys and girl, he became aware of one of the boys standing upon the rear axle of the grader, with his hand upon the seat upon which appellee was sitting. Appellee testified that he told the boy not to get on the grader, and told him that they were not allowed to haul anybody, and that a few moments later he was hit on the back of the head by what he judged to be a brick. Mr. Wiggs, the operator of the tractor and a witness for the defendant, testified that he looked back toward the tractor just in time to see appellee falling off the grader backward, whereupon he stopped the tractor, but that at that time the two boys and girl were on the bank some distance west of where they had been when the tractor passed them. Both appellee and Mr. Wiggs testify that a full sized brick was lying several feet behind the grader just after the injury and that its condition was different than it would have been had it been dug up by the grader.

The two boys, each about 15 years of age at the time of appellee's injury, testified that neither of them attempted to ride upon the grader and that neither of them threw a brick. Each of the boys testified that one of them, Percy Watkins, just after the grader passed, threw a clod of dirt at an advertising sign, located on the north edge of Spaulding street and a little east of where they stood, and that in doing so he hit appellee, when appellee was about 50 yards from them. Watkins said that the clod of dirt "kind of slipped out sideways" and that he had no intent to hit appellee. Immediately after being hit, appellee was taken to a doctor and then taken home

on the day of the injury. He was wholly incapacitated for several days and then went back to work, but could only work a few days at a time. He worked for appellant off and on a few days at a time until June 22, 1932, and has not worked since.

Four different doctors were witnesses for appellee. X-ray photographs were taken and these disclosed a long fracture of the occipital bone in the skull and a fracture of one of the processes of a vertebra in the neck. Appellee was badly troubled for some weeks with bleeding of the nose and very bad headaches. Dr. L. C. Bleick, a specialist in the treatment of the ear, said that hearing of the right ear is permanently impaired to the extent of 70 per cent. and of the left ear to the extent of 40 per cent.

Dr. Rich testified that the concussion of the brain was quite severe and that, judging from the history of the case and the symptoms still present ten months after the injury, it was his opinion that the disability was total and permanent. An absolute loss of accommodation in the eyes, constant dizziness and headaches are said, by the doctors, to be present.

From the testimony of the witnesses and the circumstances shown in the evidence, including the extent of the injuries, we conclude that the appellee was intentionally struck by a brick thrown by a boy whom he had ordered off the grader. One question involved is that of whether appellee's injuries arose "out of and in the course of his employment" within the meaning of such phrase as used in the workmen's compensation act. This phrase is used in the workmen's compensation act of England and was construed with reference to street risks by the House of Lords in the case of *Dennis v. White & Co.*, 2 K. B. Div. 1916 (Eng.) 1. A like phrase has been largely used in American legislation. Many cases dealing with this phrase are cited in the case of *Socha v. Cudahy Packing Co.*, 105 Neb. 691, and are not again cited here. Other cases dealing with the point under discussion are *City*

of Fremont v. Lea, 115 Neb. 565; *Coster v. Thompson Hotel Co.,* 102 Neb. 585; *Ridenour v. Lewis,* 121 Neb. 823. From the facts found as heretofore stated and from the law as stated in the cases above cited, we hold that the injury in this case arose out of, as well as in the course of, appellee's employment and was compensable under the workmen's compensation act.

Complaint is made of the allowance of total permanent disability. No one, of four doctors called as a witness, says that the disability of appellee is not total and permanent and some say affirmatively that, in their opinion, it is. The circumstances shown in the evidence are not inconsistent with total permanent disability. Mention has already been made of the nature of the injuries. We have read the entire bill of exceptions and conclude that the finding of total permanent disability, as far as facts are as yet ascertainable, is a proper finding.

The appellee is awarded an attorney fee in this court of $200, and the judgment of the trial court is in all things

AFFIRMED.

LINCOLN JOINT STOCK LAND BANK, APPELLANT, V. JOHN H. BEXTEN ET AL., APPELLEES.

FILED SEPTEMBER 29, 1933. No. 28562.

1. **Evidence.** A fact, relation, or state of things once shown to exist may be presumed to continue until the contrary appears.
2. **Mortgages: REDEMPTION.** When the holder of a negotiable promissory note, secured by a real estate mortgage, as collateral security for a debt, upon default of the payor thereof, acquires by judicial proceedings or conveyances in lieu thereof the legal title to the premises thus mortgaged, if the mutual relations of creditor and debtor between the principals to the transaction remain unchanged, the land so acquired is deemed substituted for the note and mortgage and remains subject to redemption.
3. ———: **MORTGAGEE IN POSSESSION.** In such event, the holder of the legal title resulting from such transaction would acquire

the rights of, and be properly designated as, a mortgagee in possession.

4. Banks and Banking: NATIONAL BANKS: POWERS. Where a national bank has lawfully acquired an interest in real property, in satisfaction of, or as security for, its debt then existing, it may purchase other undivided interests therein or incumbrances existing thereon, or in its corporate name may lawfully covenant to pay a lien on the land thus acquired by it.
5. ———: ———: ACTS OF AGENT. Except as to the execution of negotiable instruments and obligations under seal, an undisclosed principal is bound by simple contracts made by the agent, when the acts done by the agent are within the scope of his authority and in the course of his employment. This rule is applicable to national banks, subject to the limitations of the national banking act.
6. ———: ———: ———. The taking of real estate security by an agent of a national bank in his individual name for the benefit of the bank is in legal effect but the taking of security by the bank itself, and such contracts, duly authorized and entered into, create and impose identical rights and liabilities as like instruments executed in the corporate name of the bank.
7. Action: PARTIES. Generally, one dealing with an agent of an undisclosed principal may, after disclosure, sue either the principal or the agent, or join them both. The fact that the contract is required by the statute of frauds to be in writing does not affect the general rule.

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

Good, Good & Kirkpatrick, Brogan, Ellick & Van Dusen and *James J. Fitzgerald, Jr.*, for appellant.

Finlayson, Burke & McKie, contra.

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

EBERLY, J.

This is an appeal by the Lincoln Joint Stock Land Bank of Lincoln, Nebraska, from the order of the district court for Douglas county sustaining the separate general demurrers of defendants Mary A. Bexten and the First National Bank of Omaha, Nebraska, to its petition, fol-

lowed by a judgment of dismissal as to these defendants on the election of the "Land Bank" to stand on its petition as amended.

This is a suit at law by plaintiff upon a written contract which, by its terms, purports to have been executed by plaintiff, as party of the first part, and by John H. Bexten and Mary A. Bexten, as parties of the second part, and to modify the terms and conditions of a certain note and mortgage covering Iowa real estate therein described, and the payment of which as therein modified is assumed by the parties of the second part. The amount of the recovery sought is $10,916.47 with interest at 8 per cent. per annum from and after November 28, 1931, being the amount of the deficiency remaining unsatisfied after the foreclosure of this mortgage in a proceeding in equity in the district court for Monona county, Iowa, the sale of the premises embraced in said mortgage by order of the Iowa court, and the application of the proceeds thereof in satisfaction of the indebtedness then and there by that court adjudged to be due and unpaid.

The following constitute a summary of the facts of the transaction alleged in the petition demurred to:

On June 11, 1919, one Lacey and wife executed, as owners of the fee, a real estate mortgage on section 14, township 84, range 43, in Monona county, Iowa, to plaintiff to secure the repayment of a loan of $35,000 contemporaneously made to the mortgagors. This mortgage was a first lien on the premises described. The indebtedness secured bore interest at 6 per cent. per annum, and, with interest as it accrued, was payable in semiannual instalments of $1,225 each on the first day of October and the first day of April of each year. On the 7th day of April, 1923, the mortgaged lands were conveyed by the then owners to John H. Bexten. On September 10, 1926, a new contract in writing, already referred to, was entered into by and between the Lincoln Joint Stock Land Bank and John H. Bexten and wife, Mary A. Bexten, which, by its terms, reduced the rate of interest from 6

per cent. to 5¼ per cent. payable semiannually, resulting in the reduction of the semiannual payments to be made thereafter to $960.93. This written agreement also stipulated for an acceleration of the maturity of unpaid instalments in the event of default in the payment of any one of the instalments; that after five years from the date of the agreement the "mortgagor" had the option of paying in advance upon any regular instalment date any number of payments on account of the principal of this loan, etc.; also, "Party of the second part agrees to make said payments as herein provided and the said original note and mortgage shall continue in full force and effect as originally made except as extended and modified by this agreement." All instalments were paid as they became due until April 1, 1931, when default was made. Plaintiff commenced its action in foreclosure in the district court for Monona county, Iowa, on May 4, 1931, upon the mortgage executed by Lacey and wife and as modified by the written agreement of September 10, 1926, executed by John H. Bexten and Mary A. Bexten, his wife. Bexten and wife and the First National Bank of Omaha were parties defendant in said action. Bexten and the First National Bank were served with process in the state of Nebraska only, as nonresidents of the state of Iowa, and neither made a personal appearance in said action; but process was duly served on Mary A. Bexten in Iowa. On October 5, 1931, a decree of foreclosure and sale was entered in this proceeding. It determined the amount due, directed that the mortgaged lands be sold on special execution to satisfy the same, and directed that judgment be rendered in favor of the plaintiff and against the defendants (who had been personally and properly served within the state of Iowa) for any deficiency that remained after such sale, and the application of the proceeds of the sale to the satisfaction of the amount adjudged due, with costs. Sale was duly made on special execution as directed, and the proceeds thereof applied on the judgment entered, leaving a bal-

ance unsatisfied amounting to $10,916.47. The laws of Iowa governing the foreclosure of real estate mortgages are pleaded by plaintiff, but it is alleged that a personal judgment as authorized by the decree pleaded was in fact entered against Mary A. Bexten, and is and remains in full force and effect, but it is not alleged that a general execution has been issued on the decree of foreclosure against the defendants or any of them. It is expressly alleged "that, as this plaintiff is informed and verily believes, said title so conveyed (on April 7, 1923) was in fact taken by the said John H. Bexten as agent for and for the use and benefit of the defendant First National Bank of Omaha, Nebraska, and that all of the acts and doings of the said defendant Bexten from and after said date, in connection with the said land and the mortgage indebtedness thereon owing to this plaintiff (including the agreement in writing of September 10, 1926) were done and performed by the said John H. Bexten as agent for and for the use and benefit of and with the intention to bind the said defendant First National Bank of Omaha, Nebraska." It is also alleged as a matter of ratification that all payments of instalments of indebtedness after September 10, 1926, were made by the First National Bank out of its own funds, and that it has received and enjoyed all rents and profits arising out of the mortgaged premises. The plaintiff, by leave of court obtained, amended the foregoing petition by adding thereto the following: "That prior to acquiring the title to the said real estate in the name of the defendant Bexten, the defendant the First National Bank had acquired a junior mortgage upon the said real estate, which mortgage had been transferred to the said bank to secure it upon a preexisting indebtedness upon a loan made to one of its customers, and its act in acquiring the title to the said real estate to be taken for its use and benefit in the name of the defendant John H. Bexten was intended to secure the payment or further security of its said loan." To this petition demurrers, on the sole ground that the peti-

tion does not state facts sufficient to constitute a cause of action against the appellees severally, were sustained by the trial court.

In consideration of the case before us, it is to be kept in mind that the amendment to the petition, made on April 8, 1932, in so far as the facts therein are alleged, is controlling, and is not to be limited by the conclusions of law and facts set forth in the original petition inconsistent therewith. This amendment charges that the defendant bank, prior to the transfer by "mesne conveyances" of the title to the lands described in the petition to John H. Bexten, had made a loan to a customer not named in the pleadings; that subsequent to the making of this loan this customer transferred to the bank a junior mortgage on the premises here in suit to secure such bank on his preexisting indebtedness; that thereafter on April 7, 1923, the vesting of the legal title by use of "mesne conveyances" in John H. Bexten was carried out "to secure the payment or further security of" its said loan to the unnamed customer referred to in the amendment. At the time of these conveyances to Bexten, it is necessarily to be inferred from allegations quoted that the relation of debtor and creditor between this unnamed customer and the bank was wholly unaffected by the transaction and its continued existence unmodified is to be presumed until the contrary is expressly shown. "A fact, relation, or state of things once shown to exist is presumed to continue until the contrary appears." 9 Ency. of Evidence, 906. See, also, *Bell v. Young*, 1 Grant's Cas. (Pa.) 175.

The rule of law applicable to this situation thus presented is: "The holder of a negotiable promissory note, secured by mortgage, as collateral security for a debt, is entitled, upon default, to proceed with the foreclosure of the property included in the mortgage security, and to entry, and possession thereof, under appropriate proceedings. Such proceedings, however, do not change the relations of the parties to the contract of pledge, the land

being simply substituted as collateral security in place of the notes and mortgage, and remaining subject to redemption. Nor, as between the pledgor and pledgee, is such foreclosure, entry and possession a payment of the debt for which the notes and mortgages are held as collateral security." Colebrooke, Collateral Securities, 235, sec. 183.

True, in the instant case, certain voluntary conveyances are substituted for legal proceedings, but the result attained is essentially the same, and the mutual relation of the parties as debtor and creditor remains identical. *Tower v. Fetz*, 26 Neb. 706; *Riley v. Starr*, 48 Neb. 243; *Samuelson v. Mickey*, 73 Neb. 852.

As to the defendant First National Bank of Omaha, plaintiff's amended petition must be deemed an attempt to state a cause of action within the rule that an undisclosed principal is bound by an executory simple contract made by the agent within the scope of his authority and in the course of his employment, although the contract purports to be the individual contract of the agent.

Plaintiff's amended petition is silent as to the date when the information as to the relation of principal and agent between the bank and Bexten first came into its possession. It is not charged that any faith or credit was in fact extended to Bexten in the transaction involved in this litigation because of his relation to the First National Bank of Omaha now claimed to exist. It is solely because of the alleged existence of that relation on the date of the institution of the action that a recovery is claimed.

In this connection it is also to be kept in mind, as applicable alike to an undisclosed agency and to one whose creation and extent are known to the interested parties, that "one who acts through an agent in law does the act himself, *qui facit per alium facit per se*," and thus "it follows that capacity to act by agent depends in general on capacity in the principal to do the act himself if he were present. * * * That incapacity to appoint an agent

is a necessary consequence of personal disability to do the act for which the agent is employed." 2 C. J. 429, 430.

The first important question for consideration is the capacity of the defendant First National Bank to enter into the contract alleged to have been made by Bexten in its behalf as its undisclosed agent.

National banks are creatures of public statutes which are necessarily the source of their powers. Therefore, no powers may be rightfully exercised by them save such as are expressly granted or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend,* 139 U. S. 67; *California Bank v. Kennedy,* 167 U. S. 362; *First Nat. Bank v. Converse,* 200 U. S. 425; *Clement Nat. Bank v. Vermont,* 231 U. S. 120; *First Nat. Bank v. Missouri,* 263 U. S. 640.

The scope or extent of the lawful powers possessed by or vested in a national bank is to be determined by a proper construction of the federal statutes relating thereto. On this subject the decisions of the supreme court of the United States are conclusive. *California Bank v. Kennedy,* 167 U. S. 362; *Central Transportation Co. v. Pullman's Palace Car Co.,* 139 U. S. 24.

The following provisions of the federal statutes cover the subject of powers conferred on national banks, so far as pertinent to the instant controversy:

"A national banking association * * * shall have power * * * Third. To make contracts. * * * Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed. Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by

buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter." 1 Mason's U. S. Code, 596.

As to real estate, it is provided:

"A national banking association may purchase, hold, and convey real estate for the following purposes, and, excepting as provided otherwise in section 371 of this title, for no others: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." 1 Mason's U. S. Code, 598.

It is obvious that the First National Bank of Omaha was within the express words of the statute in accepting and acquiring, as alleged in the amendment to the original petition, the junior mortgage to further secure it upon a preexisting indebtedness evidenced by the loan made to its customer. And, as we have already seen, its rights thus secured were substantially unchanged as the result of the "mesne conveyances" which were thereafter made. Had the bank been named as grantee instead of Bexten in the conveyances referred to, and entered into possession thereunder, it would have been within the proper designation of a "mortgagee in possession;" that is, one who has lawfully acquired actual possession of the premises mortgaged, standing on his rights as mortgagee. 41 C. J. 612.

"Where a national bank has lawfully acquired an interest in real property, in satisfaction of a debt, it may

purchase other undivided interests therein or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage." 7 Michie, Banks and Banking, 207. See, also, *Williams v. Merchants Nat. Bank,* 42 Fed. (2d) 243; *Cockrill v. Abeles,* 86 Fed. 505.

A national bank which lawfully holds a second mortgage on property may buy in the first mortgage to protect its interest. *Holmes v. Boyd,* 90 Ind. 332; *Heath v. Second Nat. Bank,* 70 Ind. 106.

So, also, "A national bank has power to covenant to pay on demand a lien on land acquired by it." *Mutual Life Ins. Co. v. Yates County Nat. Bank,* 54 N. Y. Supp. 743. See, also, *New England Loan & Trust Co. v. Robinson,* 56 Neb. 50.

It is clear that the transaction challenged is not *ultra vires* but within the statutory powers of national banks.

Nor do we deem that the rights of the parties to this litigation, in view of the admissions in the demurrers, are in any manner modified or impaired by the fact that the defendant bank chose to act in the transaction through and by the individual name of the agent, John H. Bexten, then its cashier, instead of employing its corporate name. On this point the decision of the supreme court of the United States in *Schuyler Nat. Bank v. Gadsden,* 191 U. S. 451, 458, is pertinent. The question for decision before that court in the case cited was whether it was competent for a national bank to take a real estate mortgage in the individual name of its president to secure an indebtedness owing to it, so as to endow the obligation so acquired with all the incidents of a like instrument executed to it in its own corporate name. In announcing the affirmative of the proposition, Justice White, in the majority opinion employed the following language:

"It is not contended that under the laws of Nebraska an agent, acting in his own name, may not take security for the benefit of a principal, or that there is or could be any valid statute of the state of Nebraska discrim-

inating against national banks, and depriving them of the benefits of transactions so consummated. This being true, it follows that the taking of real estate security by the president of the bank in his individual name, for the benefit of the bank, was in legal effect but the taking of security by the bank itself."

We have in Nebraska no statutes depriving national banks of the benefits, or shielding them from the liabilities, of contracts entered into in their behalf in the individual names of their representatives.

The agreement in suit is not a negotiable instrument; neither is it an obligation "under seal." In this jurisdiction we have long been committed to the rule that "an undisclosed principal is bound by simple contracts made by his agent when the acts done by the agent are within the scope of his authority and in the course of his employment." *Bankers Surety Co. v. Willow Springs Beverage Co.*, 104 Neb. 173. See, also, 2 C. J. 840; 21 R. C. L. 890, 891, secs. 63, 64; *Webster v. Wray*, 17 Neb. 579; *Webster v. Wray*, 19 Neb. 558; *Lamb v. Thompson*, 31 Neb. 448; *Dockarty v. Tillotson*, 64 Neb. 432; *Dworak v. Dobson*, 102 Neb. 696; *Eustis Mfg. Co. v. Saco Brick Co.*, 198 Mass. 212; *Wm. Lindeke Land Co. v. Levy*, 76 Minn. 364; *Ford v. Williams*, 21 How. (U. S.) 287; *Timmerman v. Bultman*, 243 Mich. 344; *Greenburg v. Palmieri*, 71 N. J. Law, 83; *Collentine v. Johnson*, 203 Ia. 109; *Maynard v. Fabyan*, 267 Mass. 312; *Dornfeld v. Thompson*, 177 Wis. 4; *Dexter Horton Nat. Bank v. Seattle Homeseekers Co.*, 82 Wash. 480; *Gay v. Kelley*, 109 Minn. 101; *Hutchison Lumber Co. v. Lewis*, 89 Okla. 145; *Rowell v. Oleson*, 32 Minn. 288; *Nissen v. Sabin*, 202 Ia. 1362; *Moore v. Consolidated Products Co.*, 10 Fed. (2d) 319; *Byington v. Simpson*, 134 Mass. 169; *Downer v. Goodwin*, 15 Fed. (2d) 807.

This rule is applicable to the banking business, as we have seen, and as to the First National Bank is controlling in the instant case.

The principle here announced is not in conflict with

the conclusion of this court in *Farrell v. Reed,* 46 Neb. 258; *Reeves v. Wilcox,* 35 Neb. 779; *Thornton v. Farmers & Merchants Nat. Bank,* 117 Neb. 355, and like cases. The subjects under consideration in those cases were negotiable instruments which constitute a well-recognized exception to the rule here declared as to the liability of undisclosed principals.

It seems also that under the facts admitted by demurrers the statute of frauds affords no defense. The applicable rule is:

"Generally, one dealing with an agent of an undisclosed principal may, after disclosure, sue either the principal or the agent, or may join them both. * * * The fact that the contract is required by the statute of frauds to be in writing does not affect the general rule." 21 Standard Ency. of Procedure, 549. See, also, *Ford v. Williams,* 21 How. (U. S.) 287; *Exchange Bank v. Hubbard,* 62 Fed. 112; *Fitzgerald v. Morrissey,* 14 Neb. 198; *Clay v. Tyson,* 19 Neb. 530; *Rogers v. Empkie Hardware Co.,* 24 Neb. 653; *Peyson v. Conniff,* 32 Neb. 269; *Swayne v. Hill,* 59 Neb. 652; *Stanton Nat. Bank v. Swallow,* 113 Neb. 336.

It necessarily follows that the petition demurred to stated a cause of action against the First National Bank of Omaha.

By parity of reasoning, and in view of the personal judgment in favor of the plaintiff and against the defendant Mary A. Bexten, pleaded in the petition demurred to, we arrive at the conclusion that a cause of action was stated against that defendant also.

It follows that the district court erred in its order sustaining each of the demurrers, and in its judgment of dismissal entered herein.

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

REVERSED.

WALDON FRODING ET AL. V. STATE OF NEBRASKA.

FILED SEPTEMBER 29, 1933. No. 28761.

1. **Criminal Law**: EVIDENCE: IDENTIFICATION OF ACCUSED. Where an accused is identified by a witness solely from having heard his voice, the probative value of such evidence is a question for the jury.
2. ———: ———: ———. The positive testimony of one credible witness, identifying the defendants as perpetrators of the crime of robbery from the person, may be sufficient to support a conviction.
3. ———: HARMLESS ERROR. Where an examination of the entire record in a criminal prosecution clearly shows that misconduct of the prosecuting attorney, in propounding an improper question to a defendant on cross-examination, did not mislead the jury in arriving at their verdict or prejudice the accused, such misconduct will be treated as harmless error.
4. ———: ADMISSION OF EVIDENCE. An objection that evidence is incompetent, irrelevant, not proper redirect examination, being a part of the main evidence of the state, does not raise the question of the sufficiency of the foundation laid for the admission of such evidence.
5. **Evidence** examined and *held* sufficient to support the verdict of the jury.

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

William L. Dowling and *Charles J. Thielen*, for plaintiffs in error.

Paul F. Good, Attorney General, and *Paul P. Chaney, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and LOVEL S. HASTINGS and TEWELL, District Judges.

HASTINGS, District Judge.

