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JANUARY AND SEPTEMBER TERMS, 1934

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

For the benefit of the State of Nebraska

SUPREME COURT

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CHADDERDON, GLENN C.
DAUGHERTY, ALPHONSE L.
DAVIS, J. HOWARD
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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1934

A. L. MILLER, APPELLEE, V. BANNER COUNTY, APPELLANT.*

FILED MAY 10, 1934. No. 28918.

1. **Appeal: APPLICATION FOR NEW TRIAL.** When a jury is waived and trial had to the court, an application for a new trial that does not come within any of the exceptions of section 20-1143, Comp. St. 1929, must be filed within three days after the rendition of the decision, in order to obtain a review of alleged errors occurring at the trial.
2. **New Trial.** The provisions of the statute above referred to are not directory merely, but are wholly mandatory, and a motion for a new trial filed out of time is of no avail and cannot be considered, unless an earlier filing was unavoidably prevented, or the motion is based on newly discovered evidence.

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

William H. Heiss, for appellant.

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

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

PER CURIAM.

This is an action at law. Originally a claim was filed with the county commissioners of Banner county for

*See opinion on rehearing, p. 690, *post.*

services rendered by plaintiff as a physician to one alleged to be a pauper and a resident of Banner county. The claim was rejected, and the claimant duly appealed to the district court for Banner county. There issues were made up, the claimant filing his petition on September 29, 1932. The defendant, Banner county, filed its answer admitting only its corporate capacity, and denying each and every allegation of plaintiff's petition not specifically admitted.

This record discloses that on November 17, 1932, the parties to this cause stipulated that a jury be waived, and thereupon the cause was heard by the court on its merits, evidence being introduced on behalf of both plaintiff and defendant. The sufficiency of the petition was not challenged in the district court. At the conclusion of the evidence, on November 17, 1932, judgment was entered for plaintiff in the sum of $172 and interest. On November 21, 1932, more than three days after the decision was rendered, defendant filed its motion for a new trial which set up but three grounds, viz.: "1. Said verdict and judgment are not sustained by sufficient evidence. 2. Said verdict and judgment are contrary to law. 3. Errors of law occurring during trial and excepted to by defendant." This motion was overruled on April 4, 1933.

We are unalterably committed to the rule that except for newly discovered evidence a motion for a new trial must be filed within three days from the rendition, not entry, of the decision. *Ames v. Parrott*, 61 Neb. 847; *Schuyler Building & Loan Ass'n v. Fulmer*, 61 Neb. 68.

So, too, this court is committed to the view that, "When a jury is waived and trial had to the court, an application for a new trial that does not come within any of the exceptions of section 7884, Rev. St. 1913 (now Comp. St. 1929, sec. 20-1143) must be filed within three days after the rendition of the decision, in order to obtain a review of alleged errors occurring at the trial." *Young v. Estate of Young*, 103 Neb. 418.

"The provisions of the statute (now Comp. St. 1929, sec. 20-1143) are not directory merely, but are wholly mandatory, and a motion for a new trial filed out of time is of no avail and cannot be considered, unless an earlier filing was unavoidably prevented, or the motion is based upon the ground of newly discovered evidence." *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61. See, also, *Havens-White Coal Co. v. Bank of Rulo*, 98 Neb. 632.

That the pleadings taken together do not support the judgment is not an error claimed by the appellant either in this tribunal or before the trial court. Further, we find on examination that plaintiff's petition states a cause of action.

It follows that, as we are compelled to disregard the assignments of error set forth in defendant's motion for a new trial, no error appears in the record before us.

The judgment of the district court is, therefore,

AFFIRMED.

ALOIS PERRY, APPELLEE, V. YELLOW CAB & BAGGAGE COMPANY, APPELLANT.

FILED MAY 10, 1934. No. 28950.

Evidence examined and *held* to sustain the judgment of the trial court.

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

Ed. S. Hickey and *John A. McKenzie*, for appellant.

Weaver & Giller, contra.

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

PER CURIAM.

This is a civil action by Perry, plaintiff, for the re-

covery of $22.82 alleged to be unlawfully detained by the defendant, Yellow Cab & Baggage Company. Defendant's justification is based on a certain written contract of employment with the plaintiff. In the district court a jury was waived, and after the introduction of evidence judgment was entered for plaintiff as prayed. The defendant appeals.

This court, upon a careful examination of the controlling instrument, are unanimously of the opinion that its terms afford no justification of the defendant's refusal to pay over the money in suit. Therefore, the judgment of the district court is

AFFIRMED.

SCHOOL DISTRICT NO. 22, HARLAN COUNTY, APPELLANT, V. HARLAN COUNTY, APPELLEE.

FILED MAY 10, 1934. No. 28939.

1. **Schools and School Districts: SCHOOL DISTRICT BONDS: SINKING FUND: INTEREST.** In the absence of an order by the school board to the county treasurer to pay school bonds out of a sinking fund in his hands as such treasurer, the county is not liable for interest accruing on such bonds, even though the bonds were by their terms payable and the sinking fund was sufficient to discharge the bonds.
2. ———: ———: ———: ———. Interest, received under section 77-2506, Comp. St. 1929, by a county treasurer from depository banks, upon sinking funds in his custody for the purpose of paying principal and interest on bonds of a school district, is the money of the county and must under section 77-2507, Comp. St. 1929, be credited by the treasurer to the general fund of the county.

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

F. L. Pierce and *Butler & James,* for appellant.

Shelburn & Russell, contra.

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

GOSS, C. J.

Plaintiff appealed from a judgment denying it a recovery for interest on a sinking fund established for the retirement of bonds issued by it. There were two causes of action. The first cause was for $2,240, for alleged unnecessary interest at the rate of 5 per cent. per annum, paid out of the sinking fund instead of paying off the bonds at an earlier date than they were paid; the second cause is for $1,212.45, total interest collected by the county from depository banks in which the daily balance of the sinking fund earned 2 per cent. per annum. Jury trial was waived and the cause was tried to the court upon a written stipulation of facts, which comprises the entire bill of exceptions. The final judgment dismissed both causes of action.

March 1, 1918, plaintiff issued 20 negotiable bonds of $700 each, totaling $14,000, bearing 5 per cent. interest, payable semiannually, one bond maturing each year and the rest maturing March 1, 1938, but with the option to pay all or any part of the bonds at any interest paying date. Also, on August 1, 1919, plaintiff issued 19 negotiable bonds of $500 each, totaling $9,500, bearing 6 per cent. interest, payable semiannually, maturing August 1, 1939, but without option of paying before maturity. These two issues constitute the only bonds of plaintiff outstanding during any period named in this suit. The nonoptional bonds were sold to private investors. None of them were ever held by or for the county.

March 1, 1918, the county treasurer purchased the entire issue of optional bonds, not for the account of any particular fund of the county nor of any governmental subdivision thereof. They were paid for out of cash in his hands as county treasurer and were thereafter at all times carried on his books as part of the cash on hand until those then remaining unpaid were retired in Sep-

tember and October, 1931, upon request of officers of the school district. Prior to that the county treasurer had retired one of the $700 bonds each year commencing in 1920 and continuing up to 1931, inclusive. All payments to the county on these optional bonds were charged by the county treasurer to the "sinking fund." During the period from March 1, 1918, to September and October, 1931, the treasurer also charged to the account of plaintiff, as paid to the county, interest at the rate of 5 per cent. per annum on the optional bonds in his hands. All payments of interest and principal on these bonds are shown by an exhibit made a part of the stipulation of facts.

Commencing in 1918 and continuing until 1931, inclusive, the county board each year levied a tax upon property in the school district for the purpose of raising funds to pay interest on the outstanding bonds and to establish a sinking fund to retire the bonds.

The stipulation also has attached to it an exhibit which is a tabulation showing the balance as of September 1 each year in the sinking fund of plaintiff; a statement of the amount required as a sinking fund for the payment of the $9,500 nonoptional bonds; the total amount of optional bonds which the treasurer could have paid with available funds after making provision for interest payments and for sinking fund for nonoptional bonds; and a tabulation of the interest collected by the county and credited to its general fund, which the county would not have received had the county treasurer used available funds in the sinking funds of plaintiff to discharge optional bonds held by him as a part of his cash on hand.

It is stipulated that not until 1931 did the county or its treasurer at any time notify plaintiff, nor did its officers discover, that a surplus was being accumulated for retirement of bonds. Then a newly elected county superintendent notified them of the fact and they then directed the treasurer to pay the optional bonds, which was done, and at the same time a large amount of the

nonoptional bonds was paid by arrangement between plaintiff and the holders, leaving only $2,000 of the nonoptional bonds outstanding; that not at any time from 1918 to 1931 did the officers of plaintiff give any directions to the county treasurer as to how any of its sinking fund should be invested or direct him to discharge any of the optional bonds; that from January 1, 1921, to January 1, 1930, the county treasurer deposited all moneys in his hands as county treasurer in duly designated depository banks and received interest thereon at the rate of 2 per cent. on the average daily balance and this was all credited to the general fund of the county; attached to the stipulation as an exhibit is a tabulation showing that the interest thus calculated on the sinking fund of plaintiff amounts to a total of $1,212.45. This is the amount asked by plaintiff in its second cause of action.

Bearing in mind that until 1931 plaintiff and its officers gave no directions to the county treasurer as to its bond funds, let us examine the statutes to discover what, if any, directions they give on the subject. The chapter on "School District Bonds," section 11-911, Comp. St. 1929, which had been unchanged since 1913, provided for an annual tax levy upon taxable property in each school district to furnish sufficient money to pay interest upon bonds and to provide a sinking fund for their final redemption. Funds collected therefrom are to "be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity." Section 11-913, Comp. St. 1929, provides that any money remaining in the hands of the treasurer, after paying interest due on any valid school district bonds and the retention of enough to pay accruing interest for the current year, "shall be retained as a sinking fund for the final redemption of such bonds and shall be by the treasurer, *when so ordered by the school board* (italics ours), invested as follows, to wit:" The stipulation of facts shows no such order was ever given.

In the chapter on "Revenue" and article on "Deposit and Investment of Public Funds," section 77-2517, Comp. St. 1929, says that a county treasurer, where "there is a sinking fund on hand in the treasury for the redemption of outstanding county, township or school district bonds, when such sinking fund is not otherwise invested, shall have power and is hereby authorized and directed to invest such funds in legally issued and duly registered warrants and legally issued and duly registered county bonds of the county at face value of such warrants or county bonds." The evidence does not show that any warrants or bonds of the character specified in this statute were available for investment.

Section 77-2521, Comp. St. 1929, authorizes the school board "to direct the legal custodian of any of its sinking funds to invest such sinking funds in the warrants of such school district." This likewise is not available because plaintiff, upon whom rested the burden of proof, has stipulated that it gave no directions to the treasurer as to its funds and, moreover, the evidence does not show that the school district had any warrants in which the county treasurer might invest.

The plain meaning of these statutes we have referred to does away with the necessity of citing or considering any cases. The school district neglected and failed to manifest diligence in its business. Had it done so, it would have known the levies were producing more money than needed to discharge the bonds as they became due; and it would, under its statutory authority, have exercised its duty to direct the county treasurer from time to time to use the sinking fund to discharge the bonds and stop the interest thereon. No legal duty rested upon the treasurer to call the bonds and pay them without direction from plaintiff. We are of opinion the trial court's judgment on the first cause of action was correct.

Section 77-2506, Comp. St. 1929, is the section providing for not less than 2 per cent. on deposits in approved banks by a county treasurer of "moneys in his hands

collected and held by him as such county treasurer." The county treasurer held these school district moneys as county treasurer. Under section 77-2521, Comp. St. 1929, he was the "legal custodian" of the sinking funds of the school district. He was not the treasurer of the school district. The district had its own treasurer. Comp. St. 1929, sec. 79-301. Under section 77-2507, Comp. St. 1929, all interest paid by banks on "public funds" must "be credited by the county treasurer directly to the account of the general fund of the county." The school district sinking fund was a part of the public funds in the hands of the treasurer. They had not been used to retire bonds under the direction of the school district, nor had it become the duty of the county treasurer to invest them under direction of any statute, as we have shown in the former division of this opinion. We have discovered no statute, and none has been pointed out to us, that permits this interest to be taken out of the general fund for the use and benefit of the school district. The legal inference is that it was the intent of the legislature that it should belong to the county as a part of its general fund.

On this point the school district cites *Nemaha Valley Drainage District v. Nemaha County*, 100 Neb. 64, where it was held that "Interest received from depository banks by a county treasurer, upon funds in his custody as *ex officio* treasurer of a drainage district, is the money of such district and should be credited by the treasurer to its account and not to the general fund of the county." See section 1855, Rev. St. 1913 (which has come down to us with little change as section 31-459, Comp. St. 1929), making the county treasurer *ex officio* treasurer of such a drainage district, which had no treasurer of its own. So the holding was to the effect that the money from which interest was there derived was not public money or funds in the sense that the money constituted public funds as heretofore quoted in section 77-2507. For the court said in the opinion: "The money of such a drainage district as this, as soon as collected, passes

automatically from the county treasurer, in his capacity as collector, into his custody as *ex officio* treasurer of the district. It is the general rule, where there is no statute to the contrary, that interest becomes a part of the fund by whose investment it was produced, and hence the interest belongs to the drainage district." We think the case is thus distinguished from the case at bar. We are of the opinion the legislature has prevented us from holding, as plaintiff asks us to do, on principles of equity and justice, that the plaintiff may recover this interest, but that the matter is controlled by statute. If changed, the rule must be changed by the legislature. Therefore the judgment of the district court is

AFFIRMED.

UNION LUMBER COMPANY, APPELLANT, V. LEONARD MCLAUGHLIN, APPELLEE.

FILED MAY 10, 1934. No. 28946.

Record examined and judgment affirmed.

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

Carl D. Ganz, for appellant.

J. A. Hayward, contra.

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

GOSS, C. J.

Plaintiff, doing business at Elmwood, sued defendant in the county court on an account running from 1923 to 1928 for lumber and other materials for $528.95 with credits of $98.75, leaving a balance of $430.20. Defendant alleged payment. Plaintiff had judgment. In the district court the cause was tried to a jury on the

same pleadings as in the county court, resulting in a verdict and judgment for defendant. On this appeal the only question to be considered is whether the evidence sustained the verdict and judgment.

The court properly charged the jury that the burden was upon defendant to prove by a preponderance of the evidence that the account was paid.

There was evidence given by defendant that all of the items on the account of plaintiff were either paid by him in cash or were for things purchased by or for his mother, on whose farm he was a tenant, and were paid for. The evidence is not very definite or convincing but it was sufficient to be considered by and to support the verdict of the jury. The jurors might think, as they evidently did, that defendant sustained the burden of proof of payment of all items purchased by him. In such a situation we cannot disturb the judgment. It is therefore

AFFIRMED.

CARL C. CARLSEN V. STATE OF NEBRASKA.

FILED MAY 10, 1934. No. 28976.

1. **Forgery.** A recital in a principal bond, with interest coupons attached, that the makers of the bond have caused the coupons to be executed with facsimile signatures does not of itself authorize any one in the future to make facsimile signatures on extension coupons.
2. ———: COUPONS. Coupons in the usual form, purporting to evidence interest to become due on a principal bond, are the subject of forgery.
3. ———: ———: INFORMATION. Where such a coupon is set forth by copy in an information charging its forgery, it is not necessary to allege the terms of the principal bond or other facts extrinsic to the coupon to extend or explain its terms.
4. **Statutes:** CONSTRUCTION. Though section 28-601, Comp. St. 1929, denounces such a forgery "with the intent to damage or defraud," an information alleging that the coupon was forged "with the intent to prejudice and defraud" is not

demurrable on account thereof; in such a criminal statute, when necessary to give effect to the intention of the legislature, the word "and" may be substituted for "or" and *vice versa*.

5. **Forgery**: INTENT. "In a prosecution for forgery, it is not necessary to allege or prove an intent to defraud any particular person." *Uerling v. State*, 125 Neb. 374.
6. **Criminal Law**: VENUE: APPLICATION FOR CHANGE: REVIEW. "A motion for a change of venue is directed to the discretion of the trial judge, and unless an abuse thereof is disclosed by the record his ruling will not be reversed in the supreme court." *Hauser v. State*, 101 Neb. 834.
7. ———: ASSISTANT PROSECUTOR. The attorney general has power to designate an assistant attorney general to appear in his stead in the trial of a criminal cause. For that particular purpose, it is not necessary that the assistant be a bonded deputy under section 84-206, Comp. St. 1929.
8. ———. A defendant cannot ordinarily complain that he was convicted on some counts and acquitted on others.
9. ———. If one procure another to commit an offense, he may be prosecuted and punished as a principal. Comp. St. 1929, sec. 28-201.
10. ———. Other alleged errors examined and *held* not to constitute error.
11. **Evidence** *held* to be sufficient to sustain the verdict and judgment.

ERROR to the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Affirmed.*

Frank A. Peterson and *Claude S. Wilson*, for plaintiff in error.

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

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

GOSS, C. J.

Defendant assigns error in a conviction for forgery. He was charged in twelve counts with the forgery of twelve interest coupons, was acquitted on four counts and was convicted on eight counts. All the coupons were due

January 19, 1934. The first four were for $9.75 each and the other eight were for $15 each. The names of Mary A. McLoughlin and Thomas J. McLoughlin appeared as the makers. Each coupon contained these words: "Payment of this coupon is subject to the terms of principal bond of even date." There are 116 assignments of error "relied upon for reversal."

Carlsen was president and active head of both the Lincoln Safe Deposit Company and the Lincoln Trust Company. January 19, 1925, Mary A. McLoughlin and Thomas J. McLoughlin obtained from the Lincoln Safe Deposit Company a mortgage loan of $13,000, secured by a mortgage on lot 15, block 16, in Havelock, on which was a three-story brick building. The loan was evidenced by a series of 30 bonds. Nine of these bonds, for $325 each, totaling $2,925, were payable consecutively, one each six months up to and including July 19, 1929. The other 21 bonds, arranged for convenient sale, in amounts of $250, $325 and $500, totaling $10,075, were all payable January 19, 1930.

In each of the 30 principal bonds signed by the McLoughlins, it was recited that the bonds were equally secured by the mortgage without any preferences or priority whatsoever of the lien thereof in favor of any one or more of said bonds over any one or more of the others; that, if default occurs, then the Lincoln Trust Company may, as trustee for the holders of the bonds, without notice, declare all bonds due; and that the makers "have * * * caused the interest coupons hereunto attached to be executed with facsimile signatures this 19th day of January, 1925."

In 1927, the McLoughlins were in default on certain of the bonds then falling due, and on September 20, 1927, signed an extension agreement as to those particular bonds. On January 14, 1929, the McLoughlins being in default on certain of the bonds still owned and held by the Lincoln Safe Deposit Company, the company began a foreclosure. This resulted in a decree for $2,894.62 in

favor of the Lincoln Safe Deposit Company as a first lien upon the premises, concurrent, however, with the right of the holders, upon subsequent default, to foreclosure as to the balance of bonds not yet due, amounting to $12,025. At the expiration of a stay taken by the McLoughlins, the property was sold. It was bid in at judicial sale for $500 and the sheriff conveyed it to Lincoln Safe Deposit Company. That company took possession of the property. It had a deficiency judgment. Later it developed that the McLoughlins had a party wall affecting the title to the lot and building. The company paid them $200 for the party wall and, as a part of the settlement, canceled the deficiency judgment. This left the Lincoln Safe Deposit Company the owner of the property and in possession thereof, subject to the unpaid bonds, upon which the McLoughlins were still liable, totaling $12,025, most if not all of which were held by investing customers of the company.

On or about January 19, 1931, as of which time the facts in the information were laid, all of the original McLoughlin bonds still in existence were past due and investors who had purchased them were requesting the company to pay the principal. These owners of the bonds were evidently unaware the company had foreclosed on its own bonds and had taken title and possession. Accordingly the scheme was devised to procure what would appear to the holders of these bonds as an extension of the original bonds. As evidencing this the state introduced what is known as a "pink sheet." This is a form which was ordinarily used by the loan committee in approving either a "new loan" or an "extension loan," it being the custom to strike out either of the phrases not applicable. In this instance the words "new loan" were crossed out and the words "extension loan" were changed to read "extension coupons." Below the signatures of the loan committee approving the plan of extension coupons, under the heading of "remarks," appear the words "coupons only." The data in the pink sheet,

when approved by the loan committee, conveyed to the clerical force the order to draw extension coupons, only, for $11,700 (to which it showed the original McLoughlin loan had been reduced) for three years at the rate of 6 per cent. This approval was signed by C. C. Carlsen, J. A. Reichenbach and W. R. Mellor. None but Carlsen are informed against. In pursuance of the authority of the "pink sheet," extension coupons were made and signed with the facsimile signatures of the McLoughlins. These coupons found their way into the hands of holders of the bonds and served to satisfy them that the original bonds had been extended, though there was no real extension thereof. The McLoughlins testified that they never were asked to extend these bonds and never authorized extension coupons to be executed for that purpose. When they lost title and possession of the property by foreclosure and deed, they abandoned interest in the affair.

The evidence shows that, in any instance where the McLoughlins requested an extension, an extension agreement would be signed by them and new coupons would be attached to the particular bond thus extended. This was the general practice of the company. Defendant seeks to derive from the original bonds the authority for the execution of extension coupons where, as here, no extension agreement was made by the maker. As hereinbefore quoted, the original bonds merely recited the then existing fact that the McLoughlins had caused interest coupons with facsimile signatures to be attached to evidence the particular interest to come due on these bonds. It does not appear in its terms to authorize any one in the future to make other facsimile signatures on extension coupons, whether with or without an extension agreement.

However, it seems to have been the custom and practice of the Lincoln Safe Deposit Company to use facsimile coupons in cases where the company was the owner of the property. A witness who had worked for the company testified that there were twelve or fifteen cases

where they could not get the owners to sign an extension agreement or where the company owned the property, in which the stenciled extension coupons were used, as in the McLoughlin case. The usual method of producing a facsimile signature was to trace a genuine signature on a stencil sheet with a stylus, which is a pencil for tracing purposes, and then to run the signatures off on the coupons with a mimeograph. There is evidence indicating that the signatures of the McLoughlins, charged to have been forged, were traced from their signatures on the mortgage. The mere fact that it was the usual method to use facsimile extension coupons does not relieve the user from a charge of forgery if, in fact, the signatures were not authorized and if the effect of the act was to work an intentional fraud.

Defendant testified briefly as to exhibit 25, which is the "pink sheet," identifying his signature and those of the two other members of the loan committee whose names appear. He stated that he had no independent recollection as to when he and the others signed it or as to what was done with it after it was signed; that he never saw it after it was approved by the loan committee until the action was brought, but that he either took it or sent it to Mr. Amos' desk—at least that was the practice in such matters; the purpose of sending it to Mr. Amos would be to have whatever papers the exhibit calls for made up; that Mr. Amos' department made up these approval slips, sent them to the loan committee and, if approved, then they were sent back to him to make up "whatever the paper calls for;" he thinks the McLoughlin bonds were all sold; and after the exhibit was executed and the coupons were attached to them he never saw them until the preliminary hearing; that defendant had nothing whatever to do with carrying out the directions of exhibit 25—that was a detail worked out between the loan department and bond department.

Carl R. Amos testified he was a clerk in the loan department under defendant, its active head, who was pres-

ident of both companies and who handled their loans; he received his instructions from defendant; the bonds and extension coupons in evidence were drawn in accordance with the instructions contained in the approval sheet signed by the loan committee; when an order for "coupons only" came in he would turn it over to one of the girls to stencil the coupons either from the mortgage or from another coupon; that an examination of the McLoughlin signatures on the original mortgage shows that the coupons charged here have been traced therefrom; after coupons are prepared in this manner a record is made of them and they are sent to the bond department, where they are attached to the bonds. This witness identified an extension agreement of one of the bonds of this series where the McLoughlins actually signed the agreement and testified that in that instance the new coupons had been actually attached to the foot of the extension agreement. The witness also identified exhibit 24, which was another "coupons only" memorandum identifying the McLoughlin loan, prepared by the loan department and sent to the bond department, by virtue of which the latter department attached the coupons to the bonds.

Georgia Dworak testified she worked in the loan department for eight years; one of her duties was to draw papers; she got her orders in that respect from Mr. Amos, usually in the form of a pink sheet. Her testimony confirmed the practice of the company to use stenciled and mimeographed signatures on coupons where there was an extension agreement signed by the borrower; that the instructions "coupons only" meant that the coupons were to be produced by the stencil and mimeograph; and that there were only about a dozen instances of loans in which that was done, this being one of them.

The defendant and other witnesses connected with the company, who testified and who might have had something to do with the preparation of the coupons involved in this case, all testified that they had no independent recollection of the matter.

Several witnesses who held coupons charged in the information testified at the trial. When the original coupons were exhausted and they asked payment in 1931, they were told that the McLoughlins desired an extension of the loan, that they could not get the principal, and the like. They accordingly accepted the extension coupons for three years, believing the McLoughlins still owned the property, that there had been an extension, and not knowing that the company had foreclosed its own interest in the mortgage and owned the property; that had they known the McLoughlins had not authorized the company to put their signatures on the coupons they would not have accepted them. One of them testified she learned in March, 1932, that title was no longer in the McLoughlins. She telephoned Carlsen in regard to the McLoughlins. He said they were slow in paying. She then told him McLoughlin had informed her that the company had foreclosed two or three years ago and she asked Carlsen why he did not foreclose for her part. He answered: "Well, we didn't foreclose your part, we only foreclosed our own part." So Carlsen knew the mortgage had been foreclosed as to the bonds held by the company. Moreover, he had verified the petition for that foreclosure.

From the evidence it is clear that the McLoughlins never authorized the extension coupons, for the forgery of which defendant has been convicted, to be executed and delivered to holders of their original bonds.

Each count of the information alleged the forgery of a separate coupon, setting out the words of the coupon and the statutory elements of a forgery thereof. This recitation showed that the coupon was for an instalment of interest on a first mortgage bond and that the payment was subject to the terms of the principal bond of even date. Defendant moved to quash the information chiefly on the ground that each count showed that the instrument was a part of another instrument which was not set out; and demurred on the ground that the allegations did not constitute an offense punishable by the laws of

the state. The court overruled the motion to quash and the demurrer. These rulings are assigned as erroneous.

As to the motion to quash, it does not appear that the averment of the extrinsic facts shown by the original bond was necessary to advise defendant of the charge against him. The true rule was laid down in *Morearty v. State,* 46 Neb. 652, where the matter was not so advisory as here, being a charge of forging an order for the delivery of a trunk. The court said: "And where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility, by its use, to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms."

As to the demurrer to the information, the main point is that the information charged that each coupon was forged with intent "to prejudice and defraud," whereas the statute defining forgery reads "with the intent to damage or defraud any person or persons." Comp. St. 1929, sec. 28-601. In criminal statutes, when necessary to give effect to any part of a statute or to the intention of the legislature, the word "and" may be substituted for "or" and *vice versa.* 1 Words and Phrases (Second Series) 208, and cases cited. The information was sufficient to support proof that "any person" was defrauded. It is contended that the information is defective in that it merely charges an intent to defraud, without naming a particular person to be defrauded. "In a prosecution for forgery, it is not necessary to allege or prove an intent to defraud any particular person." This was said in the recent case of *Uerling v. State,* 125 Neb. 374, and is controlling here.

Section 28-601, Comp. St. 1929, defining forgery and providing a penalty therefor, does not specifically mention interest coupons. But it does denounce one who falsely makes or forges any "writing obligatory," "contract or promissory note, for the payment of money,"

"or any signature to a letter, paper, or writing of whatsoever kind," "with the intent to damage or defraud any person or persons." In *Uerling v. State,* above cited, an interest coupon was expressly held to be the subject of forgery under section 28-601. The coupons here were writings obligatory and were, in fact as well as form, promissory notes for the payment of money. The demurrer as well as the motion to quash were properly overruled.