Waldon Froding and Leonard Froding, plaintiffs in error, were tried on an information wherein they were jointly charged with robbery on May 18, 1932, from the person of one Herman Reiche, of the sum of $315. On

the trial the jury returned a verdict finding defendants guilty and each defendant was sentenced to be imprisoned in the penitentiary for a term of 15 years. From said judgment defendants jointly prosecuted error proceedings.

The evidence establishes that about 5 o'clock a. m. on May 18, 1932, Herman Reiche, a 51 year old bachelor, living alone on his farm 6 miles from Newman Grove in Madison county, was assaulted and robbed by three masked men.

Of the many errors assigned in the petition in error, only three are stressed as requiring consideration. One of the errors assigned is that the evidence is insufficient to sustain the conviction of Waldon Froding.

It appears from the testimony of Herman Reiche, the person robbed, that the defendants lived in Newman Grove, and that he had known Leonard Froding by sight for about two years prior to the robbery, but had no acquaintance with Waldon Froding; that during the robbery the mask over the face of one of the robbers became dislodged, Reiche saw his face and afterwards recognized him as one William Barnett. After they had left the house, one of the robbers, with his mask removed, came back and looked into the room where the witness was and was recognized by him as Leonard Froding. During the robbery all three of the participants were talking and he heard what they said and took account of their voices. The witness positively identifies the two defendants and William Barnett as the men who robbed him. His identification of Waldon Froding was by his voice. It appears that the witness had never heard the voice of Waldon Froding prior to the time of the robbery, but, on hearing it afterwards, recognized it as the voice of one of those participating in the robbery.

It is insisted that the identification of Waldon Froding by his voice is insufficient to establish his identity.

"That one may be identified by his voice is now generally held by the authorities. * * * Accordingly it has

been held to be competent evidence to support a conviction, where a prosecuting witness identified the defendant solely by his voice, and where the witness had never heard the defendant's voice but once before the commission of the crime, and that on the same day that the crime was committed, and then heard him speak only a few words." 8 R. C. L. 184, sec. 176. See *Mack v. State,* 54 Fla. 55, 13 L. R. A. n. s. 373, and note.

We have held that the positive testimony of one credible witness identifying the defendant as perpetrator of the crime is sufficient to support a conviction. *Lee v. State,* 124 Neb. 165, and cases cited in the opinion.

The identification by the witness of Waldon Froding as a participant in the robbery is corroborated by other facts and circumstances in evidence. It appears from the evidence that at least one of those who participated in the robbery knew that Mr. Reiche was a bachelor and lived alone on his farm. William Barnett, whom Mr. Reiche identified as one of the robbers, was apprehended a few days after the crime. He pleaded guilty to the robbery and was sentenced to the penitentiary. So the identification of William Barnett as one of the trio committing the robbery is conclusively established. Furthermore, both defendants testified that they left their home on the 17th day of May at about 11 o'clock a. m. and arrived at the home of a friend in Omaha at 6 o'clock in the morning of May 18; that they remained in the city several days and were together all the time from the time they left Newman Grove until their arrest. The defendants were brothers and both made their home with their mother in Newman Grove. If the defendants were together all the time from May 17 until after the robbery, then the evidence identifying Leonard Froding as being a participant in the robbery would also tend to establish that Waldon Froding was present.

Two witnesses for the state testified as to the presence of Leonard and Waldon Froding in Newman Grove after the time they claim they had left for Omaha. One

witness testified that he saw them coming out of the post office at Newman Grove about 2 o'clock in the afternoon of May 17, and the other that he saw the two defendants with a third party leaving their home in Newman Grove at about 7:30 p. m. on that day.

The identification of Waldon Froding by his voice, with the facts and circumstances in evidence corroborative thereof, was sufficient to warrant the jury in finding that he was one of the participants in the robbery.

Misconduct of the county attorney is assigned as error. William Barnett was called as a witness for the state. He refused to testify, and upon being asked by the court for his reason for such refusal stated: "When I plead guilty to the charge these boys are being tried on, it was with the understanding that I would never be called up here as a witness. Mr. Peterson, the county attorney, was at the penitentiary a week ago today and knew at that time that I had no intention of testifying." The witness then, on suggestion of one of the attorneys for defendants, based his refusal to testify on the ground that his testimony might incriminate him. He was then excused by the court. It is urged that this was error tending to prejudice defendants' case before the jury.

Barnett was a competent witness for the prosecution. He was one of the participants in the crime and he knew who the others were. The prosecution had a right to call him as a witness, and he could refuse to testify only by the exercise of his privilege, of which he availed himself. Error cannot be predicated thereon, although the county attorney may have believed that his effort to get the witness to testify might be futile. *People v. Plyler*, 121 Cal. 160; 16 C. J. 891.

It is claimed that, after Barnett had been called as a witness, he was placed in a chair immediately in front of the jury and the county attorney pointed him out as the third party connected with the crime. Even if this were true, it would not constitute misconduct. However, there is nothing in the bill of exceptions showing such

conduct. Two affidavits appear in the transcript reciting this fact, but as they are not a part of the bill of exceptions they will not be considered. *Walker v. State,* 113 Neb. 19.

Further complaint of misconduct of the county attorney is made on his cross-examination of Leonard Froding in asking the following question: "Q. Babe, you are lying and you know it. A. I am not." To which an objection was sustained as improper cross-examination. Two other questions of somewhat similar import were asked and answered without objection being made thereto.

Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts in each particular case. In the case of *Redick v. State,* 202 S. W. 743 (83 Tex. Cr. Rep. 225), where a similar question was involved, it was held:

"In prosecution for murder, in cross-examining defendant it was improper for the county attorney to ask, 'Don't you know that you are swearing to a lie?' But when the witness answered that he did not know he was lying, the error was harmless."

While the questions propounded were improper, an examination of the record does not disclose that they were prejudicial to the defendants. Other than in this instance the record does not show improper conduct on the part of the county attorney.

Complaint is made that the trial court erred in permitting the introduction of certain evidence in rebuttal to impeach statements made by the defendant Leonard Froding on his cross-examination. On cross-examination Leonard Froding was asked: "Q. Leonard, I think you testified you never talked to any one about this robbery prior to the 18th of May? A. I never. Q. Did you, on or about the 1st of May, talk to Marvin Griffiths in a hamburger hut in Newman Grove about robbing Herman Reiche? A. Absolutely not. Q. Did you, on or about that time, tell Marvin Griffiths that you knew a farmer who was a bachelor who had thousands of dollars in his safe

on his farm and that you and he could go and get it? A. I did not." No objection was made by the defendants to this line of cross-examination.

Marvin Griffiths was called as a witness in rebuttal by the state and the following question was propounded to him: "Q. Did Leonard Froding, on or about the 1st day of May, 1932, tell you that he knew a farmer who was a bachelor who had thousands of dollars in his safe on his farm and that you and he could go and get it?" The witness answered in the affirmative. The only objection made to that question, in substance, was that it was incompetent, irrelevant, not proper redirect examination, and being a part of the main evidence of the state. The objection was sustained as to the defendant Waldon Froding, and overruled as to Leonard Froding.

It is insisted on behalf of Leonard Froding that the court erred in its ruling, in that no sufficient foundation had been laid for impeachment; that the evidence offered was immaterial and that the defendant could not be impeached on an immaterial matter. In *McCormick v. State,* 66 Neb. 337, we held:

"An objection that evidence is incompetent, irrelevant, and immaterial does not raise the question of the sufficiency of the foundation laid for the admission of such evidence."

The objection made does not raise the question as to the sufficiency of the foundation for impeachment. By the objection made, the attention of the trial court was not challenged to the grounds now urged for a reversal, and the sufficiency of the foundation for impeachment will not now be considered.

In this connection it is further urged that the evidence given by the witness Griffiths was not rebuttal evidence, being in the nature of original evidence admissible in the state's case in chief. While the evidence was properly admissible as part of the state's case in chief, yet it was also properly admissible in rebuttal as contradictory of the statements of Leonard Froding made on cross-examination.

In this connection complaint is made to the giving of instruction No. 14. The trial court by that instruction eliminated from the consideration of the jury this evidence as original evidence on the part of the state; told the jury that the same was admitted solely because it might or might not affect the credibility of Leonard Froding's testimony, and that it must not be considered for any other purpose, and they should entirely disregard it in considering the case of Waldon Froding. That instruction was favorable to the defendant. Prejudicial error was not committed by the trial court in admitting the evidence complained of or in giving the instruction limiting its effect.

We have carefully examined the record in this case and find no error prejudicial to the rights of the defendants. The evidence is convincing as to their guilt.

Finally, it is urged that if the judgment be affirmed the sentence should be reduced. In support of this claim it is urged that Barnett, the other participant in the robbery, received a much shorter sentence than that imposed upon the defendants. There is nothing in the record showing what his sentence was. The sentence imposed upon Barnett is not before us for consideration.

The evidence discloses that the defendants and Barnett went to the home of their victim armed with a shotgun, a revolver, and a club. By menacing him with the guns they forced him to open a small safe and then extracted therefrom $315 in money. Evidently believing that it was not all the money he had, they bound him, and one of the defendants struck him on the head and face while he was bound and helpless. They then placed him upon a bed and threatened to set fire to the bed and burn the house unless he disclosed the hiding place of other money; and while he was bound and helpless upon the bed one of the defendants pressed the blade of a knife against his throat, calling him a vile name, and threatening to kill him unless he told them where they could find more money. Finally, convinced that he had no

other money, they took his automobile and drove away with it.

The defendants, at the time of the commission of the crime, were the ages of 19 and 20 years. Their youth is urged as a reason why the sentence should be reduced. It is a matter of common knowledge that many of the crimes of this character are committed by youths of the age of these defendants. Crimes of this kind are committed with an alarming frequency. Usually the victims are those who live alone and are incapable of efficient resistance. In the case of *Cherpinsky v. State*, 122 Neb. 52, a sentence of 23 years was imposed for a crime of this kind. A reduction of the sentence was asked on the ground that it was excessive, but this court refused to reduce the sentence, stating:

"It is a well-known fact that criminals, engaged in committing crimes of this character, are potential murderers. Defendants were armed with deadly weapons, prepared to use and doubtless would have used them, had it been necessary to carry out their evil designs."

The statute under which the defendants were convicted provides, as a penalty, imprisonment in the penitentiary of from 3 to 50 years. Taking into consideration the enormity of the crime proved, and that the sentence imposed was less than one-third of the maximum penalty provided by statute, we are not disposed to reduce the sentence imposed by the trial court.

The judgment is

AFFIRMED.

WILLIAM ROSS, APPELLEE, V. FIRST AMERICAN INSURANCE COMPANY, APPELLANT.

FILED SEPTEMBER 29, 1933. No. 28775.

1. Trial. The issues presented by the pleadings in this action *held* to be triable as an action at law.
2. Insurance: PREMIUM NOTE: OFFER OF PAYMENT. The facts

stated in the opinion *held* to show a sufficient offer of payment of a note, given for a premium due on a health and accident policy, to entitle the insured to maintain an action thereon to recover indemnity for a loss sustained thereunder.

3. ———: NOTICE. Where a health and accident policy requires written notice of injury or of sickness on which a claim may be based to be given the insurer within 20 days after the accident causing such injury or within 10 days after the commencement of disability from such sickness, it is sufficient compliance therewith on the part of an insured, who has received an injury apparently trivial in its nature but which thereafter causes an illness resulting in total disability, that he gives such notice when a condition developed such as would warn a person of ordinary and reasonable prudence that a disability had occurred or might occur therefrom which would entitle him to indemnity under his contract of insurance.

4. ———: ACTION ON POLICY: DEFENSES: ESTOPPEL. Where, prior to the commencement of this action, the insurer denied liability and gave as its only reason the alleged fraudulent procurement of the policy, and that on such ground it elected to rescind, the insurer cannot, after litigation had been begun, change its ground and assert as a defense the failure to give notice of loss within the time required by the contract of insurance.

5. ———: ———: ———: ———. Ordinarily an estoppel or waiver must be pleaded by the party invoking it, but where the facts showing an estoppel or waiver are within the issues made by the pleadings and the evidence thereof is admissible for any purpose, it is not necessary that the estoppel or waiver shall be specially pleaded.

6. ———: POLICY: "BODILY INFIRMITY." "Bodily infirmity means a settled disease, an ailment that would probably result to some degree in the general impairment of physical health and vigor. * * * Bodily infirmity, as used in an accident policy exempting the insurer from liability, only includes an ailment * * * of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system." *French v. Fidelity & Casualty Co.*, 135 Wis. 259.

7. ———: NOTICE. Upon the facts set out in the opinion, *held*, that the knowledge and information acquired by the agent of the insurer at the time the application for insurance was written by such agent, were imputed to his principal.

8. ———: APPLICATION. The mere failure or omission to state

the name of a physician and a treatment by him for some temporary indisposition or ailment will not avoid the policy.

9. ———: INCREASED INDEMNITY. Where a health and accident policy provides for the payment of increased indemnity for necessary removal and treatment in a regularly incorporated hospital, a recovery cannot be had thereon for treatment in a hospital other than an incorporated one.

10. Evidence examined and *held* sufficient to support the verdict of the jury, except as to the amount allowed for hospital benefits.

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

Albert S. Johnston, for appellant.

Beeler, Crosby & Baskins, contra.

Heard before GOSS, C. J., GOOD, DAY and PAINE, JJ., and CHASE and LOVEL S. HASTINGS, District Judges.

HASTINGS, District Judge.

This action was brought by William Ross, plaintiff and appellee, against the First American Insurance Company, defendant and appellant, to recover indemnity upon an accident and health insurance policy issued by the defendant. On a trial to a jury a verdict was returned in favor of the plaintiff in the sum of $879.16; judgment was entered on the verdict, and defendant appeals.

It is admitted in the pleadings that on the 23d day of May, 1931, the defendant for a premium of $260 executed and delivered to plaintiff the five year term accident and health policy sued upon. It appears from the evidence that the plaintiff in payment of the premium executed and delivered to the defendant his note for $260, dated May 20, 1931, due in six months after date, with interest at 6 per cent. per annum.

It is alleged in the petition that on June 12, 1931, while said policy was in effect, plaintiff suffered an injury by stepping upon and piercing his left heel with a rusty nail; that plaintiff suffered a total disability therefrom which was continuous up to the time of the filing of his

petition on April 28, 1932, and that from July 3, 1931, he was confined in a hospital for the treatment of the disability arising from said injury for a period of ten months.

The defendant in its answer denied all the allegations of plaintiff's petition except the issuance and delivery of the policy and the giving of the premium note. Several affirmative defenses are pleaded in the answer, which are: (1) Failure to pay or offer to pay or to confess judgment for the premium note; (2) false statements in the application which were material to the risk and hazard assumed and contributed to the loss; (3) that the disability existed at the time the policy was issued and was due in part, at least, to bodily infirmity, and not covered by the policy; (4) and that defendant, after notice of its election to rescind, had rescinded the contract of insurance for fraudulent misstatements contained in the application and had returned the premium note to plaintiff.

The reply was a general denial of the affirmative defenses alleged in defendant's answer and a plea in avoidance of the alleged breach for failure to pay the premium note.

Under the issues so framed, defendant, before trial and at the close of the evidence, moved the court for a trial of the action in equity on the sole ground that the answer by the defendant prayed for the cancelation of the policy. Both motions were overruled and the rulings are assigned as error.

The cause of action presented by the petition of the plaintiff is purely a law action and before such action is triable in equity the equitable nature of the defense must clearly appear from the facts alleged in the answer, to defeat the plaintiff of his right to a trial to a jury. The facts alleged in the answer as a defense to plaintiff's cause of action do not present a defense cognizable solely in equity. The mere fact that the plaintiff did not, on demand, surrender the policy, after a loss thereon, for

cancelation did not change the action from one at law to one in equity.

The alleged defense that the policy was procured by the plaintiff by false statements made in the application, in the suppression or concealment of facts, was as available and complete as a defense to an action at law as it would have been in equity. A determination of the issues in favor of the defendant would have been an adjudication of the rights of the plaintiff under the policy and would have operated as effectively to bar any future recovery thereon as a cancelation by decree of the court in an action in equity. The issues having been determined in favor of the plaintiff, the right of the defendant to a rescission and cancelation of the policy was thereby determined against it and there was nothing left for a court of equity to act upon. The motions were properly overruled.

It is contended by counsel for the defendant that plaintiff, being in default for nonpayment of the premium note, could not maintain an action on the policy in the absence of an offer to pay or confess judgment thereon. The policy contains no provision for forfeiture for failure to pay a premium when due. It contains a provision, however, that the company at its option may suspend the policy during the period the premium is due and unpaid. The defendant never exercised that option, nor did it make any demand for payment.

The policy also contains the provision: "Upon the payment of any claim hereunder, any premium then due and unpaid or covered by any written order, or note or check may be deducted therefrom." The note became due on November 20, 1931, and previous to that date plaintiff had sustained a loss, which, if it entitled him to indemnity, was greatly in excess of the amount due on the note. The defendant did not deny liability for the loss until more than a month after the note matured. Before the maturity of the note plaintiff wrote defendant and asked it to give the amount that was due on his

note and whether it wished it paid by draft or by deducting the amount due from the indemnity due him under his policy. Thereafter, and before the company denied liability, plaintiff again wrote the company asking for settlement of his claim and authorized the company to deduct therefrom the amount due upon the note. The company did not reply to the first letter. It replied to the second letter and told him that it would have a representative out to see him in reference to his claim. On December 23, 1931, the company finally denied liability, gave notice of its election to rescind, and returned the note to the plaintiff. After it gave notice of rescission, it is evident that any offer or tender of payment by the plaintiff would not have been accepted. Thereafter plaintiff was not required to offer or tender payment of the note prior to the commencement of the suit. *Bundy v. Wills,* 88 Neb. 554; *Filley v. Walker,* 28 Neb. 506; 26 R. C. L. 624, sec. 3.

In his petition plaintiff alleged that defendant was entitled to credit for the amount due and owing on the premium note upon the indemnity alleged to be due plaintiff, gave the defendant credit therefor, and asked judgment for the remainder. This amounted to an offer of payment in accord with the provisions of the policy, if plaintiff recovered. If plaintiff did not recover, then defendant, having rescinded, would not be entitled to recover on the note.

Another ground of the motion for a directed verdict, which was overruled, was the alleged failure of plaintiff to give notice of his injury and disability as required by the contract of insurance. The policy contained the following provision:

"Written notice of injury or of sickness on which claim may be based must be given to the home office of the company within twenty days after the date of the accident causing such injury or within ten days after the commencement of disability from such sickness. * * * Failure to give notice within the time provided in this

policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

Compliance with this provision as to notice of claim for accidental injury or disability, unless waived, is a condition precedent to recovery. *Campbell v. Columbia Casualty Co.*, 125 Neb. 1. Defendant relies on the above case to support his contention. In that case the trial court directed a verdict for the defendant on the ground that no notice had been given as required, no excuse offered for delay, or waiver shown. The facts in that case are materially different. In this case the evidence shows that on June 12, 1931, when plaintiff sustained his injury, a physician was called, treated the wound and called on him some four days thereafter and found the wound about healed and nothing to indicate that any serious consequences would result. Some days later, on another visit, the physician discovered the leg somewhat swollen, indicating an infection that was progressing upward, and he continued to treat plaintiff for a few days thereafter at his place of business; then, being fearful that the swelling might extend above the knee, told him he should go to the hospital. Plaintiff on the same day, July 3, 1931, was taken to the hospital. Prior to the time he was taken to the hospital the physician had not indicated to plaintiff that he might suffer any serious disability therefrom. When taken to the hospital, plaintiff, for the first time, was advised that he was suffering from a serious disability on which a claim for indemnity might be based. Within a day or two after he was taken to the hospital, Rankin, the general soliciting agent of defendant, who had taken his application, called at the hospital, and plaintiff told him to notify the company of his injury and sickness. The agent told him he was going to the home office within a day or two and would notify the company. Not hearing from the defendant, plaintiff then requested his physician to write the com-

pany informing it of his injury and the disability resulting therefrom. On July 13, 1931, the physician wrote the defendant advising it of the injury and that he believed that it had already been reported to them by their agent, C. E. Rankin. On July 14, 1931, the company wrote the plaintiff acknowledging receipt of the letter from his physician, stating that it was inclosing a preliminary blank to be filled out and returned to its office. The plaintiff, on receipt of the blank from the company, filled it out and transmitted it to the defendant. Previous to the time plaintiff was taken to the hospital he did not realize that the injury sustained or the disability resulting therefrom was of such a serious nature as to warrant him in making a claim thereon for indemnity. When he did realize the serious nature of his disability, he caused written notice thereof to be given to the defendant. It further appears that there was nothing in his condition or the result of the injury to give reasonable warning to plaintiff that his injury would have any serious aspect.

When an injury received by an insured is apparently trivial in its nature, but which thereafter causes total disability, he is not required to give notice thereof until such facts have developed as would warn a person of ordinary and reasonable prudence that a disability might arise therefrom which would entitle him to indemnity under his contract of insurance. Notice of sickness, resulting from an injury, given by the insured within ten days after a person of ordinary and reasonable prudence realizes that such sickness had caused a disability that might entitle him to indemnity under his policy is sufficient to meet the requirements of the contract of insurance. *Chapin v. Ocean Accident & Guarantee Corporation*, 96 Neb. 213; *George v. Aetna Casualty & Surety Co.*, 121 Neb. 647; *Jennings v. Brotherhood Accident Co.*, 44 Colo. 68, 18 L. R. A. n. s. 109; *Grant v. North American Casualty Co.*, 88 Minn. 397; *Odd Fellows Fraternal*

Accident Ass'n v. Earl, 70 Fed. 16; *Rorick v. Railway Officials & Employees Accident Ass'n,* 119 Fed. 63.

Furthermore, it appears from the evidence defendant wrote plaintiff before this action was begun, in substance, denying liability upon the contract of insurance, assigning as the sole grounds therefor that plaintiff had made false statements in his application and that had the statements been truthfully made the policy would never have been issued; that on account thereof the defendant elected to rescind its approval of his application and the contract of insurance and return the note given for the premium (which was inclosed in the letter) and asked plaintiff to return the policy for cancelation. This letter was offered and received in evidence without objection.

The defendant, prior to the commencement of this action, having denied liability and given as its reason the alleged fraudulent procurement of the policy and that on such grounds it elected to rescind, cannot, after litigation has been begun, change its ground and assert as a defense the failure to give notice of loss within the required time. *Hamblin v. Equitable Life Assurance Society,* 124 Neb. 841; *Yates v. New England Mutual Life Ins. Co.,* 117 Neb. 265.

Refusal of payment upon the grounds indicated in the letter and its alleged rescission upon such grounds constitute a waiver of notice. *Feis v. United States Ins. Co.,* 112 Neb. 777. The defendant insists that plaintiff, not having specially pleaded an estoppel or waiver by defendant as to the giving of notice of loss, cannot avail himself thereof. Ordinarily an estoppel or waiver must be pleaded by the party invoking it; but where, as in this case, the facts showing an estoppel or waiver are within the issues made by the pleadings and the evidence showing the estoppel is admissible for any purpose thereunder, it is not necessary that the estoppel or waiver should be specially pleaded. *Yates v. New England Mutual Life Ins. Co., supra; Hirsch R. M. Co. v. Mil-*

waukee & F. R. V. R. Co., 165 Wis. 220; *McDonnell v. De Soto Savings & Bldg. Ass'n*, 175 Mo. 250; 10 R. C. L. 844, sec. 149.

Error was not committed in overruling the motion for an instructed verdict on the ground assigned. In this connection plaintiff assigns error in the giving of instruction No. 3, wherein the jury were told that the burden of proof was upon the plaintiff to prove notice of loss or waiver thereof by the acts of the defendant. It follows from what has been said that the giving of that instruction was not prejudicial to defendant.

It is insisted by counsel for the defendant that the evidence establishes that plaintiff was afflicted with a bodily infirmity at the time that he made his application and at the time that the policy was issued, which materially contributed to or caused, either directly or indirectly, the disability for which plaintiff seeks to recover indemnity. In this respect the policy provides:

"Nor shall this policy cover any loss or disability caused directly or indirectly, wholly or in part, by mental or bodily infirmity."

It is established by the evidence that when plaintiff was taken to the hospital on July 3, 1931, he was suffering from a serious disease known as thrombophlebitis, which was affecting his left leg below the knee. A short time prior to May 1, 1931, plaintiff had a swelling in the calf of his right leg. To reduce the swelling he applied some strong liniment to that part of his leg. The liniment produced an irritation, and on May 1, 1931, he went to the office of Dr. Heider at North Platte, exhibited the swelling in his leg, was given a prescription for medicine to apply thereto to alleviate the irritation produced by the liniment and was told by the doctor to stay off his feet and keep his right leg elevated until the swelling went out. The doctor prescribed no other treatment and did not tell plaintiff the cause of the swell-

ing. The plaintiff paid the doctor for his treatment and did not thereafter consult him or any other physician in regard to said ailment. There was no perceptible swelling in plaintiff's right leg at the time that he made his application for insurance.

It is the claim of the defendant that plaintiff was afflicted with thrombophlebitis in his right leg at the time he consulted Dr. Heider and that such disease was present at the time he made his application and received the injury to his foot. The evidence upon this question is in conflict. The evidence in behalf of the plaintiff is that the ailment which caused the swelling in his leg, for which he consulted Dr. Heider, was not thrombophlebitis or a disease, but a condition produced by a sluggish circulation relieved by staying off his feet for a while; that the thrombophlebitis which plaintiff was suffering from at the time he was in the hospital was due directly to an infection introduced into the blood stream by the nail penetrating his foot. When plaintiff was taken to the hospital he was examined by the physician and there was no swelling in his right leg, but after he had been confined in the hospital for a short time the swelling progressed upward in his left leg to the pelvis and across and down into the right leg. Dr. Heider, called as a witness for the defendant, on his cross-examination testified that at the time plaintiff came to him for treatment of his right leg he did not diagnose his ailment as thrombophlebitis but as a temporary ailment. Dr. Heider, while testifying for the defendant in answer to a hypothetical question, stated that from the fact that plaintiff was afflicted with thrombophlebitis at the time he was taken to the hospital it was his opinion that probably plaintiff was afflicted therewith in his right leg at the time he consulted him and at the time he made his application and probably had not recovered therefrom at the time of his injury.

"Bodily infirmity means a settled disease, an ailment that would probably result to some degree in the general impairment of physical health and vigor. * * * Bodily infirmity, as used in an accident policy exempting the insurer from liability, only includes an ailment * * * of a somewhat established or settled character, and not merely a temporary disorder arising from a sudden and unexpected derangement of the system." *French v. Fidelity & Casualty Co.*, 135 Wis. 259. See, also, *Eastern District Piece Dye Works v. Travelers Ins. Co.*, 234 N. Y. 441, 26 A. L. R. 1505, and note.

The evidence in this respect sustains the verdict of the jury.

It is contended by counsel for defendant that the evidence establishes that plaintiff made false representations in his application, material to the risk, thereby deceiving defendant to its injury, and that the trial court should have sustained defendant's motion for a directed verdict. The particular questions claimed to have been falsely answered together with the answers given in the application were the following: "8. Who is your physician? None. Date of last treatment? None. * * * 9. Are you now in good health? Yes. * * * 11. Have you had any other disease in the past five years? No." It appears that plaintiff's application was taken by Pierson and Rankin, soliciting agents of defendant; that Rankin wrote the answers to the questions therein and plaintiff had nothing to do with the preparation thereof. The evidence further shows, without conflict, that plaintiff told said agents at that time that he had previously had a swelling in his right leg, had been treating it with the use of liniment and staying off his feet, that he thought it was all right then. He exhibited his leg to them and both of said agents testify that it was not swollen and appeared to be normal. Rankin told plaintiff that it was not necessary to mention it in the application; that his father had been troubled with the same thing at times when he was plowing corn with a walking cultivator,

but that as soon as that work was over and he got off his feet the swelling disappeared. The evidence shows that plaintiff was in good health at that time except as the ailment to his right leg might affect the same. Other than that ailment there is no evidence that within the preceding five years he had been afflicted with any other disease or ailment material to the risk. Plaintiff made a full disclosure to said agents about his ailment and the treatment thereof, save and except that he had consulted Dr. Heider in relation thereto and had been told to keep off his feet and elevate his foot until the swelling went out, and that he had been given a prescription for medicine to stop the burning and itching caused by the liniment. The knowledge of defendant's agents obtained at that time in regard to the ailment with which plaintiff had been afflicted is imputed to the defendant, there being no collusion shown between such agents and the plaintiff to deceive defendant. *Rubinson v. North American Accident Ins. Co.*, 124 Neb. 269; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554; *German Ins. Co. v. Frederick*, 57 Neb. 538; *Busboom v. Capital Fire Ins. Co.*, 111 Neb. 855; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404; *Norem v. Iowa Implement Mutual Ins. Ass'n*, 196 Ia. 983; *Nertney v. National Fire Ins. Co.*, 199 Ia. 1358; 21 R. C. L. 838, sec. 21.

It will be presumed that defendant's agents imparted the information thus obtained to their principal. It is insisted by counsel for the defendant that the knowledge thus obtained by defendant's agents could not be imputed to the defendant. We are cited to the case of *Morrissey v. Travelers Protective Ass'n*, 122 Neb. 329, in support thereof. The facts stated in the opinion in that case do not make the rule announced therein applicable to the facts in the instant case, nor is it in conflict with the authorities cited. The knowledge of defendant's agents being imputed to defendant, it could not have been deceived by nor relied upon the answers to questions 9 and 11 to its injury.

Representations contained in an application for insurance that the insured is in good health and has had no disease within the preceding five years means that the insured has not suffered any illness or disease of a serious nature tending to undermine the constitution or seriously affecting the general soundness or health of his system. The mere failure or omission to state the name of a physician and a treatment by him for some temporary indisposition or ailment will not avoid the policy. *Yonda v. Royal Neighbors of America*, 96 Neb. 730; *Modern Woodmen of America v. Wilson*, 76 Neb. 344; *Blumenthal v. Berkshire Life Ins. Co.*, 134 Mich. 216; *French v. Fidelity & Casualty Co.*, 135 Wis. 259. If the ailment to plaintiff's right leg was a temporary ailment or indisposition which readily responded to treatment and he having told defendant's agents all he knew in relation to the nature of said ailment, and on examination by them of his leg it appeared normal, then his answers to both parts of question 8 would be immaterial and defendant would not be deceived thereby to its injury. Under the facts and circumstances disclosed by the record, it was not error to overrule defendant's motion for a directed verdict on the grounds assigned.

Error is assigned in the giving of instruction No. 6. It is the contention of defendant that the trial court erred in instructing the jury that the answers to questions 9 and 11 did not avoid the policy if plaintiff did not intend to deceive the defendant thereby. The instruction is too long to quote and it is not necessary to a proper consideration of the question involved. The trial court, in substance, told the jury in that instruction that the answers to questions 9 and 11 would not avoid the policy if plaintiff acted in good faith and with no intent to deceive, and disclosed to Mr. Rankin all he knew about his health, and all he knew of having any disease within the five years preceding May 20, 1931; but if plaintiff did not disclose all he knew relative to his health, and knew of his having had some disease within the five years

that materially affected the risk assumed by defendant, and either failed to tell said Rankin thereof or allowed him to send such answers to the defendant with the intent to deceive the defendant, that the policy would be avoided thereby. As heretofore pointed out, the evidence, without conflict, discloses that plaintiff told defendant's agents all he knew about any ailment or disease that might materially affect the risk. The court should have instructed the jury that, in view of the disclosures made to defendant's agents, the answers to said questions would not avoid the policy, therefore the submission of such issues was without prejudice to the defendant.

The policy provides: "That no indemnities shall be paid for 'such illness' if same is contracted and begins within fourteen days from date of issue of this policy." It is insisted that the verdict is not supported by the evidence and that the illness and disability for which plaintiff claims indemnity commenced within fourteen days from the issuance of the policy. As to whether the ailment which caused plaintiff's disability was contracted and begun within fourteen days from the issuance of the policy is a question upon which the evidence is in conflict and is amply sufficient to support the verdict of the jury.

It is claimed that there was error in the giving of instructions 4 and 5, in that the court limited a bodily infirmity, which would avoid the policy, to one existing at the time of the issuance of the policy. The record discloses that the theory of the defendant was that the bodily infirmity which caused the disability on which plaintiff's claim for indemnity is based existed at the time of the issuance of the policy, therefore the claim of error in this regard is without merit.

It is also urged that the court erred in failing to correctly define "bodily infirmity" in instruction No. 5. The definition of that phrase in the instruction conforms to the meaning given by the authorities heretofore cited.

It is contended that the court erred in giving instruc-

tion No. 7, wherein the jury were permitted to find, as an element of plaintiff's recovery, that he might recover for hospital benefits provided for in the policy. The provision of the policy relating thereto is as follows:

"If on account of such bodily injury or such disease, it is necessary to remove the insured to a regularly incorporated hospital within thirty days of the date of such bodily injury, or such disease, the regular monthly indemnity payable shall be increased by one-half for a period not exceeding two months during such hospital confinement."

The hospital to which plaintiff was removed and received treatment was a small unincorporated hospital. It is contended that plaintiff was not entitled to recover benefits for treatment in such a hospital. The probable purpose of the provision limiting such benefits to treatment in an incorporated hospital is that generally such a hospital would be of a more permanent character, have better facilities for treatment, and thus shorten the period of disability, than one not incorporated. The provision was a reasonable one. The recovery for hospital benefits being limited to treatment received in a certain class of hospitals, there can be no recovery for treatment in any other class.

It appears that the jury included in their verdict hospital benefits for two months amounting to $100, with interest thereon from the date of the filing of the petition therein on April 28, 1932, to October 22, 1932, at 7 per cent. amounting in all to the sum of $103.97. The error may be cured by a remittitur of that sum from the amount of the judgment. If plaintiff file a remittitur in this court within 20 days for the sum of $103.97, the judgment for $775.19, with interest from October 22, 1932, will be affirmed, otherwise it will be reversed and cause remanded for a new trial. We have carefully examined the evidence and find that it is sufficient to support the verdict of the jury except as to the allowance for hospital benefits.

The trial court allowed plaintiff's attorneys a fee of $350 and defendant complains of this as excessive. The allowance of such fee was largely in the discretion of the trial court. When we take into consideration the length of the trial and the questions involved we do not think that the allowance made should be disturbed, although the amount involved is small.

AFFIRMED ON CONDITION.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. WISNER STATE BANK: E. H. LUIKART, RECEIVER, APPELLANT: CHRISTIAN LORENSEN, APPELLEE.

FILED SEPTEMBER 29, 1933. No. 28581.

1. **Vendor and Purchaser: OFFER: REJECTION.** Where one receives an offer for the purchase of property and later receiving a higher bid from another advises the first party of the increased offer and on the strength thereof endeavors to induce the first party to increase his bid, the first bid is thereby in effect rejected.
2. ———: ———: ———. If an offer to purchase is rejected either by an absolute refusal in express terms or by implication, the offer lapses.
3. ———: ———: ———. If an offer to purchase is rejected, it cannot thereafter be accepted so as to create a binding contract of sale, unless after such rejection the offer is renewed by the original offerer or he consents to a subsequent acceptance.

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

F. C. Radke, Otto H. Zacek, G. E. Price and *Barlow Nye,* for appellant.

A. R. Oleson, contra.

Heard before GOSS, C. J., EBERLY, DAY and PAINE, JJ., and BEGLEY, LANDIS and MEYER, District Judges.

MEYER, District Judge.

The Wisner State Bank became insolvent in 1931. E.

H. Luikart was duly appointed receiver and Howard Doty was in active charge of the bank under the receiver. On April 7, 1932, the receiver filed application with the district court for Cuming county, Nebraska, for authority to sell the bank building to one Christian Lorensen for $4,500 and the fixtures for $500, alleging that he had an offer from Lorensen of said sums. Lorensen filed objections to said confirmation, alleging among other things that after he made said offer Doty notified him that his bid for the building had been raised $100 and asked him if he desired to bid again, whereupon he told Doty that he would not and that he was through, and he also alleges that he told Doty then and again on April 6 that his offer was withdrawn. Upon hearing, the district court sustained the objections and the receiver has appealed.

The record discloses that the order appointing the receiver was in the usual form, and among other things stated that the "receiver is further authorized and empowered to sell and dispose of any and all property, both real and personal, belonging to said bank, to the best possible advantage * * * subject to the approval of the court, and as provided by law." Pursuant thereto and without other or more specific authorization or direction, Doty set about in March, 1932, to secure offers for the purchase of the bank building. He first received a bid of $3,500 from one Richmond. This bid was raised to $4,000 by Lorensen, appellee herein. Thereafter Richmond raised his bid to $4,100, and then Lorensen on March 23 bid $4,500 for the building and $500 for the bank fixtures, his bid for the fixtures being conditional, however, upon his offer for the building being accepted. Doty then solicited and on or about March 29 secured a further bid from Richmond in the sum of $4,600 for the building. After receiving this bid and on the same or the following day, Doty called on Lorensen at his home and told him his bid had been raised and endeavored to induce Lorensen to bid more.

It appears that when Doty took the Richmond bid he

told him that he did not know whether his or Lorensen's offer would be accepted. Doty's representations to Lorensen were not so qualified. Lorensen told Doty that if he wanted to bid again he would do so in open court. Lorensen also testified that Doty at that time told him that he "was out," and that he then told Doty he "was through" and was withdrawing his bid. Doty denies this, but it is undisputed that Lorensen repeated later to a member of the depositors' committee that "there was no use bidding on it," that if he wanted to bid again he would do so in open court, and that he told Doty on April 4 and again on the 6th that he was withdrawing his bid. He never did bid again. After Lorensen's refusal to bid further, the receiver's agent endeavored to secure a bid from Richmond on the fixtures. Being unsuccessful, it was then decided that the Lorensen offer was the best, and Luikart testified that he approved same on April 2. This was done without securing a renewal of Lorensen's offer, without his consent, and apparently without his knowledge.

The informal bidding extended over a period of approximately two weeks. A deposit was made to accompany each bid and they were each evidenced by a writing in nature of a contract to purchase signed by the bidder only. The Lorensen contract for $4,500 provided that it was subject to the approval of the department of trade and commerce and the approval of the district court for Cuming county, Nebraska. The evidence is not clear on this point, but it is assumed that all of the several contracts contained the same conditions. Doty testified that "these bidders were aware of the other man's bid."

It is conceded that Lorensen's bid of $4,500 for the building and the writing which he signed was a mere proposal or offer to purchase which could be withdrawn at any time before acceptance. It is also elementary that until withdrawn said offer was subject either to acceptance or rejection.

Appellant argues that there was little sale for the

fixtures apart from the building and that therefore Lorensen's bid was the best bid; that said bid was accepted by the receiver on April 2, 1932; that it was not withdrawn prior thereto; that the receiver was powerless to release Lorensen after his bid was accepted, and that it was an abuse of discretion under the circumstances for the court to do other than to confirm said sale. A number of cases are cited to the effect that in a judicial sale the officer conducting the sale is powerless to release a bidder once his bid is accepted, and other cases holding that, if the bid accepted is the best bid and the sale has been free from fraud and mistake, a binding contract results and its confirmation follows as a matter of course.

Appellant's argument is bottomed on the proposition that this was a judicial sale and the assumption that the Lorensen bid was still subsisting at the time when Luikart says he accepted it. It is unnecessary to consider whether this was or was not a judicial sale, for in our opinion the undisputed evidence discloses that said offer was in effect rejected before any move was made to accept it. The cases cited deal only with the right of an officer to release a successful bidder in a judicial sale after the bidding is concluded and the property struck off to such bidder. No authority is produced which denies the officer's right to receive a higher bid at any time before the sale is closed or which discusses the status that automatically follows the receipt of such higher bid. As we view it, this is the important point in this case.

It appears from the testimony that Doty first directed his efforts toward the sale of the building alone. Apparently the fixtures were never mentioned until Lorensen made his double bid, and Lorensen on cross-examination testified that even then Doty said the fixtures were "a separate deal" and could not be put in on the real estate. The contract to purchase the building evidencing the Lorensen bid for $4,500 is silent as to fixtures. A separate writing was made to cover his bid for them.

In our opinion when Doty went to Lorensen's home and told him that he had a $100 higher bid for the building and failed to advise Lorensen that he had received said bid conditionally and endeavored to induce Lorensen to raise his bid, that was tantamount to a rejection of Lorensen's last offer, and Lorensen thereby became as effectually released therefrom as if Doty had said to him: "Lorensen, you are out. We have a higher bid. If you want to be considered further it will be necessary for you to give us another offer." Doty might have told Lorensen, as he did Richmond, that he had received the Richmond offer conditionally and that under the circumstances Lorensen's bid might be considered the best offer. Doty did not choose to do so. Rather on the strength of the statement that he had a higher offer he sought, without disclosing the full facts, to induce appellee to offer a larger sum. It should be noted that Lorensen testified that Doty actually did say "you are out." This would constitute a direct refusal and rejection of his bid, but in any event, having under the undisputed evidence in effect represented to Lorensen that his offer had been superseded, it follows naturally that no contractual obligation could thereafter be based on such offer and that the purported acceptance thereof on April 2, 1932, came too late. "If the offer is rejected, either by an absolute refusal or by an acceptance not identical with the terms of the offer, or by a counter offer, unless the offerer consents to the conditional acceptance or counter offer, the offer lapses and becomes invalid, and it cannot thereafter be accepted so as to create a binding contract of sale." 55 C. J. 88.

Having thus decided, it becomes unnecessary for us to determine the question of withdrawal. Lorensen's offer having been rejected, it was unnecessary for him to withdraw it. In this regard, however, it may be noted that Lorensen testified positively that, on the same day that Doty told him of the last Richmond bid, he went to the bank and told Doty he was through and would

withdraw his bid and to let Richmond have it. This is denied, but Lorensen's conduct in relation to this matter, as disclosed throughout the evidence, tends to support his testimony on this point.

The action of the trial court is

AFFIRMED.

SIMEON J. THOMPSON ET AL., APPELLANTS, V. CHARLES H. JAMES ET AL., APPELLEES.

FILED SEPTEMBER 29, 1933. No. 28836.

1. **Counties and County Officers: SUPERVISORS.** The office of a district supervisor created in the manner provided by sections 26-294 to 26-299, Comp. St. 1929, is an office distinct and apart from the office of township supervisor provided for by sections 26-290 to 26-293, Comp. St. 1929.
2. **Elections.** An election held without affirmative constitutional or statutory authority is a nullity.
3. ———: SUBMISSION OF PROPOSITION. An election upon a proposition submitted to popular vote is void, if the proposition submitted is materially different in substance than the one authorized by law to be so submitted at such election.
4. ———: ———. The rule that provisions of election laws are to be construed as directory after an election, in support of the result, does not permit such a departure from such provisions in the manner of submitting a proposition to popular vote, as to leave doubt as to whether such departure did not of itself bring about a different result than would have otherwise occurred.
5. **Quo Warranto.** An information in the nature of *quo warranto* will lie upon the relation of a township supervisor whose office is invaded by one claiming that he has been elected district supervisor and that the office of relator has been abolished by an election held under the provisions of sections 26-294 to 26-299, Comp. St. 1929, even though the validity of such election and the existence of the office of district supervisor provided for therein are drawn in question.
6. ———: JOINDER. When the rights of two or more persons to separate offices depend upon the same questions of law and fact, they may properly join as relators in an action in the nature of *quo warranto* to try the title to such offices.

7. ———: ———. Two or more persons may be joined as respondents in an action in the nature of *quo warranto* when the complaint against each is based upon their joint action as a board.

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

Sandall & Webster, for appellants.

Kirkpatrick, Good & Dougherty and *John L. Riddell, contra.*

Heard before GOSS, C. J., DAY and PAINE, JJ., and CHASE and TEWELL, District Judges.

TEWELL, District Judge.

The relators filed an information in the nature of *quo warranto* against the respondents in the district court for York county, and from an order of the court sustaining a demurrer to that information and dismissing the action the relators have appealed to this court.

From the information it appears that York county, for a number of years, has been a county having township organization under the provisions of article 2, ch. 26, Comp. St. 1929 (Comp. St. 1929, secs. 26-201 *et seq.*). At some time prior to the general election held in November, 1932, the county had adopted the township supervisor system of government provided for by chapter 40, Laws 1907 (Comp. St. 1929, secs. 26-290 to 26-293). At the time of that election the county had twenty township supervisors, the territory outside of the city of York being divided into sixteen townships and that in the city of York being divided into four townships. The term of office of each of the twenty township supervisors was four years, and those in office in November, 1932, had been elected in such manner that the term of office of half of them expired in January, 1933, and of the other half in January, 1935. The relator Thompson was elected a township supervisor from Stewart township at the general election in November, 1930, and entered upon the duties of his office in Jan-

uary, 1931. The relator Richardson was elected township supervisor from the second ward of the city of York at the general election held in November, 1932, and unless prevented by matters hereafter mentioned, his term of office began in January, 1933. Both relators are alleged to have duly qualified for their respective offices. Each of the five respondents was a duly elected and qualified township supervisor and the term of office of each, with the exception of respondent Stilson, began in January, 1931. The term of office of respondent Stilson began in January, 1929, and he was defeated for reelection by relator Richardson in the general election in November, 1932.

Upon a petition for the submission of the question of the discontinuance of township supervisors at the general election in 1932, the county clerk caused to be printed on a special ballot the following:

☐ For Proposal to reduce number of supervisors from twenty to five.

☐ Against Proposal to reduce number of supervisors from twenty to five.

The special ballot upon which the proposal submitted appeared was one upon which there was submitted the question of the adoption of a measure creating a public safety commission proposed by initiative petition. At the election 3,186 voted "For" and 3,019 "Against" the proposal. At a meeting of the township supervisors, held on November 22, 1932, the county was divided into five supervisor districts, and the five respondents were selected by the township supervisors to constitute the county board. The five respondents organized themselves as a county board of district supervisors and, since their selection, have taken charge of the affairs of the county, to the exclusion of the relators. The petition alleges that the respondents usurp and invade the office held by the relators and that they had made application to the county attorney of York county to file a proceeding to recover their office and that such officer had refused so to do.