Defendant contends the court erred in not granting a change of venue. This was raised by the affidavits of defendant, of both of his counsel, and by 134 affidavits of other citizens. The latter were upon mimeographed forms with blank spaces for the name, age and occupation of affiant. Some were signed by women who did not read them carefully enough to change the masculine pronoun, in which form they were printed, to the feminine. These affidavits express the conclusions that, in conversations with citizens of the county, they have found sentiment very bitter against both of the companies, that the newspapers have carried items under large headlines relative to civil and criminal causes about defendant, and affiants are of opinion that it would be impossible for Carlsen to have a fair trial in the county. The affidavits of defendant and counsel were more elaborate. They included the additional feature of their estimate of many thousand of clients of the two institutions who were affected directly by the failure of the two companies and of others in the county who would be directly and indirectly affected. We are not given the *voire dire* examination of the jury nor the record of the challenges used by the parties when the jury were selected. The trial judge, who lives in the community, had better opportunities than we to consider the evidence of the fitness and fairness of jurors. These matters repose in his enlightened discretion. If he had granted a change of venue we could not have disturbed it. That he did not allow it is not, in view of the circumstances, an abuse

of discretion. It is the rule that "A motion for a change of venue is directed to the discretion of the trial judge, and unless an abuse thereof is disclosed by the record his ruling will not be reversed in the supreme court." *Hauser v. State,* 101 Neb. 834.

Error is assigned because the court permitted William H. Wright to participate in the prosecution. Paul F. Good, attorney general, was present at the beginning of the trial and, in answer to an inquiry of counsel for defendant, directed to the county attorney and to the attorney general, stated that Mr. Wright was a duly appointed, qualified, and acting assistant attorney general, who would appear and assist in the prosecution, acting for the attorney general and in no other way. The county attorney stated that he had requested the assistance of the attorney general. It was stipulated that Mr. Wright was not the deputy but was an assistant attorney general and was not under bond as the deputy attorney general is required by statute to be. Comp. St. 1929, sec. 12-119. Under section 84-206, Comp. St. 1929, the attorney general has power to appoint a deputy who, upon giving the bond required, is authorized, in the absence of the attorney general, to perform all acts and duties of his superior officer. So it was held in *Lower v. State,* 106 Neb. 666, relied upon by defendant, that an assistant attorney general could not make and sign an information in his own name, as had been done in that instance. This was based upon what is now section 29-1602, Comp. St. 1929, requiring an information to be filed by the county attorney. It also held: "The assistant attorney general is the agent of the attorney general, and not an independent officer, and his official acts must be performed in the name of his principal." Authority for the ruling of the court in permitting the assistant attorney general to participate with the county attorney in the trial here is found in *In re Estate of Creighton,* 91 Neb. 654, where the syllabus says: "When it is the duty of the attorney general to appear in an action or legal proceeding, he

may authorize other members of the bar to appear for him, and pleadings or other papers executed in his name by responsible members of the bar of this court will not be disregarded upon the sole ground that the attorney general must appear in person, and with no suggestion that such appearance was not duly authorized." Here the authorization was expressly made by the attorney general. There was no error in the ruling.

Defendant complains because judgment was entered on the eight counts, whereas defendant was acquitted upon four counts where the intent must have been just the same. In *Weinecke v. State*, 34 Neb. 14, the court said: "The evidence would have justified a conviction under both counts of the information. Both offenses were committed by the same person and at the same time. It is, indeed, unexplainable how the jury arrived at the verdict returned. As a separate offense is charged in each count, the verdict is not void. The defendant cannot complain because he was acquitted of the first offense. The error was in his favor."

Complaint is made of instruction No. 17, given by the court, in which he told the jury, among other things, that the original bonds gave the company, its officers or agents, the right to affix interest coupons with facsimile signatures of the McLoughlins, but that this authority did not continue indefinitely; that the right was limited to those coupons attached at the time the bonds were originally executed. This instruction stated the facts. There is not pointed out a scintilla of evidence to the contrary. Of course, the court gave the rule because so much was said in the trial, as here, about the right of the company to make other facsimile signatures after the originals were paid. There was no error on this point.

Error is charged in the giving of instruction No. 18, reading as follows:

"If you find the defendant either guilty or not guilty of the charge in each and all of the twelve counts, as set out in the information, you may return a general

verdict to that effect. However, should you find the defendant guilty of only part of the said twelve counts and not guilty as to the others you should enumerate in your verdict the particular counts on which you may acquit or convict as the case may be upon the blank verdict form."

This is a concise statement of the situation confronting the court. He could not instruct the jury either that the defendant was guilty or innocent on all of the twelve counts, nor could he instruct them that if defendant was guilty on one count he was guilty on all or that if he was innocent on one he was innocent on all. To do so would invade the province of the jury. There seems no other practical way to handle the matter. Yet counsel argue that such an instruction encourages a jury to compromise without any proper basis and encourages speculation and conjecture. No better way was suggested to cover the situation. It was cared for conventionally and we see no error in the instruction.

Perhaps the most important contention of defendant is that the evidence is not sufficient to support the verdict. We have sketched the evidence so that the facts sufficiently show that what was done by defendant was enough to support a verdict against him. There is no need to review them further or to amplify them. He, as an executive as well as an individual, set in motion the forces that resulted in carrying out, by means of the forgery of new and unauthorized coupons, the scheme which the jury has found possessed an intent to defraud. The business of making the coupons without authority of the McLoughlins and without any extension agreement was ordered by the pink sheet and was forwarded by the machinery of the office which was under his domination and direction. The orders were his. That they were carried out by some clerk (who is not charged) does not relieve him. If one procure another to commit any offense he may be prosecuted and punished as a principal. Comp. St. 1929, sec. 28-201. No word or act of his

sought to arrest the movement of the plan after its operation was begun. Under all the evidence, it was competent for the jury to find that he was as guilty of the forgery of the new coupons as if he had fashioned them with his own hands. The facts and circumstances were sufficient to point to his guilt, which the jury have found. We are of the opinion that the evidence was sufficient to support the verdict.

Defendant has assigned many other errors. We have examined them and find them without merit. A discussion of them would afford no new rule of law and so we omit it.

The judgment of the district court is

AFFIRMED.

FRANK L. HAYES, APPELLANT, V. PAYNE INVESTMENT CORPORATION: O. C. HOLMES ET AL., APPELLEES.

FILED MAY 10, 1934. No. 28907.

1. **Judgment as Bar.** Recovery and satisfaction of a judgment against one of several joint tort-feasors is a bar to an action against any of the other joint tort-feasors for the same cause of action.
2. **Judgment.** Section 1, art. IV of the federal Constitution, requires state courts to give full faith and credit to the judgments of a sister state, and the same rule is applicable to judgments rendered in the federal courts.

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

Fred Marconnit and *John A. McKenzie,* for appellant.

Kelso A. Morgan and *Wells, Martin, Lane & Offutt, contra.*

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

GOOD, J.

Plaintiff sued the several defendants to recover damages for an alleged fraud practiced by them in procuring him to enter into contracts for the purchase of lands in California from the Sacramento Suburban Fruit Land Company (hereinafter called the land company). Some of the defendants, acting as agents for the land company, procured plaintiff to enter into the contracts for the purchase of the California realty. Defendants admitted the making of the contracts, denied any fraud, and pleaded in bar a judgment and satisfaction thereof obtained by plaintiff against the land company in the United States district court for the northern district of California. At the conclusion of all the evidence, the trial court directed a verdict for defendants. Plaintiff has appealed.

It may be observed that the defendant Payne Investment Corporation was not organized and had no legal existence until long after the contracts were entered into, and there is no evidence that the defendant Securities Land & Improvement Company had anything to do with procuring the execution of the contracts. As to these defendants there can be no question that the verdict was properly directed for defendants.

From the record it appears that plaintiff sued the land company in the United States district court for the northern district of California to recover damages for the same alleged fraud. In that action there was a trial and a verdict, which reads as follows:

"We, the jury in the above entitled case, find in favor of the plaintiff, Frank L. Hayes, and against the defendant, Sacramento Suburban Fruit Land Co., and assess the plaintiff's damages at one thousand and 00/100 ($1,000) dollars. Not including balance owing the defendant."

The judgment entered on the verdict is in the following language:

"It is hereby ordered, adjudged and decreed, that there is as of this day the total sum of $2,017.20 owing and unpaid from plaintiff to defendant upon the contract of purchase referred to in plaintiff's complaint whereunder

plaintiff purchased from defendant real property described as lots 78 and 83 of Rio Linda Subdivision 6, Sacramento county, California; and plaintiff is entitled to and is hereby given credit upon said contract in the amount of the verdict of the jury, heretofore rendered herein on the 22d day of December, 1931, to wit, the sum of one thousand ($1,000) dollars together with costs in the sum of $266.88.

"Judgment entered this 22d day of December, 1931."

This judgment has not been appealed from, nor any action taken to modify it in any respect. It is the contention of defendants that this judgment is a bar to the present action. On the other hand, plaintiff contends that he is entitled to sue any or all joint tort-feasors and recover a judgment from each, but concedes that he is entitled to but one satisfaction for the cause of action. Plaintiff contends that there has been no satisfaction of the judgment obtained by him in the United States district court, and that that judgment, therefore, is not a bar to the present action.

Plaintiff cites and relies upon *Morse v. Modern Woodmen of America*, 166 Wis. 194; *Ketelsen v. Stilz*, 184 Ind. 702, L. R. A. 1918D, 303; *Fitzgerald v. Campbell*, 131 Va. 486, 27 A. L. R. 799; and 34 C. J. 687, 983.

In *Morse v. Modern Woodmen of America, supra*, it was held that payment into court of a judgment against one of two joint tort-feasors would not bar an action against the other, where the time for appeal had not expired, and that the plaintiff had the right to bring separate actions against the joint wrong-doers, and recover judgment against each and choose which judgment he will accept and satisfy. In that case the plaintiff still had the right of appeal from the first judgment, had not elected to accept the payment into court for him, and had not directed execution to issue for the collection of that judgment.

In *Ketelsen v. Stilz, supra*, it was held that an unsatisfied judgment against one of several joint tort-feasors

is no bar to an action against the other responsible for the same tort, although execution was issued thereon. In that case the execution had been returned unsatisfied, and there had been no satisfaction of the judgment.

In *Fitzgerald v. Campbell, supra,* a judgment had been recovered against one joint tort-feasor, and the clerk of the court, without the direction of either plaintiff or his attorney, had issued execution and caused the amount thereof to be paid to the sheriff. It was held that this was not a bar to an action by plaintiff against another of the joint tort-feasors. The decision was based upon the proposition that the clerk was without authority to issue the execution, under the circumstances, and that payment to the sheriff of the money on the judgment was not a satisfaction of that judgment, since plaintiff had not received, and refused to receive, the money from the sheriff.

In 34 C. J. at page 687, it is said: "In order that the acceptance of something other than money may operate as a satisfaction, there must be a positive and express agreement to accept the substitute for direct payment of the judgment." And at page 983 it is said: "Payment of a judgment into court, without acceptance thereof by plaintiff in satisfaction of his recovery, will not bar an action against a joint tort-feasor. So, where execution is issued without the knowledge or consent of plaintiff, who refuses to accept the money from the sheriff and directs that it be returned to the party who paid it, there is no such satisfaction of the judgment as will bar an action against a joint tort-feasor."

In our opinion none of the foregoing authorities is applicable to the situation presented by the record in this case. Plaintiff instituted the action against the land company; he recovered a verdict and had judgment entered thereon. That judgment gave him credit upon his contract with the defendant land company for the amount of the verdict. With this judgment he appears to have been satisfied, for he did not appeal from it or seek its

modification. By its terms, he has received the amount of the judgment, applied upon his indebtedness to the land company. It is reasonable to presume that in that case plaintiff may have been doubtful of being able to enforce payment of the judgment by execution, and preferred to have the court enter judgment in that form so that he could secure its satisfaction by its own terms. By his action plaintiff has reduced his liability to the land company by the amount of the judgment which he recovered. No action can be taken by him to enforce that judgment. It is self-executing and amounts to transferring to plaintiff the credit upon his obligation to the land company for the amount of the verdict.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Fed. Const. art. IV, sec. 1.

In 34 C. J. 1125, it is said: "But it is now settled that judgments rendered by courts of sister states are entitled to the same recognition accorded to judgments of domestic courts; and that they are entitled to the same faith and credit in every state as in the state where rendered. * * * The obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction of the person or subject-matter, * * * is without limitation. Furthermore courts should not determine what part of a judgment of a court of another state should be effective and what part not, as if such judgment is regular on the face of the record it must be given effect in all its terms."

In 15 R. C. L. 927, sec. 405, it is said: "The constitutional requirement in regard to the full faith and credit to be given to judgments is applicable to a decree of federal courts in the same manner as to decrees of state courts."

Whether the judgment of the United States district court for the northern district of California responded to the issues pleaded, or is in any manner erroneous, cannot be questioned in this court. We are required to give

full faith and credit to the judgment as rendered, since that court was one of general jurisdiction and had jurisdiction of the person and subject-matter. The judgment and satisfaction thereof against one of the joint tortfeasors is a bar to any action against other joint tortfeasors for the same wrong.

The conclusion reached upon this question makes it unnecessary to consider any of the other assignments of error.

The judgment of the district court should be and is

AFFIRMED.

ANDREW J. PERRY, APPELLANT, V. MAUDE M. PERRY MARKLE ET AL., APPELLEES.

FILED MAY 10, 1934. No. 28965.

1. **Deeds**: DELIVERY. Delivery of a deed by the grantor to one of several named grantees is sufficient delivery as to all.
2. **Mortgages**: NOTICE. One taking a mortgage on real estate is bound to take notice of the rights and claims of persons in possession of the mortgaged premises.
3. ———: ADVERSE POSSESSION. Open, adverse possession of realty by the record owner thereof for more than ten years will bar an action for the foreclosure of an unrecorded mortgage thereon of which he had no knowledge.
4. **Equity**: LACHES. "Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations." *Hawley v. Von Lanken*, 75 Neb. 597.
5. **Mortgages**: LACHES. Where a mortgagee withholds from record his mortgage for 14 years, during which time the grantees of the mortgagor are in possession of and making lasting and valuable improvements upon the mortgaged premises, without knowledge of the mortgage, and where such record is withheld until after the death of the mortgagor, the mortgagee has been guilty of such laches as will defeat an action for the foreclosure of the mortgage.

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

Frank A. Peterson, William Niklaus and *M. H. Worlock*, for appellant.

Flansburg, Lee & Sheldahl and *Lyle E. Jackson, contra.*

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

GOOD, J.

This is an action for the foreclosure of a real estate mortgage. Defendants had decree, and plaintiff has appealed.

Plaintiff's petition is in the usual form for the foreclosure of a mortgage. The mortgagor is deceased, and defendants are his children, their spouses and the administrator of his estate. For defenses they allege laches, statute of limitations and satisfaction of the mortgage.

The record discloses that the mortgagor, Samuel H. Perry, acquired title to the mortgaged premises in 1914. He was then a widower with five children. He told his children that he was buying this land for them. October 18, 1915, he executed a warranty deed, conveying the land in question to his five children. This deed was recorded July 17, 1916. The mortgage bears date May 4, 1916, and was due May 1, 1921. It was not recorded until November 24, 1930, and after the death of the mortgagor. At the time this mortgage was given the children of the mortgagor were in possession of the land, claiming as owners under their deed, and have been in the undisputed possession thereof, with the exception hereinafter noted, until the present time. None of the children had any knowledge or information that plaintiff held, or was claiming to hold, a mortgage on the land until after it was recorded and about the time of the commencement of this action. During the years that they have been in possession they have improved the land by putting up fences and building a cistern and water-works, expending a large sum of money, and one of the defendants has purchased a tract of six acres, adjoining the land, on which are substantial buildings, used in connection with

the farm, and which tract and buildings would be of little value except in connection with the mortgaged premises.

It appears that one of the mortgagor's children died, without issue and unmarried, in 1917, and the mortgagor, by reason of the death of this child, became again the owner of an undivided one-fifth interest in the land. Some time later he executed a quitclaim deed of this undivided one-fifth interest in the land to his four surviving children.

It appears that in 1919 plaintiff took from Samuel H. Perry a new note for $19,006.30, secured by a trust deed on 320 acres of land in Dawes county, Nebraska. This note and trust deed represented the original indebtedness of $15,000, plus some additional amount. The later note, by its terms, matured in 1920, one year prior to maturity of the note for $15,000. The rate of interest upon the 15,000-dollar note was 6½ per cent. and on the later note 7 per cent. When, on the witness-stand, he was asked why he had kept the 15,000-dollar mortgage off the record, plaintiff answered: "Well, he was my twin brother and I never found any kick with him and I thought his papers was all right and I just put it away. That is all the reason I did it." It is somewhat significant that the later trust deed was recorded, and when there was default in its conditions plaintiff instituted proceedings and obtained a decree of foreclosure during the lifetime of his brother. He obtained and for a long time has held possession of the Dawes county land, and has received the rents and profits thereof down to the present time. All the amounts that have been received from rents and profits have been credited upon the later note, no part having been credited on the 15,000-dollar note.

After the death of the mortgagor, plaintiff filed in the county court against the estate of his deceased brother what he terms a contingent claim, based upon the note for $19,006.30, and in that statement recites that it is secured by a collateral note and mortgage for $15,000

(evidently referring to the note and mortgage involved in this action). The trial court found generally for defendants; that plaintiff's cause of action was barred by laches and statute of limitations, and that the mortgage had been canceled by the taking of the subsequent note and trust deed for $19,006.30.

Plaintiff insists that there is not sufficient evidence of the delivery of the deed by Samuel H. Perry to his children in 1915. The record discloses that the deed was executed and acknowledged and turned over to one of the grantees, and that some one of them has had possession of it ever since. It was recorded a few months after its execution. Later, it appears, Samuel H. Perry made application for a loan upon this land after he had inherited an undivided one-fifth interest therein, and that a mortgage was executed upon the land in which he and the four surviving children joined. There can be little question that Samuel H. Perry recognized that the deed had been delivered and that his children had title to the land. We think the assignment that there is not sufficient evidence of the delivery of the deed is not well taken.

It appears without question that the defendants were in the actual possession of the land prior to the execution of the mortgage in controversy, and that they have been so in possession for more than ten years, claiming title thereto. Plaintiff, when he took his mortgage, was required to take notice of the rights of persons then in possession of the land and of their claims thereto. It appears beyond question that, as to at least four-fifths interest in the land, plaintiff's cause of action is barred by the statute of limitations, because the defendants, as to such four-fifths interest, have had open, notorious, exclusive, adverse possession of the land for more than ten years after the execution of the mortgage and prior to the bringing of the action. *Gatling v. Lane,* 17 Neb. 77; *D'Gette v. Sheldon,* 27 Neb. 829; *Petersen v. Townsend,* 30 Neb. 373; *Alexander v. Wilcox,* 30 Neb. 793; *Omaha & Florence Loan & Trust Co. v. Hansen,* 32 Neb.

449; *Ballou v. Sherwood,* 32 Neb. 666; *Flanagan v. Mathiesen,* 70 Neb. 223; *Erickson v. Crosby,* 100 Neb. 372; *Laughlin v. Gardiner,* 104 Neb. 237.

Plaintiff has had at least constructive, if not actual, notice of the deed from Samuel H. Perry to his five children since July, 1916. With this knowledge, he has permitted them to not only occupy the land, but to improve it and expend considerable sums of money in placing improvements thereon, without disclosing to them that he had any mortgage, or claim to a mortgage, until after the death of his brother, the mortgagor, which would render it difficult for defendants to prove satisfaction of the mortgage; nor can they be restored to the position they were in prior to the spending of money in placing improvements on the farm.

"In equity, unreasonable delay, independently of any statute of limitations, may operate as a bar to relief, if prejudical to adverse party." *Tombrink v. Sarpy County,* 120 Neb. 160. See, also, *Hawley v. Von Lanken,* 75 Neb. 597; *Severson v. McKenzie,* 122 Neb. 827.

In 41 C. J. 874, it is said: "Independently of the statute of limitations, a court of equity may refuse to decree the foreclosure of a mortgage, where complainant has been guilty of very great and unreasonable delay in instituting his proceedings, such as to raise the presumption that he has either been paid or has abandoned his claim."

We think the facts disclosed clearly show that, when plaintiff took the later note for $19,006.30, which included and represented the same indebtedness as that represented by the 15,000-dollar note and mortgage, and which, by its terms, matured a year earlier than the 15,000-dollar mortgage, and which bore a higher rate of interest, the fact that all credits which had been made have been upon that note and none of them upon the older, or 15,000-dollar note, is strong evidence tending to show that it was the intention of the parties that the 15,000-dollar mortgage should be extinguished and merge in the later trust deed.

We are convinced that the facts disclosed by the record are sufficient to sustain the findings of the trial court in all respects, and the judgment should be and is

AFFIRMED.

BEATRICE CREAMERY COMPANY ET AL., APPELLEES, V. MARTHA J. KIZER, APPELLANT.

FILED MAY 10, 1934. No. 28852.

Master and Servant: WORKMEN'S COMPENSATION LAW: ACTIONABLE INJURY. On hearing *de novo* this court finds that the death of William R. Kizer was solely caused by acute lymphatic leukemia, and was not due to, or contributed to by, an injury resulting from an accident occurring to him in the course of or growing out of his employment.

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

Loren H. Laughlin, for appellant.

Hall, Cline & Williams, contra.

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

EBERLY, J.

This is an action to recover compensation under the workmen's compensation act. It is based upon the claim that plaintiff's husband, an employee of the defendant company, sustained injuries in an accident occurring to him in the course of and growing out of his employment, and that disability and his death following were caused or contributed to by such injuries. The defendant and its insurance carrier contend that both disability and death ensuing were due solely to the disease of acute lymphatic leukemia. The trial in the district court resulted in a judgment denying plaintiff's claim and dismissing her action, and she appeals.

Workmen's compensation cases are now heard and de-

termined in the district court as causes in equity, and on appeal to the supreme court are considered *de novo.* Comp. St. 1929, sec. 48-137; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121; *Herbert v. State,* 124 Neb. 312; *Mullen v. City of Hastings,* 125 Neb. 172.

In order that plaintiff may recover under the workmen's compensation law for accidental death of an employee, the burden of proof is upon her to show with reasonable certainty that the death of such employee was proximately caused by injuries resulting from an accident arising out of and in the course of his employment. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526.

But claimant's case may be established by circumstantial evidence, and is required to be proved only by a preponderance of the evidence. *Supica v. Armour & Co.,* 131 Kan. 756; *Ginsberg v. Burroughs Adding Machine Co.,* 204 Mich. 130; *Hogan v. Twin City Amusement Trust Estate,* 155 Minn. 199; *Flint v. City of Eldon,* 191 Ia. 845.

William R. Kizer, husband of plaintiff, at the time of his death was 59 years of age, and had been continuously in the employment of the Beatrice Creamery Company since October, 1905. He was a carpenter and general repair man by trade, and the shop in which he worked was located on the second story of the plant of the Beatrice Creamery Company in Lincoln, Nebraska. He was under the supervision of Ed Spirk, chief engineer of that company. Until December, 1930, his general health had been good. True, twenty years before his death he had had an attack of rheumatism which continued for about two months, during which time he took treatment for it at Excelsior Springs, Missouri, but from that disease he had completely recovered. However, he had developed varicose veins in both of his legs, which condition had prevailed for several years and was quite noticeable below the knees.

A chronology of the important developments immediately preceding the death of Mr. Kizer would embrace the following:

Some time in December, 1930, red spots appeared on both of his feet; they were also between the toes and some of the toes were swollen; they varied in size from a dime to a quarter; doctors were not consulted on this occasion, and the disorder was treated with home remedies. Some of these spots still were on his feet when his last illness commenced. It also appears that he complained prior to the commencement of his illness that he was suffering pain from the varicose veins in his legs, especially the left one. During the period from January 3 to 10, 1931, William Senne saw deceased sitting on a chair at the place of his employment with one of his shoes off and one sock off. Deceased showed Senne some red blotches between his toes and on top of his toes and instep; some of them were of the size of a dime, some smaller; and deceased complained of the foot hurting when he would go up town. About the same time deceased also complained to witness McIntyre that he was not feeling well. The accident occurred in the forenoon of January 12, 1931, and on the next day Mr. Kizer stated that he stepped backward and struck the calf of his leg against a motor sitting on the floor, which motor was not connected with power and not running. It was about a foot in height. The result claimed was a bruise on his left leg. On January 13, 1931, Mr. Kizer went to work, but was unable to continue and then returned home, and for the first time complained to his wife about the injury. On January 14 and 15, 1931, Mr. Kizer remained at home, unable to work. On January 16, 1931, Mr. Kizer went to the Lincoln Clinic for examination. An examination of his blood at this time disclosed a white cell count of 119,000 per cubic millimeter. (Normal count of adult is between 6,000 and 9,000.) Hemorrhagic bleeding appeared under the skin of the calf of the left leg. January 17, 1931, no change in his condition appeared. On January 19, 1931, hemorrhagic bleeding was discovered under the skin of the calf of the right leg, which had not been injured. On January 20,

1931, the red blotch or bruise on calf of the left leg was improved and "fading out," but the blotch and hemorrhagic bleeding on the right lower leg was worse and ultimately appeared to be in the same condition, so far as bleeding and discoloration were concerned, as the disabled left leg appeared to be at its worst. On January 27, 1931, Mr. Kizer was found in a condition of stupor, with partial paralysis. He was taken to the hospital where he died on the same day. His blood count was made at the hospital before his death, and the white cell count was found to be over 400,000 per cubic millimeter. Blood slides were also made at the hospital before his death. After his death an autopsy was performed by these physicians in the presence of representatives of plaintiff. At the autopsy specimens of blood were taken and further blood slides made; sections of tissue from various parts of the body were taken and tissue section slides made; and all were developed in the approved routine manner.

From these various sources of information Doctors Covey, Reinhard, Welch, and Everett, who appeared as defendant's witnesses, testified positively that the death of deceased was caused by acute lymphatic leukemia. (Doctors Reinhard and Welch may also be classed as the attending physicians during the illness of deceased.)

Without setting forth the evidence of these witnesses at length, it may be said that it amply sustains the conclusion that there is no proof of any relationship whatever between the trauma and acute lymphatic leukemia of which deceased died; further, that medical authorities are unanimous in the opinion that there is no relationship between the two either in causing acute lymphatic leukemia or aggravating it, or in joining with an injury in any way whatsoever to produce death; in short, that the bruise on the calf of deceased's left leg, received on January 12, 1931, in no manner caused or contributed to the death of Mr. Kizer on January 27, 1931. Thus their evidence affirmatively establishes as a fact that the accident

of January 12, 1931, was not a proximate cause of the death of Mr. Kizer.

We have carefully considered the conflicting views of Dr. Smith, as introduced in evidence by the appellant, not only in connection with the views of opposing experts, but also in the light of the cogent facts and circumstances set forth in the record. This doctor's evidence was that of an expert only. He had personally never met, examined, nor treated the deceased. The ultimate cause of death, acute lymphatic leukemia, we find practically agreed to by all of the medical witnesses. They differ in fact only on the question of whether the trauma occasioned by the accident of January 12, 1931, was a contributing cause in the death that resulted on January 27 following. On this point Dr. Smith, in disagreement with the other expert witnesses, expresses the affirmative opinion. In view of all the facts and circumstances shown in the record, we are unable to accept this view.

We find that the plaintiff has failed to meet the burden of proof imposed upon her by the determining issues involved in this case. It follows that the judgment of the district court is right, and is

AFFIRMED.

A. E. TORGESON, RECEIVER, APPELLEE, V. DEPARTMENT OF TRADE AND COMMERCE, APPELLANT.

FILED MAY 10, 1934. No. 29012.

1. **Banks and Banking: ACTS OF GUARANTY FUND COMMISSION.** Evidence in the record examined, and *held* that the acts of the guaranty fund commission in May, 1925, in taking over the property and business of the Bridgeport Bank, and thereafter managing it as a going concern until August 29, 1927, were authorized under the provisions of chapter 191, Laws 1923, as amended by chapter 30, Laws 1925, and not in violation of law; and such acts so performed in reference to closed transactions wherein the good faith of the commission

is admitted, and fraud is not charged, are not subject to collateral challenge or attack.

2. ———: GUARANTY FUND COMMISSION: DISSOLUTION. The taking over of the assets of a banking corporation by the department of trade and commerce, and the opening and managing thereof by the guaranty fund commission, as provided by statute, does not effect a dissolution of the corporation. In such cases the corporation retains its corporate capacity and is subject to suit upon its contracts.

3. ———: BANKERS' CONSERVATION FUND. The "Bankers' Conservation Fund" is, and was, the creation of statute, the ownership of which, by the express statutory terms employed, at all times belonged to the banks contributing thereto as their private property subject to a statutory use. The possession of the department of trade and commerce is as to plaintiff the possession of the ultimate private owners, and is therefore *animo domini* and not precarious.

4. Corporations: RECEIVER. Defenses which might have been made against the party over whose property a receiver is appointed, or whose title to sue and whose interests are represented by a receiver, may be interposed as against him. So a receiver of a corporation takes its assets subject to the conditions and legal disabilities with which they were trammeled in the hands of the corporation and causes of action in the right of the corporation are subject to defenses which might have been available against it.

5. Banks and Banking: LIMITATION OF ACTIONS. Evidence in the record examined and *held* insufficient to toll or prevent the running of the statute of limitations.

6. ———: ———. The cause of action in the instant case having accrued more than four years prior to the commencement thereof is barred.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Paul F. Good, Attorney General, and *Edwin Vail,* for appellant.

Butler & James and *Neighbors & Coulter, contra.*

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

EBERLY, J.

This is a suit in equity by A. E. Torgeson, a receiver

of the Bridgeport Bank, to recover certain moneys alleged to be a trust fund in the possession of the department of banking, formerly the department of trade and commerce, of the state of Nebraska. In the district court judgment was entered for plaintiff, and defendant appeals.

The facts giving rise to the controversy include the following: On May 15, 1925, under the provisions of section 11, ch. 191, Laws 1923, as amended by section 1, ch. 30, Laws 1925, the department of trade and commerce entered into possession of the Bridgeport Bank, a state banking institution. The property and business of this bank were then placed in the charge of the guaranty fund commission, which thereupon took charge and control of the property and business of such bank, opened it, and thereafter managed it "as a going concern, without regard to its solvency." Laws 1925, ch. 30, sec. 4. On August 29, 1927, the guaranty fund commission determined that "the bank cannot be continued as a going concern and there is no probable chance of restoring solvency;" advised the attorney general of this condition, and requested the appointment of a receiver. The attorney general, pursuant to this notification, in due time caused the necessary application to be filed in the district court for Morrill county, and on September 8, 1927, an order was entered in that court determining the corporation insolvent, appointing H. C. Peterson as receiver of this institution, and directing the liquidation thereof as provided by law. In due time H. C. Peterson as receiver was, by order of the court, succeeded by Clarence G. Bliss, and he in turn, in a similar manner, was succeeded by A. E. Torgeson, the plaintiff herein. However, it also appears that the department of trade and commerce, through the action of the guaranty fund commission in the manner provided by law, had allocated to the Bridgeport Bank, for use in conducting the affairs of that bank, the following funds from the bankers' conservation fund, to wit: In April, 1926, the sum of $10,000; in August, 1926, the sum of $12,000. These sums were thereupon

transmitted to the agent or representative of the guaranty fund commission for the purpose intended by the statute. It also appears that a new bank had been chartered at Bridgeport, Nebraska, under the name of the Bridgeport State Bank. To this new bank the guaranty fund commission sold the banking house, furniture and fixtures of the Bridgeport Bank, the corporation of which they were in charge, together with certain other assets of their trust. This sale was finally consummated on July 18, 1927. On July 19, 1927, from the proceeds of this sale the $22,000 advanced from the bankers' conservation fund was repaid.

About the time of the sale of the banking house and other assets, the agent of the guaranty fund commission refused payment of certain checks drawn by its depositors on the Bridgeport Bank, and returned unhonored certain collection letters to its correspondent banks. All this occurred immediately prior to the repayment of the $22,000 bankers' conservation fund money to the department of trade and commerce. Plaintiff alleges in his amended petition: "That said payment was made by the officers and agents of the guaranty fund commission in good faith, but under a mistaken idea as to the proper construction of the statutory provisions applicable thereto; * * * and the use of assets and funds of said bank to repay the deposit of the bankers' conservation fund to the department of trade and commerce after payment of checks of other depositors of said bank had been refused and the operation of said bank as a going concern had ceased, was an illegal and unauthorized diversion of trust funds committed to their care." In the evidence submitted there is not the slightest trace of fraud or fraudulent concealment, and every act performed evidences a *bona fide* effort to discharge a public duty.

In passing it may be said that we are not in accord with the views of appellee, stated in his brief, on what was decided in *Morrill County v. Bliss*, 125 Neb. 97. The opinion in that case discloses that the pleading therein

challenged the lawfulness of every payment made by the guaranty fund commission out of the assets of the state bank. While not specially identified in the terms of that pleading, the repayment of the $22,000 was necessarily included as part of the cause of action as alleged. And though it is true that the issues involved in that case embraced elements not present in the instant one, one of the defenses which was sustained both in the district court and in this court on appeal was that of a full compliance by this commission and its agents with the requirements of the statute during the entire transaction there in suit. On the consideration of this defense, Day, J., after a review of the statute applicable, states his conclusion as follows: "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."

The plaintiff in the instant case was made a party defendant in *Morrill County v. Bliss, supra,* in his capacity as receiver of this bank. The judgment in that case is not pleaded in the present litigation, so that we may refer to the opinion only as a precedent, but not to be treated necessarily as the law of the case.

Limited to a consideration of the present record the writer hereof is impressed with the view that the repayment of the $22,000 to the secretary of the department of trade and commerce, when and as made, is probably amply justified. However, in law and fact, the point,

not being necessary for the disposition of this case, need not be determined. We are, however, satisfied with and approve the general conclusions as to the powers and duties of the guaranty fund commission as set forth in the opinion in *Morrill County v. Bliss, supra.*

By the law in force during the period covered by the transaction in suit, upon a proper certificate of the guaranty fund commission, the department of trade and commerce was authorized to levy an assessment on state banks, the fund resulting being denominated by statute as the "Bankers' Conservation Fund." This statute also provided that this fund shall at all times "belong to the banks contributing thereto." Laws 1923, ch. 191, sec. 25. Its purpose, as expressly declared, was to prevent the closing of banks and to promote the conserving of the depositors' guaranty fund. Where a definite sum thereof was allocated to a bank, the statute expressly directed that such sum should be transmitted by the department of trade and commerce to the agent or representative of the guaranty fund commission in charge of such bank, to be used by him as a deposit, and for no other purpose, but in addition its exclusive use was to be applied under the control and direction of the guaranty fund commission in conducting the affairs of such beneficiary bank, which was necessarily one that had been taken over by said commission, and as to which it was exercising its vested powers to open and manage it as a going concern, without regard to solvency. Laws 1923, ch. 191, sec. 18, as amended. In this manner there was placed at the service of the agent or representative of the guaranty fund commission in charge of this institution a trust fund by means of which lacking cash was supplied and the corporate existence of the bank as a continuing institution was assured.

For, "The taking over of the assets of a banking corporation by the department of trade and commerce of this state for the purpose of managing or liquidating such bank does not effect a dissolution of the corporation.

"In such case, the corporation retains its corporate entity and is subject to suit upon its contracts, with this qualification, that by such suits it is not sought to interfere with the possession of the assets of the bank or the distribution thereof." *Svoboda v. Snyder State Bank*, 117 Neb. 431.

It is quite apparent that all of the provisions of our banking act, in force at the time of the occurrences involved in this litigation, when construed together, fairly evidence a legislative intent that that portion of the bankers' conservation fund provided for the use of the agent of the guaranty fund commission in conducting the affairs of banks in its possession should be ultimately repaid to the secretary of the department of trade and commerce for the owners whose private property it was. Further, it must be admitted that by the fair intendment of the words employed by the legislature, as well as by the executive construction of the same, the fund created for this purpose was a "revolving fund" for use in connection with each institution only so long as the purpose of its creation was subserved, and when circumstances negatived this result it was to be returned for the same use elsewhere.

No legislative intent is to be found expressed to the effect that the bankers' conservation fund was merely a security to the depositors in the same manner as the guaranty fund was regarded. It was rather the theory of the enactment that a bank in straitened circumstances, and even though temporarily insolvent, aided by the use of the bankers' conservation fund, would be enabled to discharge its pressing obligations with excellent possibilities of being restored to solvency. Even if restoration to solvency should prove in the end impracticable, still, contributed funds having been used in settling its obligations, the repayment of the funds contributed from its assets would leave it in no worse position. In principle, while termed a "deposit," in connection with the representative of the commission it was a deposit for a highly

special purpose and possessed many if not all of the elements of a trust fund, when considered in the light of the limited use to which it was restricted. "A deposit of money in a bank under a contract or understanding that it shall be held and used for a special purpose is a specific deposit." *State v. American State Bank,* 126 Neb. 34. See, also, *State v. State Bank of Touhy,* 122 Neb. 582; *State v. Citizens State Bank,* 124 Neb. 562.

In this connection it may be said that sections 28 and 29, ch. 191, Laws 1923, are special provisions applicable only to cases where lawful purchases of the assets and capital stock of such bank shall have been secured by the governmental agencies and a sale of the bank and its assets thus made *en masse.* That situation did not arise in the instant case.

This action is based on an alleged "deposit." If insolvent, as plaintiff alleges, the Bridgeport Bank had no power to receive it (Comp. St. 1929, sec. 8-147), and it received it, if at all, not by virtue of its corporate powers, but because of the act of the agent of the guaranty fund commission. It was used by this governmental agency for its benefit and the benefit of its creditors, in conducting the business of the bank as a going concern, so long as there remained any hope of a corporate reviver or attaining the purpose for which this fund was created. Indeed, the plaintiff charges that such use was unnecessarily prolonged. This suit by the corporation's receiver is for the recovery of the amount repaid on a "deposit," made for a special purpose, after that purpose had been fully performed. In its then condition of insolvency this corporation at the time it received the benefits of these moneys, which it now terms a deposit, was in its own capacity precluded from receiving a "deposit" for any purpose whatever. Now, after it has had the benefits of this $22,000 without charge, in excess of the period permitted by law (as it now alleges), and when its position of insolvency has not been adversely affected by this repayment made, it seeks recovery of the same, the

result of which, if successful, will be that, to the extent of the recovery permitted, the public policy evidenced by the law creating the bankers' conservation fund will be utterly defeated. Truly, the situation here presented invokes the application of the ancient maxim, viz., *"Jus ex injuria non oritur."*

All parties concede that, if applicable, our statute of limitations requires this action to be instituted within four years after the cause of action accrued. This action was commenced on January 11, 1932. The moneys of the bankers' conservation fund were repaid July 19, 1927. Appellee contends that the rule is that possession of the fund by the department of trade and commerce is precarious and not *animo domini,* and being trustee it cannot acquire the trust by lapse of time. The answer is that the bankers' conservation fund is owned by the contributing banks. It is private property subject to a statutory use. The possession of the department of trade and commerce is the possession of the ultimate private owners, and is therefore *animo domini* and not precarious.

Appellee also contends that the receiver appointed, H. C. Peterson, was a member of the guaranty fund commission and remained a member of that commission until April 30, 1929, when the same was abolished by the legislature; that the guaranty fund commission caused these payments to be made to the department of trade and commerce before his appointment as receiver; and that therefore the statute of limitations will not commence to run until the control of this trustee over the affairs of the bank has ceased and an independent and disinterested representative of the *cestui que trust* comes into the affairs of the bank. But, as the payment of the $22,000 was not in fact made by H. C. Peterson in person, he had no financial interest whatever involved in the transaction. No fraud or concealment is alleged on the part of any one. The contrary is conceded. Besides, this court is committed to the view that, "In a cause properly before a court of equity for determination, the appointment of a necessary receiver is a ju-

dicial function which cannot be exercised or controlled by the governor or the legislature." *State v. State Bank of Minatare,* 123 Neb. 109.

In all respects we must consider the receiver, appointed on September 8, 1927, solely as an officer of the court appointing him, and subject to its absolute control. He was in fact the hand of the court. The court was at all times open to any complaining creditors. So, too, the action in this case is not brought against the guaranty fund commission or any of the members thereof in that capacity. This action is prosecuted solely against the department of trade and commerce. When the repayment of the $22,000 was made, so far as the members of the commission were concerned, it was a closed transaction. As to it their official duties were completed, and they at no time had any financial or personal interest involved. After the appointment of Peterson as receiver on September 8, 1927, no adverse interest of any kind existed so far as the discharge of his duties as receiver was concerned. The reasons which furnish the basis of the cases cited by plaintiff in support of his contention on this point are wholly absent in the instant case.

As to the necessity of actual notice to, or knowledge by, the receivers, for which plaintiff apparently contends, it may be said that his pleadings contain no allegations which in substance and legal effect negative contemporaneous notice or knowledge of the several receivers of this institution, and of all parties in interest, of the fact of the advancement of the sum of $22,000 to this bank, and of the dates on which made, as well as of the fact of the repayment thereof on the date when made. No facts thus appear in the record as established which would prevent or toll the running of the statute of limitations.

Furthermore, the evidence preserved in this bill of exceptions supports the conclusion that books of account of the bank, while in the charge of the guaranty fund commission, were properly kept, and fully and fairly disclosed the repayment of the $22,000. These records were in the

lawful possession or control of all of the receivers and subject to their inspection, and, indeed, of all parties in interest. On this subject of right of inspection the applicable rule is:

"The books and accounts of the receiver and all other papers in or upon which appears anything pertaining to the trust or his administration thereof are quasi-public in character and so open to examination not only by the court but by all persons interested in the estate, subject to the qualification that the time and manner of such examination may not be such as to interrupt the business of the receiver or prevent resort to the books and accounts by other interested persons." 53 C. J. 172.

This language would also define the rights of stockholders and directors of the old institution during the period when control was exercised by the guaranty fund commission.

It necessarily follows that the defense of the statute of limitations in the instant case is one of the "defenses which might have been made against the party over whose property the receiver is appointed, or whose title to sue and whose interests are represented by the receiver, may be interposed as against him. So a receiver of a corporation takes its assets subject to the conditions and legal disabilities with which they were trammeled in the hands of the corporation and causes of action in the right of a corporation are subject to the defenses which might have been available against it." 53 C. J. 329.

It follows that the cause of action set forth in the petition is barred, and the district court erred in sustaining the same and in its entry of judgment thereon.

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

REVERSED AND DISMISSED.

A. E. TORGESON, RECEIVER, APPELLEE, V. DEPARTMENT OF TRADE AND COMMERCE, APPELLANT.

FILED MAY 10, 1934. No. 29013.

1. **Limitation of Actions.** The statute of limitations is a wise and beneficial law, and does not raise a presumption of payment, but is intended as a statute of repose.
2. *City of Chadron v. Dawes County*, 82 Neb. 614, *City of Albion v. Boone County*, 94 Neb. 494, and *State v. Stanton County*, 100 Neb. 747, examined, construed, and *held* inapplicable to the issues in the present case.
3. **Limitation of Actions.** Actions in substance or effect in the nature of actions for money had and received, in the absence of a specific statute of limitations, must be brought within four years from the receipt of the money.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed and dismissed.*

Paul F. Good, Attorney General, and *Edwin Vail,* for appellant.

Butler & James and *Neighbors & Coulter, contra.*

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

EBERLY, J.

This is a suit to impress a trust upon funds in the hands of the defendant, department of trade and commerce (now department of banking), to the credit of the depositors' guaranty fund. From a decree impressing such trust and permitting the plaintiff to reclaim therefrom the sum of $7,355.14, the defendant appeals.

This is a companion suit between the same parties and brought at the same time as *Torgeson v. Department of Trade and Commerce, ante,* p. 38. In both cases last referred to, it appears that between the dates of May 15, 1925, and September 8, 1927, the Bridgeport Bank was under the control of the guaranty fund commission, and was being operated by that commission "as a going concern, without regard to solvency."

Plaintiff alleges that, while it was so operated, "the secretaries of the department of trade and commerce who were in office during the period from May 16, 1925, to July 11, 1927 (notwithstanding the Bridgeport Bank was insolvent), acting in good faith, but under a mistaken idea of the proper construction of the statutory provisions applicable thereto, illegally and in contravention of law, levied assessments against the Bridgeport Bank (while wholly insolvent) to maintain the depositors' guaranty fund," and in payment of such assessments wrongfully caused to be withdrawn from the assets of this bank the sum of $7,355.14. The last withdrawal of money so made was on April 5, 1927. A receiver for this bank was appointed on September 8, 1927, who immediately qualified and commenced his duties in that capacity. This action was commenced on January 11, 1932.

Concerning the validity of these assessments, we deem that issue not essential to a proper disposition of the case, and therefore the question will not be determined. The defense which is controlling we deem to be the statute of limitations.

In consideration of the applicability of this statute, it will be remembered that, under the provisions of our state law regulating banking, the assessments here in suit were made by the proper officer entrusted with that duty by the express terms of the statute. They were admittedly paid to an officer unmistakably designated in a similar manner. It is charged they are invalid solely because the bank, in the hands of the guaranty fund commission and being conducted by it as a going concern without regard to solvency, was actually insolvent at the time of the making of each of the challenged levies, and at the time each was paid. The department of trade and commerce (now the department of banking) takes issue with this contention. But it cannot be questioned that in the utmost good faith these assessments aggregating the sum sued for were in fact paid by the bank while in charge and under the control of the guaranty fund commission.

Under these circumstances, the good faith of all parties being admitted, fraud and concealment being neither alleged nor proved, and essentially the only mistake charged being an honest mistake in the construction of a statute, is the defense of the statute of limitations applicable and controlling?

This jurisdiction was early committed to the view that the statute of limitations is a statute of repose. *Mayberry v. Willoughby,* 5 Neb. 368. Further, "The statute of limitations is a wise and beneficial law, and does not raise a presumption of payment, but is intended to be a statute of repose." *Chapman v. Kimball,* 7 Neb. 399. See, also, *Gatling v. Lane,* 17 Neb. 80; *Goodwin v. Cunningham,* 54 Neb. 11; *Pinkham v. Pinkham,* 61 Neb. 336; *Scott v. DeGraw,* 90 Neb. 274.

The essential, inherent, legal nature of the successive receivers of the Bridgeport Bank as appointed by a proper court of competent jurisdiction, and thereby respectively created wholly independent and judicial officers of the court naming them, has already been considered in case No. 29012, a companion case of the same title, between the same parties, and covering the same period of time. We are content with the determination there made and with the principles there announced.

Appellee contends that the principles announced by this court in *City of Chadron v. Dawes County,* 82 Neb. 614, *City of Albion v. Boone County,* 94 Neb. 494, and *State v. Stanton County,* 100 Neb. 747, sustained by the reasoning in *New Orleans v. Fisher,* 180 U. S. 185, and *City of Osawatomie v. Miami County,* 78 Kan. 270, are controlling and necessitate the conclusion that the transactions in suit are not within the scope of our statute of limitations. This contention may not be accepted. Indeed, the obvious reply is that the instant case is not a tax suit, and does not involve the controlling elements of the tax suits which the cases cited by appellee determine. The essential issues there adjudicated are entirely different, foreign, and wholly unrelated to the issues we must determine in this liti-

gation. The analogies are too remote to be logically controlling.

The *Chadron* and *Albion* cases involved the proper distribution of the county road fund. By the general law in force during the period covered by the cases cited, it was provided: "On the last day of sitting as a board of equalization the county board shall levy the necessary taxes for the current year, including * * * for roads, not more than five mills on the dollar valuation." Comp. St. 1909, sec. 5057. By construction and later by express amendment, section 76 of the road law provided that road tax levied upon property "within cities of the metropolitan class, cities of the first and second class and villages" should be disposed of as follows: "One-half of all such tax, when collected, shall go to the county road fund, the other half, when collected, to be paid to the city or village where levied." Comp. St. 1909, sec. 5327. It was "the other half" to which the cities were entitled that was in litigation in the first two cases cited by the appellee.

In the *Stanton County* case the law in force during the period covered by the litigation (Ann. St. 1911, secs. 10094, 10095) provided substantially that the several counties of the state having patients in the state hospitals for the insane should receive notice by the state auditor's certificate as to the amount due the state for the board and care of such patients for the support of which they were respectively chargeable; whereupon the statute in terms imposed the duty and required that "the board of county commissioners (of such county) shall add such amount to the next state tax to be levied in said county, and pay the amount so levied into the state treasury." Ann. St. 1911, sec. 10095. As to the amounts in suit, it appears conceded that a state auditor's certificate had been received by Stanton county, the respective amounts thereof had been added to the state tax, and the combined amount had been collected in due course "as state tax" by the county treasurer, but, instead of being remitted to the state treasurer, were appropriated by the county authori-

ties to their own purposes under a claim that the directing statute was unconstitutional. It will be observed that in the three cases now under consideration the rights of the ultimate taxpayer were in no manner involved. No claims in his behalf were presented, considered, or decided. In each of the three cases the litigation was essentially and strictly between two municipalities. In the first two cases the causes of action on which recoveries were sought related exclusively to public funds in which there was at the time of collection substantially a joint ownership between the parties, and in all three cases there was involved the possession of public funds by public bodies under such circumstances as imposed a continuing duty to pay the same over to the other public body then complaining. Likewise, in all three cases the relief sought amounted to no more than to require the performance of a continuing public duty relating to public funds imposed by the express terms of a public statute upon one public agency for the benefit of another public agency, and as to which the general public had an actual though indirect interest. In the *Stanton County* case this court determined that the additional tax, having been assessed and collected as a state tax, was "a part of the revenue of the state within the meaning of section 7581, Rev. St. 1913;" and as the action was in effect one to recover revenue by the state from the county, the statute of limitations did not apply.

There is no claim in the instant case that the assessments in suit involve the characteristics of revenue of the state. In *City of Chadron v. Dawes County, supra,* the reasoning of this court upon which that decision proceeds is clearly set forth in the following language: "The statute of limitations is interposed as a defense. It is conceded that, if this defense can be made in a case of this kind, the defendant has allowed plaintiff all that it was legally entitled to demand. Under the law in force at the times set out, the county collected all of the road taxes. All of the taxes collected outside of an incorporated city and

one-half of the tax levied and collected upon property within the corporate limits of a city could properly be held and disbursed by the county, but the other one-half of the taxes collected upon property within the corporate limits of a city belonged to the city, and it would be the duty of the county to pay such money over to the city. Plaintiff and defendant were therefore jointly interested in that portion of the fund derived from the levy upon property within the corporate limits of the plaintiff; and, being so jointly interested, when the fund came into the possession of the county, it held one-half of it in trust for the city. The fund had been raised in the exercise of a governmental function, for governmental purposes, and, we think, was held in a governmental capacity. But whether so or not, it seems clear to us that the county held that portion belonging to the city as a public trust; that it was the continuing duty of the county to faithfully execute the trust by paying over the money, and that the statute of limitations does not apply."

This reasoning is approved in *City of Albion v. Boone County, supra,* and indeed is the embodiment of the principles announced in *New Orleans v. Fisher,* 180 U. S. 185, and *City of Osawatomie v. Miami County,* 78 Kan. 270. But the issues there determined were between public municipalities and related to public funds. The principles involved are necessarily limited by the subject-matter to which they are applied by the court, and are binding as precedents only within the scope of the issues in the determination of which they are announced.

In the instant case we are not in any manner concerned with a contest between public bodies relating exclusively to public funds, and where the relief sought is compulsion in the performance of public duties of a continuing nature. Therefore, assuming *arguendo* that the assessments here in suit were levied and collected without authority of law, it must be admitted that the injury sustained by the bank is exclusively in the nature of a private wrong. The redress to which the injured party is entitled, if any, is

redress for a private injury. It is wholly devoid of the characteristics of a public nature. It would necessarily follow that the doctrine announced in the three Nebraska decisions relied on by plaintiff has no necessary application in the instant case, and is not controlling. That certain analogies exist between the case at bar and the facts embodied in the precedents referred to may be admitted. The fallacy of the argument insisting that they are here controlling plainly appears when, by assumption, the analogies are perfected or rather made more complete.

For this purpose we may assume that the property of the Bridgeport Bank was by the proper taxing authorities taxed for an illegal or an unauthorized purpose, and the taxes so assessed were in good faith paid by the agents in charge. On these facts obviously no recovery of the taxes so paid could be had on the theory as advanced by plaintiff in the case actually presented for review. Section 77-1923, Comp. St. 1929, provides for relief in the case supposed. But its terms must be complied with. *Darr v. Dawson County*, 93 Neb. 93. The running of the statute of limitations is not prevented or tolled, and after the specified lapse of time following the accrual of the cause of action the statute of limitations affords a complete defense. This is true, not only because of the provisions of our statutes, but the general rule on the subject is:

"If there are special statutes of limitation applicable to actions for the recovery of taxes paid, and such statutes are valid, the action is barred unless brought within the prescribed time after the cause of action has accrued; otherwise, it is barred by the same lapse of time which would limit an action for money had and received between private parties." 61 C. J. 999. See, also, *Matter of Hoople*, 179 N. Y. 308.

In the instant case plaintiff's right of action is based on primary facts such as the usual and necessary allegations in the ordinary action for money had and received are ample to cover. The right to relief, if any, vested in the Bridgeport Bank involves no more. Even if the en-

forcement of this primary right because of peculiar circumstances involves the application of equitable remedies, the resulting action is still within the scope of the statute of limitations which provides that actions of the nature of the one under consideration shall be commenced within four years after the cause of action has accrued. *Murphy v. City of Omaha*, 1 Neb. (Unof.) 488. This construction is necessitated by the words of our enactment and reinforced by the policy of this legislation as early determined by this court. Plaintiff's action was therefore barred when commenced, and the district court erred in sustaining the petition and in its judgment entered thereon.

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

REVERSED AND DISMISSED.

FIDELITY FINANCE COMPANY, APPELLANT, V. FRANK WESTFALL, APPELLEE.

FILED MAY 10, 1934. No. 28958.

1. **Judgment.** It has long been the general rule in this jurisdiction that the findings of fact and judgment must conform to and be supported by the pleadings.
2. **Pleading.** Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it.
3. **Appeal.** It is essential that the findings of fact be sustained by sufficient evidence.

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

Peterson & Devoe, Jack & Vette and *W. A. Stewart, Jr.*, for appellant.

York & York, contra.

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

DAY, J.

This is an action in replevin brought by the Fidelity Finance Company against Frank Westfall to recover possession of a truck under a claim of special ownership by reason of a chattel mortgage. The case originally began in the county court, and, upon an appeal, the district court, without the intervention of a jury, found in favor of the defendant. Plaintiff appeals to this court.

The plaintiff in its petition alleges that the defendant became indebted to the Lexington Motor Company for a portion of the purchase price of a truck and executed his note for $487.92, dated March 16, 1932, which was secured by a chattel mortgage on the truck; that afterwards for a valuable consideration, and before maturity, it was sold to the plaintiff; that said note was in default and that under the terms of the mortgage the plaintiff was entitled to immediate possession of the truck.