Sections 26-294 to 26-299, Comp. St. 1929, provide the procedure for discontinuance of a system of township supervisors. Section 26-296 provides: "The forms of ballots shall be respectively 'For continuance of township supervisors' and 'Against continuance of township supervisors,' and the same shall be written or printed on the regular ballots used at said election, and shall be counted and canvassed in like manner." Section 26-297 provides: "If it shall appear from the returns of said election that a majority of the votes cast on the question are against the continuance of township supervisors, then such system shall cease to exist in such county as soon as supervisors from each district are selected and qualified as hereinafter provided."

By section 26-298 it is provided that, when the township supervisor system shall cease, the county shall be divided into five supervisor districts, the corporate limits of the county seat being one district and the remainder of the county being divided into four districts.

Section 26-299 provides as follows: "The county boards in counties discontinuing the township supervisor system shall proceed in like manner, and in the same time and place, as the county commissioners are now required to proceed when township organization is adopted, to reestablish the district system, except that the supervisors residing in each district shall determine by lot which one is to continue as the supervisor from said district. In every other respect said district system shall be reestablished in said counties in like manner as when township organization is adopted."

One of the questions presented involves the validity of the election by virtue of which the respondents claim their right of office. Quotation of other sections of said article 2, to which reference is made in the above quoted section 26-299, would take more space than is justified by the degree of clarity thereby attained. It is apparent from the sections above quoted that the office of each township

supervisor in counties under township organization that have adopted the township supervisor system is completely abolished whenever a majority of votes cast upon the question authorized by statute are against the continuance of township supervisors and district supervisors are selected and qualified in the manner provided by said article. It must follow that the office of the district supervisor is an office newly created by the statute and the election and is distinct and apart from that of township supervisor theretofore existing. In the selection of respondent Stilson as a district supervisor at the meeting of township supervisors on November 22, 1932, the statute seems to have been so interpreted by the township supervisors. His term of office theretofore held by him expired by operation of law in January, 1933, yet he was selected to hold the office of district supervisor until a much later date.

The question authorized by statute provided for the complete abolition of township supervisors, while the question submitted to the voters provided for reducing their number from twenty to five. A rule uniform in all the states is that an election held without affirmative constitutional or statutory authority is a nullity. 20 C. J. 95, and cases cited under note 4. In accord with this rule is the rule to the effect that an election upon a proposition submitted to voters is void, if the proposition submitted is materially different in substance than that authorized by Constitution or statute. *People v. Snedeker,* 282 Ill. 425; 20 C. J. 149; *People v. Myers,* 256 Ill. 529. Each of the two rules above mentioned is necessary to a continuance of our form of government. Whether or not the electorate understood the proposition submitted is immaterial, if its submission was not authorized by constitutional or legislative authority, or if its substance is not that of one authorized. It is true that a system of government should not be perverted from its proper function by any rule that increases impediments to justice without the warrant of clear necessity. However, to pro-

tect the electorate from that which aids self-destruction is a warrant of clear necessity. If a question not authorized may be submitted to popular vote, or a question authorized be changed in substance and submitted, a chaotic condition may easily come about. Cost of government as well as impediments to justice would thereby be multiplied. The departure from the statute rendered the election a nullity, on account of the question submitted not having been authorized by law and on account of its changing the substance of the question authorized.

The respondents urge that the departure from the statute was of such nature as to leave the intent of the electorate discernible and that, if so, the result should be upheld. Provisions of election laws are, for the most part, mandatory, if enforcement is sought in a direct proceeding for that purpose before an election held under such provisions, but after such an election are directory only, in support of the result, unless strict compliance is declared by the law authorizing the election to be necessary to a valid election or unless the provision affects an essential element of the election. *State v. Russell,* 34 Neb. 116; *Tuntland v. Noble,* 30 S. Dak. 145; 20 C. J. 181. Assuming, for a discussion of the application of the last mentioned rule, that the question as submitted in the case at bar was authorized by legal authority, and also assuming that the substance of the question authorized was not changed by the form of the question as submitted, it may be said that, even though the statute is construed as directory, such construction must not allow such a departure from the provisions of the statute as leaves the mind in doubt as to how the election would have resulted if such departure had not occurred. 9 R. C. L. 1091, sec. 101; 20 C. J. 181; *Tuntland v. Noble, supra; Rideout v. City of Los Angeles,* 185 Cal. 426. If the form of question authorized had been used, an affirmative or "For" vote would have been counted for a continuance of township supervisors, and a negative or "Against" vote would have been counted against the con-

tinuance of township supervisors. By using the form of question as submitted the reverse of such condition is made true. Then, too, the form used, having provided that the "For" vote should be counted as against the continuance of township supervisors, contained the "For" at the top position on the ballot, which is probably a favorable position. The proposition as submitted was carried by a narrow margin. Who can say that doubt as to how the election would have resulted, had the prescribed form of question been submitted, does not exist, or that the intent of the electorate is clear? That the question was submitted upon a special ballot rather than upon the regular ballot as provided by the statute at least does not lessen such doubt, especially when the only votes counted were those upon the question, regardless of how many voters cast the regular ballot at the election. Whether or not the use of a special ballot instead of the regular ballot would have by itself made the election a nullity, we are not called upon to decide. We do hold that the departure from the statute in this case, when considered in its entirety with the result, was of such a nature as to leave doubt as to whether or not it itself did not bring about a different result than would have occurred had no such departure been made, and rendered the election a nullity, even though the statute prescribing the form of ballot is construed after the election as directory.

Respondents claim that relators do not have legal capacity to maintain this action, and in this connection argue that, if the election was void, then the only persons doing wrong are those members of the twenty township supervisors who are failing to function as officers. This argument disregards the alleged fact that respondents are functioning as the county board by themselves to the exclusion of relators. It also assumes the office now claimed by each respondent to be the same office such respondent held as township supervisor. By section 20-21,137, Comp. St. 1929, a citizen of the state claiming

an office that is usurped or invaded by another may maintain this form of action in a district court with or without the consent of the prosecuting attorney, upon his own relation. The relators are not claiming that respondents as a part of the old board of township supervisors have invaded any office, but rather that respondents claim to hold newly created offices and to thereby constitute a complete board to the exclusion of relators, and are thereby invading the office of relators. The acts of respondents are as much an invasion of the office of relators, when they claim under a void election to hold offices, which, if existent, would supersede the offices of relators, as would be like acts done by private citizens under no claim of right. The statute above cited is quoted in the case of *Eason v. Majors,* 111 Neb. 288. Relator Thompson alleged possession of his office since January, 1931, and relator Richardson alleges his election at the general election in 1932 and qualification by filing of oath and bond. Incidentally the action determines the existence of the office claimed by each respondent, but it is nevertheless an action to try title to the office held by relators and invaded by respondents, who assume to act as a complete board. Relators are given capacity to maintain this action by the above cited section of the statute upon their own relation, and are not required to comply with section 20-21,113, Comp. St. 1929, which provides for such an action by an elector, upon refusal of the prosecuting officer to bring the action and upon the giving of bond for costs, attorney's fee and prosecution without delay.

An improper joinder of parties, both as to relators and as to respondents, is claimed. When the rights of two or more relators to separate offices depend upon the same question of law and fact, they may properly join as relators in one action, and two or more persons may be joined as respondents, when the complaint against each is based on the same acts. 51 C. J. 340; *School Trustees v. Barker,* 164 N. Car. 382; *Bonynge v. Frank,* 89 N. J.

Law, 239; *Lockard v. People*, 80 Colo. 31; *State v. Kearn*, 17 R. I. 391.

We have examined other arguments advanced by respondents in support of the order dismissing the relators' action and find that they do not set forth legal justification thereof. The order dismissing the action is reversed and the cause remanded for proceedings in accord herewith. Costs in this court are taxed to respondents.

REVERSED.

CLARENCE WALLACE, APPELLEE, V. ELLEN CLEMENTS ET AL., APPELLEES: JOHN CLEMENTS ET AL., APPELLANTS.

FILED OCTOBER 6, 1933. No. 28502.

1. **Mortgages**: APPLICATION FOR MORATORIUM: JURISDICTION. On appeal from the confirmation of a judicial sale in the district court in a suit to foreclose a mortgage on real estate, an application for a moratorium until March 1, 1935, under the moratory act of March 2, 1933, is not within the original jurisdiction of the supreme court.
2. ———: ———: APPEAL: ISSUES. The rule that an issue not raised in the trial court is not generally cognizable in the appellate court applies to an application for a moratorium in the supreme court on appeal from the confirmation of a judicial sale in the district court in a suit to foreclose a mortgage on real estate.

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

A. R. Oleson, for appellants.

Zacek & Nicholson, contra.

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

ROSE, J.

On appeal from a judgment confirming a judicial sale in a suit to foreclose a mortgage, mortgagors, defendants, presented an original application to the supreme court

for a moratorium delaying until March 1, 1935, further judicial action and granting them the right to remain in possession and to redeem the mortgaged land in the meantime. The application is made under the moratory act of the legislature adopted March 2, 1933. Laws 1933, ch. 65, sec. 1.

Mortgagee, plaintiff, objected to the granting of a moratorium on the grounds, among others, that the question as to the right of defendants to such relief is not presented by the record in the foreclosure suit and that the moratory act of the legislature is unconstitutional and void. These questions were discussed in briefs and orally argued at the bar. If the preliminary question is not presented by the record, the constitutional question should not be considered herein, as, in that contingency, an opinion would be mere dictum, open to future controversy. In an action in which the validity of the moratory act must be authoritatively determined for the first time, the court of original jurisdiction and the litigants should not be embarrassed by previous dicta on that subject.

This is a suit in equity to foreclose a mortgage on lands of defendants in Cuming county. It was properly commenced and determined in the district court for Cuming county. The amount due on the mortgage was $12,076 April 8, 1931. On that date, in default of payment, a decree of foreclosure was entered. Defendants took a stay of execution for nine months. Thereafter, under an order of sale issued February 10, 1932, the sheriff sold the mortgaged land to plaintiff for $12,000. From an order confirming the sale, defendants appealed to the supreme court, where the confirmation was affirmed April 14, 1933, after a full hearing and a review of the record. *Wallace v. Clements,* 124 Neb. 691.

The application for a moratorium was filed in the supreme court April 3, 1933, while the cause was under advisement, 11 days prior to the affirmance of the judgment of the district court and 32 days after the moratory

act was approved with an emergency clause March 2, 1933. The jurisdiction of the supreme court is granted and limited by the following provision of the Constitution:

"The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law." Const. art. V, sec. 2.

This original jurisdiction is thus limited to cases relating to the subjects thus enumerated and cannot be extended to other subjects by legislation. *State v. Hall,* 47 Neb. 579. Neither the application for a moratorium nor the case in which it was originally filed on appeal relates to the revenue, a civil case in which the state is a party, mandamus, quo warranto, or habeas corpus, and neither is within the original jurisdiction of the supreme court.

Is the constitutionality of the moratory act a question presented by the record? It is well-settled law that an issue not raised in the trial court is not generally cognizable in the appellate court. *First Trust Co. v. Glendale Realty Co., ante,* p. 283, and cases cited in the opinion. The application is no part of the record for review in the case at bar. It was not, and of course could not have been, presented to the district court before trial and judgment below. Such a remedy was not then in existence. It is argued, however, that the supreme court has jurisdiction of the parties and subject-matter and may remand the cause to the court below for the purpose of granting the new statutory relief in an emergency. The application does not require a departure from well-settled rules of appellate procedure. The district court administered justice according to well-settled rules of law and equity when the judicial sale was confirmed and plaintiff's right to possession adjudicated. There was no error in the proceedings or decree. The granting of a moratorium until March 1, 1935, permitting defendants

to retain possession until that date, would require the reversal of a valid judgment on a question not presented to or considered by the district court or raised in the supreme court by the record for consideration—a course at variance with proper appellate procedure.

The application herein for a moratorium is therefore denied and the question as to the validity of the moratory act left open for future determination in a case wherein it is properly raised.

MORATORIUM DENIED.

LINCOLN SAFE DEPOSIT COMPANY, APPELLEE, V. JOHN CARLSON, APPELLANT: SARAH CARLSON ET AL., APPELLEES.

FILED OCTOBER 6, 1933. No. 28542.

1. **Mortgages:** APPLICATION FOR MORATORIUM. On authority of *Wallace v. Clements*, *ante*, p. 358, application on appeal for a moratorium in a suit to foreclose a mortgage overruled.
2. ———: **FORECLOSURE: SALE: CONFIRMATION.** "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676.

APPEAL from the district court for Cheyenne county: J. LEONARD TEWELL, JUDGE. *Motion overruled and judgment affirmed.*

Radcliffe & Wehmiller and *Winfield M. Elmen*, for appellant.

S. E. Torgeson, Rodman & Kuns and *A. M. Bunting*, *contra.*

R. A. Boehmer and *Perry W. Morton*, for L. A. Ricketts, Trustee, *amici curiæ.*

George B. Thummel and *Hall, Cline & Williams*, *amici curiæ.*

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

ROSE, J.

This is a suit in equity to foreclose a mortgage on 960 acres of land in Cheyenne county. For default in payment of debt and interest a judicial sale of the premises was ordered in 1931. Under the decree of foreclosure the mortgaged land was sold for $21,498.14, the amount of debt, interest and costs. From an order May 5, 1932, confirming the sale, defendants appealed to the supreme court.

When the cause was pending on appeal April 3, 1933, John and Sarah Carlson, defendants, filed in the supreme court a motion for a moratorium, delaying further judicial action and permitting them to retain possession of the mortgaged premises until March 1, 1935, under the moratory act of the legislature approved March 2, 1933. Laws 1933, ch. 65, sec. 1. Mortgagee, plaintiff, objected to the granting of a moratorium on the grounds that the question as to the right of defendants to such relief is not presented by the record in the foreclosure suit and that the moratory act of the legislature is unconstitutional and void.

For reasons stated in the opinion in *Wallace v. Clements, ante,* p. 358, the motion is overruled and the question as to the validity of the moratory act left open for future determination.

The only question presented by the appeal is the adequacy of the price for which the land was sold at the foreclosure sale. A critical examination of all the evidence leads to the conclusion that the trial court properly found that the price was fair and reasonable and that a resale in the regular course of judicial proceedings would not result in a higher price. There was no such discrepancy between the value of the premises and the accepted bid of the purchaser as to prevent confirmation or require a resale, the controlling principle being as follows:

"Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless

such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White,* 122 Neb. 676.

MOTION OVERRULED AND JUDGMENT AFFIRMED.

LAWRENCE BRADLEY, APPELLANT, V. L. M. KALIN, DOING BUSINESS UNDER TRADE-NAME OF LINCOLN TOBACCO CO., ET AL., APPELLEES.

FILED OCTOBER 6, 1933. No. 28869.

1. Master and Servant: WORKMEN'S COMPENSATION CASES: APPEAL. Appeals to the supreme court under the workmen's compensation law shall be prosecuted under the general laws regulating appeals in actions at law except that such appeals shall be perfected within thirty days from the entry of the judgment. Comp. St. 1929, sec. 48-139.
2. ———: ———: ———. This statutory provision necessitates the filing of the transcript of the record containing the final order appealed from within thirty days from the entry thereof.
3. Appeal: TIME. The legislature having power to limit the time within which an appeal must be taken, it is essential to the jurisdiction of this court that it be taken within the time limit, when prescribed.
4. ———. The trial court has no inherent power, directly or indirectly, to extend the time for taking appeal, and it appearing that an order was entered by it for that express purpose, the same is ineffective.

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

Frank M. Coffey, for appellant.

L. R. Doyle, contra.

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

EBERLY, J.

This action is prosecuted under our workmen's compensation act. There was a trial on the merits in the district court resulting in a judgment for the defendant and

a denial of the claim for compensation. From this adverse decision claimant seeks to appeal.

The chronology of this law suit, as appears from the transcript filed in this court, embraces the following: Trial to the district court followed by its decree finding for defendant and denying compensation, February 17, 1933; motion for new trial filed February 20, 1933; a pleading entitled "Supplemental to Motion for New Trial" filed April 4, 1933; motion for new trial regularly overruled April 7, 1933; on April 26, 1933, stipulation of parties was filed requesting and jointly stipulating that the order overruling motion for new trial of April 7, 1933, be vacated and that thereafter such order overruling motion for new trial may be reentered at the convenience of said court, and expressly setting forth as the sole reason for the proceeding: "This application is made so that the plaintiff will have the necessary time available to perfect an appeal within the statutory time." On April 27, 1933, a formal order or judgment was duly made and entered in this cause, wherein and whereby "in accordance with the above stipulation the ruling entered April 7, 1933, and of record on page 61 of this court journal overruling motion for new trial," was vacated and set aside, and in this same order thus entered this motion for new trial was again overruled. On May 11, 1933, bond on appeal was filed in the district court and approved. On May 18, 1933, transcript on appeal was filed in the supreme court.

It will be remembered that section 48-139, Comp. St. 1929, with reference to appeals in actions prosecuted under the workmen's compensation act from judgments of the district courts of this state, provides in part:

"Any appeal from such judgment shall be prosecuted in accordance with the general laws of the state regulating appeals and (in) actions at law except that such appeal shall be perfected within thirty days from the entry of the judgment."

This language necessitates the filing of a transcript on

appeal in the supreme court within thirty days from and after the entry of the judgment appealed from in the district court.

We are committed to the view that, "the legislature having power to limit the time within which an appeal must be taken, it is essential to the jurisdiction of this court that it be taken within that time limit." *Morrill County v. Bliss, ante,* p. 97.

The waiver of this limitation by consent of the parties is not effective to enlarge the time of the appeal thus limited by statute. *Tootle, Hosea & Co. v. Shirey,* 52 Neb. 674.

Nor is it within the powers of the courts to extend the time thus limited unless the failure is in no wise attributable to the appellant. *Omaha Loan & Trust Co. v. Ayer,* 38 Neb. 891.

See, also, *Johnston v. New Omaha Thomson-Houston Electric Light Co.,* 86 Neb. 165; *Smith v. Silver,* 58 Neb. 429; *Renard v. Thomas,* 50 Neb. 398.

In *Morrill County v. Bliss, supra,* the principle was announced that the "trial court has no inherent power, directly or indirectly, to extend time for taking appeal."

In the present case the order of the district court overruling the motion for a new trial was regularly made on April 7, 1933. The appellant therefore was limited to thirty days thereafter in which to file his transcript in this court. *Lincoln Packing Co. v. Coe,* 120 Neb. 299. It follows that the order entered in this cause by the district court for Lancaster county on April 27, 1933, expressly pursuant to the stipulation of the parties reciting as sole reason therefor "that the plaintiff will have the necessary time available to perfect an appeal within the statutory time," is wholly ineffective to extend the time of perfecting such appeal; and that a transcript filed on May 18, 1933, under the facts in this case, is ineffective to confer jurisdiction of the cause upon this court. The proceedings on appeal are therefore ordered dismissed.

APPEAL DISMISSED.

BLANCHE H. WITHAM, APPELLEE, V. CITY OF LINCOLN, APPELLANT.

FILED OCTOBER 6, 1933. No. 28708.

1. Municipal Corporations: DETACHMENT OF TERRITORY: JURISDICTION. "Under the general chancery and common-law powers conferred by the Constitution, and without reference to statute, district courts are vested with jurisdiction to hear and determine whether an owner of agricultural lands included within the corporate limits of a city is entitled to have the same disconnected therefrom." *Sole v. City of Geneva*, 106 Neb. 879.
2. ———: ANNEXATION OF TERRITORY. A municipality cannot annex territory for revenue purposes only.
3. Appeal. When, in a suit involving the annexation of real estate claimed to be farm land, the trial court has made a careful inspection thereof, its findings are entitled to great weight.

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

Max Kier and *Lloyd E. Chapman*, for appellant.

George A. Adams, G. E. Hager, Richard C. Hunter and *Sanden, Anderson & Gradwohl, contra.*

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

PAINE, J.

This is an action in equity, wherein Blanche H. Witham, plaintiff and appellee, seeks to have certain real estate owned by her detached from the city of Lincoln, defendant and appellant.

In her petition, filed August 15, 1929, plaintiff alleges that she is the owner of a certain tract of land, which, for the purposes of this opinion, may be said to lie on the north side of East O street, immediately west of Seventieth street, which land the city of Lincoln has recently annexed by ordinance. Plaintiff alleges that said land is agricultural and farming land. The land is not subdivided into lots, nor have any streets or alleys been located thereon, nor is the land in any way benefited by

being included within the corporate limits of the city of Lincoln. That the purpose of the city in annexing said lands is to raise revenue to construct a water-main through the same to furnish water to and for the use of the Veterans' Hospital, near the plaintiff's land, and plaintiff prays that her land may be adjudged not suitable for city purpose, and be taken out of the city, and relieved from the control and management of the city.

The answer of the city of Lincoln admits that it is a municipal corporation, operating under a Home Rule Charter adopted November 14, 1917. That on July 29, 1929, an ordinance, No. 3061, extended the corporate limits of the city of Lincoln from Fifty-eighth street to Seventieth street, thereby including the real estate of plaintiff lying on East O street. That O street was paved by the state of Nebraska to Seventieth street, without expense to the plaintiff, and that a large water-main running east on O street to Seventieth street will supply abutting property for domestic and industrial purposes. That immediately east of Seventieth street, and just south of O street, the United States Government has erected the Veterans' Hospital. The city alleges that the real estate of the plaintiff is strictly urban in character, and has a distinct unity of interest with the older portions of the city, and has been materially benefited by annexation thereto. That plaintiff cannot collaterally and indirectly attack the validity of ordinance No. 3061, annexing the said property, but that only the state of Nebraska can question the same, and that plaintiff has an adequate remedy at law; and asks that plaintiff's petition be dismissed. To this answer a reply was filed by the plaintiff.

Upon trial of the issues, nearly 500 pages of evidence were taken, and 35 exhibits introduced, including four large airplane photographs, showing the land in question, as well as the surrounding lands. The evidence discloses that the ordinance, No. 3061, annexed a narrow strip of land, reaching for nearly a mile east of Cotner boulevard,

and running along O street to Seventieth street, but extending only 400 feet on either side of O street.

The plaintiff's land lies on the north side of O street, and at the extreme east end of the strip annexed. It is a part of an ordinary farm of 99 acres, and was planted to corn and wheat by the plaintiff's husband. There are no improvements or buildings of any kind on the part of the plaintiff's land which is annexed to the city.

Edward C. Witham, the husband of plaintiff, admitted that the street was paved in front of their land without expense to the plaintiff; that there was motor service by bus of the city street railway in front of their property; that there was natural gas service, and that a sanitary sewer had been constructed through their land, all without cost to the plaintiff. He admitted that he made no objection to the building of the 8-inch water-main along O street, and that the plaintiff would not now object if the water-main had been built free of cost to her, as were all of the other city improvements mentioned. The plaintiff has not used gas, electricity, nor water upon the farm, and does not desire the same. That the assessments against plaintiff's land, because of the construction of the water-line to the Veterans' Hospital, will amount to above $2,000. That a number of witnesses, familiar with the situation, testified in favor of the plaintiff to the effect that the land is, and always has been, ordinary farm land. That no benefits resulted from its annexation to the city, and that it would simply result in heavy burdens of city taxes for the water-main and other special assessments. That the land sometimes is flooded from a creek running through it, known as Dead Man's Run.

Frank D. Eager testified that, as vice-president of the Chamber of Commerce of Lincoln, he personally submitted the proposal of the Chamber to the U. S. Veterans' Bureau to get the hospital located in Lincoln, and that proposal stated that a city water-main would be extended to the southwest corner of the proposed site of the hospital at Seventieth and A streets, free of cost, but that

the original plan to get water to the Veterans' Hospital via A street was changed, and the water-main leading to the Veterans' Hospital was finally located in East O street.

Charles G. Beck, manager of the U. S. Veterans' Hospital, testified that the total construction cost to date had been $1,167,904, which did not include the cost of the real estate, of $92,000.

The evidence further discloses that a civil engineer employed by the Sanitary Sewer District built the sewer which follows Dead Man's Run, and that it is only used by the Veterans' Hospital, and that there was no request for sewer from private owners. Harvey Rathbone, Charles Stuart, J. H. Humpe, and Frank D. Eager, all engaged in the real estate or investment business, together with some others, testified that the plaintiff's land was urban in character, but the majority of these witnesses admitted that they were speculating upon future possibilities of the growth of the city, rather than upon the actual condition today of the land annexed.

The trial judge made a personal inspection of the premises, and in his decree held that the plaintiff's real estate had been used for many years as farm land, and for no other purpose; that no part of the land had ever been platted into lots or blocks, and that it is in no wise urban property, but is solely agricultural land, which will not at the present time be benefited by being annexed to the city; that the object of the defendant city in passing said ordinance and annexing said lands, or attempting to do so, was to raise revenue, and that such annexation was at the time, and is now, destructive to the value of the land and confiscatory of the property of the plaintiff. The trial court further found that it was beyond the power of the city of Lincoln to annex said land, and that its attempt so to do was wrongful and without authority of law, and found generally for the plaintiff, and that the ordinance passed, annexing said land, was of no force or effect, and that said land be considered as out-

side of the boundaries of the city, and that the taxes levied or assessed upon said land be declared invalid and no lien upon the property.

In the motion for a new trial, the city set out many grounds therefor, which may be summarized as alleging misconduct on the part of the plaintiff; accident and surprise, which ordinary prudence of the city could not have guarded against; that the decree was not sustained by sufficient evidence, and is contrary to law; and in the assignments of error the constitutionality of sections 15-104 and 15-105, Comp. St. 1929, is attacked; and charged that the court was without authority to cancel and discharge the taxes and special assessments.

1. It may be admitted that, in passing ordinance No. 3061, annexing this territory, the city proceeded under section 2, art. I of the Home Rule Charter of the city of Lincoln, which provided: "The corporate limits of the city shall be those existing when this charter becomes effective, and the council may thereafter by ordinance alter the same to the extent and in the manner provided by law, and upon conditions in such ordinance prescribed," which section appears to be the only express provision in the Home Rule Charter for the annexation of territory, and that this section adopts as a part of the charter, by the general reference in the section quoted, sections 15-101 to 15-105, Comp. St. 1929, to the same extent as if such sections were set forth in the Home Rule Charter.

It may be admitted that the statute provides methods for detaching land which has been annexed, but this action is brought under the general equity power of the court, without reference to any statute to determine whether the owner of agricultural land, which has been annexed to a city against his will, can have it detached therefrom.

Plaintiff insists that courts of equity may place a limitation upon annexation of such land by a municipality, and that such courts have the power and duty to protect the rights of an owner of agricultural land from being

compelled to pay large assessments of taxes for benefits which are of no value to his farm land, and which have been installed under the direction of the city, not by the request of the property owners living on such annexed land, but for an entirely different purpose, such as appears from the evidence in this case.

"Under the general chancery and common-law powers conferred by the Constitution, and without reference to statute, district courts are vested with jurisdiction to hear and determine whether an owner of agricultural lands included within the corporate limits of a city is entitled to have the same disconnected therefrom." *Sole v. City of Geneva,* 106 Neb. 879. See *Village of Osmond v. Smathers,* 62 Neb. 509.

2. The city charges in its brief that the trial judge in the case at bar relied upon a case which has been overruled. Let us examine these two cases thus brought to our attention.

In the early case of *Bradshaw v. City of Omaha,* 1 Neb. 16, plaintiff alleged that his land was two miles from the settled part of the town and one mile from any lands occupied as town lots, and that he did not intend to divide it into lots for town purposes, and that his property was annexed for the sole purpose of subjecting his land to city taxation, and prayed for an injunction to restrain the sale of his property for delinquent city taxes. In the long opinion by Chief Justice Mason, he asked the question, "Can a legislature authorize a city to tax for its support, lands not reasonably to be considered city property?" After reviewing many of the leading cases prior to 1871, he set out certain tests of the liability of such lands to taxation by a city, and held that, if the lands had been divided by the owner into town lots, or if the owner had done any other affirmative act inducing the authorities of the city to treat his land as town property, he would be justly liable for municipal taxation, but if the lands he retains are in a large body, located a half mile from the settled part of the town, and no streets

need to be opened up for the use of adjoining lot owners, then it was proper to enjoin the collection of such taxes, and he states that, while each case must be determined by its own circumstances, these tests were offered to furnish an easy solution of any case which might arise in the future.

The defendant city, in its very complete brief of more than 100 pages, insists that the case of *Bradshaw v. City of Omaha, supra,* was overruled by the case of *Turner v. Althaus,* 6 Neb. 54, but the writer of that opinion used this language: "In conclusion, for the purpose of guarding against any erroneous inference which might be drawn from this opinion, it is proper to state, that the issues in the case at bar do not present for our consideration one in which it may clearly appear that the *sole* object of the legislative act, extending the power of taxation by a city over a community or lands beyond its original limits, is to increase its revenues only, and not for the purpose of any municipal regulations or government over the same."

This court has held that a municipality cannot annex property for revenue purposes, as appears to have been done in the case at bar. *Joerger v. Bethany Heights,* 97 Neb. 675; *Village of Osmond v. Smathers,* 62 Neb. 509.

It is found that many of the cases cited in briefs arise under the law relating to the detaching of territory from cities of the second class and villages, as set out in section 17-412, Comp. St. 1929, yet the references in those cases to the power of a court of equity to protect an owner of agricultural lands whose rights have been infringed may well be considered in passing upon this case. *Sole v. City of Geneva,* 106 Neb. 879; *State v. Dimond,* 44 Neb. 154; *Village of Osmond v. Smathers,* 62 Neb. 509; *Commonwealth Real Estate Co. v. City of South Omaha,* 78 Neb. 368; *Gregory v. Village of Franklin,* 77 Neb. 62.

3. We have carefully considered the plaintiff's land in reference to its possibilities for use as urban property. There is evidence of Charles Stuart showing that, with an

expenditure of approximately $250,000 for paving, gas, sewers, water-mains, sidewalks, and electrolier system, the lots in Piedmont addition, located more than a mile nearer the city, have not found ready sale, while other additions between Piedmont and the plaintiff's land have been platted, put on the market, and the owners have failed to sell a single lot. These and other facts, to determine whether the plaintiff's property is urban or agricultural in character, were personally examined into by the trial court when it made a personal inspection of these and adjoining lands. The finding of the trial court in relation thereto is entitled to great weight.

It is insisted by the city that this case is of tremendous importance to the city of Lincoln, and that an adverse decision will in a measure hamper the continued growth and prosperity of this fine city. This court does not share this dire forecast, but believes that, as the natural growth of the city requires the annexation of subdivisions lying contiguous to the city, the owners thereof will plat the same and urge their annexation to the city as the needs demand. We are constrained to hold that the city exceeded its power when it annexed a narrow strip of plaintiff's land, reaching out like a finger, along the exact location of an 8-inch water-main required to be constructed to the Veterans' Hospital, and that such annexation of such farm land was wrongful and without authority, and that said land shall be considered as outside of the boundaries of the city, and that the taxes levied for the construction of such water-main are declared invalid, and the decree of the district court is

AFFIRMED.

JOHN H. UERLING V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1933. No. 28680.

1. **Forgery.** A written instrument, made the subject of forgery by statute, is as much the subject of forgery on Sunday as upon any other day of the week.
2. ———: INFORMATION. An information in a prosecution for forgery, setting forth in full the instrument alleged to have been forged, should not be quashed on motion, merely because the pleader designates it by a name that does not indicate its true character, if, as set forth, it is plainly embraced within the instruments made the subject of forgery by statute.
3. ———: INTENT. In a prosecution for forgery, it is not necessary to allege or prove an intent to defraud any particular person.
4. ———: JUDGE: QUALIFICATION. A judge in a prosecution for forgery is not disqualified because of being "interested," merely because he had purchased from the defendant genuine bonds and notes similar to, but having no connection with, the instrument alleged to have been forged, where it was not shown that he had a pecuniary interest in the outcome of the prosecution.
5. **Courts: RULES.** Subject to conformity to constitutional and statutory limitations and provisions, a court has inherent power to make reasonable rules for the regulation of its practice and the conduct of its business.
6. ———: ———. A valid rule of court, made in a particular case, fixing the time within which pleadings must be filed, is not obligatory upon the court, but may be enforced by the court in the absence of proof, aided by matters apparent from the face of the record, that its enforcement would deny the one against whom enforced a reasonable opportunity to exercise a legal right.
7. **Jury: PANEL: MOTION TO QUASH.** It is not error to overrule a challenge to the array that does not plead facts showing in what way the statute regulating the manner of drawing the jury panel was violated.

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

J. E. Willits and *James D. Conway,* for plaintiff in error.

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

Heard before GOSS, C. J., ROSE, EBERLY, DAY and PAINE, JJ., and CHASE and TEWELL, District Judges.

TEWELL, District Judge.

The plaintiff in error, John H. Uerling, hereinafter called the defendant, was convicted in the district court for Adams county for the crime of forgery, and has brought the record of his trial here for review.

The evidence discloses that one Jule Bassett, about the year 1918, sold his farm and turned the proceeds, several thousand dollars, over to the firm of Hoeppner & Uerling of Hastings, Nebraska, a copartnership, engaged in the business of selling real estate, making investments and loans and writing insurance for others. The firm consisted at all times of Ernest Hoeppner and defendant until the death of Hoeppner, after the act charged is alleged to have been committed. The defendant is the surviving partner of the firm. Other than to collect interest, Bassett paid little attention to any investments made for him between the date of turning the money over to Hoeppner & Uerling and March 3 or 4, 1932, at which time he went to the place of business of the firm and, in the absence of the defendant, obtained three boxes that he thought contained all notes and mortgages owned by him. In one of these boxes a coupon bond bearing the date of August 24, 1930, for the principal sum of $1,000 and a mortgage to secure the same were found, each purporting to have been executed by W. W. Keith and Ethel Keith, husband and wife. The property described in the mortgage was the home of Dr. W. W. Keith in Hastings, Nebraska. Jule Bassett was named payee in the bond and mortgagee in the mortgage. The mortgage purports to have been dated, acknowledged and recorded August 24, 1930. A certificate on the back of the mortgage, certifying to the book and page where recorded, and the time when recorded, purports to have been signed by L. N. Button, the then register of deeds. The defendant's name appears as a witness on the mortgage and the mortgage purports to have been acknowl-

edged before him as notary public. At no time while the partnership took care of investments for Bassett did Bassett have the custody of any notes, bonds, mortgages or other instruments evidencing any investments. These were all left in the custody of the partnership.

Dr. W. W. Keith and his wife are shown to have actually executed a mortgage upon their home on August 24, 1922, in which the defendant was named as mortgagee, such mortgage being executed to secure the payment of three notes, one for $200, one for $400, and one for $600. The note for $200 was paid August 20, 1923. The two remaining notes and all accrued interest were paid August 20, 1925. The defendant is shown to have taken Bassett to look at the residence of Dr. Keith and to have told him that he had a loan on it for $1,000. Upon looking at the property, Bassett said he would take the loan. The record is not clear as to when the inspection of the property occurred. The defendant, at a time not clearly disclosed by the record, gave Bassett a memorandum referring to a loan from Wellington W. Keith and wife, Ethel, for $1,000, divided into one note for $400 and one note for $600, each dated August 24, 1922, and due August 24, 1925. This memorandum shows the due dates of interest and principal and amounts thereof on the two last mentioned notes only. The amount paid by Keith to pay off the mortgage on his home seems never to have been paid to Bassett, and Bassett apparently had no knowledge of the principal having been paid. The record shows clearly that the names of W. W. Keith and Ethel Keith were signed to the coupon bond for $1,000 and the mortgage to secure the same, each dated August 24, 1930, by the defendant without the knowledge or consent of the purported makers. It also clearly shows that the mortgage dated August 24, 1930, was never recorded, and that the defendant made the certificate on the back of the mortgage to show the time and place recorded and attached thereto the name "L. N. Button," the then register of deeds, without the knowledge or consent of

such officer. The defendant, in his testimony, denies having had any intent to defraud any one. He says that he made the note and mortgage for a notation to remind him when "we checked up Mr. Bassett's papers that there was a loan that ought to be looked after and checked up to find out whether he did or didn't own it." The certificate on the back of the mortgage, he says, was made and signed by him to prevent any one from recording the mortgage. The name W. W. Keith is written on the note and mortgage by the use of large letters, heavily shaded, while the name of Ethel Keith is written by the use of much smaller letters and made to simulate the handwriting of a woman.

Sometime in 1932 a receiver was appointed to take charge of the affairs of the partnership.

The information contained two counts, the first charging forgery of the coupon bond, and the second forgery of the mortgage. The issues submitted to the jury referred only to the elements of forgery as applied to the coupon bond and the conviction was of forgery thereof. A motion to quash the information and a demurrer to the information, each made jointly to both counts, were filed and overruled prior to a plea of not guilty being entered.

Each of one group of assignments of error relates either to the sufficiency of the information or to the sufficiency of the evidence.

It is claimed by the defendant that the information fails to charge a crime and that the evidence fails to prove the commission of a crime for the reason that the information charges that the names of W. W. Keith and Ethel Keith were affixed to the coupon bond on August 24, 1930, and the evidence shows such date to have been on a Sunday, and does not show that the act charged was committed on some other day of the week. It is the theory of the defendant that a promissory note executed on Sunday is void, and that therefore it was necessary for the information to charge facts extraneous to the face

of the instrument showing its execution to have been on some day of the week other than Sunday, in order to charge the false making of an instrument having sufficient legal efficacy to be the subject of forgery. The cases cited to support this theory are from states other than Nebraska, and are largely civil cases. This court has held that a contract made on Sunday is not void for that reason. *Horacek v. Keebler,* 5 Neb. 355. It has been held also that a bill of sale made on Sunday was not for that reason invalid. *Fitzgerald v. Andrews,* 15 Neb. 52. We are cited to no statute making promissory notes void because executed on Sunday. Furthermore, apparent legal efficacy is all that is required, and we hold that a written instrument, made the subject of forgery by statute, is as much the subject of forgery on Sunday as upon any other day of the week, regardless of whether or not it is void because executed on Sunday. 26 C. J. 906.

The defendant also claims the information and evidence are each insufficient for the reason that the instrument that is set forth in full in the first count of the information, and therein called a "promissory note," and alleged to have been forged, is designated upon its face as a "Coupon Bond." In this contention it is urged that the statute defining forgery does not make a coupon bond the subject of forgery and that no act is a crime that is not made penal by the plain import of a statute. The instrument is shown on its face to have all of the qualities of a negotiable promissory note. The statute mentioned makes both a bond and a promissory note, as well as a contract or writing obligatory, the subject of forgery, and plainly includes the instrument copied in the first count, although such instrument bears the name "Coupon Bond." In a prosecution for forgery, it makes no difference what the pleader names the instrument alleged to have been forged, if such instrument is set forth in full in the information and if, as set forth, it is plainly embraced within the instruments made the subject of forgery by the statute. 26 C. J. 941.

It is urged that the evidence is insufficient to prove an intent to defraud. In a prosecution for forgery it is not necessary to allege or prove an intent to defraud any particular person. *Morearty v. State,* 46 Neb. 652; 26 C. J. 904.

One logical construction of the evidence in this case is that the instrument was made with an intent to cause Bassett to believe that his money was invested and safely secured by the mortgage when it was not, while the defendant used the money and paid Bassett interest thereon. Bassett, in such case, would be defrauded of security acceptable to him. The evidence has been examined and is held sufficient to establish the intent to defraud.

A motion requesting disqualification of Judge Blackledge, the judge who presided at the trial, was overruled and this action is assigned as error. To support this motion it was shown that Judge Blackledge, during a few years next preceding the trial, purchased some bonds, secured by mortgage, from the firm of Hoeppner & Uerling, and had lent upon real estate money once or twice through that firm. Some of these notes are still unpaid and a loss may occur on some of them. These bonds and notes were not the obligation of Hoeppner & Uerling, at least other than as indorser or guarantor. No ill feeling for any cause is alleged or claimed. Interest of the trial judge in the outcome of an action to disqualify must be of a pecuniary nature. Comp. St. 1929, sec. 27-315; *Chicago, B. & Q. R. Co. v. Kellogg,* 54 Neb. 138; *State v. Smith,* 77 Neb. 824. It is not shown that the trial judge could benefit in a pecuniary way, either directly or indirectly, by the outcome of this action, and no ground of disqualification other than interest being claimed, no error was committed in denying the disqualification.

One assignment of error relates to the refusal of the trial court to hear what the defendant designates a plea in abatement. The defendant was arraigned and entered a plea of not guilty May 23, 1932. September 26, 1932,

the defendant and his counsel being present in court, this cause was set for trial during the September term, and an order then made to the effect that all preliminary motions or matters to be brought to the attention of the court before the actual trial should be filed and presented on or before October 10, 1932. The motion to disqualify the trial judge was overruled on October 10, 1932, and on that date this case was assigned for trial on October 31, 1932, at 10 o'clock a. m. The so-called plea in abatement, which in reality is a motion to quash the jury panel, was filed on October 31, 1932, and presented to the trial court when the cause was called for trial on that date. The court denied the motion, refused a hearing thereon, assigned the failure to present the same at an earlier date in compliance with the order of September 26 as a reason for its action and immediately began the proceedings to impanel the jury. No showing or offer of showing of a reasonable excuse for not presenting the motion prior to the date set for trial was made. The record does not show when or how the jury panel was drawn.

The state has made a motion in this court for a diminution of the record for the purpose of showing how and when the jury panel was drawn and this motion has been submitted with this cause. We treat the instrument mentioned, although designated on its face a "plea in abatement," as a motion to quash the panel as that is its nature and prayer. To do so is the more advantageous to the defendant, since the statute provides and this court has held that the plea of not guilty waives all defects which may be excepted to by plea of abatement. Comp. St. 1929, sec. 29-1811; *Green v. State*, 116 Neb. 635. The rule in question that was made by the court affected procedure only and did not affect jurisdiction of the subject-matter. Subject to conformity to constitutional and statutory limitations and provisions, courts have inherent power to make reasonable rules for the regulation of their practice and the conduct of their busi-

ness. 15 C. J. 901-915. Our attention has not been called to any provision of the Constitution or statute or to any court rule to which the rule in question is contrary. The making of the rule was known to the defendant and his counsel at the time made. Such rule may not deprive a person of a legal right secured by law, as it then becomes an unreasonable rule. The rule in question, under many sets of facts, could have the effect to deprive a defendant of a reasonable opportunity to avail himself of a legal right, and thus its enforcement be unreasonable, and under many sets of facts grant ample opportunity to enjoy every existing legal right, and thus its enforcement be reasonable. The defendant is the one best in position to know facts that cause the rule to deprive him of a reasonable opportunity to enjoy any legal right he may have, and the burden is therefore upon him, aided by matters apparent from the face of the record, to show cause why he has not complied with the rule, if he desires to prevent its enforcement. A court rule, at least such as the one in question, is not obligatory upon the court. 15 C. J. 911. It is of such a nature that it may be legally enforceable under one set of facts and not under another. Matters apparent from the record or a showing by the defendant as to why such a rule deprives him of a reasonable opportunity to enjoy a legal right is necessary to cause the enforcement of such a rule to be so unreasonable as to be error on the part of the court. No such showing, either by matters apparent from the record or by proof or offer of proof of facts extraneous thereto, is shown in this case and the court is not shown to have exercised power wrongfully in its enforcement. To place the burden of proof otherwise than as herein placed or to hold such a rule as herein involved unenforceable under any circumstances would aid unscrupulous practitioners in delaying and obstructing the administration of justice.

An additional reason why the trial court did not commit reversible error in overruling the challenge to the

array is that the pleading does not set forth any facts, even if true, that would justify an order quashing the panel. It contains four paragraphs. No fact pleaded in the first three paragraphs would cause the procedure of drawing the jury to be even irregular and the fourth paragraph is in its entirety a mere conclusion. No affidavit was filed in support of the motion, but an oral offer to prove all facts therein alleged was made. A motion of this kind must set out facts that show how the statute regulating the manner of drawing the panel was violated. *Nelson v. State,* 118 Neb. 812; *Strong v. State,* 63 Neb. 440.

The burden being upon the defendant, under the condition of the record in this case, to show how the rule of court requiring him to file any motions preliminary to trial before a specified date deprived him of a legal right, a diminution of the record as asked by the state in its motion is not necessary and such motion is overruled. Finding no reversible error in the record, the judgment of conviction and sentence is

AFFIRMED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, RELATOR, V. LESTER C. BLACK, RESPONDENT.

FILED OCTOBER 11, 1933. No. 28754.

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

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

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

PER CURIAM.

The attorney general instituted this proceeding, the purpose of which is to discipline the respondent, an at-

torney at law. It is charged that the attorney failed to faithfully discharge his obligation as such and committed personal misconduct as follows: That about March 1, 1932, while acting as the guardian of two minors, in violation of said trust, he converted their money to his own use; that on February 3, 1933, in the Omaha division of the United States district court, he entered a plea of guilty to said offense and was sentenced to the United States penitentiary at Leavenworth, Kansas, for a period of 18 months. The respondent filed no answer to the charges and did not appear at the hearing before the referee. Upon a hearing, the referee, the Honorable Charles F. McLaughlin, found that the charges were true and recommended that the respondent be disciplined. The opinion in *State v. Scoville*, 123 Neb. 457, is controlling.

The motion for judgment on the findings of the referee should be sustained. It is the order of the court that a judgment of disbarment be entered, that the defendant be enjoined from the further practice of law in the courts of the state, and that his name be stricken from the roll of attorneys.

JUDGMENT OF DISBARMENT.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF OTOE, E. H. LUIKART, RECEIVER, APPELLANT: VILLAGE OF OTOE, INTERVENER, APPELLEE.

FILED OCTOBER 11, 1933. No. 28596.