The defendant's answer admits the execution and delivery of the note and mortgage to the Lexington Motor Company and that the payment is in default. The answer further alleges that the defendant had a series of transactions with the Lexington Motor Company in which he purchased three different cars, one after another, and that the note involved in this case represents the purchase price of the last; that the interest charges on the several transactions were usurious, and that plaintiff took the note with a knowledge of the custom of the Lexington Motor Company and under such circumstances as amounted to bad faith, so that the plaintiff is not a *bona fide* holder in due course but took said notes subject to the defense of usury. The prayer of the defendant's answer was that the note and mortgage be adjudged unenforceable and for a return of said truck, or, in lieu thereof, a judgment for its value.

The trial court, after a hearing, found that said note, "although made payable to the Lexington Motor Company, was executed for immediate transfer to the plaintiff in return for a loan of $420 by the plaintiff to the defendant, such sum of $420 to be paid directly to said Lexington

Motor Company for the defendant." The court makes numerous findings of fact upon other matters which may be summarized as a finding that the loan was made directly by the plaintiff to the defendant, and the judgment of the trial court was based upon these findings. This finding of fact is not justified by the defendant's answer, which admits the execution and delivery of the note and mortgage to the Lexington Motor Company, and alleges that it was subsequently purchased by the plaintiff from the company which indorsed the same. This and other allegations of the answer not only negative the idea that the plaintiff loaned money to the defendant but in fact substantiate and admit the contention of the plaintiff that it purchased the note. It has long been the general rule in this jurisdiction that the findings of fact and judgment must conform to and be supported by the pleadings. *Hobbie v. Zaepffel,* 17 Neb. 536; *Upton v. Betts,* 59 Neb. 724; *Solt v. Anderson,* 63 Neb. 734; *Domann v. Domann,* 114 Neb. 563.

Furthermore, the findings of fact upon which the judgment was based in this case are erroneous. The answer admits the truth of allegations in the plaintiff's petition which are contrary to the findings of fact upon which the judgment is based. The allegation in the petition is that the plaintiff purchased a note from the Lexington Motor Company to whom it was executed and delivered, and the answer admits that fact. Where an allegation in the petition is admitted by the answer, the fact is established for the purpose of the case, and the court cannot disregard it. *Jacobs v. Williams,* 85 Conn. 215, Ann. Cas. 1913B, 900; *Heflebower v. Wiley,* 30 S. Dak. 184.

Moreover, findings of fact in this case are not supported by but are contrary to the evidence. It is essential that the findings of fact be sustained by sufficient evidence. *Sutherland v. Holliday,* 65 Neb. 9; *Fairfield v. Hart,* 139 Mich. 136; *Peckham v. Keenan,* 122 Kan. 544. The evidence of the defendant in this case is that he never had any dealings with the plaintiff company but

that all his dealings were with the Lexington Motor Company. The evidence does not, therefore, support the finding that the defendant borrowed money from the plaintiff.

The evidence not only does not support the finding that the plaintiff loaned money to the defendant but establishes quite the contrary; that the plaintiff purchased the note and mortgage executed by the defendant and did not in fact loan money to the defendant. This disposes of the contention of the appellee that the plaintiff made a loan under the provisions of the small chattel loan act (Comp. St. 1929, sec. 45-119) for the reason that there was no loan of money made by the plaintiff to the defendant. It was upon the theory that the plaintiff had loaned money in violation of this act that the trial court entered a judgment by which the plaintiff forfeited both principal and interest because of a violation of this act. This cannot be justified under the facts in this case. Under the general usury law, the payee loses only the interest. This court recently had under consideration a transaction whereby an automobile dealer sold a note at a discount to a finance company. See *Grand Island Finance Co. v. Fowler,* 124 Neb. 514.

The question presented for determination by the pleadings and the evidence in this case relates to the matter of usury and the knowledge of the plaintiff of the usury, if any, at the time of the purchase. This should be determined in this case with reference to the opinion of this court in *Grand Island Finance Co. v. Fowler, supra.*

It follows that the judgment of the trial court is erroneous and that the judgment should be reversed and the cause remanded.

REVERSED AND REMANDED.

PETER O'SHEA ET AL., APPELLEES, V. COMMODORE C. HAMPTON, APPELLANT.

FILED MAY 15, 1934. No. 28953.

Vendor and Purchaser. Where grantor, for $50,000, conveyed a farm in 1919, described as consisting of a certain quarter section and three numbered government lots, fronting on the Platte river, described as "containing 248 acres, more or less, according to United States government survey," without knowledge of either grantor or grantee that, by reason of encroachments of the river, there was, at the most, a shortage of actual land amounting to 9.8 acres between the government survey of 1877 and a survey made by grantee in 1920, *held*, in the circumstances, more fully disclosed by the evidence: (1) That there was no fraud in the representations of grantor; (2) that the sale is to be considered as in gross and not by the acre; (3) that the actual deficiency in land is not sufficient to warrant a recovery by the grantee.

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

White & Heiss, for appellant.

J. M. Fitzgerald and *Mothersead & York, contra.*

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

GOSS, C. J.

This is an action for damages for an alleged shortage of the number of acres in a farm purchased of defendant. There was a verdict for plaintiffs for $1,006.40, on which judgment was entered.

June 30, 1919, defendant (joined by his wife) entered into a written contract with Peter O'Shea to sell and convey to him on March 1, 1920, a certain quarter section and three (government) lots connected therewith, located on the south side of the Platte river near Gering, in Scotts Bluff county, "containing 248 acres, more or less, according to the United States government survey." March 1, 1920, Hampton and wife conveyed the land to Peter O'Shea and Charles L. Schuler (O'Shea's nominee)

by warranty deed containing the same description and acreage as above quoted.

The amended petition of O'Shea and Schuler, plaintiffs, alleged that at the time of the purchase "the defendant represented to the plaintiffs that there was a total of 250 acres of land in said tract and it was agreed between the parties that the price of said land should be two hundred (200) dollars per acre;" that the contract was so prepared, but, before signing, defendant stated that he had made a mistake in the actual acreage and so the proposed contract was changed to show 248 acres; that as an inducement to plaintiffs to purchase the land defendant "represented and warranted said tract of land to contain 248 acres; that relying on said representations and warranty, as aforesaid, plaintiffs purchased said land; that in truth and in fact said tract of land contained but two hundred thirty-eight (238) acres, which fact was unknown to plaintiffs and plaintiffs would not have purchased said tract of land for said price if they had known that it did not contain two hundred forty-eight (248) acres." They allege the land was worth $200 an acre and that they have been damaged $2,000, for which they pray judgment.

The answer admitted the execution of the contract with O'Shea and the execution and delivery of the deed to O'Shea and Schuler, but denied all other allegations of the amended petition.

Schuler died and revivor in the name of his administrator was duly entered.

The case was tried upon the theory, not of fraud, but of mutual mistake in the representation and understanding of the acreage of the tract and that it was a sale of the farm by the acre and not a sale in gross, plaintiffs claiming it was by the acre and defendant claiming it was in gross.

There was testimony of Peter O'Shea, one of the plaintiffs, who was engaged in the real estate business, that Hampton had listed the farm with him for sale and had

described it as containing 250 acres and had listed it at $200 an acre. When he agreed a few days before the execution of the contract to purchase the farm for $50,000, he engaged the late P. J. Barron to draw the contract and it was drawn to cover 250 acres. On the day it was executed O'Shea, Barron and a notary went to the Hampton home to secure the execution of the contract. Hampton in their presence read the contract very carefully and suggested three or four changes. One of these, after a conversation with his wife, was to change the 250 acres to 248 acres. These changes were made in ink by Barron, as the latter testified.

Copies of government maps, filed January 22, 1878, in the General Land Office, duly exemplified, showing the government survey of these lands in 1877, were offered by defendant and received in evidence. The original government survey showed 247.25 acres in the tracts. This shows all the land to the then meander line or the south river bank.

Plaintiffs introduced the testimony of J. G. Marzel, taken by deposition, and a map made by him. This survey was made October 23, 1920, at the instance of plaintiffs, and the map and testimony of Mr. Marzel show 238.2 acres actually in the farm up to the then river bank. He testified that the meander line as shown on his map was farther inland than the meander line shown on the government map. At the time his deposition was taken he was state geologist for Wyoming. He had been a surveyor for 22 years. He testified that, at the time he surveyed the land, the river was at flood stage and there was evidence of erosion of the river bank of the farm. In surveying the south, east and west sides of the farm he used a general land office map made from the government field notes and in the survey actually located certain government corners. Of course, the river having eroded its south bank, these notes did not fix the present line there. Marzel did not survey the government meander line of the river as it existed in 1877,

nor did he indicate it on his map. His survey and map are criticized by appellant largely on the ground that the evidence of location of government monuments was not established, but that goes to the weight of the evidence rather than to its competency. To go into details as to the points of the government survey of which he claims to have found evidences, the cross-examination thereon and the evidence on behalf of defendant seeking to prove his errors would be burdensome and not of value here. The map might be considered as correct so far as it goes; that is, as far as the land above water at the time of the survey is concerned.

So, assuming the Marzel survey was correct in following the government survey as to the south, east and west lines of the farm up to the river bank, yet it failed to show how much acreage there was in the farm "according to government survey" as required by the contract and the deed, both of which were prepared in that form at the instance of plaintiffs themselves. It does not show, as it should have done, the government meander line. It does not show the distances along the river bank on its own meander line which ran in a somewhat southeasterly direction. It does show the total east and west linear distance across the farm along the south boundary of the government lots is 3,986.5 feet. However, a fine scale rule, applied to the meander line from point to point of the meander angles indicated, shows a total meander line of 4,117.5 feet along the south bank of the river when the survey and map were made on October 23, 1920. This proves from the evidence of plaintiffs that, to produce a shortage of 10 acres in the original government survey, the meander line of the government survey is, on the average, less than 106 feet north of the line fixed by the Marzel map. The evidence shows that the land along the river was greatly inferior in quality and value to that on the south part of the farm. Though the court,

whether properly or improperly we do not decide, instructed the jury in effect to take the purchase price an acre and multiply it by the deficiency in the number of acres in order to assess the recovery, the jury allowed only about half that amount.

All possible errors are assigned, chief of which is that the judgment is not sustained by the evidence. The question is whether the farm was sold in gross for $50,000 or whether it was sold by the acre; if the latter, was there such a discrepancy between the 248 acres described in the contract and deed on the one hand and the actual acreage of the farm as to warrant a recovery?

In re Estate of Robinson, 105 Neb. 1, was a case involving an action for damages for shortage in the width of a lot on O street in Lincoln, the whole width of which, so far as possession could be and was delivered under the deed, was covered by a brick building. The deed described the property as lot 20, block 44. The record plat described the lot as being 25 feet wide and 142 feet long. The actual width of the building, due to 9 inches encroachment of a building east of it was only 24 feet and 3 inches. It was held that "the purchaser is not entitled to an abatement in the purchase price unless it appears that fraudulent representations were made by the vendor as to quantity that induced the vendee to purchase." The opinion reviews cases from many states and concludes that the decision is in harmony with the great weight of authority, has prevailed from an early day and is a reasonable rule. Several of the cases hold that any surveyor could easily have determined the quantity of land contained within the limits and plaintiff might have known the quantity before he purchased, by taking proper measures.

In *Anthony v. Hudson,* 131 Ky. 185, it was held: "A contract to sell land in Illinois, and the deed thereafter given, both recited that the tract sold contained so many acres, 'according to United States survey,'

and the contract also recited that the gross amount of the purchase money was at the rate of $105 per acre. Held, that the sale would be considered to be in gross, and not by the acre." It cites numerous cases and text-books in support.

In Illinois, where the land involved in the Kentucky case was situated, the general rule seems to be as stated in *In re Estate of Robinson,* 105 Neb. 1. For in *Wadhams v. Swan,* 109 Ill. 46, it was said: "The general rule unquestionably is that where a tract of land is sold for a sum in gross, by its proper numbers, as indicated by the government survey, or by any other specific description by which its exact boundaries are or may be determined, the boundaries to be thus ascertained, in case of a discrepancy, will control the description as to the quantity or number of acres, and in such case neither the purchaser nor the vendor will have a remedy against the other for any excess or deficiency in the quantity stated, unless such excess or deficiency is so great as to raise a presumption of fraud. *Jackson v. Moore,* 6 Cow. 717; *Noble v. Googins,* 99 Mass. 231."

The words "more or less" indicate a sale in gross. 18 C. J. 289; 20 Am. & Eng. Ency. of Law, 875; *Rathke v. Tyler,* 136 Ia. 284. Though in the Iowa case, where the description was by metes and bounds, of an irregular tract described as "containing one hundred acres, more or less," and an early survey promptly taken advantage of by the vendee, disclosed a shortage of 6.41 acres, the court held under the evidence there was a sale by the acre and that the shortage was sufficient to afford relief.

But in the instant case the description was not by metes and bounds but was by government sections and lots "according to government survey." In 20 Am. & Eng. Ency. of Law, 873, the general rule, supported by a large number of cases from many states, is put in the following language: "The words 'more or less'

in a deed, after a quantitative recital as to the number of acres, imply a waiver of the warranty as to the specific quantity on the part of the buyer and an agreement on the part of the seller not to demand more than the fixed price, although on the one hand there should be an excess or on the other a deficiency in the quantity supposed, both parties being willing to abide by such presumptive or probable evidence of the quantity as they were then possessed of, but of which neither pretends to have an accurate and perfect knowledge, and which neither insists upon as a condition annexed to the purchase or sale. By the use of these words, the statement of the number of acres becomes descriptive merely, and not of the essence of the contract. There is a mutual risk by the vendor as to the sum of money, and by the vendee as to the quantity of land. If there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency."

In the case at bar, a day or so before the contract of sale was made, O'Shea went to Hampton and offered Hampton $48,500 for the farm. Hampton refused it, saying he would not take less than $50,000 for the place. A day or so later O'Shea appeared with his attorney and notary. Before disclosing that he had the contract already prepared, O'Shea found Hampton down by the barn and asked him if he would take $49,500 for the farm. Being answered in the negative, he said, "Come on up to the house and we will fix it up." When the contract was produced and the changes heretofore recited were made, O'Shea made no suggestion that the price ought to be abated because the acreage according to government survey was reduced in the contract. He and Schuler, the grantees in the deed, on June 30, 1919, paid the $5,000 down on the contract, made the payment of $20,000 and obtained their deed March 1, 1920, having satisfied themselves that the title

was "marketable," made the mortgage for $25,000 due on or before March 1, 1930, obtained the Marzel survey October 23, 1920, showing that the actual land then in the contract was 9.8 acres short of the 248 acres stated in the deed, continued to pay the interest on the mortgage and made no complaint until this suit was brought. The transcript here does not show when the action was commenced, but the amended petition was filed January 4, 1928. That is the first date indicative that any suit was pending.

We are of the opinion plaintiffs ought not at so late a date to be permitted to claim and set up a shortage in the acreage. We think the evidence and circumstances clearly show that they bought the farm in gross, not by the acre. The shortage alleged is of course attributable partly to erosion and partly to the high water at the time the Marzel survey was made. Even assuming it is about 9 acres, there is not sufficient in the circumstances of this case to warrant recovery.

For the reasons stated, the judgment is reversed, with directions to dismiss the action.

REVERSED.

HARRY DICKERSON ET AL., APPELLANTS, V. SURETY NATIONAL FARM LOAN ASSOCIATION ET AL., APPELLEES.

FILED MAY 15, 1934. No. 28940.

1. **Appeal.** Findings of trial court in a law action have the same force as the verdict of a jury. Such findings will not be disturbed on appeal unless clearly wrong.
2. **Account.** The basic reason for equity jurisdiction in an action for accounting is inadequacy of remedy at law.
3. **Equity.** Ordinarily, equity will not take cognizance of an action to recover a specific amount of money, alleged to have been embezzled by defendants.
4. **Evidence** examined and *held* to sustain court's findings.

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

Gerald E. La Violette and *T. B. Murray,* for appellants.

Courtright, Sidner, Lee & Gunderson and *Paul Maynard,* guardian *ad litem, contra.*

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

GOOD, J.

Plaintiffs, as the only heirs at law of James Dickerson, deceased, brought this action to recover from defendants a judgment for a definite amount. Defendants denied liability. Trial to the court resulted in judgment for defendants. Plaintiffs have appealed.

The facts which give rise to this controversy may be summarized as follows: James Dickerson obtained a loan from the Federal Land Bank of Omaha, secured by a mortgage on his farm. The loan was payable in instalments of $195 semiannually, in April and October of each year, with privilege to him to pay a larger amount upon the principal on any interest pay day. Payments of interest were made as they became due through the defendant Surety National Farm Loan Association, which, for brevity, will hereinafter be referred to as the national association. This association is organized pursuant to federal statute, the stockholders in the corporation being borrowers from the land bank. Defendant Roper was secretary-treasurer of this association and also secretary-treasurer and general manager of another corporation, known as the Dodge Agricultural Credit Association, hereinafter referred to as the credit association. In designating this corporation, Roper sometimes substituted his individual name for the word "Dodge." Both corporations occupied the same office. The credit association appears to have conducted a general real estate and loan business.

August 22, 1928, James Dickerson paid to Roper $2,000, and the following instrument was executed in two parts:

"Date August 22, 1928.

"To Roper Agricultural Credit Association:

"I am inclosing $2,000, which amount I wish to leave with you for approximately until October 1, 1928. This money is left with you with the understanding that I am to be allowed interest at the same rate I am paying on my federal farm loan.

"(Signed) James Dickerson.

"Address, Madison, Nebraska."

"Date August 22, 1928.

"Received from James Dickerson of Madison, Nebraska, the sum of $2,000, which amount is to be left with us and upon which interest is to be allowed at the same rate as James Dickerson is now paying on his federal farm loan. It is further agreed that such funds shall be returned to James Dickerson with interest as aforesaid on October 1, 1928, without notice.

"Roper Agricultural Credit Association,

"(Signed) John H. Roper,

"Secretary-Treasurer."

At a time thereafter, perhaps in September, Dickerson paid the further sum of $543.58 to Roper. On the first of October following, Roper paid $195 out of the funds so received from Dickerson to the land bank as an interest payment upon Dickerson's mortgage. Some time in December following, Roper was removed from his office as secretary-treasurer of the credit association, and, in his stead, defendant Tresnak was appointed secretary-treasurer of the association. Defendant Vakiner was president of the credit association, was a farmer, and had no part in the management of the affairs of the association, except to preside at directors' meetings.

A few weeks after Tresnak was installed as secretary-treasurer he discovered from its books that the credit association apparently owed Dickerson $2,348.58, being the difference between the $2,543.58, paid to Roper by

Dickerson, and the $195 expended by Dickerson in paying the interest upon the latter's loan. They also discovered that there were other liabilities of a like character, aggregating a considerable amount, and that the association was indebted to banks for money borrowed. Vakiner and Tresnak, according to their testimony, ascertained that the assets of the credit association consisted principally of second mortgages and aggregated about $79,000; that the liabilities of the association amounted to about $53,000, and that the association was not able to pay its obligations at that time, but they believed that its liabilities could be settled, if given an opportunity to realize on the assets it possessed. Vakiner and Tresnak thereupon prepared a number of promissory notes, sought out the various creditors and asked them to take notes for the amounts due them. A number of the creditors accepted these notes, and among them Dickerson accepted a note, dated April 1, 1929, for $2,348.58, due in two years, with interest at 4 per cent. per annum, and at the same time he received from the credit association interest on the amount from the date it had been paid to Roper until the date of the note. At that time Dickerson did not have with him the instruments above set out, but stated to Tresnak and Vakiner that they were in his safe deposit box in Norfolk. He promised to obtain these instruments and return them to the credit association, and this he did a few days later. In July, 1929, Dickerson departed this life intestate, leaving no widow or issue, and the plaintiffs are his only heirs at law. His estate was fully administered, debts paid, property assigned to the plaintiffs, and the administrators discharged.

It is the contention of plaintiffs that Dickerson was of unsound mind and had been for a number of years previous to his death; that when he made the deposit of the $2,000 and the $543.58 with Roper he made it for the specific purpose of having it apply upon his mortgage to the Federal Land Bank on the first of

October, 1929, and that the money was paid to Roper as secretary-treasurer of the national association; but that Roper had embezzled the money; that Tresnak and Vakiner had assisted in doing so, and that all the defendants were liable to the plaintiffs.

Plaintiffs in their brief contend that this is an action in equity for an accounting. If such is the case, then the action is triable *de novo* in this court. If, in fact, it is a law action, then the findings of the district court have the same force and effect as the verdict of a jury, and the court's findings will not be disturbed, on appeal, unless they are clearly wrong.

Originally, the basis of equity jurisdiction over matters of accounting was necessity for a discovery, but later authorities have added two other grounds, viz.: The complicated character of the accounts and the existence of a fiduciary or trust relation. 1 C. J. 613. We think the real basic reason for equitable jurisdiction is inadequacy of remedy at law.

In *Merritt v. Johnston,* 109 Neb. 859, it was held, referring to actions for accounting: "Neither party is entitled, as a matter of right, to have the case transferred to a court of equity, unless it should manifestly appear that the issues and items therein are so numerous and the evidence to sustain them so variant, technical and voluminous that a jury is incompetent to deal intelligently with them and come to a just conclusion."

In *Kuhl v. Pierce County,* 44 Neb. 584, in an action against a county treasurer and his bondsmen for two successive terms, the sureties being different persons, the petition alleged that because of the manner in which the treasurer had kept his books of account his record did not disclose whether the defalcations, complained of in the petition, occurred during his first or second term. The prayer of the petition was for an accounting in equity. *"Held,* (1) That the averments of the petition made out a cause of action in favor of the county upon contracts for the payment of money

only unincumbered by any collateral agreements, contracts, or securities whatever; (2) that the action was one legal in its nature; (3) that the facts averred in the petition were not sufficient to entitle the county to equitable relief."

In *Lamaster v. Scofield,* 5 Neb. 148, it was held: "Under the Code, discovery has ceased to be one of the objects sought in a court of equity. Jurisdiction, therefore, in cases of mutual accounts between the parties, cannot be maintained on that ground, and is restricted to cases which have their origin in intimate or confidential relations of the parties, and does not extend to ordinary cases of mutual accounts between creditor and debtor."

We are convinced, from an examination of the pleadings, that the action is not one for equity jurisdiction, but is an action at law to recover a specific amount which plaintiffs claim defendants have embezzled and appropriated to their own use.

The trial court found generally for the defendants. The evidence respecting Dickerson's mental condition was in conflict. We must, therefore, conclude that James Dickerson was mentally competent to transact his business. Moreover, the evidence shows that he had been a farmer and stock raiser, and continued his farm operations, the buying, selling and shipping of live stock to the markets, until within a few months of his death. There is no evidence that the amounts paid to Roper were intended by Dickerson to be used to make payment upon his mortgage to the land bank, except the inference that might be drawn from the fact that the money was left with Roper, or with the credit association, on interest, until the first day of October, when his interest payment was due and he could make a payment upon the principal of his mortgage. If Dickerson was competent, as the court found, then it must be presumed that he knew he had loaned the money to the credit association; that he was to receive

interest thereon at the rate his mortgage bore. He knew that that instrument plainly provided for the repayment of the money to him at a fixed date, to wit, October 1, 1928. He knew, when Tresnak and Vakiner visited him at his farm and informed him of the financial condition of the credit association, that they were tendering him a note, due in two years, drawing interest at 4 per cent., which he consented to accept as representing his claim against the credit association, and not a claim against the national association. He had been careful to preserve in his safe deposit box the evidence of his deposit with the credit association. When he agreed to accept the note he agreed to return that evidence, and this he did, clearly showing that he understood the transaction. Later, it appears, the credit association became bankrupt and Dickerson executed a power of attorney to a reputable lawyer to represent his claim against the bankrupt estate, and the attorney prepared for him, and he signed and verified, a claim against the bankrupt estate of the credit association. Two dividends have been paid by the bankrupt estate which were received either by Dickerson or by the plaintiffs in this action.

From the entire record, we conclude that the action was not equitable in its nature, but was one at law; that there is ample evidence to support the findings of the trial court.

No error is apparent in the record. The judgment is therefore

AFFIRMED.

MANLEY N. PATTERSON, APPELLEE, V. WILLIAM W. KERR, APPELLANT.

FILED MAY 15, 1934. No. 28930.

1. **Courts.** Where this court established a rule and it has been followed for more than thirteen years by trial courts of this state, it ought not to be changed except for reasons of grave importance.

2. ———. An instruction, in the language of an opinion of this court construing a statute, approved indirectly and directly in numerous cases for a period of thirteen years, will not be held reversible error unless prejudicial.
3. **Appeal.** Erroneous instruction is not reversible error, unless it is prejudicial to substantial rights of appellant.
4. ———. Where instruction is given which is not misleading and which ordinarily would be construed by laymen to accord with the well-settled rule governing the question in issue, it does not constitute reversible error.
5. **Evidence.** Speed of an automobile is not a matter of exclusive expert knowledge or skill, but any one with a knowledge of time and distance is a competent witness to give an estimate. The opportunity and extent of his observation goes to the weight of the testimony.
6. **Negligence.** Under the doctrine of comparative negligence, all questions of negligence and contributory negligence are for the jury.
7. ———. Where there is some evidence of contributory negligence, failure to submit issue to the jury is reversible error.
8. **Appeal:** BILL OF EXCEPTIONS. Affidavits not included in bill of exceptions will not be considered by this court.
9. ———: ———. Where it is apparent, from bill of exceptions itself, material evidence has been omitted, the certificate that it contains all that was considered by the court will not be taken as conclusive.
10. ———: ———. Where there is no proper bill of exceptions in the record, a question will not be determined which requires consideration of evidence which has not been made a part of the record.
11. **Damages.** Evidence as to plaintiff's disability examined and *held* that judgment is not excessive.

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

Stewart, Stewart & Whitworth and *F. L. Rain,* for appellant.

Burkett, Wilson, Brown & Van Kirk and *E. A. Wunder, contra.*

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

DAY, J.

This is an action to recover damages resulting from a collision between automobiles owned and driven by plaintiff and defendant. Defendant appeals from a judgment in favor of plaintiff for $6,500.

The appellant argues various assignments of error, one of which is directed to the instruction relating to the doctrine of comparative negligence. The doctrine of comparative negligence, with recovery to the plaintiff whose contributory negligence was slight and the negligence of defendant gross in comparison, with a mitigation of damages in proportion to the amount of contributory negligence attributable to plaintiff, was adopted in this state by legislative enactment in 1913. Laws 1913, ch. 124, now Comp. St. 1929, sec. 20-1151. Some confusion resulted by engrafting this doctrine on our jurisprudence by statute. Several judgments were reversed because of erroneous instructions. In 1920 this court made a careful and comprehensive examination of this subject in the case of *Morrison v. Scotts Bluff County,* 104 Neb. 254, and held in part: "Even when plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained." It is noted that the language of the instruction criticized here is identical with that of the opinion in *Morrison v. Scotts Bluff County.* The criticism of the instruction is that it attempts to compare "contributory negligence" with "the whole amount of damage sustained." For a criticism of this instruction, see *Sgroi v. Yellow Cab & Baggage Co.,* 124 Neb. 525, in which it was said: "It is clear that the comparison was to be made between the negligence of the two parties, and if the plaintiff was entitled to recover, then her recovery should be reduced in the proportion that her negligence contributed to the injury." This criticism was not necessary to a decision of the case, but it was held that, even if erroneous, the instruction was not prejudicial there,

for that it related only to the measure of recovery, and there was no assignment of error that the verdict was excessive.