1. **Municipal Corporations**: VILLAGE TREASURERS: DEPOSIT OF VILLAGE FUNDS. Under section 17-515, Comp. St. 1929, a village treasurer is not authorized to deposit village funds in any bank which has not been designated by the board of trustees as a depository.
2. **Banks and Banking**: DEPOSIT OF VILLAGE FUNDS: NOTICE. Knowledge of the president of a bank, who is treasurer of a village, will be imputed to the bank in transactions where such officer acts solely for and in the interests of the bank.
3. ———: ———: TRUSTS. A state bank, not designated by or

known to the trustees as a depository but receiving deposits of funds of a village, the village treasurer being the president and managing officer of the bank, holds such funds as trustee for the village.

4. ———: INSOLVENCY: TRUST FUNDS. Where a state bank holding trust funds mingles them indistinguishably with its general mass of bank assets, which are thus augmented, uses the trust funds in the regular course of its banking business, fails to execute the trust or to return the trust funds to the beneficial owner, and goes into receivership, equity will restore the trust funds as a preferred claim payable in full from the general assets, if sufficient.

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

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

W. W. Wilson and *Allen Wilson, contra.*

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

GOSS, C. J.

In the proceeding in the district court for Otoe county to wind up the affairs of the Bank of Otoe, an insolvent state bank, the Village of Otoe, intervener and claimant, petitioned for an allowance of two claims, totaling $7,707.94 and interest thereon from the respective dates of the conversion alleged, as preferred claims arising out of their trust character. After a trial of the issues the court, on May 31, 1932, allowed the claims with interest, then totaling $8,821.43, as a preferred lien on all the assets of the bank in the hands of the receiver and provided that the judgment should bear 7 per cent. interest until paid. The receiver appealed.

The Bank of Otoe closed its doors October 13, 1931. The department of trade and commerce took possession of its property, and E. H. Luikart was appointed receiver on December 26, 1931.

S. H. Buck was the president and managing officer of

the bank and was also treasurer of the village of Otoe at all times mentioned herein. A. R. Buck was cashier of the bank and village clerk. The village owned its own pole-line and distributing system for electric light current, for which at the time of construction it incurred a bonded debt of $8,000. This had been reduced to $6,000, held by the Nebraska City Building & Loan Association. In February or early March of 1930 an informal mass meeting was held in the village to appraise the sentiment of the taxpayers on the question of selling the electric system to pay the bonded debt against it and so much as possible of a $2,000 bonded debt of the village water system. Thereafter the electric system was sold and conveyed by the village to Central Power Company for $7,000. On March 24, 1930, the check of the power company, payable to the village treasurer, was deposited by S. H. Buck, village treasurer, in the Bank of Otoe and was duly paid by the bank on which it was drawn. Thereupon Buck told Naffziger, chairman of the village board, he had received the money from the sale of the lighting system. He expressed a desire that the village board leave it with the bank, stating that the bank would pay 4 per cent. interest on the money. Mr. Naffziger rejected the offer, saying: "We disposed of the pole-line to retire the bonds and we expect them paid." The Bank of Otoe had never applied, as contemplated by section 17-515, Comp. St. 1929, for the privilege of keeping the money of the village, nor had the village board taken any action authorizing its treasurer to use the Bank of Otoe as a depository of its funds. The treasurer on his own motion kept the village funds in that bank. On April 18, 1930, S. A. Naffziger, chairman, and A. R. Buck, clerk, of the village, drew a warrant for $6,237.50, directing the village treasurer to pay that amount to the Nebraska City Building & Loan Association in payment of the $6,000 of bonds and accrued interest thereon held by that institution. On July 15, 1930, having sufficient balance in the hands of the treasurer, the same village

officers drew another warrant for $2,041.67, directing the village treasurer to pay that amount on account of water bonds held by the state of Nebraska. S. H. Buck caused the two warrants to be stamped as paid. As president of the bank he drew a cashier's check for $6,237.50, in favor of the Nebraska City Building & Loan Association, and another for $2,000, in favor of the state of Nebraska. Neither check nor its proceeds was ever delivered to the payees in discharge of the light and water bonds, but in 1931, after the board discovered the bonds had not been paid and pressed him, Mr. Buck paid $1,000 of the water bonds and probably paid $237.50 interest on the light bonds. He testified that the village money augmented the assets of the bank and remained in the bank or was used by the bank. The cashier's checks were used to transfer the credit from his account as village treasurer to some other account, but the light bonds were not paid in full as contemplated, nor was any payment made on the water bonds held by the state of Nebraska. After the warrants of the village were delivered to Mr. Buck to pay off the light and water bonds in 1930, S. A. Naffziger, chairman of the village board, was told by Mr. Buck that the bonds had been paid and that they were in the vaults of the bank. Buck's annual report as village treasurer for the year ending April 29, 1930, showed in the light fund the receipt of $7,000 for the sale of the light plant and an expenditure of $6,887.50 for "bonds and interest." It is not just clear in what form the bank kept the money in the intervening time, but on January 6, 1931, a deposit slip in evidence and Mr. Buck's testimony show that $8,000 of the village money was placed in a Village Treasurer Bond Account. This was a device by Mr. Buck, as manager of the bank, to keep in the bank the village funds in his hands as treasurer. Mr. Naffziger did not learn until February, 1931, that the bonds had not been paid. Thereafter the treasurer was frequently pressed for their payment. They were never paid except as to the extent above recited. When the bank closed it

held as funds of the village the amounts claimed by the village as principal. The foregoing facts are clearly established by the evidence. They are almost undisputed. Appellant states in his brief that the evidence shows conclusively that each member of the village board knew that the funds in the hands of the treasurer were deposited in this bank. He does not cite such evidence, nor do we find it. On the contrary, Mr. Naffziger and Mr. Meyer, board members, testified they did not know until 1931 that the treasurer kept the village funds in the bank.

The question is whether this fund is a trust fund in the hands of the bank and therefore a preferred claim.

Appellant argues that the statute required the treasurer, in the state of facts presented, to keep the village money in the bank. He relies upon the provisions of section 17-515, Comp. St. 1929, the pertinent parts of which follow:

"The treasurer shall be required to keep at all times on deposit for safe-keeping in the state or national bank doing business in the city or village, and of approved and responsible standing, the amount of moneys in his hands collected and held by him as such city or village treasurer. Any such banks located in the city or village may apply for the privilege of keeping such moneys upon the following condition: * * * It shall be the duty of the city council or board of trustees to act on such application or applications of any and all banks, state or national, as may ask for the privilege of becoming the depository of such moneys, as well as to require from all banks other than state banks a bond in such penal sum as may be the maximum amount on deposit at any one time and approve the bonds of those selected as such depository, and the city or village treasurer shall not deposit such moneys or any part thereof in any bank or banks other than such as may have been so selected by the city council or board of trustees for such purposes, if any bank or banks have been so selected by the city council or board of trustees."

In the recent case of *Massachusetts Bonding & Ins. Co. v. Steele, ante,* p. 7, we considered almost identical provisions of section 77-2508, Comp. St. 1929, save that it applied to a county treasurer instead of a treasurer of a city of the second class or village. We there held: "A county treasurer is not authorized to deposit county funds in any bank when it has not been duly designated as a depository and given bond, as such, and then only to the extent provided by statute"—citing *Shambaugh v. City Bank of Elm Creek,* 118 Neb. 817. While it is true that section 77-2508, Comp. St. 1929, required all banks receiving deposits of a county treasurer to give bonds for the safe-keeping and payment of such deposits and here the statute did not then require a state bank thus to indemnify a village, yet otherwise the analogy is complete. And in *Dovey v. State,* 116 Neb. 533, we affirmed a conviction of a bank officer, prosecuted under what is now section 77-2508, who received a deposit of a county treasurer without furnishing a bond to protect such deposit.

Appellant argues that section 17-515, Comp. St. 1929, made the banking department the authority to decide whether a state bank is of "approved and responsible standing," and required the treasurer to deposit the money in a bank if no bank had been selected by the village board. We are of the opinion that a fair interpretation of the language of the whole statute makes it the duty of the village board to pass upon all applications of eligible banks to become depositories and to decide whether or not to approve the responsibility and standing of such applicants; but, if no bank make such application and no bank is selected by the board, the village treasurer cannot bind the board by his own act in selecting and using a bank without the participation or knowledge of the board.

Whatever S. H. Buck knew the bank knew.

"Knowledge of the president and managing officer of a bank will be imputed to such bank, where such officer is

acting for and in the interest of his bank." *Nebraska State Bank v. School District,* 122 Neb. 483.

"Knowledge of active managing officer of the bank will be imputed to the bank, where, as in this case, said officer handled the transaction for the bank, although he acquired his information as treasurer of the school district." *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538 (citing cases).

Under prior law it was held that a bank receiving a general deposit from a treasurer of a school district becomes a trustee of the district. *State v. Midland State Bank,* 52 Neb. 1. We have so held recently. *Nebraska State Bank v. School District,* 122 Neb. 483; *Lincoln Nat. Bank & Trust Co. v. School District,* 124 Neb. 538.

In *Union Nat. Bank v. Village of Beemer,* 123 Neb. 778, it was held that, in the absence of actual notice or knowledge on the part of a village, knowledge of the president and cashier of a bank who are also mayor and village clerk will be imputed to such bank when such officers are acting for and in the interests of themselves and the bank; and that "A bank receiving a deposit of funds of a village, the mayor and village clerk of such village then being the president and cashier of such bank, holds such funds as trustee for the village."

The funds being deposited by S. H. Buck, village treasurer, in the bank of which he was cashier, without authority or knowledge of the village board; the treasurer being directed, by warrants drawn by the chairman and by A. R. Buck, clerk of the village board, the latter being also cashier of the bank, to pay the bonds, but failing so to do and acting therein solely in the interests of the bank; it follows on principle and authority that the bank was trustee for the village and its assets are chargeable with a preferred claim of the village for the funds so held.

In the circumstances it is the settled rule that it was the duty of the bank and now is the duty of the receiver to restore the trust fund to the village. The fund was

unlawfully converted by the bank as trustee and illegally mingled with a mass of bank assets into which the trust fund has been traced. It is not required that the particular fund should be further traced or identified. Equity charges the mass of assets and restores the trust fund as a preferred claim payable in full from the general assets, if sufficient. *State v. Farmers State Bank*, 121 Neb. 532; *State v. State Bank of Touhy*, 122 Neb. 582.

The judgment of the district court is

AFFIRMED.

GOOD and EBERLY, JJ., concur in the result.

CARRIE A. HALL, APPELLANT, V. AUSTIN WESTERN ROAD MACHINERY COMPANY ET AL., APPELLEES.

FILED OCTOBER 11, 1933. No. 28908.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMPENSABLE INJURY.** An injury, to be compensable under the workmen's compensation law, must be caused by an accident arising out of and in the course of the workman's employment.
2. ———: ———: ———. Under the workmen's compensation law, a compensable injury can only arise while the workman is engaged in, on or about the premises where his duties are being performed, or where his services require his presence as a part of such service at the time of the injury and during the hours of service as such workman.

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

A. R. Strong, W. W. Gibson and *Rosewater, Mecham, Burton, Hasselquist & Chew*, for appellant.

Kennedy, Holland & DeLacy and *Edward J. Svoboda, contra.*

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

GOOD, J.

This is an action to recover compensation and other benefits under provisions of workmen's compensation law. From an adverse judgment, claimant for compensation has appealed.

Plaintiff is the widow of Tracy G. Hall, who died February 14, 1932, as the result of an automobile accident occurring on the previous day. The question presented for determination is: Did Hall's injuries, which resulted in his death, arise out of and in the course of his employment?

The facts are not in dispute. Defendant is engaged in the manufacture and sale of road machinery and equipment, and maintains a branch office at Omaha, Nebraska. Hall was employed by the manager of this branch office as a salesman of defendant's machinery, and was assigned certain specified territory in Nebraska, comprising about 20 counties in the southeastern part of the state. Hall's home was in Sioux City, Iowa. It was his custom to spend each alternate week-end at his home. He was not authorized to make sales or transact any business for defendant in the state of Iowa.

January 30, 1932, Hall signed an instrument, of which the following is a copy:

"Sioux City, Ia. Jan. 30, 1932.

"For a valuable consideration, receipt of which is hereby acknowledged, I hereby consent to the reproduction and use of name, picture and statement by McCann-Erickson, Inc., its nominees (including any publisher) and its client Standard Oil Company (Indiana) for advertising trade and art purposes in any and all publications and other advertising media, without limitation or reservation.

"(Signed) F. J. Hagg, Witness. (Signed) T. G. Hall.
"5300—4th Ave.
"Sioux City, Ia."

McCann-Erickson, Inc., is an advertising agency, which

was engaged in putting on a campaign of advertising for the Standard Oil Company of Indiana. February 13, 1932, at the request of a representative of the advertising agency, Hall had a conference with this representative and representatives of the Standard Oil Company at Sioux City, where they discussed the desirability of having a picture taken of Mr. Hall standing in front of road machinery manufactured by defendant, and on which its name was painted or stamped. This picture was to be used in an advertisement for the Standard Oil Company in connection with an interview with Hall, in which he was to extol the merits of a lubricating oil manufactured by the Standard Oil Company. All of this was without the direction, consent or knowledge of defendant. At this conference it was ascertained that there was road machinery manufactured by defendant at Moville, Iowa, 20 miles east of Sioux City, and, for the purpose of taking such picture, Hall, with the representatives of the Standard Oil Company and the advertising agency and a photographer, started in an automobile for Moville. On the way thither, and about 11 miles east of Sioux City, an accident occurred, in which Hall received injuries from which he died the following day.

Plaintiff contends that Hall was engaged in the performance of his duties as a salesman for defendant, in that he was procuring the advertisement in which the name of defendant's machinery would appear, and that, therefore, his injuries arose out of and in the course of his employment.

We think the contention is not tenable. Hall had no authority to transact any business for the defendant outside of the state of Nebraska; had no authority to procure any advertising; nor, indeed, had defendant's branch office at Omaha any authority to do any advertising for defendant. Moreover, it may be questioned whether an advertisement for the Standard Oil Company, in which the merits of one of its products was being extolled in an interview, would be of any value, as an advertising

medium, to the defendant, simply because its name might appear on machinery in a picture in connection with the advertising. Moreover, the instrument, above quoted, which Hall signed, indicates that he received a valuable consideration. What or how much it was is not disclosed. Whatever the consideration, it did not move from the defendant. Plaintiff contends that the evidence shows Hall received no compensation for going to Moville, Iowa, but the only evidence upon this is in an answer by the representative of the Standard Oil Company in which he says that, to his knowledge, no consideration was paid by it to Hall. It must be borne in mind that McCann-Erickson, Inc., was the one putting on the advertising campaign, and it was securing its material for the advertisement for the Standard Oil Company. There is no evidence from any one that McCann-Erickson, Inc., did not agree to compensate Hall for the proposed trip to Moville, and the written instrument, signed by Hall, indicates that he had received such a consideration from McCann-Erickson, Inc.

Under the workmen's compensation law, an injury, to be compensable, must be caused by an accident arising out of and in the course of the workman's employment. Comp. St. 1929, sec. 48-109. Section 48-152, Comp. St. 1929, defines certain terms in the workmen's compensation law. Subdivision "c" of that section reads as follows: "Without otherwise affecting either the meaning or interpretation of the abridged clause, 'Personal injuries arising out of and in the course of employment,' it is hereby declared: Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

This provision of the section was under consideration by this court in *Pappas v. Yant Construction Co.*, 121 Neb. 766. In that case plaintiff received injuries while

working on a truck which he was using in hauling paving material for his employer. The injury was received while he was working on the truck at his home, a considerable distance from the place of his employment. It was held that his injuries did not arise out of and in the course of his employment.

In *Bergantzel v. Union Transfer Co.*, 124 Neb. 200, it was held: "A compensable injury, under the workmen's compensation act, must be reasonably incident to the employment, and unless there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, such injury does not arise out of the employment."

It appears also that the 13th of February fell on a Saturday and that Hall had completed his week's work, had returned to his home in Sioux City for the week-end, and was not then engaged in the work of his employer.

From the facts and the foregoing authorities, we are impelled to the view that the injuries, resulting in the death of Hall, did not arise out of or in the course of his employment.

It is charged that the court erred in excluding evidence tendered by plaintiff. The record does not disclose any prejudicial error in the exclusion of proffered evidence.

The judgment of the district court is right and is

AFFIRMED.

ELLEN ROSA GEIS, APPELLEE, V. ALBERT J. GEIS: GEORGE J. GEIS, INTERVENER, APPELLANT.

FILED OCTOBER 11, 1933. No. 28597.

1. Parties: INTERVENTION. Intervention is unknown at common law, and is the creature of statute.
2. ———: ———. Statutes that create and regulate this right, while to be liberally construed, must be substantially followed. The applicant intervening must bring himself within their provisions, otherwise he is a mere interloper.

3. Attachment: INTERVENTION. The mere fact that a party claims to be the owner of attached property does not give him the right to intervene in the attachment and thus have the question of his ownership determined in the attachment suit.

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

Thomas & Vail, for appellant.

Norval Brothers, contra.

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

EBERLY, J.

The plaintiff, Ellen Rosa Geis, in September, 1930, instituted an action in the district court for Seward county against Albert J. Geis, a nonresident of the state of Nebraska, based upon a money judgment rendered against the latter in the state of Colorado. On the sole basis of the defendant's nonresidence, an attachment was issued in the cause and levied on certain real estate in Seward county "as the property of the said defendant Albert J. Geis," who was thereafter served by publication of notice as provided by statute.

In October, 1930, George J. Geis, as intervener, filed a petition alleging in part that he was the owner of the attached lands; that the defendant Albert J. Geis had no interest or title therein; and that the attachment proceedings cast a cloud on intervener's title. Intervener prayed that the cloud created by the attachment proceedings be removed; that his title to the attached lands be quieted and confirmed; and that the attachment be dissolved and plaintiff be enjoined from prosecuting her action against the real estate involved.

To the petition of intervention the plaintiff filed a motion to strike from the files, for the reason, in substance, that under the facts of the record it was a proceeding wholly unauthorized in law. This motion the district court sustained, and the intervener refusing to plead

further, the trial court dismissed the intervener's action. Intervener appeals.

Intervention was unknown at common law, and is a creature of statute. In this state sections 20-328, 20-329, 20-330, Comp. St. 1929, create and regulate the exercise of this right. These provisions are to be liberally construed. But they must be substantially followed and the applicant intervening must bring himself within their provisions, otherwise he is a mere interloper. *Parker v. City of Grand Island,* 115 Neb. 892; *State v. Hall, ante,* p. 236.

In the case of *Kimbro v. Clark,* 17 Neb. 403, which was determined prior to the enactment of the present controlling statute, Reese, J., in delivering the opinion of the court in this case, quoted and construed section 478 of the Nebraska Code of Civil Procedure, now section 20-324, Comp. St. 1929, and held, in the absence of statute expressly authorizing, that "new parties to an action by way of intervention are permitted only where the intervener claims some interest in the subject of the action. In an ordinary action on a promissory note, and in which action an order of attachment has been issued and levied upon real estate the title to which is held by a third party, the question of the ownership of the real estate cannot be adjudicated by the intervention of the holder of the title, that question not being involved in any degree in the action." Accordingly intervention was denied.

However, in 1887 an act entitled "An act to amend title three (3) of the Code of Civil Procedure * * * entitled 'Parties to civil actions,' and to provide for the intervention of *third parties claiming an interest in the event of any suit pending or to be brought* in any of the courts of the state of Nebraska," was enacted as chapter 100 of the session laws of that year. The appellant relies on the second section of this act, now section 20-328, Comp. St. 1929, to sustain his contentions. It provides:

"Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to

an action, or against both, in any action pending or to be brought in any of the courts of the state of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the petition, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences."

Appellant contends that, according to the decided weight of authority in jurisdictions other than Nebraska, a third person whose property has been wrongfully attached in a civil action against another as the property of the latter has such an interest in the subject-matter of the proceeding as entitles him to intervene for the purpose of establishing his right and removing the cloud cast on his property by the attachment. He also contends that the statutory provisions quoted above were first enacted by the state of Louisiana; that from this source it was reenacted by the state of California and carried into the laws of many of the western states, including our own; that prior to the enactment of this law by our legislature it had received, both in Louisiana and in other states, a construction by their courts in harmony with the claims of appellant in the present case. See *New Orleans Canal & Banking Co. v. Beard,* 16 La. Ann. 345, 79 Am. Dec. 582; *Speyer v. Ihmels,* 21 Cal. 280, 81 Am. Dec. 157; *Potlatch Lumber Co. v. Runkel,* 16 Idaho, 192, 23 L. R. A. n. s. 536.

Frankly conceding the force and cogency of the arguments advanced, were this a case of first impression in this jurisdiction, we are unable to accept them in view of the situation now prevailing. The words of the title of our intervention statute constituting for the purpose of construction a part thereof, at least for the purpose of determining its scope, suggest, if they do not import, a limitation of the scope of its relief to the "parties claiming an interest in the event of any suit." For, any pro-

vision in a legislative bill which is not clearly expressed in its title cannot be enacted into law. *Union P. R. Co. v. Sprague,* 69 Neb. 48; *Haverly v. State,* 63 Neb. 83.

So, too, the term "event of any suit" must be taken to mean the "legal event" of any suit. *Ward v. Mallinder,* 5 East (Eng.) 489; *Swinglehurst v. Altham,* 3 T. R. (Eng.) 138, 140.

The word "event" in similar connections has been defined as "the consequence of any thing, the issue, conclusion, end, that in which an action, operation or series of operations terminates." *Fitch v. Bates,* 11 Barb. (N. Y.) 471, 473.

The construction of our legislative act thus limited by its title would support the view that "the event," in the instant litigation, in which the "claiming of an interest" qualifies a party to intervene in a pending proceeding is the judgment ultimately to be rendered in the litigation. In the instant case the ultimate judgment to be entered, determined by the issues tendered in the petition of plaintiff, will be binding upon Ella Rosa Geis and Albert J. Geis and those in privity with them only. Intervener, not being a party or in privity with either, and not in any manner interested in the issues tendered by this petition, will not be bound by, nor does he possess any possible interest in, this ultimate judgment to be finally entered between the original parties. In other words, he may not be regarded as "claiming an interest in the event of the suit," and therefore is not authorized to intervene therein under the terms of the enabling act. True, the words just considered are found in the title of the act and do not appear in the body of the same. But acts of the legislature must be construed with reference to, and their scope may not be extended beyond, the limitations of their constitutional title. Indeed, the inference here suggested is quite in harmony with the course of judicial decisions in this jurisdiction since the enactment of the statute here under consideration in 1887.

In the case of *Haines & Co. v. Stewart,* 3 Neb. (Unof.) 216, the facts involved were quite similar to the instant case, and this court announced the following as the approved principle of law:

"The mere fact that a party claims to be the owner of attached property, does not give him the right to intervene in the attachment, and thus have the question of his ownership determined in the attachment suit."

And then again, in the case of *Mahoney v. Salisbury,* 83 Neb. 488, where another phase of the question here controlling was before this court, the rule was declared to be:

"The question of the ownership of real estate cannot be adjudicated on a motion to dissolve an attachment. The issue of fact in such a proceeding is not whether the attachment debtor owns the property, nor whether his grantee has an unimpeachable title or interest therein." See, also, *Danker v. Jacobs,* 79 Neb. 435.

After a careful reading of the case of *Deere, Wells & Co. v. Eagle Mfg. Co.,* 49 Neb. 385, cited by appellant, we have come to the conclusion that this case does not in truth support his contentions. The report discloses that both of the parties to that action were attaching creditors of the same debtor. Section 232 of the then Civil Code, now section 20-1037, Comp. St. 1929, was as follows: "Where several attachments are executed on the same property, * * * the court, on the motion of any of the plaintiffs, may order a reference to ascertain and report the amounts and priorities of the several attachments." Deere, Wells & Company thereupon filed a petition of intervention and sought to attack the validity of the attachment of the Eagle Manufacturing Company. This intervention was sustained only to the extent authorized by the statute last quoted. The controlling rule approved by this court was: "Writs of attachment having been levied in different actions on the same property, the plaintiff in the later case may intervene in the earlier case on proper showing, not to defend the principal action or to

move to discharge the attachment, but to have the relative priority of the levies adjudicated."

It follows that the intervention of appellant in the instant proceeding was unauthorized by statute, and the action of the trial court in sustaining the motion to strike his petition from the files was correct, and is

AFFIRMED.

CLARENCE G. BLISS, RECEIVER, FARMERS & MERCHANTS BANK OF WESTON, APPELLANT, V. WILLIAM FALKE ET AL., APPELLEES.

FILED OCTOBER 11, 1933. No. 28598.

1. Principal and Agent: AUTHORITY OF AGENT. Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency.
2. ———: ———. That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it, but is only a circumstance or fact to be considered in the determination of such question.
3. ———: ———. Full authority to receive payment of the money due on a note may be conveyed by the owner to the collector by word of mouth. *Held*, that the banks in question fully authorized Kirchman to collect and that payment to him discharged the mortgages held by them.

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

F. C. Radke, Barlow Nye, Joe F. Berggren and *G. E. Price*, for appellant.

H. A. Bryant, contra.

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

SHEPHERD, District Judge.

This is an appeal from the decision of the district court

sitting in Kimball county which found for the defendant and dismissed the action. There is but one question in this case. Did the Farmers & Merchants Bank of Weston and the State Bank of Swedeburg authorize Frank J. Kirchman to collect their Falke mortgages and to receive the cash therefor?

Falke owned a half section of land in Kimball county, Nebraska, the east half of section 18, township 14, north, range 55, west of the 6th p. m. He mortgaged this land to the Nebraska State Savings Bank of Wahoo for approximately $6,800. The bank sold half the mortgage to the Farmers & Merchants Bank of Weston, and half of it to the State Bank of Swedeburg. The mortgage became due on the 1st day of January, 1928, and was renewed through the said Savings Bank or through Kirchman, its president. Two mortgages were made in this renewal, one of $3,400 on the south half of the land to the Swedeburg bank, and one of $3,400 to the Farmers & Merchants Bank of Weston covering the whole half section, but subject to the Swedeburg bank's mortgage on the southeast quarter. These mortgages are the ones in question. About the time they became due, January 1, 1930, the banks notified Kirchman, who had been the go-between of the parties in the said renewal and also in the collection of interest and in the preparation of papers and who was also a stockholder of both of the banks, that they desired payment. Kirchman notified Falke and suggested that he get the money from the defendant Otto, giving him a mortgage on the land to secure the same, and pay off the banks. He did so and placed the money in Kirchman's hands for that purpose. The record shows, we think, that he borrowed the whole or major portion of it from the Nebraska State Savings Bank of Wahoo. This he did, believing that Kirchman was duly authorized to collect and receive. Kirchman did not account to the bank but reloaned and used the money for other purposes.

The banks failed and their receiver, the plaintiff in this

action, finding the described mortgages among the assets and that the same were unreleased of record, took the ground that Kirchman was not an authorized agent for collection and began this foreclosure.

Certainly, if Kirchman had not been made an agent to collect and was unauthorized to receive the money, the receiver was not bound by what he did and may foreclose and sell the land to discharge the two mortgage debts.

On the other hand, the fact that Kirchman did not have the mortgages in his possession when he collected the money is not sufficient to prove that he was unauthorized to receive it and to bind the bank by so doing. Lack of possession, to be sure, is a circumstance to be considered and Falke took some risk in paying without requiring a release or an authorization in writing showing Kirchman's agency. *Thomson v. Shelton,* 49 Neb. 644.

Agency may of course be established by parol or verbal authorization. In defending against the foreclosure Mr. Otto, who was made a party defendant, undertook to show authority and agency by this means. He produced upon trial the testimony of the said Kirchman, of Frans Johnson, the cashier of the Swedeburg bank, and Ferdinand Pacal, cashier of the Farmers & Merchants Bank of Weston, all tending to show that Kirchman was duly authorized to collect and receive the cash as the agent of these banks. The trial court evidently believed their testimony in this regard and upon due consideration of the same found that Kirchman was an agent for collection and entered a decree adjudging that the mortgages had been fully paid, canceling said mortgages and dismissing the case.

The fact that the banks never received their money, the fact that Kirchman never accounted for the money paid, the fact that the rights of innocent depositors are involved, is not material if Kirchman was authorized to collect and receive. Kirchman may have been guilty of breach of trust, but that cannot be chargeable to Falke or to Otto if they were not parties to it; and there is no evidence of the latter.

The one question, therefore, is the question of agency. And upon careful examination of the bill of exceptions this court is of the opinion, not only that the trial court was justified in his finding, but that no other finding could properly have been made.

The facts of the record are well-nigh sufficient to show that Kirchman was a general agent of the banks in connection with these mortgages, not only in drawing the mortgages, collecting interest, conducting all of the negotiations before and after with the mortgagor but in notifying the latter that the mortgages would not be renewed and collecting the same when they fell due. But express authority in regard to collection was specifically given him by the cashiers and managers in conversations over the telephone and otherwise. Pacal testified: "Q. You expected Kirchman to see Bill Falke and get the money on these exhibits 1 and 2? A. Yes, sir." Johnson testified: "Q. You wanted Mr. Kirchman to go to him and get the money, didn't you? A. I wanted—Kirchman was handling the loan, and naturally he was the—Mr. Falke was arranging for a loan and now that was the only way he could get it. Q. You wanted Mr. Kirchman to look after it, didn't you? A. Yes. * * * Q. You did want Kirchman to get the money out of this man Falke? A. Yes, sir; I wanted the money paid." And Kirchman testified: "Q. Isn't it a fact, Mr. Kirchman, that both of these cashiers told you to get the money on these Falke notes? A. Well, I think I answered it Mr. Bryant. Q. Well, answer it again. A. Oh, you want to have it cinched, do you? Yes; that's true." Not only was the testimony of these three men to this effect, but the whole of the evidence confirms the conclusion that Kirchman was authorized to receive the money on these mortgages as the banks' agent; and no facts or circumstances in the record seriously militate against this conclusion.

No mistake was made by the district court in its finding and decree and the judgment must be affirmed.

AFFIRMED.

ROSS H. PETERSON, JR., APPELLEE, V. BORDEN'S PRODUCE COMPANY, INC., APPELLANT.

FILED OCTOBER 11, 1933. No. 28857.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: COMMUTED AWARD.** A commuted award extends over the full period originally covered by the same.
2. ———: ———: LIMITATION OF COMPENSATION. Under the Nebraska compensation law, compensation above $15 a week cannot be had. While a workman may receive concurrent compensation for two or more injuries, the combined amounts received may not exceed $15 a week.
3. ———: ———: APPEAL: TRIAL DE NOVO. Compensation cases are now tried *de novo* and it devolves upon the reviewing court to make independent findings and to decree accordingly.
4. **Evidence** and record carefully examined and the court finds that the same do not sustain the allegations of the pleadings of the plaintiff-appellee and do not make a case of compensable injury against the appellant. The judgment of the district court is therefore reversed and the case dismissed.

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

Hutton & Mueting, for appellant.

Webb Rice, contra.

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

SHEPHERD, District Judge.

This is a compensation case from Madison county where it was tried upon appeal from the order of the compensation commissioner. The plaintiff-appellee prevailed in the district court and was found to have been temporarily totally disabled for a period of 300 weeks from and after July 10, 1932. He was awarded compensation at the rate of $14 a week, together with costs, an attorney fee of $500, and medical and hospital expenses aggregating $181.70.

The appellant presents eight specific assignments of

error, which may be grouped in three, as follows: (1) The findings and decree are contrary to the evidence, contrary to the law, and not supported by preponderance of the evidence. (2) The court erred in rendering a judgment for compensation which, running concurrently with the compensation of a prior judgment, allows the plaintiff to recover a weekly compensation in excess of the amount permitted by statute. (3) The attorney fee is excessive.

One of the facts of the record, undisputed in the evidence, is that on the 17th day of March, 1930, appellee had an earlier automobile accident involving injury to his back, ribs and trunk, which was quite similar to the one in question. In that case he was given compensation at $15 a week for total temporary disability to June 8, 1931, and compensation at the rate of $7.4666 a week for permanent partial disability for 236 weeks thereafter. Since in the case presently before the court appellee is adjudged to receive compensation at $14 a week for a period of 300 weeks of temporary total disability, it is clear that the two awards overlap and that appellee will be receiving, if the instant decree stands, $21.4666 a week for a period of 179-3/7 weeks.

Under the statute such compensation in excess of $15 a week cannot be had. While a workman may receive concurrent compensation for two or more injuries, the combined amounts received may not exceed $15 a week. Comp. St. 1929, sec. 48-121; *Nelson v. Service Oil Co.*, 121 Neb. 762. It is also the law that a commuted award extends over the full period of its original coverture. *O'Brien v. Albrecht Co.*, 206 Mich. 101; *Diskon v. Bubb*, 88 N. J. Law, 513.

The two judgments in the two Peterson compensation cases are in conflict as to whether permanent partial disability arose from his first accident. The court sitting at Hastings found that it did and placed it at 40 per cent. The court sitting at Madison in the case at bar found that total disability arose from his second accident.

Apparently the last finding belies the first. No doubt the court in the last case, the case now before us, concluded, even though the appellee was then enjoying the fruits of the first finding upon the matter, that he had fully recovered from the results of his first accident and that said finding was mistaken or ill-advised. But the judgment of the first case was in evidence to the contrary and must be regarded as an evidence of high order, unmodified, unquestioned and affirmed in commutation proceedings as it was. If the finding of the court in this case is correct, the first employer of the appellee has been woefully despoiled. In the interest of common fairness the rule ought to be that a workman who receives compensation for a permanent disability should be precluded from ever thereafter applying for or receiving a subsequent award for total temporary disability resulting from a later injury; for the administration of justice in compensation cases is indeed plagued by litigants who are prone to look upon every accident as a business opportunity. However, the rule suggested is probably for the legislature and not for the court. It will not be applied here.

We do not agree with the court below in its determination that the accident happened as alleged or that the injury of the appellee, if any, was compensable. Trying the case *de novo*, as we are required to do by the recently amended statute, section 48-137, Comp. St. 1929, we conclude to the contrary. The old doctrine to the effect that compensation judgments will not be disturbed if supported by competent evidence, however meagre or unconvincing, is no longer in force, and it now devolves upon the reviewing court to make independent findings and to decree accordingly. The appellee did not prove his case by a preponderance of the evidence, as was requisite to a judgment for compensation in his favor.

Peterson's account of his alleged accident is that on the 10th of July, 1932, he was driving a milk truck, weighing with its load about 7,200 pounds, and going south toward

the town of Osmond at the rate of 30 or 35 miles an hour; that he fell asleep in his cab and that the truck turned into the ditch on his right, throwing him out to the left and running over his left chest and shoulder by the outer member of its dual left rear wheel as it mounted the bank beyond, and going on at an angle of approximately 45 degrees through a barbed wire fence and over rises and depressions into a stubble field to a point perhaps forty rods from the road; that appellee was unconscious for some moments from the impact he had received, but finally came to, staggered into the field to the truck, climbed in, turned it around and drove it back in the very tracks which it had made in its runaway journey, recrossed the ditch and emerged upon the road at the exact spot where the truck had left it; and that thereafter he immediately drove on to the Kumm farm where he fainted and was revived, and then provided with conveyance and company to Osmond to consult a doctor. He saw Dr. Mailliard there, who gave him an examination and treated him. Following this he was taken to the Good Samaritan Hospital at Wayne where he remained five days and was discharged as perfectly normal. He insists that his injury brought on tuberculosis and that he is entitled to the total temporary disability finding made and to the compensation awarded.

No one witnessed the alleged accident and the physical facts considerably dispute Peterson's version of the manner in which it occurred. According to the testimony of the witness Tubel, who examined the tracks immediately after, the imprint of the left rear wheel was plain in the soil all the way through the ditch with nothing in its course to show that it had passed over any obstacle. His testimony was: "The tracks were perfectly smooth without any interruption." If the wheel had gone over his chest and shoulder at any point there must have been a break in the continuity of that imprint. It is almost impossible to explain how the wheel could have hit him. By the law of mechanics the turn of the truck would

throw him out of the course in which it was proceeding and away from it. The loaded truck was of great weight and going at a high rate of speed. Had it passed over his chest and shoulder it must have crushed him, or produced objective symptoms far beyond those described by any witness. Appellee declared that the truck "eased" off into the ditch; Ed Schad testified that it went in almost at right angles. Appellee testified that he returned to the road at the point where he left it. The testimony of Tubel is that on his return he drove south in the ditch a considerable distance to a place of easier access.

The alleged accident happened in a cup between two comparatively high hills which shut out all observation. Before it took place Peterson had passed and repassed the place three times. In his examination before the compensation commissioner he first denied the fact that he had turned and driven back through this cup or depression and then turned and gone into it again to his alleged accident. True, he explains this on the plea that he had become confused about the road to Osmond. In his former accident he had suffered an injury to his chest and back and two or three broken ribs. He was fully advised as to the possibility of tuberculosis from trauma.

At all times following the occurrence the appellee stated that he suffered great pain. He was bleeding at the nose and his left hand was scratched and bloody. He was covered with dirt and much dishevelled, but when he stripped in Dr. Mailliard's office no further marks appeared, save a slight bruise on the chest. The doctor first thought he had sustained a broken left rib and strapped him with surgeon's tape. He was X-rayed at the hospital. He had no injury to his sternum, no dislocations, no broken bones, except a hair line fracture of his rib. Over and over again he complained of pain, hemorrhages, coughing, etc., and expressed fear that he was going into consumption. But no doctor or person, outside of the appellee's family, ever witnessed any of these symptoms. The numerous X-rays show nothing of the sort.

In view of the medical testimony respecting his condition after the alleged accident, it is almost without doubt that his injury did not bring on consumption and that he did not have it. In this particular the burden was upon him to show by competent and convincing evidence, amounting to a preponderance of the evidence, that tuberculosis resulted. From every point of view the testimony of his employer outweighed and overbalanced the evidence which he presented. Just one medical witness, Dr. Stark, maintained through cross-examination that his injury had superinduced a tubercular condition. He said, "I think the man is tubercular." All of the further testimony on this point, carefully examined in the bill of exceptions and faithfully abstracted in appellant's brief, is to the effect that there was no convincing indication upon medical and surgical examination of the existence of tuberculosis within a period of six months from the time that his injury was received, and that had it existed examination would have disclosed it within that period.

The record shows that upon trial of the case the appellant offered to pay wages and medical and hospital expenses from July 10 to July 15; and that said offer was refused. Awards of compensation are not to be had on speculation, conjecture, possibility, or even probability. There must be proof that the accident occurred, and proof that the complainant suffered a compensable injury. The evidence will not be quoted further. A most painstaking examination has been made, however, of the bill of exceptions and pleadings.

The appellee has entirely failed to prove the allegations of the petition or to make a case for compensation. It follows that the judgment of the lower court should be reversed and the case dismissed, and it is so ordered.

REVERSED AND DISMISSED.

CITY OF SOUTH SIOUX CITY, APPELLANT, V. WILLIAM H. MULLINS ET AL., APPELLEES.

FILED OCTOBER 20, 1933. No. 28594.

1. Municipal Corporations: CITY TREASURERS: DEPOSIT OF CITY FUNDS. Under section 4324, Comp. St. 1922, and under section 17-515, Comp. St. 1929, a treasurer of a city of the second class is not authorized to deposit city funds in any bank which has not been designated by the city council as a depository.
2. ———: ———: ———: LIABILITY. The treasurer of a city of the second class is liable on his official bond for the loss of city funds deposited by him in a bank not duly designated by the city council as a depository.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed.*

W. V. Steuteville, for appellant.

Gaines, McGilton, McLaughlin & Gaines and *George W. Leamer, contra.*

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

GOSS, C. J.

Plaintiff, a city of the second class, sued its treasurer and his surety on his official bond for $15,000 and interest, alleged to have been deposited by him and lost in the failure of the Bank of South Sioux City, a bank not designated by plaintiff as a depository. Upon trial to the district judge, the petition was dismissed and plaintiff appealed.

Most of the evidence was stipulated. Mullins was elected city treasurer at the April election in 1926 and has been reelected every two years. On April 26, 1926, he filed his bond in the penal sum of $15,000, with Fidelity & Deposit Company of Maryland as surety, to cover his term of two years beginning June 3, 1926. The condition of the bond:

"The condition of the above obligation is such that if the said W. H. Mullins, shall render a true account of

his office, and of the doings therein to the proper authority, when required thereby, or by law; and shall properly pay over to the person or officers entitled thereto all money which may come into his hands by virtue of his said office; and shall faithfully account for all the balances of money remaining in his hands at the termination of his office; and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, securities, or other property appertaining to his said office, and deliver them to his successor, or to any person authorized to receive the same; if he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void; otherwise in full force and effect."

When the treasurer's term of office began, on June 3, 1926, the Bank of South Sioux City was in the hands of, and had been operated by, the guaranty fund commission since about March 19, 1925. It continued to be so operated as a going concern until December 24, 1927, when it was placed in the hands of a receiver. When the guaranty fund commission took over the bank, it had on deposit $14,581.25 of city deposits; when the commission ceased to operate it and turned it over to the receiver, it had $31,064.75 such deposits. The district court allowed claims in the above amount and ordered the commission to pay them. It paid dividends sufficient to reduce the claims to $24,684.80 and accrued interest. No further sums have been paid.

No application was ever made by said bank to the city for the privilege of keeping any funds of the city. No bank was ever designated by the city council as a depository of the city money. While the bond was in force the bank paid the city 2 per cent. on the money on deposit.

Each month the treasurer made a written report to the council, showing all receipts and disbursements, indicating the source of the receipts and their allocation to

various funds, and, on the disbursement side, showing the warrants paid. He also included in his report deposit slips showing all money deposited in the bank of South Sioux City. It is due him to say that nothing in the evidence reflects upon his personal or official honor.

The defendants appear to seek to have the cause considered as if plaintiff were asking a recovery solely on the ground of the common-law negligence of the treasurer in depositing funds in a bank which failed. It is true that in three of the eight separate specifications of the petition, alleging the manner in which the treasurer breached the conditions of his bond, it speaks of his negligence in depositing the money in the bank or in failing to withdraw it therefrom when he knew or ought to have known the bank was unsafe and insolvent; yet in four of the specifications the issue was tendered flatly charging a breach upon his plain failure to restore the funds of the city. The eighth and last specification is as follows:

"That said William H. Mullins was negligent in depositing and keeping on deposit the funds of said city in a bank which had not been designated as a depository by the city council of the city of South Sioux City."

The issues tendered by the last five specifications were met by a general denial by the surety. The treasurer alleged that the city council knew the money was deposited in this bank and demanded the interest on said funds. The proofs showed (1) that the treasurer had officially received and had failed to restore to plaintiff a sum largely in excess of the amount prayed, and (2) that the city had never formally approved or designated the bank as a depository of its funds. The question for the district court and for this court is a question of law. Under the facts stated, was the bank a designated depository of the funds within the meaning of the statute?

When the term of the treasurer began on June 3, 1926, the section of the statute relating to deposit of money in a bank by a treasurer of a city of the second class

was section 4324, Comp. St. 1922. This was amended in 1927 and became section 17-515, Comp. St. 1929, operative during the remaining portion of that year, in which the bank in question was placed in the hands of a receiver on December 24, 1927. However, its text under both acts required banks desiring the privilege to make application to become depositories, made it the duty of the city council to act on such applications, and required the treasurer to keep his public funds in a bank of approved and responsible standing. The section applies to cities of the second class and villages.

We recently had before us a case where the same section was considered and so do not think it necessary to quote the pertinent language of the statute. The case is that of *State v. Bank of Otoe, ante,* p. 383. We there held that, under section 17-515, Comp. St. 1929, a village treasurer is not authorized to deposit funds in any bank which has not been designated by the board of trustees as a depository. In support we cited *Massachusetts Bonding & Ins. Co. v. Steele, ante,* p. 7, considering a statute almost identical save that it applied to county treasurers, and *Shambaugh v. City Bank of Elm Creek,* 118 Neb. 817, 65 A. L. R. 804. The annotation beginning on page 811 indicates that it is the generally accepted rule that custom or usage does not so enlarge a public officer's statutory powers as to enable him to perform his duties in a manner other than that prescribed by statute.

Deciding the case involving the Bank of Otoe and a school district treasurer, with respect to whom the statute is in similar terms, we decided that such a treasurer is not authorized to deposit school funds in a bank not designated by the school board. *State v. Bank of Otoe,* p. 414, *post.*

The city council knew that the treasurer kept his official funds in the bank. That was proved by the stipulation as to his reports being accompanied by his deposit slips, but that is ineffective to prove that the bank made application and that the council designated the bank as a de-

pository as prescribed by statute. The treasurer reported interest credited to him by the bank. He held the funds officially and it was his duty to report and pay over any interest received by him. He could make no personal profit from the use of the funds. The stipulation shows that the treasurer received credit at the bank for the interest, but does not show that the council demanded that the bank pay him or them interest on the funds on deposit. We are of the opinion that this item of the interest created and constituted no defense to the action on the bond.

Under the authorities cited in this opinion and under section 4324, Comp. St. 1922, and under section 17-515, Comp. St. 1929, a treasurer of a city of the second class is not authorized to deposit city funds in any bank which has not been designated by the city council as a depository. Such a treasurer and his surety on his official bond are liable for such funds so deposited and lost through the failure of the bank in which they were deposited without the bank being designated by the city council as a depository.

The judgment of the district court is reversed and the cause remanded for a new trial, in harmony with the views expressed in this opinion.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. BANK OF OTOE, E. H. LUIKART, RECEIVER, APPELLANT: SCHOOL DISTRICT NO. 78, OTOE COUNTY, INTERVENER, APPELLEE.

FILED OCTOBER 20, 1933. No. 28608.

1. **Schools and School Districts: TREASURERS: DEPOSIT OF SCHOOL FUNDS.** Under Laws 1931, ch. 141, and Comp. St. Supp. 1931, secs. 77-2525, 77-2526, 77-2527, a school district treasurer is not authorized to deposit school funds in any bank which has not been designated by the school board as a depository. *State v. Bank of Otoe, ante*, p. 383.