This instruction has a long judicial history. It was quoted in the syllabus in *Bauer & Johnson Co. v. National Roofing Co.*, 107 Neb. 831, as decisive of that case. It was again quoted in the syllabus of *Mitchell v. Missouri P. R. Corporation*, 114 Neb. 72, as applicable where the controlling issues in the case are the matters of negligence and contributory negligence. In *Emel v. Standard Oil Co.*, 117 Neb. 418, after criticizing the instruction there given on comparative negligence, this court said: "It may well be said in passing that the opinion of this court in *Morrison v. Scotts Bluff County, supra, affords trial courts a safe guide* (italics ours) for instructing on the rule of comparative negligence." In *Pratt v. Western Bridge & Construction Co.*, 116 Neb. 553, this court said: "Since the case of *Morrison v. Scotts Bluff County*, 104 Neb. 254, decided by this court in 1920, there is scarcely any excuse for attempting to define the rule pertaining to comparative negligence otherwise than is therein stated." Very recently, in the case of *Brooks v. Thayer County*, 126 Neb. 610, this court said: "Instruction No. 18 is a model instruction given by the court on comparative negligence, giving all the proper elements of such an instruction as laid down in the leading case on that subject. *Morrison v. Scotts Bluff County*, 104 Neb. 254." An examination of the transcript in *Brooks v. Thayer County, supra*, discloses that instruction No. 18 used the identical language of the instruction in this case.

In the interests of grammatical exactitude, trial courts should correct what has become a stock instruction by virtue of this court's decision in *Morrison v. Scotts Bluff County, supra*. But where this court established a rule and it has been followed for more than thirteen years by trial courts of this state, it ought not to be changed except for reasons of grave importance. It has been held to be a good reason for refusing to change a rule

established by a decision of court that it has been adhered to for many years. *Purvis v. Shuman,* 273 Ill. 286. In 15 C. J. 944, it is stated: "The doctrine of *stare decisis* applies with full force to decisions construing statutes, especially where they have been long acquiesced in." See *Bradley v. Village of Union,* 150 N. Y. Supp. 112; *Miller v. Hart,* 161 Wis. 611. Our court has followed this rule in *Mosher v. Huwaldt,* 86 Neb. 686, where it was held: "This court is not ordinarily bound by the construction put upon statutes by former opinions, if such construction is dictum only, being unnecessary to the determination of the case then before the court, but when such construction involves a question of practice only, and has been for more than 19 years followed by the trial courts, and indirectly several times approved by this court, it will be followed until changed by the lawmakers." An instruction, in the language of an opinion of this court construing a statute, approved indirectly and directly in numerous cases for a period of thirteen years, will not be held reversible error unless prejudicial.

Section 20-853, Comp. St. 1929, provides: "The court in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." This section of the statute was discussed in *Maxson v. J. I. Case Threshing Machine Co.,* 81 Neb. 546, as follows: "This court will disregard any error or defect in instructions given or error in the failure or refusal to give instructions requested, where the action of the trial court did not affect the substantial rights of the litigants." The application of this positive legislative mandate compels us to ignore the irregular language of this instruction.

The instruction taken as a whole was clear to the jury and did not affect the substantial rights of the appellant. The entire instruction is set out to clarify the argument herein: "The jury are instructed that if, on the trial of

an action brought to recover damages for injuries to a person and his property caused by the negligence of another, the plaintiff is found to be guilty of negligence directly contributing to the injuries complained of, he cannot recover, even though the defendant was negligent, unless the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison therewith; and if, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which, under the circumstances, amounts to slight negligence, or if the negligence of the defendant falls in any degree short of gross negligence, under the circumstances, the contributory negligence of the plaintiff, however slight, will defeat a recovery, *and even when the plaintiff has established his right to recover under this rule, it is the duty of the jury to deduct from the amount of damages sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained.*" (Italics indicate the part to which complaint is directed here.) Is the language so ambiguous as to require a reversal? The prevailing modern tendency of judicial decisions is not toward such inconsequential, technical refinements. The trend of the decisions of this court has been stated in *Waltz v. Elmore,* 95 Neb. 736: "Error in instructions which are not prejudicial to appellant is not a ground for reversing a judgment against him." Very recently this court said in *Kelso v. Seward County,* 117 Neb. 136: "When an instruction is substantially correct, a case will not be reversed because it is possible to improve the phraseology thereof."

The instruction is not misleading. The instruction correctly told the jury that they must compare the negligence of the plaintiff and the defendant and that under certain circumstances the plaintiff was entitled to recover. This would clearly inform the jury that they were comparing negligence of the parties, and then when they are told that if the plaintiff, after such a comparison, is en-

titled to recover they shall deduct from the amount of damages sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained, they, as laymen, would understand that the verdict is to be reduced by the amount that the plaintiff's negligence contributes toward the damage.

Let us consider the practical application of this instruction. If the jury find both parties guilty of negligence, and find that the plaintiff's negligence was slight in comparison with the gross negligence of defendant, and find that the total damage of the plaintiff was $6,000, and that the slight negligence of the plaintiff is by comparison with the gross negligence of the defendant one-sixth of the gross negligence of defendant, then they must reduce the total amount of damages sustained by one-sixth, and the recovery could only be for five-sixths of such damage, or $5,000. The language, taken in its context in the sentence, is not ambiguous or misleading. Where an instruction is given which is not misleading and which would ordinarily be construed by laymen to accord with the well-settled rule governing the question in issue, it does not constitute reversible error. *Moore v. Sturm,* 88 Neb. 793.

But the appellee argues that the instruction is not prejudicially erroneous, because the evidence does not establish that the plaintiff's negligence was either a proximate or concurrent cause of the accident. We cannot agree with this contention. Let us first consider the evidence of the defendant upon the question of the negligence of the plaintiff. The defendant's evidence is in substance that he was driving east on the highway at about 40 miles an hour; that, as he approached a wagon loaded with cobs, he slackened his speed to 25 miles; that, when the wagon had passed the crest of the hill, he turned out to go around the wagon, at which time he saw plaintiff's car about 200 feet away; that there was room to drive his car between plaintiff's car and the wagon if he had driven it directly east and west; that plaintiff driving west

was never south of the center of the graveled thirty-foot highway; that defendant's right front end of car was damaged by the collision, and plaintiff's car landed in the ditch. This much of the testimony does not establish negligence of the plaintiff, even when viewed most favorably for the defendant. Of course, the plaintiff's evidence directly disputes that of defendant in some material matters which are not here considered, because that is a question of weight of evidence.

But the defendant testified over objections that the plaintiff was driving 50 or 55 miles an hour and negligence on the part of the plaintiff is predicated upon this fact. The plaintiff was coming directly toward defendant and collided with him. The defendant was competent to testify as to the speed of the car. "A witness who sees a moving car, and possesses a knowledge of time and distance, is competent to express an opinion as to the rate of speed." *Pierce v. Lincoln Traction Co.*, 92 Neb. 797 (quoting from *Omaha Street R. Co. v. Larson*, 70 Neb. 591). The rule is stated in a different way in *Coffey v. Omaha & C. B. Street R. Co.*, 79 Neb. 286, that, since there is no reason why an independent observer of moving objects cannot express an opinion of value as to speed, such testimony is received and appraised according to the means of the observer and the standards he has used. See, also, *Oakes v. Omaha & C. B. Street R. Co.*, 104 Neb. 788; *Miller v. Central Taxi Co.*, 110 Neb. 306; *Dunkelbeck v. Meyer*, 140 Minn. 283. In *Owens v. Iowa County*, 169 N. W. 388 (186 Ia. 408) it was held: "Testimony of one, several hundred yards directly in front of an automobile in the nighttime, as to the speed thereof, might be of little value, but should not be excluded on that account." Jones, Commentaries on Evidence (2d ed.) 2323, 2330, discusses the rule as follows: "A person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile was being operated at a given time. The rate of speed of an automobile on a public highway is a

matter of which people generally have some knowledge. It is not a matter exclusively of expert knowledge or skill. As stated above, where the rate of speed of such a vehicle is material in an action, any person of ordinary ability and means of observation who may have observed the vehicle may give his estimate as to the rate of speed at which it was moving. The extent of his observation goes to the weight of his testimony." Whether the speed of plaintiff under the conditions of the traffic at the time of the accident was negligence was a question for the jury. In addition, testimony of plaintiff relating to condition of brakes on his car and the physical facts raise a question upon plaintiff's negligence upon which reasonable minds might differ. Under the doctrine of comparative negligence, all questions of negligence and contributory negligence are for the jury. Comp. St. 1929, sec. 20-1151; *Day v. Metropolitan Utilities District,* 115 Neb. 711; *Casey v. Ford Motor Co.,* 108 Neb. 352. Where there is some evidence of contributory negligence, failure to submit issue to the jury is reversible error. *Mares v. Chaloupka,* 110 Neb. 199. Therefore, if the instruction were prejudicially erroneous, it would require a reversal of this judgment.

Another assignment of error challenges the verdict for that it was what is commonly known as a quotient verdict. The defendant relies upon *Killion v. Dinklage,* 121 Neb. 322, in which we defined, discussed and condemned a quotient verdict. The defendant offered in evidence affidavits of ten of the jurors to establish the fact that the verdict was in fact a quotient verdict. These affidavits were prepared in blank and apparently were prepared by the defendant. If the affidavits thus filed are to be relied upon, it would seem that this verdict comes within the definition of a quotient verdict unless the fact that eight of the ten affidavits contain a statement, "And we added a small amount to make it come out even," would indicate that the verdict was not the result of the agreement that they should adopt the quotient obtained by

adding together the amounts which each of the jurors thought the verdict should be and dividing by twelve. However, we do not have to determine the question upon this affidavit. The plaintiff also prepared affidavits which were filed and form a part of the transcript but are not included in the bill of exceptions. Affidavits not included in the bill of exceptions will not be considered by this court. *First Trust Co. v. Glendale Realty Co.*, 125 Neb. 283. In the bill of exceptions we find a note by the reporter of the minutes of the court as of the dates shown. "April 14. Affidavits in support of motion for new trial filed by defendant submitted. The affidavits in opposition to the defendant's affidavits in support of new trial submitted." The reporter further reported the hearing on the motion for new trial from which it appears that affidavits had been filed by both the plaintiff and defendant relating to the question of a quotient verdict. This appears in the bill of exceptions as settled by the court. An inspection of the bill of exceptions indicates that material evidence has been omitted upon which the court based its judgment. The rule is well established in this state that, where it is apparent, from the bill of exceptions itself, material evidence has been omitted, the certificate that it contains all that was considered by the court will not be taken as conclusive. *Missouri P. R. Co. v. Hays*, 15 Neb. 224. In *Dawson v. Stockmen's Nat. Bank*, 119 Neb. 115, this court said in substance that it is true that the certificate to the bill of exceptions is to the effect that it is complete and contains all the evidence produced on the trial, but we find within the bill itself, in the questions and answers especially, incontestable proof that it does not. When such is the case, the certificate will not be taken as conclusive on that point. When all the evidence used on a trial is not before us, we cannot say that the finding was unsupported. "A bill of exceptions showing on its face that material evidence has been omitted will not be considered on appeal in determining issues of fact or the

sufficiency of the evidence to sustain a finding below, though certified by the trial judge as a bill of exceptions containing all the evidence." See, also, *Oberfelder v. Kavanaugh,* 29 Neb. 427. *Dawson v. Williams,* 37 Neb. 1, states the rule as follows: "If the bill of exceptions discloses that without doubt important evidence has been therefrom omitted, the settlement and authentication of the bill of exceptions will not control, though therein the recitations are to the contrary, and in such case the verdict will not be disturbed as contrary to the evidence." See *Nelson v. Jenkins,* 42 Neb. 133; *Alling v. Fisher,* 55 Neb. 239; *Storz v. Finklestein,* 48 Neb. 27; *Greene v. Greene,* 49 Neb. 546.

Since the bill of exceptions in this case discloses that important material evidence has been omitted and contains only a part of the evidence which was considered by the trial judge, the judgment of the trial court will not be disturbed. The bill of exceptions is not a proper one, and where there is no proper bill of exceptions in the record, a question will not be determined which requires consideration of evidence which has not been made a part of the record. *Hazelet v. Holt County,* 51 Neb. 724; *Beatrice Savings Bank v. Beatrice Chautauqua Assembly,* 54 Neb. 592; *Andrews v. Kerr,* 54 Neb. 618; *German Nat. Bank v. Farmers & Merchants Bank,* 54 Neb. 593. In such a case, this court will presume that the evidence was sufficient to support a finding of the trial court. It is here noted without discussion of the effect, because unnecessary to a determination of this case, that the journal entry overruling the motion for a new trial contains this statement: "The affidavits for the motion for a new trial filed by the defendant are submitted to the court as are the affidavits in opposition to the defendant's affidavits in support of the motion for new trial." The effect of an apparent conflict between different parts of the record is an interesting question we reluctantly refrain from discussing.

The last assignment of error which we will discuss is

that the verdict was excessive. The verdict was for $8,788. The trial judge required a remittitur of $2,288 as a condition for overruling the motion for new trial and entered judgment for $6,500. The plaintiff was badly injured, his leg was broken and is now shorter than the other. There was a dispute as to the cause of the shortness which was submitted to the jury. The evidence discloses that this man was seriously and permanently injured, and the judgment of $6,500 is not excessive. If some elements of damage were submitted to the jury upon which the plaintiff was not entitled to recover, such as inclusion of the expenses for expert testimony with medical services, and damages for other small matters, it has been taken care of by the remittitur required by the trial court, the judgment is not at this time subject to criticism as being excessive.

The evidence supports the requirement of the trial court that a remittitur be filed. This court will not set aside such a remittitur as the evidence may warrant.

The appellant cites *Zelenka v. Union Stock Yards Co.*, 82 Neb. 511, to support his contention that the trial court should have given an instruction on the doctrine of last clear chance. The instruction upon this doctrine was not necessary. Before the last clear chance doctrine may be applied, it must appear from the evidence that plaintiff discovered or by the exercise of ordinary care could have discovered the defendant in a position of danger in time to have prevented the accident. *Zitnik v. Union P. R. Co.*, 91 Neb. 679; *Lucas v. Omaha & C. B. Street R. Co.*, 104 Neb. 432; *Wilson v. Union P. R. Co.*, 107 Neb. 111. The defendant's version of the accident is that he drove around the wagon-load of cobs and had plenty of room to pass between it and the plaintiff's car. The plaintiff had a right to assume that defendant would do so. When it could have become apparent to plaintiff in the exercise of ordinary care that defendant would not, it would have been impossible to stop his car. Appellant is mistaken when he argues that plaintiff should have stopped when

he first saw defendant turning around the wagon. He was not then in apparent danger, and had defendant exercised ordinary care he never would have been in imminent peril. One is required only to have his car under such reasonable control as to be able to avoid a collision with other vehicles whose drivers exercise due care. Complete control which is such as will prevent collision by the anticipation of negligence on the part of another in the absence of warning or knowledge is not required. *Spomer v. Allied Electric & Fixture Co.*, 120 Neb. 399. The inferences most favorable to defendant which can be drawn from the evidence do not bring this case within the doctrine of the last clear chance.

We have carefully considered all the assignments of error and the arguments thereon, and we find no reversible error.

AFFIRMED.

A. F. BOTSFORD, APPELLEE, V. CARL HOLCOMB ET AL., APPELLANTS.

FILED MAY 15, 1934. No. 28959.

1. **Fraudulent Conveyances.** Where purchaser of stock of merchandise in bulk substantially complies with "bulk sales law," execution cannot be levied thereafter on stock of goods by judgment creditor of seller. Comp. St. 1929, sec. 36-501.
2. ———. Examination of evidence requires finding that there was substantial compliance with "bulk sales law" in this case. Comp. St. 1929, sec. 36-501.

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

Schaper & Runyan, for appellants.

Squires, Johnson & Johnson, contra.

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

DAY, J.

This is a replevin action upon a trial to the court without the intervention of a jury. A judgment was entered in favor of plaintiff and against defendants, from which an appeal was taken to this court.

The case arose in the following manner: J. H. Ottun owned and operated a general merchandise store at Sargent for a number of years. He was indebted to the Sargent State Bank and to several others. He was hopelessly insolvent and started negotiations with one of his creditors to make an assignment for the benefit of creditors. This creditor referred the matter to the Omaha Association of Credit Men who sent an agent to Sargent. An arrangement was made whereby the stock of goods was sold to Botsford, plaintiff in this case and a son-in-law of Ottun. The Sargent State Bank was one of Ottun's creditors and after this sale secured a judgment. A levy was made under an execution issued on this judgment by the defendants, the sheriff and deputy sheriff of Custer county, which precipitated this case.

The determination depends upon whether or not there was a compliance with section 36-501, Comp. St. 1929, commonly known as the "bulk sales law." The defendants contend that the assignment to a Council Bluffs, Iowa, wholesale grocery dealer was by him assigned to the Omaha Association of Credit Men. There is no evidence to support such a finding of fact. The representative of the credit organization apparently acted as a mediator between creditors and Ottun and Botsford. It is urged that the alleged assignment was in fact a sale without a compliance with the law relating to the disposal of a stock of merchandise. Since it appears that there was in fact no such assignment, there was no necessity for an attempted compliance.

The sale of this stock and fixtures (the law does not apply to sales of fixtures, *Lee v. Gillen & Boney*, 90 Neb. 730) was by Ottun to Botsford. The bill of sale was signed by a representative of the Omaha Association of

Credit Men as agent for Ottun. This does not sustain the claim of defendants that an assignment had been made to them.

Since this is a sale by Ottun to Botsford, it is necessary to examine the circumstances under which it was consummated. Botsford made an offer to buy the stock and fixtures. An inventory had been taken by Ottun and McQueen, an employee of the Omaha Association of Credit Men. Instead of making another inventory, Botsford accepted this one as his own. Ottun made a sworn statement, listing his creditors and the amounts he owed them. Botsford was given a copy.

On January 25, 1932, the following notice was sent to the creditors: "You are hereby notified that the undersigned A. F. Botsford of Ainsworth, Nebraska, is purchasing through the Omaha Association of Credit Men, of Omaha, Nebraska, the stock of groceries, invoicing $449.02, and fixtures, invoicing $113, of J. H. Ottun, Sargent, Nebraska, in bulk for the sum of $325. The purchaser will take possession of said property and pay therefor on February 1, 1932. This notice is sent to you in compliance with the bulk sales law of the state of Nebraska. A. F. Botsford (Purchaser)." This notice was received by the judgment creditor for whom the sheriff made the levy involved in this case on January 26, and the sale was consummated, possession taken, and settlement made by Botsford on February 1 following.

Botsford's money went to creditors and not to Ottun. The bank did not get any part of this money for that it would not take it in full settlement of its claim as did all the other creditors. There is no evidence to indicate that any one misled the bank in any way about this transaction. With the notice required by law, it made no objection and took no action to prevent the sale. (1) An inventory was taken; (2) a sworn statement of the list of creditors was made and the amount of all indebtedness, and the sum due each; and (3) five days before taking possession or paying therefor, every creditor listed (in-

cluding the bank) was notified by registered mail of the proposed sale, the price, terms and conditions thereof. This complied substantially with the "bulk sales law." Until this sale was consummated, Ottun was the owner and in possession of the stock of merchandise. There is no evidence of bad faith in the transaction. That the price was reasonable and fair is not questioned. The bank cannot thereafter subject the property to the payment of its judgment. An assessment of the property in the name of Mrs. Ottun instead of Botsford, considered with the evidence relating to the assessment made in the absence of Botsford, Ottun himself disclaiming ownership to the assessor, does not establish that Botsford was not the owner. Botsford as the owner of the stock of merchandise and the fixtures can leave them with whom he sees fit, even his father-in-law Ottun. For remedies when there is no compliance with the "bulk sales law" see *Mutz v. Sanderson,* 94 Neb. 293; *Damicus v. Kelly,* 120 Neb. 588.

The trial court properly decreed that there had been a substantial compliance with the "bulk sales law;" that the property belonged to Botsford and could not be subjected to the payment of a judgment against Ottun.

AFFIRMED.

IN RE GUARDIANSHIP OF ROBERT B. HERTEN ET AL. AGNES STEWART, GUARDIAN, APPELLANT, V. FRANK HERTEN, GUARDIAN, APPELLEE.

FILED MAY 15, 1934. No. 28925.

1. **Infants:** CUSTODY. In considering the proper custody of minor children, the expressed wish of a dying father should always be given great weight by the court, but it does not relieve the court from the responsibility of determining from all the evidence the one question of paramount consideration, *i. e.,* what is now for the best interests of the child.
2. ———: ———. It is ordinarily true that a brother and sister should be kept together. However, when the brother is in high

school, and may soon leave for college, while the sister has not entered school, and has been habitually ailing, and is in the hands of a loving and devoted uncle and aunt, who have tenderly nursed her through continuing sickness, it is clear that the best interests of the little girl require that she remain where she is for the present.

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

Robert G. Fuhrman and *Anson H. Bigelow,* for appellant.

Alfred D. Raun, contra.

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

PAINE, J.

This is a controversy between a brother and sister, who are joint testamentary guardians of two minor children. They each have the custody of one minor, and the sister brings action to get the custody of both minors.

Charles F. Herten, a stock-feeder and farmer of Walthill, died January 29, 1931, following an operation for stomach trouble. His wife died two days prior thereto from an infection communicated to her from her infant daughter, Marilyn, who had been very sick for two weeks. The objects of this litigation are the orphans left, to wit, a son, Robert, born in 1917, and this infant daughter, Marilyn. On the night before his death Charles F. Herten made a will, giving almost his entire estate, which was later appraised at $94,979 (now worth perhaps $70,000), to these two children, and appointing his sister, Agnes Stewart, the plaintiff herein, and his brother Frank, the defendant herein, as joint guardians.

Mrs. Agnes Stewart lives with her husband in a rented home at 2016 North Fiftieth street, Omaha, five or six blocks from the Benson high school, and in a high-class residence district. They have no children of their own, but Mrs. Stewart's sister, Miss Tina Herten, about 24

years of age, makes her home with them. Robert Herten, the older of the two children of Charles F. Herten, has lived with them since March 22, 1931. Mr. Stewart is manager of a laundry supply house, and earns about $350 a month, being a stockholder in the company.

Frank Herten lives at Walthill, Nebraska, in the former Charles F. Herten residence, at a rental to the estate fixed by the court. He had worked for his deceased brother, Charles, for about 18 years. After his brother's death he moved from the house he had occupied, which was given to him in the will. His household comprises himself, his wife, Benita, a former school-teacher and now a member of the school board in Walthill, and little Marilyn, who has been with them since the death of her parents. They have no children of their own. Frank Herten has been operating the Charles F. Herten farm at Rosalie, the Herten 80 acres at the edge of Walthill, and an adjoining 80 acres rented from Chester Boughn, coexecutor of the Charles F. Herten estate, and he also feeds hogs in the Charles F. Herten feed yards.

When Charles F. Herten died, January 29, 1931, leaving two children and a considerable estate, his death started a series of lawsuits, which have disturbed the peace of mind of the children and relatives, and estranged a brother and sister, who were appointed joint guardians.

The first appearance in this court of litigation affecting these two minors is the case of *Stewart v. Herten,* 125 Neb. 210, where a decision was entered upon an action brought by Agnes Stewart in the district court to have a trust company appointed to handle the funds of the wards, and it was held that exclusive original jurisdiction in such matters is conferred on the county court, and that the district court was not authorized to entertain original jurisdiction in such matter, and that the district court could not appoint a trustee who would take over the property of these two minors, and manage and invest and control it, for that power was granted by the county court to the joint testamentary guardians.

The transcript shows that on February 23, 1931, the county judge issued letters of guardianship, naming the plaintiff and defendant in this case as joint testamentary guardians, directing them to take the custody of the two minor children, and the care and management of their estate. Upon March 27, 1931, the plaintiff herein filed her petition, asking that she be given the custody of both children. On April 17 Frank Herten, the defendant herein, filed his answer and cross-petition, denying many of the allegations in the petition, and asking that he be given the custody of both minors, and upon April 21 Anson H. Bigelow, attorney for the plaintiff, filed a petition of intervention for seven other relatives, joining in the request of the plaintiff herein for the custody of both of them.

Upon June 13, 1931, the county judge entered his order, finding that, at the time of the death of the father, both minor children were in the home and in the custody of the defendant herein, but that soon thereafter the minor son, Robert, began spending a part of his time with his maternal grandparents, and about March 1, 1931, abandoned the home of this defendant, in which his sister was then living, and where she has continued to live, and lived with his grandparents until March 22, 1931, when he voluntarily went to Omaha to live with the plaintiff herein; and decided that the said Robert might remain with the plaintiff herein at her home in Omaha. The court further found that Marilyn was not of school age, and that the defendant and his wife are suitable and proper persons to have the care, custody, control, and education of Marilyn, and that she shall be permitted to visit her maternal grandparents, also living in Walthill, a portion of three days in each week between meal-times.

The concluding paragraph of the county judge's order as to custody reads as follows: "It is further ordered that as this is not a controversy between the joint guardians and outside contestants but is a personal controversy between one joint guardian and the other as to custody

no costs or expenses arising out of the question of custody are taxable against the estates of said minors."

On July 10, 1931, the plaintiff herein having filed her notice of intention to appeal, it was provided that no appeal bond be required of her. On August 20, 1931, the plaintiff herein filed her petition on appeal in the district court, setting up that on January 29, 1931, as her brother was facing a serious operation, he made his last will and testament, in which the plaintiff and defendant, being brother and sister, were appointed joint guardians of the children, and that the dying man asked the plaintiff herein if she would be willing to assume the care of both of his children, and she now prays for the custody of both of the minor children. That on September 12, 1931, the defendant and cross-petitioner filed his answer, stating that he and his wife have had the complete care and custody of the minor Marilyn from the day of the death of her mother; that Marilyn is now only slightly over two years of age, and has been carefully taken care of by the defendant and his wife, who are living in the valuable, modern home belonging to the two minors, and that the minor Robert could also be taken care of in the same home at less expense than in Omaha. That Charles F. Herten before his death expressed the wish that his brother, Frank Herten, live in said home; that it is within three blocks of an up-to-date grade and high school. That the defendant and his wife are good, frugal, Christian people, and are capable and competent to have the care and custody of the minors, and asks that the petition of Agnes Stewart, his sister, be denied, and that he be given the custody of the two minors; and again a petition of intervention is filed, signed by Anson H. Bigelow, attorney for the plaintiff, for seven other relatives joining in the request of the plaintiff. But on December 11, 1931, five of the seven interveners asked to withdraw their appearance as interveners, and asked that their petition be dismissed, which was granted by the district judge.

This case was tried to Honorable Louis Lightner, district judge, and upon April 4, 1933, he filed his written findings and decree.

Several parties were in the hospital and heard the father speak of the two children. Agnes Stewart, the plaintiff herein, testifies: "He said, 'Agnes, will you take the children?' I said: 'Yes.' And he said: 'How will Phil feel about it?' And I said: 'Charley, Phil will feel the same way as I do; do you want me to ask him; would you feel better?' And he said: 'Yes.' So I called Phil in and Phil came and he asked Phil. * * * Phil said he would see that his wishes were fulfilled."

Chester Boughn, a druggist and the closest friend of Charles F. Herten, testified: "In my own language—Charley looked up at Agnes. He says: 'Agnes, just which one of my children do you want?' She says: 'Both of them.' He says, 'No; not both of them,' or words to that effect, and he says: 'What will Phil say about this?' 'Well,' she says, 'we will just send and get him.' So she went and got him, or somebody else. They brought him in, and Charley says to him, Charley or Agnes, I don't know which, says: 'We were just talking about the children.' I think she was the one that was talking there of the children. And she says: 'Charley wants to know how you would feel about having one of the children.' And Phil says: 'That is all right, Charley; whatever you say is perfectly all right,' or words to that effect; 'whatever you say is perfectly all right with me.'"

Dr. Alva Rousey was also in the room at the hospital at the time, and testified that, "when Phil was called into the room, * * * he asked Phil if it would be all right with him if he and Agnes, or rather if Agnes would take one of the children, in case he died. * * * He said anything that Charley wished would be all right with him, whatever he wanted to do. Q. And did Charley say anything to Frank at that time? A. Well, if I remember correctly, he just turned to Frank and asked him if it was all right, and Frank nodded it was."