2. ———: ———: ———. A school district treasurer's sole authority for deposit of school funds in banks is found in the statutes, and the directions, limitations and public policy evidenced thereby must be complied with by such officer and by all who deal with him with reference to such funds.
3. **Banks and Banking**: DEPOSIT OF SCHOOL FUNDS: NOTICE. Knowledge of the active managing officer of a bank, who is also treasurer of a school district, will be imputed to the bank in its relations to unauthorized deposits of school moneys held and handled through the bank.
4. ———: ———: TRUSTS. "Bank receiving deposit of funds of school district treasurer, who is also active managing officer of the bank, holds such funds as trustee." *Lincoln Nat. Bank & Trust Co. v. School District*, 124 Neb. 538.

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

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

I. D. Beynon, contra.

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

GOSS, C. J.

The Bank of Otoe closed its doors October 13, 1931, with total resources of $182,332.62. The department of trade and commerce took possession of its property. It was duly adjudged insolvent and E. H. Luikart, secretary of the department, was appointed receiver on December 26, 1931. School District No. 78 of Otoe county, Nebraska, intervened and petitioned for the allowance of its claim for alleged trust deposits, amounting to $2,275.04, on hand when the bank closed. Upon joinder of issues and trial the district court allowed the claim as a trust fund in preference of claims of general depositors. The receiver appealed.

S. H. Buck was treasurer of the school district and was also president and managing officer of the bank at all times mentioned herein. The evidence shows that he

deposited the funds of the school district in the bank but that the bank had never applied for the privilege of keeping such moneys nor had the governing body of such school district approved or designated such bank as a depository.

The 1931 legislature passed, with an emergency clause, a new act complete in itself, providing for the deposit of school district and township money in banks. It was approved and became effective on March 25, 1931. Laws 1931, ch. 141; Comp. St. Supp. 1931, secs. 77-2525, 77-2526, 77-2527; Comp. St. Supp. 1933, same numbers. The pertinent sections read as follows:

"Section 1. That any school district treasurer or township treasurer may deposit the money received or held by him by virtue of his office in some state or national bank situated in such school district or township or in some nearby city or village which has been approved as such depository by the governing body of such school district or township.

"Section 2. Any such bank may apply for the privilege of keeping such moneys. All such deposits shall be subject to payment on check when demanded by the district or township treasurer. It shall be the duty of the school district board or township board to act upon such application.

"Section 3. No such treasurer shall be liable on his bond for money on deposit in a bank under and by direction of the proper legal authority."

At the annual meeting of the board in June, 1931, the balance on hand reported by the treasurer agreed with the balance shown by the ledger kept by the secretary but, when the bank closed, its individual ledger account showed that it held a balance of $1,386.18 in the account of Buck as treasurer of the school district. The evidence shows, however, on the bank account, that he had drawn and the bank had paid four checks, totaling $894, which were not recorded by him in his accounts as school treasurer nor reported by him to the school board or to

its secretary. No warrant or order directed the treasurer to pay out the money indicated by the checks. These amounts were checked out of the bank account of the treasurer for cash or otherwise in favor of S. H. Buck personally. Whether he appropriated the money to his own use or for the use of the bank is not disclosed. He was a witness for the receiver but was not questioned on this subject. His books show a charge of $5.14 not appearing on the secretary's ledger which is not contested by intervener. Giving him that credit and charging him with the $1,386.18 balance in the bank and with the $894 converted by means of the checks, the intervener derives the $2,275.04, which was allowed by the trial court. The evidence amply showed that the treasurer owed that sum to the school district and, but for his conversion of the amount above described, would have had in the bank the amount claimed.

Section 79-405, Comp. St. 1929, makes it the duty of the treasurer of a school district to pay over upon order of the director, countersigned by the moderator, all moneys received by the treasurer. Section 79-2008, Comp. St. 1929, forbids a school treasurer to lend or use any part of school moneys under the penalties provided by the statutes regarding embezzlement. These sections were not repealed, modified, nor referred to in the 1931 act hereinbefore quoted. This act of 1931 shows an intent on the part of the legislature to place a school district treasurer under the same restrictions as county treasurers and treasurers of cities of the second class and villages by making it unlawful for any such treasurer to deposit funds in a bank unless authorized so to do in the manner provided by statute. For example in recent cases: Considering section 77-2506, Comp. St. 1929, we held that a county treasurer is not authorized to deposit county funds in a bank not duly designated as a depository. *Massachusetts Bonding & Ins. Co. v. Steele, ante,* p. 7. And, considering almost identical provisions of section 17-515, Comp. St. 1929, relating to treasurers of

cities of the second class and villages, we have held this term, in a case involving this same Bank of Otoe and S. H. Buck as treasurer of the village of Otoe, that a state bank, not designated by or known to the trustees as a depository but receiving deposits of the funds of a village, the village treasurer being the president and managing officer of the bank, holds such funds as trustee for the village. *State v. Bank of Otoe, ante,* p. 383. To avoid unnecessary repetition, we refer to the arguments and cases cited in these two recent cases, involving the same principles as here.

Appellant pleads and argues that the school district is estopped because the board members knew the treasurer kept the school account in the bank. And he argues that the school district was guilty of laches. He frankly admits that there are no reported decisions that are decisively in point. Without taking the time or space to discuss or analyze the cases cited, we think it very clear they cannot weigh in the balance with the public policy expressed in the statutes relating to treasurers, heretofore quoted. It is contrary to that policy for any governing authority to permit, by acquiescence or connivance, any treasurer to deposit money in any bank, except that bank be approved and designated in the manner provided by statute. In *Shambaugh v. City Bank of Elm Creek,* 118 Neb. 817, it was held: "A county treasurer's sole authority for the deposit of public moneys in banks is to be found in sections 6191-6196, Comp. St. 1922, and the directions, limitations and public policy evidenced thereby must be complied with by such officer and all who deal with him with reference to such public funds." This authority might be paraphrased to apply to a school district treasurer under the statutes applicable to him.

What S. H. Buck knew the bank knew. Both he and his bank were charged with knowledge that he had no right to put school district money in an undesignated bank. When he checked out the $894 of the school money and converted it he and his bank knew he was appropriat-

ing it. "Knowledge of active managing officer of the bank will be imputed to the bank, where, as in this case, said officer handled the transaction for the bank, although he acquired the information as treasurer of the school district." *Lincoln Nat. Bank & Trust Co. v. School District*, 124 Neb. 538. In that case it was further held: "Bank receiving deposit of funds of school district treasurer, who is also active managing officer of the bank, holds such funds as trustee." The Bank of Otoe, holding the funds in trust, should not have permitted Buck to use any portion of the funds and is held as trustee for all the funds not paid out on the orders of the school board.

The judgment of the district court is

AFFIRMED.

INTERSTATE POWER COMPANY OF NEBRASKA, APPELLANT, V. CITY OF AINSWORTH ET AL., APPELLEES.

FILED OCTOBER 20, 1933. No. 28934.

1. Municipal Corporations. A municipal corporation is a creature of the law established for special purposes and its corporate acts must be authorized by its charter or other laws applicable thereto. 1 McQuillin, Municipal Corporations (2d ed.) sec. 367.
2. ———: POWERS. The powers which a municipal corporation may exercise are: "(1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable." 1 McQuillin, Municipal Corporations (2d ed.) sec. 367.
3. ———: ———. "Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51.
4. ———: ———: PURCHASE OF LIGHTING AND POWER PLANT. Neither express nor implied power to purchase an electric light and power plant and pay for it by pledge of future net earnings therefrom is conferred on cities by chapter 116, Laws 1931.
5. ———: ———: ———. Section 18-101, Comp. St. 1929, confers on cities of the second class power to purchase, con-

struct, maintain and improve lighting systems. The succeeding section provides two methods for raising funds to pay for a heating or lighting plant, but does not provide any method of raising funds to maintain and improve the lighting plant.

6. ———: CONTRACTS: INJUNCTION. A contract, entered into by a city without power, express or implied, so to do, is void, and its performance may be enjoined.

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

Flansburg, Lee & Sheldahl, Julius D. Cronin and *George A. Farman, Jr.*, for appellant.

William M. Ely and *Dressler & Neely, contra.*

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

GOOD, J.

This is a suit to enjoin performance of a contract for the construction of an electric light and power plant and electric distribution system in and for the city of Ainsworth, to be paid for only out of future net earnings of the plant. The trial court denied the injunction, and plaintiff has appealed.

Plaintiff is a taxpayer in the defendant city, in which it owns and operates an electric distribution system. The contract in question provides for the construction of a plant and distribution system at a cost of $90,629, plus $5,200 engineering fees, all of which is to be paid out of future earnings of the plant, title to which, until fully paid for, is to remain in the contractor, Fairbanks-Morse Construction Company. The contract provides that the city is to operate the plant, keep it in repair, insured for the benefit of the contractor, and that the city shall carry compensation insurance and hold contractor harmless from actions for damages, growing out of the operation of the plant, until paid for. The project has not been authorized by the legal voters of the city; nor does it have the funds on hand available for the construction of an electric plant; nor does the city now own any electric

light or power plant or electric distribution system. The evidence shows that the actual cash value of the proposed plant to be constructed is $74,000, and that the cost to the city, including engineering fees, will be about $96,000. In addition to this, the contract provides for the issuance of warrants, payable out of net earnings when the plant is constructed and ready for operation, and that these warrants shall draw interest at the rate of 6 per cent. per annum from date until paid.

Among other grounds on which plaintiff bases its action is that the city does not have authority to make such a contract, and that it is, therefore, void, and for that reason its performance should be enjoined. It becomes important, therefore, to ascertain the extent of the city's power with relation to such a contract.

The rule with respect to powers of municipal corporations is stated in 1 McQuillin, Municipal Corporations (2d ed.) sec. 367, in this language: "A municipal corporation, therefore, possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. It is a creature of the law established for special purposes and its corporate acts must be authorized by its charter or other laws applicable thereto.

"Every investigation, therefore, of its powers must be conducted from the standpoint of such laws. Wherefore, the usual formula, invariably supported by judicial utterances and judgments, in substance is: That the only powers a municipal corporation possesses and can exercise are: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable." The above rule is quoted and approved in *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51. In respect to implied authority, it is held in that case: "Where a certain power is conferred upon

a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power."

In *City of Ft. Scott v. Eads Brokerage Co.*, 117 Fed. 51, it was held: "The prescription, by the statutes, under which a municipality is organized or acting, of the manner in which it shall exercise one of its powers, limits the right to exercise it to that method, and its use in any other way is *ultra vires* of the corporation, and void."

In *Putney Bros. Co. v. Milwaukee County*, 108 Wis. 554, it was held that a contract by the county for the private treatment of an inebriate at a Keeley Institute was not authorized as implied from its general power to provide for paupers and inebriates, the court saying (p. 557): "Thus it appears that the legislature has provided certain methods by which inebriety or habitual drunkenness may be dealt with, and we think it plain that by prescribing certain methods it has excluded other methods, and that the general provisions requiring the county or town to care for and relieve paupers refer to necessary food, clothing, ordinary medical treatment, and the like, and not to medical treatment looking toward the cure of inebriety as a disease."

In *State v. Irey*, 42 Neb. 186, this court held: "A municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power." The rule thus stated is reaffirmed in *State v. Temple*, 99 Neb. 505.

In *People v. Wolper*, 350 Ill. 461, it was held: "Cities have no inherent powers but derive all powers from statutory enactments, which are strictly construed, any fair or reasonable doubt of the existence of a power being resolved against the city, and while power to pass an ordinance need not be wholly derived from a single grant, implied powers are those, only, which are necessarily incident to powers expressly granted."

In *Indiana Service Corporation v. Town of Warren*,

as reported in 180 N. E. (Ind. App.) 14, it was held:

"Where municipal officials are unlawfully expending funds, taxpayer of municipality may sue to prevent such illegal acts.

"Municipality can exercise only powers expressly granted, those implied or incidental to powers expressly granted, and those essential to declared objects of municipality.

"Methods prescribed for exercising power granted to municipality must be pursued."

In *Branham v. Mayor and Common Council of San Jose,* 24 Cal. 585, it was held that a municipal body "could take and exercise only such powers as were conferred upon it by the will of the sovereign, as expressed in the laws creating it."

In view of the rule above announced, we shall now proceed to consider what express or implied powers are granted to the defendant city by the laws of Nebraska.

Defendants contend that express authority to enter into such a contract is contained in Initiated Law No. 324, appearing in chapter 116, Laws 1931. There are expressions and language used in the body of the act which would seem to sustain the contention of defendants, but the scope of the act must be determined from its title. It is a familiar rule that a legislative act is limited in its scope and operation by its title, and a like rule is applicable to a law adopted by the initiative method. A careful examination of the title to the act, which is quite lengthy, clearly discloses that it applies only to such cities or villages as are engaged in the generation, transmission or distribution of electrical energy, and provides that such cities may extend, improve and add to their plants and pay the cost of such extensions, additions or improvements by pledging the future earnings of such plants. Clearly, the act does not apply to a city which does not own any electric light or power plant or distribution system. Neither express nor implied power is conferred by said chapter 116 to acquire an electric light and power plant and pay for it by pledge of future earnings.

Sections 17-601 and 17-602, Comp. St. 1929, confer upon cities the power to erect electric or other light works outside the corporate limits of the city, and provide methods for raising funds for such a plant. These sections are inapplicable to the facts in the instant case, and no attempt was made to proceed thereunder.

Section 18-101, Comp. St. 1929, confers on cities of the second class power to purchase, construct, maintain and improve lighting systems. The succeeding section provides two methods of raising funds to pay for a heating or lighting *plant,* one by direct levy of a tax and the other by a bond issue, but this section does not provide specifically any method for raising funds to maintain and improve lighting systems. Section 18-103, Comp. St. 1929, provides the method which must be followed in issuing bonds to pay for the plant and has no application to raising funds or issuing bonds to maintain or improve the plant. Clearly, these sections do not confer express authority upon the city to acquire an entire light plant in the manner proposed in the instant case.

Defendants place reliance on *Christensen v. City of Fremont,* 45 Neb. 160. That case involved the power of the city to pay for an electric light plant out of funds on hand in its treasury which had been previously raised, in part by direct taxation and in part by accumulation of occupation taxes. There was a sufficient fund in the treasury available to pay for the plant. In the manner provided by law, the city passed a special appropriation ordinance appropriating sufficient funds to pay for the plant. The question was: Had the city power to thus appropriate money on hand for such purpose? The statute then existing authorized cities to purchase electric light plants, and provided two methods of raising funds with which to pay for the same: One by direct tax levy; the other by issuance of bonds which would be paid by direct tax levy. The court took the view that it was a needless formality for the city to resort to a new tax levy or to a bond issue, to be paid by direct tax levy,

to raise funds when the city already had funds available. Referring to the statute authorizing the method of raising funds the court held: "That act, in providing for the levy of a tax and the issuing of bonds for erecting and maintaining a lighting system, provides how money must be raised for the purpose when it is not already available; but where a city already has in its general fund sufficient unappropriated funds, it may appropriate and use those funds for the purpose of erecting a lighting system." The court further held: "A city of the second class having more than 5,000 inhabitants may make special appropriations for improvements at other times in other ordinances than the annual appropriation bill, provided such appropriations first receive the sanction of a majority of the electors either by petition or at an election." In that case the appropriation was authorized by a petition signed by a majority of the electors. That case does not appear to be authority for the contention here made.

Defendants also cite and rely upon *Carr v. Fenstermacher,* 119 Neb. 172. In that case there was involved the power of a city to improve an existing electric light plant by pledging earnings of such plant to pay for the improvement. The then-existing statute authorized cities to acquire and improve electric light plants, and provided two methods for raising funds with which to erect and pay for such plants, but provided no method for raising funds with which to improve an existing plant. It is clear that, where the power is granted to improve a plant and no provision is made for raising the funds with which to make the improvement, the city has the implied power to resort to any proper method for so doing. We think that case is not authority for the contention here made.

Since the adoption of the opinion in *Carr v. Fenstermacher, supra,* the people, by enactment of Initiated Law No. 324, have expressly authorized municipalities to enter into contracts for the improvement of or addition to an

existing plant, and to pay for such improvement or addition by pledging the earnings thereof. That act, however, did not confer express power on municipalities to so acquire an entire new plant.

Defendants argue that there is no distinction to be made between improvement of an existing plant and construction of an entire new plant, and that, if there is implied power to so contract for an improvement of or repair to an existing plant, as was held in *Carr v. Fenstermacher, supra,* there is the same implied power for the construction of an entire new plant.

In view of the language of sections 18-101 *et seq.,* Comp. St. 1929, we think the contention is not well founded. With respect to new plants, power to acquire them is conferred and methods provided for raising funds to pay therefor. With respect to improvements and additions, power is conferred to make them, but no specific method provided for paying for them, and there is good reason for making this distinction. A municipality may be operating a plant when some portion of it gives out, and it is necessary that an improvement or repair be made at once or discontinue the service, which would greatly incommode the inhabitants. There would not be time, without closing the plant, to raise a new fund by taxation or by special levy. Hence, the implied power was left to the city to provide for repair in any reasonable manner that the city, by its constituted authority, might adopt.

In *Van Eaton v. Town of Sidney,* 211 Ia. 986, the supreme court of Iowa had before it the question of power of a city to enter into a contract quite similar to the one here involved. The statutes of Iowa gave to cities and towns "the power to purchase, establish, erect, maintain, and operate within or without their corporate limits * * * electric light or power plants, with all the necessary * * * poles, wires, * * * machinery, apparatus, and other requisites of said works or plants." The statute further provided for the submission of the question to

the voters at a special election and provided for the issuance of bonds for payment of the cost of establishing the plant. The court held in that case that the city did not have the implied power to enter into such a contract. After reviewing the authorities relating to implied power of cities, the court, in the body of its opinion, said (p. 993): "Under these rules, in the case before us, the fact that it may be useful or convenient to the corporation to buy this machinery and pay for it by pledge warrants will not authorize the conclusion that it has the implied power to do so, because it is not absolutely necessary to attain the end sought, the statute providing that it may issue bonds and pay the same by taxation. It follows, therefore, that the contract entered into is void and of no effect."

In view of the authorities hereinbefore quoted, we are of the opinion that the city did not have implied power to construct an entire new light and power plant in the manner attempted in this case. If the city does not possess power, either express or implied, to so contract, then it necessarily follows that the contract entered into was void, and performance thereof should be enjoined as prayed by plaintiff.

The judgment of the district court is reversed and the cause remanded, with directions to that court to enter a decree enjoining performance of the contract.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF WOOD RIVER, E. H. LUIKART, RECEIVER, APPELLANT: PRESTON HINKSON, INTERVENER, APPELLEE.

FILED OCTOBER 20, 1933. No. 28829.

Banks and Banking: COLLECTIONS: TRUST FUNDS. Where an item was sent direct to a payor bank for payment and the liability thereon discharged by cancelation when there was cash in bank sufficient to pay said item, by the issuance of draft to transmit

the fund, which was not paid because of failure of payor bank, the assets of failed bank shall be impressed with a trust in favor of owners of such item. Comp. St. 1929, sec. 62-1812.

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

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

Prince & Prince, contra.

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

DAY, J.

This is an appeal from a judgment of the district court for Hall county, decreeing claim of intervener against an insolvent bank to be a preferred claim payable in full out of the assets in possession of the receiver.

Briefly summarized, the evidence, which was stipulated, reveals that the intervener purchased from the Farmers State Bank of Wood River a cashier's check for $3,000 which he indorsed and sent to a brother in Texas who in turn indorsed it and deposited it in a Texas bank which bank sent it to the issuing bank "for payment and immediate remittance." When the cashier's check was received by the Wood River bank, it was stamped paid and a draft was issued on the Continental National Bank in Lincoln, Nebraska, which was sent to the Texas bank. When this draft was presented for payment to the Lincoln bank, the Wood River bank had been closed by the department of trade and commerce, and the draft was not paid. At the time the draft was sent to the Wood River bank and by it stamped paid, there was sufficient cash in the vault and also on deposit in the Lincoln bank to pay it, which condition continued to the time when the Wood River bank was closed. The Texas bank assigned its claim to the intervener who is the real party in interest.

The trial court very properly concluded the provisions of section 62-1812, subd. b, Comp. St. 1929, were applicable

and controlling: *"When a drawee or payor bank has presented to it for payment an item or items drawn upon or payable by or at such bank* and at the time has on deposit to the credit of the maker or drawer an amount equal to such item or items and such drawee or payor shall fail or close for business as above, after having charged such item or items to the account of the maker or drawer thereof, or otherwise discharged his liability thereon but without such item or items having been paid or settled for by the drawee or payor either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such drawee or payor or other debtor therefor, the assets of such drawee or payor shall be impressed with a trust in favor of the owner or owners of such item or items."

When the intervener purchased the cashier's check, he became the holder of the bank's exchange. But when he transmitted the check to his brother who deposited it in the Texas bank which sent it to the Wood River bank for payment, the obligation of the bank was to pay. This was accomplished by draft to the Texas bank. The obligation of the bank was then materially changed. When the remittance draft was issued, the Texas bank was not the holder of exchange. It had sent the item for payment which was accomplished by stamping the check paid. There was cash in the vault of the bank to pay the item and it was the obligation of the bank to pay. For convenience, it undertook to transmit the money by draft. The Texas bank did not want exchange of the bank. The obligation to pay was not performed until the draft was paid by the Lincoln bank. *State v. Farmers State Bank,* 124 Neb. 693.

The intention of the legislature, expressed by the title to chapter 41, Laws 1929, of which the present section 62-1812, subd. b, Comp. St. 1929, is a part, is: "An act to expedite and simplify the collection and payment by banks of checks and other instruments for the payment of

money." This refutes the argument of appellant that it was the legislative intention only to provide protection for items sent to a bank for collection as distinct from items sent for payment. Omitting words and phrases applicable to other situations, the provisions of the statute applicable to this case may be stated more simply as follows: When a payor bank has presented to it for payment an item payable by such bank and such payor shall close for business after having discharged liability thereon but without such item having been paid, the assets of such payor shall be impressed with a trust in favor of the owner of such item.

We are constrained to hold the statute under consideration is applicable where an item is sent to the payor bank for payment as well as where an item is sent to a bank to collect from a third party. The rule in this state is that where an item is sent direct to a payor bank for payment and the liability thereon discharged by cancelation when there is cash in the bank sufficient to pay said item, by the issuance of a draft to transmit the fund, which is not paid because of failure of payor bank, the assets of failed bank shall be impressed with a trust in favor of owners of such item. Comp. St. 1929, sec. 62-1812.

This view finds support in *Fulton v. Baker-Toledo Co.*, 125 Ohio St. 518, wherein the Ohio court construed a similar statute in which the language was not as clearly applicable as ours to a case where the item was sent direct to the payor bank for payment.

Cases cited by appellant in which exchange of the bank had been requested, as well as those decided prior to the enactment of the collection code, are not applicable here. And since it is held that the statute is applicable, it is unnecessary to consider the argument of appellee, that, regardless of the statute, the intervener is entitled to have the assets impressed with a trust.

An affirmance of the judgment of the trial court is required.

AFFIRMED.