While the evidence is sharply in conflict as to the exact words of the father, and while Agnes Stewart insists that he gave both of the children to her, even if this was not disputed by other witnesses, we do not believe that the expressed wish of a dying father would be final. If he could be here today, under the many changed conditions, he might have entirely different wishes. The governing rule, that has ever been adhered to by courts from the earliest times, is, what is now for the best interests of these two children?

"That a deceased parent of minor children expressed a wish as to the appointment of a guardian, or that a guardian is designated in a will, will not oust the jurisdiction of the court to determine who shall be the guardian." *In re Waite,* 180 N. W. 159 (190 Ia. 182).

"One with whom the child has had a home, where it has been properly treated and cared for, should be preferred over one whose appointment would necessitate its removal to a new home. So the separation of children of tender years from one another, or from those to whom they have become attached, should be avoided unless their true interests peremptorily require it." Woerner, American Law of Guardianship, 101, sec. 32.

"The rule of the court in choosing guardians seems to be to fix upon those who upon the whole appear best suited for, and will act most for the advantage of the ward. The court will consider nearness of relationship, and will select the nearest relations if there be no personal objection, *e. g.,* the aunt of the mother, the maternal uncle, the grandfather, the maternal grandmother, the uncle and aunt. The court will pay much regard to the wishes of the father, and will appoint as guardians those whom he has professed to appoint, though informally, *e. g.,* by a will not duly executed, * * * but the wishes of the father are not binding, and will not be acted on, if it be shown to be disadvantageous to the infant." Simpson, Law of Infants (4th ed.) 168.

The welfare of the child is the primary consideration

to which all other questions must yield, and the court must consider, not only the spiritual and temporal welfare, but the minor's further training, education, morals, and the ability of the proposed guardian to best take care of the child. *In re Butcher's Estate,* 266 Pa. St. 479.

"In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child." *Sturtevant v. State,* 15 Neb. 459.

"In a situation like this, there is only one sensible thing to do, to wit, consider what is the best interests of the child. Are her surroundings at present happy and conducive to the right development of character, mind and body? Should we, under the circumstances, change these happy relations? * * * We are loath to disturb the happy relations as they exist at the present time, and under the facts, as we understand them from the record, will only determine what is for the best interests of the child." *State v. Highberger,* 103 Neb. 258.

The boy Robert insists that he wants his sister with him in Omaha, but his conduct and actions, when he could have been with her in Walthill, do not entirely support his expressed desires on the witness-stand.

The little girl Marilyn has been sickly, and has been most tenderly nursed by her Uncle Frank and his good wife, Benita. She has suffered from kidney trouble, and they have watched over her diet and nursed her back to health with such loving devotion that they have earned the appellations by which she calls them, of "Papa" and "Mamma." They have now had her in their home longer than she was in the home of her own parents. To forcibly remove her from this home might be serious to her health. It is a fine, religious home, with all the surroundings that a little girl should have, and the district judge was right in leaving her there.

The plaintiff herein has Robert with her. He plainly desires to live in Omaha, with its city attractions and educational advantages; only time will tell whether he

will use these advantages wisely. But the district judge left Robert where he found him, and as he had the advantage of this court in seeing the witnesses face to face, and hearing the testimony from their lips, we are inclined to concur in his judgment. This court is adverse to this continual litigation in regard to these two children and their property, and suggests that the guardians husband these diminishing resources, and use them solely for the benefit of the children.

Each guardian is separately answerable for the steps taken in this matter. Possibly the plaintiff feels that this litigation, instituted by her to get for herself the exclusive custody of both minors, is in the nature of a service which is necessary or beneficial to these wards. This contention does not appeal to us. Litigation that is of benefit to the wards is often brought under specific authority from the county court, and it does not appear in the record that the county court has authorized or approved this litigation, and it appears to this court to be a simple contest between two joint guardians for personal supremacy, and it is the hope of the court that, for the effect upon the wards, such efforts will be discontinued. *In re Estate of Aubrey,* 128 Okla. 79; *In re Talomase's Estate,* 98 Okla. 212.

Finding no error in the record, the judgment of the district court is hereby

AFFIRMED.

DAY, J., dissents.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS & MERCHANTS BANK OF WESTON, E. H. LUIKART, RECEIVER, APPELLANT: CHARLES H. SLAMA, INTERVENER, APPELLEE.

FILED MAY 15, 1934. No. 28960.

1. **Banks and Banking.** A bank cannot ratify so much of an unauthorized act of its president as is to its advantage and repudiate the remainder.

2. **Principal and Agent.** "An affirmance of an unauthorized transaction may be inferred from a failure to repudiate it." Restatement, Agency, sec. 94.

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

James L. Brown, Clinton J. Campbell, F. C. Radke, Barlow Nye and *Schiefelbein & Donato,* for appellant.

H. H. Wilson, Charles H. Slama and *H. A. Bryant, contra.*

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

PAINE, J.

From a decree canceling the note of the intervener, and requiring the receiver of the Farmers & Merchants Bank of Weston to deliver the note to the intervener, the receiver appeals.

Charles H. Slama, intervener and appellee, a resident of Wahoo, Nebraska, alleges in his petition of intervention, filed August 3, 1931, that F. J. Kirchman was president of the Saunders County National Bank at Wahoo, and also president of the Farmers & Merchants Bank of Weston, Nebraska, and was a stockholder and director in both of said banks; that on Sunday, January 19, 1930, said Kirchman telephoned for the intervener to come right down to the Saunders County National Bank, and when he arrived Kirchman requested a favor of him. Kirchman told him that the Saunders County National Bank had a second mortgage of $10,000 on a half-section of land owned by Wilhelmina Hruby, which had been past due since November 1, 1929, and that the bank had been ordered by the examiner to either foreclose said mortgage or charge it off; that the surplus and undivided profits were not sufficient to charge the mortgage off from its books, and that the bank disliked to foreclose the mortgage against the maker thereof, who had been an old friend and good customer. Thereupon, Kirchman begged

intervener to take an assignment of the mortgage and foreclose it in his own name. Intervener replied to Kirchman that he was not in the market to buy any second mortgage, having no available funds, and Kirchman said he did not expect any cash, but would replace the assignment of mortgage in the bank's assets by notes, which he had already prepared, and dated them the day before, and that intervener's notes would be kept in the bank until a decree of foreclosure was obtained, and upon intervener then assigning the decree of foreclosure to the bank, said notes would be returned at once to the intervener. Mr. Slama, as well as citizens generally, had at that time entire confidence in said Kirchman, who had been in the banking business in one location in Wahoo for 45 years prior thereto. Intervener asked to see the mortgage, and Kirchman said he did not have it available, but would deliver it the next day. That, relying upon the representations of said Kirchman, the intervener signed the three notes for $3,000 each, and one note for $1,000, all prepared in advance by Kirchman, for which notes he was to receive the assignment of the $10,000 mortgage. That intervener called for the mortgage the next day, but found Kirchman too busy to attend to it, and did not actually receive the assignment of the mortgage until February 11, 1930, and immediately upon examining the title discovered an existing second mortgage of $6,000 against one of the quarters of land, in favor of the Nebraska State Savings Bank, operating in the same room as the Saunders County National Bank, and of which Kirchman was also president, and when his attention was called to this $6,000 mortgage, Kirchman agreed to have it released at once. That, relying upon all of these representations, the intervener brought a petition for foreclosure of the $10,000 mortgage upon February 14, 1930, subject to the first mortgage thereon of $24,000. That all three banks mentioned herein failed on April 15, 1930, and a decree of foreclosure upon intervener's petition was entered April 22, 1930, after which date he learned that

said Kirchman had failed to release the $6,000 mortgage, as promised, and demanded of the receiver that some of his $10,000 notes be returned to him, or the $6,000 mortgage released. That the receiver of the Nebraska State Savings Bank refused to deliver any of his notes, and refused to release the $6,000 second mortgage.

The intervener states that in April, 1930, seven banks in Wahoo and vicinity closed, and that he was beset with an enormous amount of labor, with investigations of numerous clients who were depositors and investors in said banks, and also by demands made upon him personally by reason of his being surety on several bonds for F. J. Kirchman, and that he suffered ill health thereafter, which accounts for his delay in filing the petition of intervention. That after the failure of the banks, the intervener found that the said Kirchman had made one of the notes payable to the Farmers & Merchants Bank of Weston in the sum of $3,000.

The intervener alleges that, promptly upon discovering the fraud, he informed the receiver of the bank of Weston of all the facts herein, and that he had received no consideration for said $3,000 note, and that said note was procured by fraud, deceit, and misrepresentation of the president of said bank, and the intervener asked that the note be canceled and delivered up by the receiver of said bank.

The receiver, for answer to the petition of intervention, admits that Kirchman was the president of both banks, and charges that, since acquiring knowledge of the alleged fraud practiced upon him by Kirchman, the intervener had made payments upon both principal and interest of the other three notes, which, with the note held by the receiver of the Farmers & Merchants Bank of Weston, all constituted one and the same transaction, and that by his conduct the intervener has ratified and affirmed the transaction with Kirchman, which was, in effect, an absolute purchase by Slama of the Hruby $10,000 mortgage. That if Kirchman, as president of the Nebraska State Savings

Bank, agreed to release the $6,000 mortgage, then it should be released by the receiver of that bank, and the receiver of the bank of Weston prays that the receiver of the Nebraska State Savings Bank be made a party and be ordered to release the $6,000 mortgage, and that the court render judgment against the intervener for the sum of $3,000, with interest at 7 per cent. from January 18, 1930, to July 18, 1930, and at 10 per cent. thereafter.

For reply the intervener alleged that, without his consent, Kirchman wrongfully transferred three of said notes to innocent purchasers for value, one for $3,000 to the State Bank of Swedeburg, of which Mr. Kirchman was only a director, and that he transferred the $1,000 note and a $3,000 note to the Federal Reserve Bank; that the intervener, after convincing himself that he had no defenses as against the holders of these three notes, paid off the $3,000 note to the State Bank of Swedeburg in full, and paid to the Federal Reserve Bank the $1,000 note in full, and $1,200 on the $3,000 note held by said Federal Reserve Bank.

At the trial the intervener testified that he had been attorney for the Saunders County National Bank for more than eight years. He then related at length how Mr. Kirchman had called him to the bank on that Sunday morning, January 19, 1930, and urged him to do the bank a favor by taking an assignment of the Mrs. Hruby $10,000 mortgage because it was not good advertising for the bank to foreclose it, and because her family had been very friendly with Kirchman; that Kirchman definitely promised to keep the four notes, which he then signed, for $10,000 there in the bank, and just as soon as the decree of foreclosure was secured and assigned to the bank his four notes would be returned to him, and in addition agreed to pay him the same attorney fee as though the foreclosure had been brought in the name of the bank; that when the intervener asked Kirchman for the note and mortgage he said it was locked up in the vault, and that he would send it up to him the next day,

and that he did not receive it the next day, and telephoned on several different days to Mr. Kirchman to send it up, but did not receive it until the middle of February. Intervener testified that he did not notice that the four notes he signed, amounting to $10,000, were not all payable to the same bank, but that one was payable and drawn on the blank of the Farmers & Merchants Bank of Weston, Nebraska, and another was payable to the State Bank of Swedeburg. Intervener testified that it was agreed that the notes would lie there in the bank, and not be negotiated, and that they were to be returned to him when the decree was signed. He testified that the Weston bank gave him no consideration for the note in question. The witness F. J. Kirchman testified that the bank examiner had objected to the Hruby mortgage, and directed that it be eliminated from the bank's assets, and that he had no means of eliminating it from the bank's assets, and got the intervener to accommodate him by executing four notes, on his agreement that he would see that the intervener lost nothing by the transaction. He admitted that he had the four notes all prepared before the intervener arrived at the bank that Sunday morning. Kirchman testified that in the foreclosure, so far as outward appearance was concerned, intervener was acting for himself, but that in reality he was acting for the bank. Kirchman denied that anything was said about assigning the decree, but testified that it was his intention to take the decree off from the intervener's hands as soon as things shaped themselves so he could get back intervener's notes. He said he told the intervener, "We will see that you don't lose anything by this transaction; it is an accommodation for the Saunders County National Bank and you will not be injured financially;" and admitted that he intended to so bind the National Bank, although he said that the agreement was not put in writing, which he now regretted, and said that his nephew, W. H. Kirchman, cashier of the bank, also knew all about the transaction. While being cross-examined, he was

handed exhibit 4, which was the written agreement covering this whole matter, signed by himself, his nephew, W. H. Kirchman, and Charles H. Slama, and then admitted that he had forgotten all about drawing up or signing this exhibit, which was also dated on Saturday, January 18, the same as the notes, and not on Sunday, January 19, when the transaction actually took place in the private office of F. J. Kirchman.

1. While this case is not free from doubt, and while the tragedy which resulted from the failure of an entire line of banks, under practically the same management, has brought untold loss to the depositors and many customers, who purchased questionable securities, represented to be good, yet each case which reaches this court must be determined upon the facts definitely proved in that particular case.

After a careful study of the evidence, including the exhibits in the case at bar, we are convinced that the intervener did not enter into a fraudulent deal with F. J. Kirchman. The intervener already owed the bank a large sum of money; he did not go to the bank that Sunday morning to buy a $10,000 mortgage; he went there as the attorney who had for many years been counsel for the bank. He was told that the examiner required that a past-due mortgage of $10,000 must be charged off or foreclosed. The bank's condition was such that it could not be charged off, hence it must be foreclosed. But it was against a friend of Kirchman, who was a valued customer of the bank, and she was also a widow. Kirchman wished to keep the bank's name out of the foreclosure suit, saying it would be poor advertising for the bank, and the intervener was persuaded to put in $10,000 worth of his personal notes, take an assignment of the mortgage, and immediately bring foreclosure, upon Kirchman's specific promise to return him his notes in exchange for the assignment of the decree of foreclosure. To make it still more clear that Slama is not more than a holder of the

naked title, a written memorandum, exhibit 4, executed at the time the notes were signed, provided that Kirchman would pay all the costs in connection with the foreclosure, including attorney's fees. If this was a *bona fide* sale of this mortgage, as claimed by the receiver, why should the bank agree to pay all costs, and also an attorney's fee to the intervener?

Viewed in this light, there was nothing crooked or fraudulent in the transaction, and Kirchman could have immediately reported to the examiner that he had followed his direction, and turned the mortgage over to the bank's attorney for action, and, to avoid a foreclosure in the bank's name, arranged to have the foreclosure brought in the name of the attorney.

The attorney for the intervener also stresses the point that the receiver has failed to prove that any depositor will suffer if the receiver is defeated in this action.

It was held in *First State Bank v. Hare,* 152 S. W. (Tex. Civ. App.) 501, that a bank which accepts a note obtained in negotiations conducted by its president cannot deny that he represented the bank in the transaction. To the same effect is an Iowa case. A cashier was required to hold stock in his bank, and a certificate was made out to Cashier Hambright, and paid for by his note, with the agreement that it would be carried by the bank without interest as long as he remained its cashier. He had also renewed this note. When he ceased to be cashier, the bank brought suit on the note. The defendant proved that the agreement included the condition that when he ceased to be cashier the certificate of stock would be returned to the bank, and his note returned to him. The bank alleged that Davis, its president, had no authority to make any such an agreement. The trial court held that, at most, it was a private deal between the president and cashier, and that this would not affect the note. Upon appeal, the appellate court reversed this decision, and held that the bank was not an indorsee holding title, but was

the original payee of a note secured by its president, who testified that, in making the transaction, he was acting in behalf of the bank. The holding in the first paragraph of the syllabus was: "A principal cannot ratify so much of the unauthorized act of its agent as it thinks to its advantage and repudiate the remainder." *Security Savings Bank v. Hambright,* 193 N. W. 576 (195 Ia. 1147).

2. Section 94, Restatement, Agency, says: "An affirmance of an unauthorized transaction may be inferred from a failure to repudiate it." And in the same authority, at section 104, the law is declared to be: "Although there is no ratification, a person on whose account another acts or purports to act may become a party to a transaction similar to the original transaction by manifesting consent, or he may become subject to liability for the value of the benefits received as a result of the original transaction." *Division No. 1, Railway Employees' Department, A. F. L., v. American State Bank,* 113 Neb. 196; *Security State Bank v. Schomberg,* 119 Neb. 598; *Brownell v. Ruwe,* 117 Neb. 407.

The receiver insists that a corporation is not chargeable with the knowledge, nor bound by the acts, of one of its officers in a matter in which he acts in behalf of his own interests, and deals with the corporation as a private individual, and in no way represents it in the transaction, citing *Koehler v. Dodge,* 31 Neb. 328; *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123.

But a careful consideration of all the evidence leaves little doubt that Kirchman, in taking this $3,000 note directly to the Weston bank, was acting for that bank. The cashier of that bank, Ferdinand Pacal, testified that, when he received the note in suit by mail, he gave credit on his books to the Saunders County National Bank, which had charged the note to his bank on its books, and that, in a talk with Mr. Kirchman prior to the failure of the two banks Mr. Kirchman told him that this note of the intervener would be taken up as soon as the foreclosure of the Hruby mortgage took place.

The trial judge wrote a long memorandum opinion, which discussed many features of the case at length, and we desire to set out two paragraphs found therein, as follows:

"It would seem to be rather clear that a president of a bank accepting a security knowing that it was defective and not an enforceable obligation would bind his bank by his knowledge of the fact. The cases cited by the receiver on this point concede that where the officer is acting for the bank his knowledge is imputed to the bank.

"Another contention of the receiver is that the president of the National Bank, as such, had no authority to make an agreement with Slama that he would not be required to pay the notes. This may be conceded as a general rule that where the bank parts with value for a note the president has no authority to release the note except upon payment. But the transaction with intervener was clearly within the implied authority of the president and the manager of the bank, in an arrangement whereby intervener was employed to assist the bank in collecting the asset represented by the Hruby mortgage, and the method employed contravenes no principle of law or ethics."

We are indebted to the receiver for furnishing us the full opinion of Judge Redick in his brief.

We are able to reach no other conclusion than that it would be unjust to allow the Weston bank to take advantage of that part of the transaction only by which it secured this note, and relieve it from the remainder of the same agreement. Finding no error in the judgment of the trial court, the same is hereby

AFFIRMED.

IN RE ESTATE OF ANTHONY M. WILSON.
E. H. LUIKART, RECEIVER, APPELLEE, V. CLAIR E. WILSON, ADMINISTRATOR, APPELLANT.

FILED MAY 15, 1934. No. 28638.

1. **Constitutional Law.** The provisions of section 7, art. XII of the Constitution, prior to amendment in 1930, were self-executing, and the bank stockholders' liability thereby created was free from legislative interference.
2. **Banks and Banking: LIABILITY OF STOCKHOLDERS.** Since the time when the liability of a bank stockholder can be enforced is definitely fixed by the Constitution, no other time for the enforcement of that liability can be prescribed by the legislature so long as the Constitution stands unchanged. *Bodie v. Pollock*, 110 Neb. 844.
3. **Executors and Administrators: CLAIMS AGAINST ESTATE.** So long as a state bank is a going institution, the liability imposed upon its stockholders by section 7, art. XII of the Constitution, is not a "claim or demand," "absolute or contingent," against the estate of a deceased stockholder, within the meaning of section 30-609, Comp. St. 1929.

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

R. O. Reddish, for appellant.

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

Rodney S. Dunlap, Seymour S. Sidner and *Howard W. Loomis, amici curiæ.*

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

HORTH, District Judge.

This is an appeal from a judgment of the district court for Sheridan county allowing an absolute claim against the estate of Anthony M. Wilson, deceased, upon a bank stockholders' double liability under section 7, art. XII of the Constitution of Nebraska, as the same existed from 1875 to its amendment in 1930, upon 10 shares of the

capital stock of the Lakeside State Bank of Lakeside, Nebraska, owned by the deceased at the time of his death. The district court acquired jurisdiction of the action by appeal from a judgment of the county court disallowing the claim upon the ground that it was barred by the statute of nonclaims.

The cause was tried in the district court upon a stipulation of facts and it was therein agreed that Anthony M. Wilson died, intestate, a resident of Sheridan county, Nebraska, on April 7, 1919; that on July 26, 1919, letters of administration upon his estate were issued to Clair E. Wilson, who continued to act as such administrator during the administration of said estate; that on July 26, 1919, the county judge of Sheridan county entered an order fixing December 1, 1919, as the time within which creditors of the estate of said Anthony M. Wilson should present and file claims against his estate, and directing that a hearing upon claims be held on that date at 2 o'clock in the afternoon; that notice limiting the time for filing claims and the time fixed for a hearing thereon was given by publication in the manner provided by law; that the inventory filed by said administrator included therein 10 shares of the capital stock of the Lakeside State Bank; that on February 3, 1920, the county judge made and entered an order barring claims against said estate; that said administrator filed his final account in said estate, of which filing due notice was published as required by law; and on March 5, 1920, the county court made and entered an order determining heirship, ordering distribution of said estate and discharging such administrator; that no claims were filed against said estate during the administration thereof and no claim was filed on account of the stockholders' liability herein alleged until November 18, 1931, when a contingent claim was filed by the receiver of said bank, and afterwards an amended claim was filed by the receiver alleging that the contingent claim filed had become absolute.

It also appears from the record that on June 14, 1932,

in an action then pending in the district court for Sheridan county, Nebraska, wherein E. H. Luikart, as receiver of the Lakeside State Bank, was plaintiff and J. F. Lowe et al. were defendants, it was adjudged by the court that the contingent claim of plaintiff against the defendant Clair E. Wilson, as administrator of the estate of Anthony M. Wilson, deceased, had become absolute, and the plaintiff was directed to file an absolute claim against said estate in the county court of Sheridan county, the filing of said claim and the enforcement thereof to be without prejudice to the defendant's right to contest the same, on the ground that it was barred by the statute of nonclaims, upon the theory that said claim was not filed within the proper time and is, therefore, barred.

In 1901 the legislature of Nebraska amended the nonclaim statute and it now appears as section 30-609, Comp. St. 1929, and, in so far as it is material to this action, reads:

"Every person having a claim or demand against the estate of a deceased person whether due or to become due, whether absolute or contingent, who shall not after the giving of notice as required in this chapter exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or from setting off the same in any action whatsoever."

Plaintiff's right of action, if one exists, arises by virtue of section 7, art. XII of the Constitution, as the same existed prior to its amendment in the year 1930, and, so far as pertinent to this case, reads:

"Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of the stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder."

Was the contingent liability thus imposed upon Anthony M. Wilson, as a stockholder in the Lakeside State Bank,

by section 7, art. XII of the Constitution, such a contingent claim against him and his estate, the recovery of which would be forever barred if such contingent claim was not exhibited to the county judge within the time limited by the county court for filing claims against his estate?

It must be borne in mind that the time fixed by the county court for filing claims against the estate of Anthony M. Wilson, deceased, was limited to December 1, 1919, that the Lakeside State Bank remained solvent and a going institution until August 6, 1927, and that the superadded liability imposed by the Constitution upon the bank's stockholders did not become absolute until June 14, 1932. So that its influence, in the determination of the question here involved, may be fully understood, it becomes necessary to read into said section 7, art. XII of the Constitution the constructions given to its provisions by this court, and, for that purpose, we quote. In *Bodie v. Pollock*, 110 Neb. 844, it is held:

"Sections 4 and 7, art. XII of the Constitution, are self-executing when considered together, as they have been and should be; and, so considered, they form a complete constitutional rule to the effect that, while stockholders in banks are subject to the double liability set out in said sections, such liability cannot be enforced until the property of the bank has been exhausted, and the amount justly due judicially determined.

"Since the time when the liability of a bank stockholder can be enforced is definitely fixed by the Constitution, no other time for the enforcement of that liability can be prescribed by the legislature so long as the Constitution stands unchanged."

In *State v. Citizens State Bank*, 118 Neb. 337, Justice Good said: "It will thus be seen that the rule is established that the provisions of the Constitution, contained in said section 7, may not be limited or extended by legislative act. It follows that whatever rights are given by this constitutional provision to the creditors of a state

bank remain unaffected and unhampered by any legislative act. The liability so created against stockholders in favor of all creditors of the bank cannot be divested or taken from them. The liability of the stockholder to the creditors of such bank for claims accruing while he was such stockholder becomes and is a security to such creditors, and the legislature may not, by any act, relieve such stockholder of the liability so created."

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

In *State v. Citizens State Bank, supra,* it is held:

"The provisions of section 7, art. XII of the Constitution, are self-executing. No legislative act is necessary for their enforcement. The stockholders' liability thereby created is free from legislative interference.

"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 and the stockholder is liable only to those creditors whose claims accrue while he is such stockholder. * * *

"The constitutional double liability of the stockholders of a state bank is not an asset of the bank, but it is for the security of the bank's creditors."

In *Dempster v. Atwood,* 118 Neb. 579, it is held: "The stockholders made liable by section 7, art. XII of the Constitution, * * * are those who are such when the credit was extended to the bank or the liability incurred by the bank."

In *Farmers Loan & Trust Co. v. Funk,* 49 Neb. 353, it

is said: "The special individual liability of a stockholder in a banking corporation or institution, superadded to his ordinary liability by the above quoted section of the Constitution, is for the creation of a trust fund for the benefit of all creditors of the banking corporation or institution in which stock is held, and an action to render available such liability must be prosecuted by one creditor of such corporation or institution for the benefit of all other creditors, or by the receiver of such corporation or institution when there is a receiver."

In *Rogers v. Selleck,* 117 Neb. 569, it is held:

"The terms of the constitutional provision imposing upon stockholders of a state bank a double liability are by construction embodied in the contracts of subscription for bank stock but cannot be enforced until the exact amount justly due in all cases of claims against the bank has been ascertained and the corporate property exhausted. * * *

"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 contribution 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."

In *Luikart v. Paine,* 126 Neb. 251, it is held: "Stockholders' double liability in banking corporations is contractual obligation and by construction constitutional provisions in effect at the time of purchase of corporate stock are material parts thereof."

Reading sections 4 and 7, art. XII of the Constitution, as the same were from the year 1875 to the amendment of section 7 in the year 1930, in the light of the constructions placed upon the same by this court, it is clear that the provisions of said section 7 are self-executing; that the bank stockholders' liability thereby created is contractual and free from legislative interference; that its purpose is to require all stockholders in a state bank, who were such when the credit was extended to the bank or

the liability incurred by the bank, to contribute, if necessary, an amount not exceeding the par value of the shares of stock owned by them, respectively, to a trust fund for the benefit of the creditors of such bank in the event of its insolvency, when it has been ascertained that the amounts received from the liquidation of its assets are insufficient to pay its creditors; that the liability thus created is not an asset of the bank, and, prior to its amendment in 1930, could only be enforced by an action prosecuted by one or more creditors in his or their behalf and in behalf of all other creditors of the bank, or by the receiver of the bank; that the right of the individual creditors of such insolvent bank is to participate with all other creditors of the bank in a trust fund arising from the payment of the stockholders' liability; and that the rights of the creditors and the liabilities of the stockholders, as they are established by the Constitution, cannot be changed, limited or extended by legislative act.

The gist of the stockholders' contract is to contribute to the trust fund for the benefit of creditors, when the bank has become insolvent, its assets have been exhausted and it has been ascertained that there are still unpaid creditors of the bank. The cause of action, thus created, is not one in favor of the individual creditors of the bank against its individual stockholders. It is a single cause of action against all stockholders of a bank who were such when the credit was extended or the liability incurred by the bank, and having for its purpose the creation of a trust fund for the benefit of all those who are creditors of the bank at the time the cause of action accrues. In the instant case, more than twelve years elapsed from the time limited by the county court for filing claims against the estate of Anthony M. Wilson, deceased, until the cause of action against the stockholders in the Lakeside State Bank accrued. Common knowledge tells us that the personnel of the bank's creditors changed greatly during that period, and that few of the claims of those who were its creditors on December

1, 1919, were the claims they held on June 12, 1932, when the cause of action accrued.

The Constitution, as construed by this court, says that all those who were creditors of the bank at the time the cause of action accrued upon its stockholders' double liability shall share *pro rata* in the trust fund created thereby. Section 30-609 of the nonclaims statute would destroy this order of distribution by giving moneys contributed to such trust fund by the estates of deceased stockholders to those creditors who filed claims against the estates of such deceased stockholders within the time limited by the county court.

The constitutional provisions with which we are dealing were in force in 1901, when section 2740 (226) ch. 23, Comp. St. 1901, now section 30-609, Comp. St. 1929, was enacted. It will be presumed that the legislature, in enacting said section, did not intend to run counter to the Constitution, and, therefore, did not intend to classify the liability imposed upon bank stockholders by the Constitution as a contingent "claim or demand" of any person, within the meaning of those terms as used in section 30-609 so long as the bank, of which the deceased was a stockholder, was a going institution. If the legislature intended the term "claim or demand," as used in said section, to include the contingent liability of bank stockholders in going institutions, it exceeded its authority. It has no power to limit the rights given to bank creditors by the Constitution.

We find support for the conclusions here reached in the decisions of other courts.

North Dakota has a statute making a shareholder in a state bank liable "for all contracts, debts and engagements of such association made or entered into, to the extent of the amount of his stock therein at the par value thereof, in addition to the amount invested in and due upon said shares." It also had a nonclaim statute reading: "All claims arising upon contract hereafter made, whether the same be due, not due or contingent, must be

presented within the time limited in the notice; and any claim not so presented is barred forever." Comp. Laws N. Dak. 1913, sec. 8736.

Baird v. McMillan, 53 N. Dak. 257, presented the single question, whether or not the estate of a deceased person, who had been a shareholder in a state bank, could be held liable for the double liability imposed by the statute, when the bank failed after the death of such shareholder and the claim was not filed in the probate court, and the court held that the claim for superadded liability was not barred though not presented within the time specified in the notice for filing claims against the estate. In the body of the opinion it is said:

"It is further to be observed that the bar operates against the specific claim and that the statute seems to presuppose the existence of a legal person capable of presenting the claim, whether or not it be due or whether or not it be contingent. The statute does not seem to contemplate a situation where, owing to the nature of the liability, there is no person in existence capable of presenting the claim. * * * From these observations, then, it would seem that to adopt the appellant's construction of the statute in the Probate Code barring claims for failure to present them within the required time, * * * as applied to such a claim as that involved here, would be equivalent to holding that a claim is barred though there was no legal person in existence capable of presenting it during the prescribed period. For during the whole of that period the bank was in operation, in charge of its own officers and presumptively, and perhaps actually, solvent; hence, there was no receiver to enforce the claim. Not being in the full sense of the term an asset, it could not have been enforced by the officers of the bank. * * * While the bank is a going institution a depositor or other creditor is in no position to present a contingent claim to the probate court in case of the death of a stockholder, and even the suggestion that he might have done so borders on absurdity. Yet, under the appellant's contention,

this would be the only means of preventing the bar of the statute from applying in case the bank should continue open and apparently solvent for the period prescribed by Probate Code for filing claims."

In *Tierney v. Shakespeare,* 34 N. M. 501, the supreme court of New Mexico held: "Claim against executor for superadded liability on bank stock owned by testator, on account of insolvency of state bank occurring after testator's death, is not governed by statutory requirements for filing in probate court nor by statute of nonclaim."

The Probate Code of the state of Minnesota provides: "All claims * * * arising upon contract, whether due, not due, or contingent, must be presented to the court for allowance, within the time fixed by the order, or be forever barred." Mason's Minn. St. 1927, sec. 8812.

In *Hantzch v. Massolt,* 61 Minn. 361, the supreme court of Minnesota, in construing this section, held: "That a contingent claim, arising on contract against the estate of a decedent, which does not become absolute and capable of liquidation before the time limited for creditors to present their claims to the probate court for allowance, is not barred because it was not so presented; and the holder of such a claim, after it becomes absolute, may maintain an action against the heirs, next of kin, legatees, or devisees to whom the residue of the estate has been distributed, to recover such claim to the extent of the estate received by them."

In *Drain v. Stough,* 61 Fed. (2d) 668, the circuit court of appeals, ninth circuit, held that a statute barring all claims against a decedent unless presented to his executor or administrator within a certain period does not operate to require presentation within such period of a claim against the estate for the amount of an assessment levied after the expiration of the period by the comptroller of the currency upon stockholders of a national bank for which a receiver was appointed subsequent to the decedent's death, but before the expiration of such period.

The statutes of the United States, governing the lia-

bility of stockholders in national banks, so far as material to this case, provide: "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. St., sec. 5151.

In construing this statute in *Matteson v. Dent*, 176 U. S. 521, the court said: "The obligation of a subscriber to stock, to contribute to the amount of his subscription for the purpose of payment of debts, is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. But the obligation to respond is engendered by and relates to the contract from which it arises."

In *Rankin v. Miller*, 207 Fed. 602, it is said: "Limitations will not run against the right of action to enforce the statutory liability of stockholders of national banks until the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable."

It is conceded by the parties to this suit that Anthony M. Wilson, at the time of his death, was the owner of ten shares of the capital stock of Lakeside State Bank; that said bank remained a solvent and going institution for more than eight years after Mr. Wilson's death; and it follows from what has been said that recovery upon his stockholders' liability created by the Constitution was not barred by reason of the failure to file a contingent claim thereon in the county court within the time limited by the county judge for filing claims against his estate.

The judgment of the district court is

AFFIRMED.

J. T. CAVETT, COUNTY CLERK, ET AL., APPELLEES, V. FIRST NATIONAL BANK OF COZAD, APPELLEE: ARTHUR NELSON ET AL., APPELLANTS.

FILED MAY 15, 1934. No. 28669.

Record examined and found to be controlled by the law as announced in paragraphs 2 and 3 of the syllabus in *Greeley County v. First Nat. Bank of Cozad*, 126 Neb. 872, and that the judgment rendered by the district court is sustained by the evidence.

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

Morsman & Maxwell, for appellants.

Cook & Cook and *C. G. Perry, contra.*

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

HORTH, District Judge.

The only question presented by this appeal is whether the defendant First National Bank of Cozad or the defendants Arthur Nelson and George Nelson are entitled to the proceeds of a car of lumber sold by the Standard Bridge Company of Omaha to the plaintiff, county of Morrill.

An examination of the record discloses that on or about July 24, 1931, the county of Morrill purchased a car of lumber from the Standard Bridge Company of Omaha for the agreed price of $1,434; that thereafter the Standard Bridge Company delivered to one E. G. Solomon of Omaha, through whom the defendants Arthur Nelson and George Nelson claim, a written assignment in the words and figures following: "Omaha, Neb., July 25, 1931. For value received, I hereby sell, assign, transfer and set over to E. G. Solomon all my right, title and interest in and to any and all moneys arising or coming to me from the county of Morrill, Nebraska, by reason of a certain claim No. ——— against the said county for bridge ma-

terial amounting to one thousand four hundred thirty-four & no/100 dollars, which said claim was filed with the county clerk on the 24th day of July, 1931. At its own expense the Standard Bridge Company may collect the above sum and upon such collection hold the same for the assignee hereunder, and for the use of such money from this date until such assignee is fully repaid the Standard Bridge Company shall pay such assignee interest at the rate of 7 per cent. per annum from July 25, 1931, until paid in cash or registered warrants. And I hereby authorize, empower, direct and instruct the county clerk of said county to assign and deliver all warrants therefor to E. G. Solomon. Standard Bridge Company, Assignor, By J. H. Vastine, Auditor;" that attached to said assignment is a verified statement showing that the bridge material mentioned in the assignment corresponds to the materials for which the Standard Bridge Company filed its claim with the county clerk of Morrill county, Nebraska, on the 11th day of August, 1931; that the moneys invested in said assignment, by said E. G. Solomon, were funds belonging to the defendants Arthur Nelson and George Nelson, left by them with E. G. Solomon for investment by him for their account; that no notice of the assignment from the Standard Bridge Company to E. G. Solomon was given to the plaintiffs or either of them, nor did they or either of them have any knowledge of the existence of said assignment until December 26, 1931, when the plaintiff J. T. Cavett, county clerk, received a letter from Messrs. Morsman & Maxwell, attorneys for the defendants Arthur Nelson and George Nelson, dated December 24, 1931, in which they stated: "The Standard Bridge Company, under date of July 25, 1931, assigned to E. G. Solomon claim against Morrill county for $1,434, for bridge material, filed with you on July 24, 1931. This claim has been assigned to our clients Arthur Nelson and George Nelson of this city by the executor of the estate of E. G. Solomon, who died about a month ago;" that on August 11, 1931, said Stand-

ard Bridge Company filed with the county clerk of Morrill county its verified claim for $1,434, the purchase price of bridge material, the claim was allowed by the county commissioners of Morrill county on August 25, 1931, a county warrant was issued therefor payable to the Standard Bridge Company, or order, and on August 31, 1931, the Standard Bridge Company sold, indorsed and delivered said warrant to the defendant First National Bank of Cozad, it paying said Standard Bridge Company therefor the sum of $1,434; that at the time of the purchase by it of said warrant the defendant First National Bank of Cozad had no notice or knowledge of the assignment from the Standard Bridge Company to E. G. Solomon.

The district court found upon the issues joined by the defendants Arthur Nelson and George Nelson and the defendant First National Bank of Cozad that the latter was the owner of the county warrant for $1,434 issued by the county of Morrill in payment of the claim for that amount filed by the Standard Bridge Company, and that the defendants Arthur Nelson and George Nelson have no right, title or interest therein, and entered judgment accordingly, and we find the judgment as rendered is supported by the evidence.

The decision of this court in *Greeley County v. First Nat. Bank of Cozad,* 126 Neb. 872, as expressed in the second and third paragraphs of the syllabus in that case, is controlling in this case, and the judgment of the district court is, therefore,

AFFIRMED.

PETER TJADEN, APPELLEE, V. JOHN D. SMITH ET AL., APPELLEES: JAMES F. CROWLEY, TRUSTEE, APPELLANT.

FILED MAY 15, 1934. No. 28931.

1. **Mortgages.** In the absence of showing of a superior equity, the several bonds of a series secured by mortgage are equal in standing as to priority.

2. **Subrogation.** Holders of bonds secured by one mortgage, which bonds had been paid to a defaulting agent of such holders, are not entitled to be subrogated to the interests of the agent in bonds secured by another mortgage, as against the trustee in bankruptcy of such agent, but can only share with other creditors.
3. **Interest.** Where a loan company, in the course of its business, advanced the money to take up interest coupons on loans negotiated or sold by it, the evidence being insufficient to establish a purchase, such coupons ceased to be current obligations, so as to entitle the loan company to recover 10 per cent. interest after maturity as provided therein; the transaction evidenced a loan or forbearance of money, and only legal interest at 6 per cent. should be allowed.

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

Tibbets, Canaday & Hewitt, for appellant.

James D. Conway, contra.

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

REDICK, District Judge.

This action is brought by Peter Tjaden, holder of one of the bonds secured by a $15,000 mortgage on some lots in Hastings, Nebraska, to foreclose said mortgage. A large number of defendants were named as payors of the bonds, owners of the real estate covered by the mortgage, and holders of other mortgage liens. The several mortgages were not all upon the same property but overlapped each other and presented many complicated questions of priority which were disposed of by the district court and are not now in controversy before us, with one exception hereafter referred to. We are concerned only with the rights of three litigants in two of the mortgages, one for $15,000, dated April 1, 1919, and one for $18,000, dated December 28, 1926, and the controversy is between the trustee in bankruptcy of Hoeppner & Uerling, a copartnership, on the one hand, and Charles Callahan and Rus-

sel W. Shields, representing distinct interests, on the other.

Callahan filed a petition of intervention claiming to be the holder of one of the bonds secured by the $15,000 mortgage, in the sum of $3,000, and joined in the prayer of the plaintiff for foreclosure. Shields filed a petition of intervention claiming to be the holder of another $3,000 bond as collateral security for a debt owing him by Hoeppner & Uerling in the sum of $2,000, and joined in the prayer of the plaintiff for foreclosure.

Callahan had left his bond with Hoeppner & Uerling for collection, and Shields had received his bond after maturity, and in view of these facts the district court held that Callahan's bond was paid in full, and Shields' bond to the extent of $2,000, by means of a payment of $5,000 made by the mortgagor to Hoeppner & Uerling, and to that extent denied them foreclosure. For the remaining $1,000 the court allowed Callahan a lien for $600 and Shields a lien for $400. The correctness of these holdings is not before us.

The trustee filed a petition of intervention claiming to hold $7,500 in bonds secured by the $18,000 mortgage, $4,000 in absolute ownership and $3,500 as collateral to a $1,268.87 indebtedness of one Louis Traut to Hoeppner & Uerling; also the sum of $5,665 for interest coupons on the various mortgages, paid by Hoeppner & Uerling and not repaid by the mortgagors. After trial in the district court, a decree was rendered finding and adjudging that Callahan and Shields were not entitled to participate in the foreclosure of the $15,000 mortgage except to the extent of $1,000 split between them, as above stated, and that there was due the trustee upon the $18,000 mortgage for the two notes owned by them, with interest, the sum of $4,623.24, and as assignee of the sum due Louis Traut, $4,375, but these amounts were decreed subject to the claims of the other bondholders; that the trustee was also entitled to a lien for $5,353 on account of coupons paid by them. It was further decreed that Hoeppner &

Uerling had an interest to the extent of $3,482 in the claim of Louis Traut, but that such interest was subject to the claims of Charles Callahan for the sum of $2,088, and of Russel W. Shields in the sum of $1,392. The effect of this decree was to transfer the unpaid portions of the bonds held by Callahan and Shields from the $15,000 mortgage to the $18,000 mortgage, which furnishes the principal ground of complaint of the trustee, who files his appeal in this court. Callahan and Shields are the only appellees who appear and file briefs.

The trustee assigns six errors for reversal and they will be taken up in their order.

(1) That the court should have allowed 10 per cent. interest on the bonds held by the trustee in connection with the $18,000 mortgage. The bonds provided for 10 per cent. interest after maturity, and the point is well taken.

(2) The court erred in holding the indebtedness on said bonds a subordinate lien to that of other bondholders under the same mortgage. This point is also well taken; there seems no good reason for distinguishing between the different bonds.

(3) The court erred in assigning the trustee's interests in the Traut bonds to Callahan and Shields. The bonds held by Callahan and Shields were under the $15,000 mortgage and were held to be paid, to the extent of $5,000, and they were given liens under that mortgage for the remaining $1,000. They made no claim of subrogation in their pleadings, and we know of no rule which would allow them any preference over general creditors. It might be that in a contest purely between them and Hoeppner & Uerling, and under proper pleadings, equity would allow the subrogation; but we think the court was in error in allowing it against the trustee. Callahan and Shields are simply holders of claims against Hoeppner & Uerling for conversion—are creditors to that extent; but their position is not superior to any other creditors.

(4) The court erred in its computation of the prin-

cipal amount due on the coupons paid by Hoeppner & Uerling for which they were not reimbursed by the mortgagor. The court computed the amount at $5,353, but an examination of the record shows that Hoeppner & Uerling paid coupons on the $7,000 mortgage in the sum of $1,425, on the $25,000 mortgage, $2,865, and on the $15,000 mortgage, $1,375. This totals $5,665, which should be allowed the trustee.

(5, 6) The court erred in refusing to allow 10 per cent. interest on the amount of coupons paid by Hoeppner & Uerling after maturity and from the date of the decree. The decree of the court in this particular is correct. With reference to these coupons the allegations of the cross-petition that the receiver "owns" coupons attached to the $7,000 bonds, $1,425, that he is the "owner and holder" of those attached to the $25,000 bonds, $2,865, and a *recital* that Hoeppner & Uerling purchased those attached to the $15,000 bonds, $1,375, are denied by some, but not all, of the holders of the bonds, and the only evidence offered in this connection was that of Uerling who speaks of them as "items of interest advanced." We think the evidence insufficient to sustain a finding that Hoeppner & Uerling purchased the coupons, but that they simply advanced the amount for the mortgagors expecting reimbursement within a reasonable time; and when they took up the coupons, presumably at maturity, they were paid and ceased to function as current obligations. The relation of debtor and creditor was established between the mortgagor and Hoeppner & Uerling to the extent of the moneys advanced by the latter, for the repayment of which the law implied a contract on the part of the mortgagor with interest at the legal rate, in the absence of a contract for a greater rate. We think the rate of interest is governed by section 45-101, Comp. St. 1929, for the loan or forbearance of money.

The decree of the district court is modified and affirmed, and the cause is remanded, with directions to correct the decree in accordance with this opinion.

AFFIRMED AS MODIFIED.

JOHN R. GILKESON, APPELLEE, V. NORTHERN GAS ENGINEERING COMPANY, APPELLANT.

FILED MAY 15, 1934. No. 29148.

Master and Servant: WORKMEN'S COMPENSION LAW: COMPENSABLE INJURY. Mere exertion that would not by itself produce compensable disability, and which is not greater in extent than that ordinarily incident to an employment, but which combines with a preexisting disease to produce a disability, is not an injury caused by accident that becomes such a part of the proximate cause of such disability as to be compensable under the provisions of the workmen's compensation act.

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

Crossman, Munger & Barton and *Robert G. Fuhrman*, for appellant.

Hanley & O'Brien and *Archie M. Smith, contra.*

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

TEWELL, District Judge.

This action is prosecuted under the provisions of the workmen's compensation act. The compensation commissioner denied compensation. This action was then filed in the district court for Thurston county, and a trial resulted in an order of that court allowing compensation for total permanent disability for 90 weeks and for partial permanent disability for 210 weeks, each at the rate of $15 a week. The cause comes to this court upon appeal by the defendant, Northern Gas Engineering Company, hereinafter called appellant.

The applicant, John R. Gilkeson, hereinafter called appellee, was employed by appellant, at a wage of $52.50 a week, to superintend the work done in constructing a pipe-line. On October 14, 1931, when about 51 years of age and while working at such employment near Pender, Nebraska, the appellee instructed a fellow employee to

attempt to drive an automobile up a grade in a road. The road was muddy. For some immaterial reason the automobile, upon which appellee was pushing from behind, rolled backward a short distance, and appellee pushed and lifted upon it to prevent it from going backward over a bank. The driver of the automobile then succeeded in starting it forward by the force of its own power. It is not claimed in the pleadings that appellee received any injury from being struck by the automobile or by any other object, or received any injury through violence other than what might have arisen from the strain arising from his pushing and lifting upon the automobile. The appellee contends that the exertion experienced in lifting and pushing upon said automobile so strained the muscles of his heart as to cause a mitral regurgitation therein, and that such condition of his heart resulted in his total permanent disability.

According to the plaintiff's testimony he experienced difficulty in breathing immediately after lifting upon the automobile, and went to the hotel in Pender, ate a lunch, and then, in the afternoon of the same day, went to his room in Emerson, Nebraska, and called a doctor. The next morning he went to Kansas City, Missouri, where he stayed one day and one night, and then returned to Emerson, and after resting there in bed a day or so went back to work. He found that he did not feel well enough to work, and stayed at the hotel in Pender and directed the construction work from there. About ten days after his alleged injury, appellee went to Sioux City, Iowa, where he called upon Dr. C. C. Yancey. He spent about all of the time between October 28, 1931, to July, 1932, in various hospitals in Sioux City, Iowa, Omaha, Nebraska, and Kansas City, Missouri.

The testimony of four medical experts appears in the record. Dr. Jongewaard, a witness for defendant, testified that he examined the appellee at Jefferson, Iowa, on January 30, 1931, over eight months before the alleged injury, and treated him several times between that date

and March 18, 1931, and that the appellee then had a mitral regurgitation or leakage of the mitral valve of his heart. He says appellee then experienced difficulty in breathing. Rest in bed was prescribed. Dr. Anderson, a witness for the defendant, examined the appellee on December 29, 1933, the night before the trial in the district court. This witness testified that a mitral regurgitation then still existed, that he found the heart fully compensated, no œdema, or swelling of the lung structure, no cyanosis, or discoloration of the skin, no dyspnœa, or shortness of breath, and very little, if any, hypertrophy, or enlargement of the heart. About nine months before the alleged injury appellee had had all of his teeth pulled. The witness Jongewaard testified that appellee in January, 1931, gave him a history of having had pneumonia in 1908, rheumatism in the legs and forearms about 1928 that again occurred in the shoulder joints and legs in 1930, and that appellee then stated that he then had spells of dizziness and felt "knocked out."

Doctor Otten, a witness for appellee, testified that he examined appellee at Springfield, Illinois, in May, 1931, and found his lungs and heart normal. Dr. Yancey, under whose care appellee was during the greater portion of the six months following the date of the alleged injury, was a witness for appellee, made a diagnosis about ten days after the alleged injury of cardiac decompensation with dilatation. This witness testified that a mitral regurgitation existed at the time of his diagnosis, and that in his opinion it was caused from stress or strain being thrown upon appellee.

The weight of the medical testimony is to the effect that the cause of a mitral regurgitation in the heart is nearly always an endocarditis, or infection of the inner lining of the heart, which so affects the mitral valve as to cause it to fail to completely close just before the heart contracts to force the blood through the body. A part of the blood is thus, contrary to normal, forced back through the mitral valve, causing a sound technically known as

a systaltic murmur. Endocarditis followed by a mitral regurgitation is shown often to result from rheumatism, and from an infected condition of the teeth or sinuses. A mitral regurgitation often causes difficulty in breathing, especially after exertion. The evidence shows that once a mitral regurgitation exists it continues throughout the remainder of the life of its possessor, and that strenuous exertion should be avoided by one having such a condition in the heart.

One of the questions involved in this case is that of whether or not the exertion experienced by appellee was an injury caused by accident, which, either alone or in combination with other causes, proximately caused the disability for which compensation is sought. From a consideration of the evidence, we conclude that the appellee had a mitral regurgitation and disability therefrom prior to and at the time of such exertion, and that it was not increased in extent but was made temporarily more disabling by the exertion.

Did it combine with a preexisting disease to produce a disability in such manner as to be a part of the proximate cause of an injury caused by accident? This court has held, in cases arising by virtue of the workmen's compensation act, that when an injury combines with a preexisting disease to produce a disability, it is sufficient to satisfy the requirement of proximate cause of disability to show that the injury and preexisting disease combined to produce the disability, and that it was not necessary to show that the injury accelerated or aggravated the disease before the disability arising from the injury might be adjudged compensable. *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246. Citations of other decisions of this court in cases of the nature of this one and in which an injury combined with a preexisting disease to produce a disability are as follows: *Skelly Oil Co. v. Gaugenbaugh*, 119 Neb. 698; *Van Vleet v. Public Service Co.*, 111 Neb. 51; *Miller v. Central Coal & Coke Co.*, 123 Neb. 793;

Uribe v. Woods Bros. Construction Co., 124 Neb. 243. Section 48-128, Comp. St. 1929, provides:

"If an employee receives an injury, which, of itself, would only cause partial disability, but which, combined with a previous disability, does in fact cause a total disability, the employer shall only be liable as for the partial disability, so far as the subsequent injury is concerned."

The reported opinion in none of the above cited cases makes mention of this provision of the statutes. In all of them, however, in which compensation was allowed, the injury that combined with the preexisting disease was such as to form a part of the proximate cause of an injury caused by accident, and did not arise merely from exertion no greater in extent than that ordinarily incident to the occupation involved. None of these cases goes further in this regard than to hold that the time during which compensation shall be paid is based upon the period of the disability suffered by the combined action of all causes thereof. In this case the exertion to which appellee was subjected is not shown by the evidence to have been such as would have produced, by itself, any disability whatsoever, and is not shown to have been greater than that ordinarily incident to appellee's occupation.

The following citations are of cases in which exertion in some form or another combined with a preexisting disease to produce a disability, and in which compensation was either denied or apportioned according to the per cent. of disability due to the injury: *Banks v. Industrial Commission*, 74 Utah, 166; *Fredrickson v. Industrial Commission*, 68 Utah, 206; *Herlihy's Case*, 267 Mass. 232; *Standard Oil Co. v. Industrial Commission*, 322 Ill. 524; *Wallins Creek Collieries Co. v. Williams*, 211 Ky. 200; *Kingston-Pocahontas Coal Co. v. Maynard*, 209 Ky. 431; *Employers Mutual Liability Ins. Co. v. Industrial Commission*, 212 Wis. 669.

The workmen's compensation act provides for compensation "in every case of injury or death caused by accident arising out of and in the course of employment."

Comp. St. 1929, sec. 48-109. The exertion shown in this case is not shown to have been an injury caused by accident that formed any part of the proximate cause of the disability for which compensation is sought. With this view of the case, it becomes unnecessary to decide whether or not the percentage of disability that arose from the preexisting disease must be determined and the award diminished accordingly, and unnecessary to decide whether or not a sufficient showing of the extent and reasonable value of doctor's and hospital bills, of which complaint is made, was shown to justify the award made therefor.

For reasons herein given, the judgment of the district court is reversed and the cause remanded, with directions to dismiss this action at the cost of the appellee.

REVERSED.

S. MORGAN SMITH COMPANY, APPELLANT, V. VAN ACKEREN BROTHERS ET AL., APPELLEES.

FILED MAY 15, 1934. No. 28879.

Evidence examined and *held* to sustain findings of district court.

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

Williams & Williams, for appellant.

W. J. Donahue, contra.

Heard before ROSE and PAINE, JJ., and REDICK and THOMSEN, District Judges.

THOMSEN, District Judge.

This is a suit to recover the balance due for a hydroelectric turbine installed by the plaintiff for the defendants. The purchase price was represented by notes, some of which, due to delay in installation, were paid by the defendants. Under the written contract between the parties, the plaintiff sent an expert erector to install the machinery,

and the defendants paid the erector for his time and expenses. At the conclusion of the installation, the erector expressed himself as dissatisfied with the completed job and advised the defendants not to finish payments on it until the company made it right, and this evidence is not denied in any of the testimony.

The written contract provided for the development of certain horse-power, and the defendants claim that the turbine failed by almost one-half to develop the guaranteed horse-power. Changes in the water supply recommended by the plaintiff's engineer were made by the defendants, they claim, but even such changes failed to increase the efficiency of the turbine substantially.

The case was tried to the court without the aid of a jury. The court found for the defendants. In this situation, the appellate court is required to determine only whether any evidence exists to sustain the findings of the trial court, since the credibility of witnesses was a matter for the trial court's determination. We have read the bill of exceptions and find sufficient evidence to sustain the findings of the trial court.

However, the plaintiff contends that the defendants did not fulfill the terms of their written contract, in that the defendants under such contract were required to furnish the plaintiff "with all necessary information, such as measurements, the size of the head of water, size of the flume, etc., before the company could even design the turbine." A sufficient answer to this is that, although the contract did so provide, the plaintiff's own engineer was on the ground and made all of the required measurements, and it was from the data furnished by this engineer before the order was ever placed that ultimately the plans and specifications were drawn. Under those conditions it became unnecessary for the defendants to furnish the plaintiff with any details.

The only other provision of the contract mentioned in the brief of appellant, with which it is stated the defendants did not comply, is that, under certain conditions of dispute

as to the efficiency of the machinery, tests should be made at the expense of the purchaser, and that the purchaser should give the company reasonable notice of such tests, so that the company could also have a representative present when the tests were made, and the tests should be made according to the American Society of Mechanical Engineers' code. The evidence shows that the plaintiff on at least two different occasions sent experts to inspect the plant and to attempt to satisfy the defendants that the contract had been fulfilled. Moreover, the expert erector upon completion of the job was dissatisfied with the performance of the machinery, and the correspondence indicates that the plaintiff was informed of this fact immediately. As we view the evidence, the plaintiff had the advantage of this provision of the contract. The provision seems to have been inserted for the purpose of ample notice to the plaintiff and ample opportunity to remedy defects. The record shows that both of these purposes were fulfilled by actual knowledge and investigation.

This case is to be distinguished from those cases cited by plaintiff in his brief, for example, in which pipes, radiators and all heating equipment, except the boiler, were furnished by the contractor, and due to the boiler's inefficiency the equipment furnished by the contractor failed to give satisfactory and efficient service. *Knutzen v. Hanson,* 28 Neb. 591. In the instant case the plaintiff's expert engineer investigated and knew all of the conditions present before the order was ever signed, knew the purpose for which the machinery was intended, and the water supply with which it had to operate, and the machinery which it had to supplant. What the plaintiff attempted was to furnish a turbine for a specific purpose, to meet a specific condition, and this under the defendants' theory and evidence the plaintiff failed to do. We are satisfied that the evidence of the defendants is ample to sustain the findings of the district court.

The plaintiff assigns as error the court's admitting evidence, over the objection of the plaintiff, which was prej-

udicial to the plaintiff, but nowhere in the brief does appellant point out specifically such claimed erroneous admission of evidence. Although we have read the bill of exceptions, it is not the duty of the court to search the record for all the details of claimed errors. The plaintiff should have specifically called the court's attention to any such claimed errors upon which it relied.

One other matter is to be mentioned: The appellant failed to comply with rule 13 of the supreme court rules, sections 1 and 3, in preparing its briefs. Although the failure to cite the jurisdiction from which the different cited decisions were taken, and particularly the failure to give the Nebraska citations, has required much additional work on the part of the court, yet in this instance we have not invoked the penalty mentioned in *Joyce v. Tobin*, 126 Neb. 373.

Since we find sufficient evidence in the record to sustain the findings of the district court, the judgment of the district court is in all respects

AFFIRMED.

STATE, EX REL. CITY OF COLUMBUS, APPELLEE, V. WILLIAM B. PRICE, AUDITOR OF PUBLIC ACCOUNTS, APPELLANT.

FILED MAY 21, 1934. No. 29241.

1. Statutes. Constitutional provision relative to method of amendment has no application to legislation independent and complete as to its subject-matter.
2. ———. Where provisions of statutes are new and complementary, independent and complete as to subject-matter, they are not amendatory of existing laws.
3. ———. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title.
4. ———. Title of a bill may be general, but must be specific enough to answer the purpose of the constitutional requirement.
5. ———. The title of an independent act authorizing the con-

struction of sewers and providing that owners or occupants of the premises shall be charged for the services, and to raise money, is broad enough to include legislation authorizing issuance of mortgage and revenue bonds which do not impose a general liability upon the municipality but are secured only by the property and revenues of the sewerage system.

6. Municipal Corporations: BONDS: PAYMENT. All bonds issued by the city, except paving district bonds, are required to be payable at the option of the city after five years, by section 16-721, Comp. St. 1929.

7. ———: ———: REGISTRATION. All bonds issued by city are required to be registered by the auditor of public accounts by section 11-201, Comp. St. 1929.

APPEAL from the district court for Lancaster county: LINCOLN FROST, JUDGE. *Reversed, with directions.*

Paul F. Good, Attorney General, and *George W. Ayres,* for appellant.

George S. Reeder and *Lowell L. Walker, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

DAY, J.

This is an action in mandamus brought by the city of Columbus, as relator, against the state auditor of public accounts, as respondent, to secure a writ requiring the auditor to register certain sewer bonds of the city of Columbus in the amount of $60,000. The trial court issued the writ, and the auditor has appealed from the judgment.

The petition sets out the history of the bonds and alleges that the auditor refused registration. The auditor in his answer admits his refusal, and pleads justification for a number of reasons. These will be discussed in the order in which they appear in the answer.

First. It is contended by respondent that the act under which the bonds were issued, chapter 146, Laws 1933, now sections 18-1401 to 18-1408, Comp. St. Supp. 1933, was amendatory of the sections of the statute which gov-

erned the construction of sewer systems in various cities of Nebraska, which it did not purport to amend or repeal as the Constitution requires, and is therefore invalid and void. Prior to the enactment of this statute, the city of Columbus had authority to erect, extend or improve and maintain a sewerage system and issue bonds payable from taxes. Comp. St. 1929, secs. 16-649 to 16-654. The 1933 act was either amendatory of sections 16-649 to 16-654, Comp. St. 1929, or it was an independent and complete act. If it was amendatory, it violated section 14, art. III of the Constitution, which provides that no law be amended unless the new act contains the sections as amended and repeals the sections amended. *State v. Moore,* 48 Neb. 870; *State v. Cornell,* 50 Neb. 526; *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493; *Minier v. Burt County,* 95 Neb. 473. In the last case cited, *Minier v. Burt County, supra,* the appellant places much reliance to sustain his position. Searching the opinion to determine the applicable value of the opinion here, we find that "The original act, as amended and still in force, provides that the county board may raise funds for that purpose by the regular 15 mill levy without a vote of the people, provided that they do not require more than $1,500. This statute provides that they may raise the funds in the same manner to the amount of $100,000 if the proper petition is filed." The *Minier* case is not applicable to the situation here. The question for our determination is whether chapter 146, Laws 1933, was an act complete in itself, or manifestly amendatory to the existing statutes to which it does not refer. See *State v. Moore,* 48 Neb. 870; *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493. Quoting from *Stewart v. Barton,* 91 Neb. 96: "Where an act is passed as original and independent legislation and is complete in itself so far as applies to the subject-matter properly embraced within its title, the constitutional provision respecting the manner of amendment and repeal of former

statutes has no application." See, also, 1 Lewis' Sutherland, Statutory Construction (2d ed.) 446.

We think the test applied by this court in *State v. Bauman,* 126 Neb. 566, is accurate in its determination. It is: "The words of this act standing alone would be meaningless. It is only after it is applied to existing statutory provisions that it evidences any 'command.' It provides for no agencies, machinery, or means by which the object sought to be promoted may be secured. When applied to existing laws nothing new, independent, or complementary results. In other words, if the careful student should take House Roll 345 and with it annotate his Compiled Statutes, marking the changes it effects, when his labor was completed not a single new paragraph would be written therein, but old provisions irreconcilable therewith would be changed." Applying that test here, the provisions of the statutes in question are new, independent and complementary. They are independent and complete, and not amendatory. *State v. Cornell,* 50 Neb. 526; *Hoopes v. Creighton,* 100 Neb. 510. The authority given the city of Columbus by sections 16-649 to 16-654, Comp. St. 1929, was not curtailed, restricted, or enlarged by sections 18-1401 to 18-1408, Comp. St. Supp. 1933. The latter provides for a different kind of a sewerage system to be built with a rental charge to the users and to be paid for from such rentals without tax money. The same powers remain, but another and a different power was conferred upon the city. *Bridgeport Irrigation District v. United States,* 40 Fed. (2d) 827.

Secondly. It is urged that the provisions of the act (Laws 1933, ch. 146) are broader than the title. The act attempts to authorize the issue of bonds by cities and villages in the state of Nebraska which shall not be a general liability upon the city or village issuing them but shall be secured only by the property pertaining to the sewer system of the municipality and the revenue derived therefrom, and which attempts to authorize a municipality to secure the payment of such bonds by giving a

mortgage upon its sewer system and the revenue derived therefrom. The title reads as follows: "An act authorizing cities and villages to provide a sanitary means of disposing of the sewage and night soil thereof; to charge owners or occupants of premises therefor; to raise money and issue bonds to erect, extend or improve and maintain sewerage systems and sewage disposal plants, and to authorize municipalities to grant franchises and enter into contracts with private corporations for the construction and operation of sewerage systems and sewage disposal plants." The powers which it was attempted by the legislature to be conferred upon cities to finance a sewer project are found in section 18-1402, Comp. St. Supp. 1933: "For the purpose of owning, operating, constructing and equipping such sewage disposal plant and sewerage system or improving or extending such existing system a municipality may issue mortgage bonds therefor. Such mortgage bonds as provided in this section shall not impose any general liability upon the municipality but shall be secured only on the property and revenues as hereinafter provided of such utility including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale thereof on foreclosure. Such mortgage bonds shall be sold for not less than par and bear interest at a rate not to exceed six per cent. per annum."

The provision of section 14, art. III of the Constitution of Nebraska, that the subject of a bill shall be clearly expressed in the title has frequently been before this court. In *State v. Johnson,* 116 Neb. 249, it is said: "The main purpose of the constitutional provision that 'No bill shall contain more than one subject, and the same shall be clearly expressed in the title,' was to prevent surreptitious legislation, and not to put the lawmakers in a straightjacket." Again, in *Affholder v. State,* 51 Neb. 91, it was determined: "But this constitutional provision should be

liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the purposes of the act as expressed in its title." See, also, *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254; *Elliott v. Wille*, 112 Neb. 78. The title of this, an independent act authorizing the construction of sewers and providing that owners or occupants of the premises shall be charged for the services, and to raise money and issue bonds to erect, extend, or improve sewerage systems, is broad enough to include legislation authorizing issuance of mortgage and revenue bonds which do not impose a general liability upon the municipality but are secured only by the property and revenues of the sewerage system. If by a fair and reasonable construction the title calls attention to the subject-matter of the bill, it may be said that the object is expressed in the title. The title of a bill may be general, but must be specific enough to answer the purpose of the constitutional requirement. See *State v. Johnson*, 116 Neb. 249. 1 Lewis' Sutherland, Statutory Construction (2d ed.) 203. The language in the title of chapter 146, Laws 1933, gave notice of a legislative purpose to provide authority for cities to build a different kind of sewerage system by the issuance of bonds to which the property and the revenues of the system were to be pledged, instead of general obligation bonds of the city.

Thirdly. Objection is made to the bonds for the reason that they do not comply with section 16-721, Comp. St. 1929, which provides: "No bonds issued by the city for any purpose, except paving district bonds, shall draw interest at a greater rate than six per cent. per annum, nor be sold for less than par or face value, and shall be redeemable at the option of the city at any time after five years from their date." The provisions of this statute are applicable to the city of Columbus. It is urged that

this section of the statute is general and relates to other things than the five-year payment option clause, and that since the act in question covers two of the three points it was the legislative intent that this specific legislation should govern and these bonds should not be subject to the general act. The bonds in question are special bonds issued by the city for the purpose of erecting a sewerage system and are comprehended within the general act requiring that they shall be redeemable at the option of the city at any time after five years from date, and it clearly appears that it was not the intent of the legislature to amend section 16-721, Comp. St. 1929. This omission in the bonds would justify the auditor in refusing to register them for that reason.

Fourthly. The respondent contends that, since the bonds are not a general obligation of the city, he is not required to register them by section 11-201, Comp. St. 1929. This section requires that all city bonds be registered with the auditor, and the provisions of chapter 146, Laws 1933, do not except these bonds from registration. There is no repugnancy in the statutes, and the contention of the auditor on this point is untenable. The statute requires him to register all proper bonds when presented.

There are other matters set out in the answer of the auditor relating to the details of the provisions of the bonds, but which are not argued in the appellant's brief and are therefore waived. They are not necessary to a determination of the issues. We conclude that the auditor is required to register these bonds except for the vital and fatal omission required by section 16-721, Comp. St. 1929. Consequently, it is necessary to reverse the judgment of the trial court and remand the cause, with directions to deny the writ.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FARMERS STATE BANK OF WOOD RIVER, E. H. LUIKART, RECEIVER, APPELLEE: MARO D. LYHANE, INTERVENER, APPELLANT.

FILED MAY 22, 1934. No. 28891.

1. **Pleading**: AMENDMENT. "The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court; and unless it is made to clearly appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defense, the supreme court will not interfere." *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281.
2. ———: ———. "It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense or an additional cause of action." *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281.
3. **Evidence** examined, and *held* ample to require the affirmance of the judgment of the district court on a hearing here *de novo*.

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

H. G. Wellensiek, for appellant.

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

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

EBERLY, J.

The Farmers State Bank of Wood River, Nebraska, is an insolvent institution and in charge of a receiver duly appointed.

The appellant, Lyhane, herein designated as plaintiff, by petition of intervention filed in the receivership, presented his claim for a trust fund against the insolvent bank. His right thereto was challenged by the bank's receiver, hereinafter called the defendant, and issues were made up. Upon a hearing on the merits, plaintiff's claim for a trust fund was disallowed, and from the order of the trial court overruling his motion for a new trial he appeals.

This litigation finds its source in the following transactions: In the fall of 1929, Rudolph Durtschi, M. J. McDermott, Otha Oldfather, Maro D. Lyhane, W. T. Schooley, A. E. Hauke, W. A. Francis, and F. J. Miller were the directors of the Farmers State Bank of Wood-River, and the larger stockholders therein. The bank was in need of cash, not only because of the situation created by the failure of several nearby banks, but in order to supply the demand for live stock loans made upon it by "feeders" of the territory it served. For this purpose five of the directors above named evidently "loaned their credit" to this bank in the following manner: McDermott, Oldfather, Hauke, Francis and plaintiff, Lyhane, made up a fund of $46,000, each contributing the sum of $10,000 excepting Francis who paid in the sum of $6,000. This $46,000 was paid over to the Farmers State Bank of Wood River to meet the situation confronting it.

Substantially contemporaneous with this all the directors, including Lyhane but excepting F. J. Miller, entered into an agreement in writing "on —— day of November, 1929," in contemplation of this transaction, wherein it was expressly agreed, among other provisions, that each of said parties "shall purchase from the Farmers State Bank of Wood River, Nebraska, notes, either secured or unsecured, without recourse, and pay therefor the face value thereof to such an amount as each may determine for himself and to carry said note or notes until such time as the said bank may, at its discretion, desire to repurchase the same or to purchase renewal notes, if said notes should be renewed, * * * and further agree to carry said notes until maturity or for a period of —— months. * * * It is further agreed and understood that the signing of this contract does not in any way obligate or bind the Farmers State Bank of Wood River to repurchase any of said notes and the purpose of this agreement is that each of the parties signing the same will stand an undivided one-seventh of any and all loss which may be sustained by the parties hereto through the purchase of

said notes. It is agreed that said loss shall be determined within a period of —— months from the date hereof, unless otherwise mutually agreed upon by the parties hereto."

The record supports the inference that the money thus contributed by all except Lyhane was the proceeds of real estate loans made on real estate by them severally owned. The $10,000 contributed by Lyhane was borrowed at the Packers National Bank of Omaha, Nebraska, on his individual note. As these sums were each received by the bank there was withdrawn from the bank's bills receivable "good notes" of substantially equivalent amount and placed in an envelope on which the contributor's name was inscribed. These notes were each indorsed without recourse in lead-pencil in order that upon payment or renewal the indorsement could be erased so that the fact of its having been made could be concealed.

Director Oldfather testifies that the notes thus placed "in separate pouches" were left at the bank for the cashier to look after, to collect the interest and renew, or if any of them were paid, to substitute equally as good notes (from the bank note case) as those paid. The evidence in the record indicates that the interest on all loans made by the several contributors was paid by the bank out of its own funds, but that the bank got the benefit of the interest accruing on the notes placed in the contributors' envelopes. This is certainly true as to the nonpayment of interest by the plaintiff.

There seems to have been no interruption of the intended progress of this transaction until on April 10, 1930. On that day plaintiff's note of $10,000 was in the possession of the Packers National Bank. In the envelope with his name inscribed thereon were notes substantially aggregating the amount of his note. The state examination of the bank had just been completed the day previous, and the result thereof was a requirement that $29,580.28 of the bills receivable be "charged off." Plaintiff was admittedly present for a part of the time while

this examination was being made. The evidence for the defendant tends to establish that the matter of providing for the "charge off" was submitted to him and he approved verbally substantially the following plan: That $11,120.28 should be debited to undivided profits, and $18,460 should be taken out of the contributors' envelopes and returned to the bank. This was embodied in a report to the state under date of April 10, 1930, over the signatures of all the directors save Lyhane. In this report are schedules of the notes contributed for the purpose of making up the $18,460. It discloses that $4,610 was received from Maro D. Lyhane in eight notes which are itemized by date, name of maker, and amount. A true copy of this report continued to be a part of the records of the bank, and was made a part of the directors' minutes. The $18,460 in notes was thereupon received and regularly entered up in the bills receivable as the property of the bank. Lyhane now denies all knowledge of this transaction.

In his petition filed in the present case, plaintiff in substance alleges that he was on April 10, 1930, the owner of eight notes of the total value of $4,610, which he had previously purchased from the defendant bank, and which he had left with the bank for safe-keeping and payment; that the defendant bank without his knowledge or consent illegally converted said notes to its own use by substituting them for worthless notes of the bank which the bank examiner had directed to be eliminated from the assets of the bank; that the eight notes in suit were good and collectible, and augmented the assets of the bank in the sum of $4,610, all of which went into the possession of the receiver. Plaintiff admits a total credit of $850, which the bank is entitled to, and prays judgment for $3,750 and interest as a trust fund with priority of payment over all other creditors. The defendant's answer, in addition to a general denial, alleged that on April 10, 1930, plaintiff, intervener, contributed said notes to a common pool for the purpose of elim-

inating certain "bad paper" from the assets of the bank, and accepted his proportionate share of such "bad paper," and that he knew of this procedure and acquiesced therein. Certain other allegations were contained in the answer, to which plaintiff filed a reply. Thereafter, during the trial of the action to the court, at the suggestion of the trial judge, defendant amended his answer by incorporating therein allegations of estoppel. The cause was thereupon, on application of plaintiff, continued for ten days to allow for filing an amended reply to the amended answer, with permission to withdraw rest. The amended reply was thereafter filed, and on the evidence received upon the issues thus made the trial court entered judgment for defendant, and dismissed plaintiff's action.

Two errors are presented on this appeal. The first for our consideration is the charge that the trial court erred in permitting the defendant to amend his answer, after plaintiff had rested, by incorporating therein the allegations of estoppel.

It will be noted that, the amendment having been made, the trial court continued the hearing ten days "with permission to withdraw rest." Conceding that estoppel, to be available as a defense, must be pleaded *(Salladin v. Mitchell,* 42 Neb. 859), still the action of the trial court in permitting the amendment complained of is not erroneous. In *Omaha & R. V. R. Co. v. Moschel,* 38 Neb. 281, we held:

"The permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court; and unless it is made to clearly appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defense, the supreme court will not interfere.

"It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense or an additional cause of action." See, also, *Dunn v. Bozarth,* 59 Neb. 244.

In order to predicate error in allowing the amendment of pleadings by the trial court, at any stage of the trial, it must be shown affirmatively that the trial court abused its discretion. *Blakeslee v. Van der Slice,* 94 Neb. 153; *Continental Supply Co. v. Syndicate Trust Co.,* 52 N. Dak. 209.

Plaintiff's rights were amply protected, so far as disclosed by the record, by the continuance of the hearing for the period of ten days, "with permission to withdraw rest." The district court therefore must be deemed to have proceeded within its discretion and without error.

The second contention of plaintiff is, in effect, that the evidence is insufficient to support the judgment.

Preliminary to a discussion of the evidence, it may be said that during all of the time occupied by the related transaction involved in this litigation plaintiff was an active and qualified director of the Farmers State Bank of Wood River. On a related subject in *Merchants Bank v. Rudolf,* 5 Neb. 527, 540, Lake, C. J., in delivering the opinion of this court, employed the following language:

"In Morse on Banks and Banking, 90, 91, it is said that 'The general control and government of all the affairs and transactions of the bank rest with the board of directors. For such purposes the board constitutes the corporation,' and 'uniform usage imposes upon them the general superintendence and active management of the corporate concerns. They are bound to know what is done, beyond the merest matter of daily routine, and they are bound to know the system and rules arranged for its doing.' Again, on page 115: 'Whatever knowledge a director has, or ought to have, officially, he has, or will be conclusively presumed at law to have, as a private individual. In any transactions with the bank, either on his own separate account, or where others are so far jointly interested with him that his knowledge is their knowledge, he and his joint contractors will be affected by this knowledge which he has or which he ought, if

he had duly performed his official duties, to have acquired.' *Lyman v. United States Bank,* 12 How. 225."

The transaction in suit considered as an entirety contains peculiar features. In the fall of 1929 this bank wanted new cash in the amount of $46,000. Two resources were presumably open to it. It could borrow on its bills payable, or it could rediscount bills receivable. Either of these methods if adopted would require appropriate entries on its books and the facts would be disclosed on its published statements. It does not clearly appear to what extent the bank had exercised these powers in November, 1929. But on July 10, 1930, after the demand for "feeder loans" was largely over, the record before us discloses that it had bills payable outstanding in the sum of $8,100; rediscounts with the Federal Reserve, $18,139; rediscounts with the Grand Island Clearance Association, $25,000, or a total of $51,239. Its total amount of paid-up capital and surplus was then $66,000.

"The aggregate amount of the rediscounts and bills payable of any corporation transacting a banking business in this state shall at no time exceed the amount of its paid-up capital and surplus. * * * Provided, however * * * any state bank becoming a member of the Federal Reserve system, may * * * have the same privileges as to rediscounts and bills payable with the Federal Reserve banks and may incur liabilities to such banks to the same extent as national banks." Comp. St. 1929, sec. 8-136.

So, too, it is to be remembered in this connection that the total of bills payable and rediscounts appears in the published statements of banks and thus becomes in part the basis of its credit with those who deal with it.

The necessary result of the transaction initiated in November, 1929, is that the bank received $46,000 "new cash." This amount was covered by the directors' individual obligations to third persons, on which the bank paid the interest. The record establishes that the bank received the interest on the notes kept in the directors' individual pouches. It thus profited to the extent of the

difference between the interest paid and the interest so received. Identified by its results the transaction was identical with the rediscount of the $46,000 in notes. At least the entire deal was solely for the benefit of the bank, and in the transaction $46,000 of its good notes was charged with the ultimate extinguishment of the obligations constituting the source from which $46,000 in cash was received. The situation suggests the query that, looking through form to substance, should not this transaction have been reported to the state either as "bills payable" or as "rediscounts," and the further query, is not plaintiff's claim substantially within the words of inhibition contained in the statute last referred to?

But, wholly aside from the questions suggested, while plaintiff orally testified in the presence of the trial court that he at no time authorized the withdrawal of $4,610 in notes from the envelope inscribed with his name, this testimony was met with like positive oral evidence that, though he was not present when the formal action was taken of accepting these notes and incorporating them in the assets of the bank, plaintiff in substance approved this plan and fairly authorized the action taken. The trial court heard this evidence and observed the witnesses as they testified, and thus possessed advantages which this reviewing court does not have.

Unquestionably the plaintiff, in general, knew of the bank examination of April 7 to 9, 1930, and in a general way knew the results, and necessarily must have known that steps were required of the board of directors to remedy the situation. What was actually done was itemized, and the notes claimed by plaintiff were scheduled by date, name of maker, and amount, and formally taken into the assets of the bank. The action taken was formally reported to the state. The records retained in the bank were full, detailed and explicit. Twice thereafter the "bills receivable" of this bank were checked over by its directors as a board of auditors with plaintiff present each time and participating. Twice the statements which

included the notes now claimed by plaintiff were formally unanimously approved. Twice it was expressly certified in reports of the bank to the state that the record of obligations of the bank, as contained in these reports, was complete. Twice as a member of the board of directors, and subsequent to the taking over by the bank of the notes now claimed by plaintiff, plaintiff certified that no other outstanding obligations of the bank existed. And admittedly at both of these times the obligations scheduled, of which plaintiff's certificate formed a part, did not contain the claim now made by plaintiff. On the basis of these reports this bank was permitted to continue business by the state, and on the basis of the published statements required by law, which we may assume were made, depositors permitted their deposits to remain in the bank and also made new deposits.

Under the situation thus presented, this reviewing court, in a trial *de novo,* has reached the conclusion that the judgment of the trial court is in all respects correct, and the same is

AFFIRMED.

CLARENCE G. BLISS, RECEIVER OF FARMERS STATE BANK OF POLK, APPELLANT, V. FARMERS GRAIN & STOCK COMPANY: FRANK A. ADELSON ET AL., APPELLEES.

FILED MAY 22, 1934. No. 28910.

1. **Corporations: NOTES: CONSIDERATION.** Extension of credit to a corporation is sufficient consideration for indorsement of corporation's note by an officer.
2. **Set-off** implies demands between same persons in same capacity at the same time. *Bank of Crab Orchard v. Myers,* 120 Neb. 84.
3. **Appeal.** "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223.

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

W. T. Thompson and *E. R. Mockett,* for appellant.

H. G. Wellensiek and *Mills & Mills, contra.*

F. C. Radke, Barlow Nye and *W. A. Crossland, amici curiæ.*

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

DAY, J.

This is an action to recover a balance due on three promissory notes which were the obligation of the Farmers Grain & Stock Company, a corporation, and indorsed by Frank A. Adelson, A. C. Jones, Charles W. Flick, and Adam Deuker. The plaintiff was the assignee of the notes after the failure of the bank, and the defense to the notes was that the defendants were accommodation indorsers, and, even if they were not, they were entitled to a set-off in the amount of their deposits in the insolvent state bank. The trial court found that the individual defendants were ordinary indorsers and liable personally as such and entered a judgment against the Farmers Grain & Stock Company but found that Adelson, Jones, and Deuker were entitled to a set-off in the amount of their deposits.

The Farmers State Bank of Polk was adjudicated insolvent in May, 1929. In October the receiver filed an action on the notes against the defendants to recover thereon the balance due, approximately $2,500. Before the issues were made up, the receiver sold the notes, constituting the cause of action, to Josephine S. Warren, who made an application and secured an order from the trial court to be substituted for the receiver and to prosecute the action in the name of the receiver. An amended petition was filed to which the Farmers Grain & Stock Company made no answer. The defendants Adelson, Jones,

and Deuker admitted the making and delivery of the notes. The other indorser, Flick, was deceased. The defendants alleged as a defense that they were accommodation indorsers and that they signed merely as officers and directors of the Farmers Grain & Stock Company to authorize the loan by the bank.

The defendants also filed a cross-petition in which they allege that the Farmers Grain & Stock Company, Flick's estate, and Farmers State Bank of Polk and the depositors' guaranty fund were insolvent; that the receiver of the bank had sold all the assets or converted them into cash and paid a dividend of 25 per cent. on the claims of the depositors; that there was a small amount of money in the hands of the receiver, and the liabilities of stockholders of the bank were paid, but not more than 40 per cent. would be paid to depositors on their claims, and that the depositors' guaranty fund law had been repealed. The defendants further alleged that each of them were depositors in the bank when it was adjudged insolvent. The deposits were: Deuker $18.91; Jones $112.49, and Adelson $10,370.49, and on which each of the defendants were allowed 25 per cent. dividend, and that Adelson had been paid $2,592.62, leaving him a balance due of $7,777.87 from the bank, and that Jones and Deuker had been allowed but not paid their 25 per cent. dividends. It was further alleged that Adelson filed a general claim with the receiver on which he had been allowed a general creditor's claim in the sum of $5,152.50. The defendants alleged that they were entitled to have the balance on their claims as alleged set off as to any amount found due from the defendants on the note of the plaintiff and to have said notes canceled and discharged.

The plaintiff admitted in her answer to defendants' cross-petition the allowance of the claims of defendants Jones, Deuker, and Adelson, as depositors; that the defendants had filed claims for the entire amount of their deposits, and that Adelson had been paid the dividend on his. As further answer to defendants' cross-petition,

plaintiff alleged that the defendants did not at the time of filing their claims for deposits with the receiver, or any time thereafter, ask to have their claims set off against what they owed the bank on the notes, but that they filed their claims and secured the allowance of the same for the full amount, and that Adelson received in dividend $2,592.62 and did not at any time return or offer to return any part thereof; that neither Jones nor Deuker had ever renounced his right to or ownership of the dividend allowed them, but that each of the defendants had elected to accept dividends on his claim in full and in lieu of any right he might have to a set-off, all of which was done prior to the purchase of the notes by Warren; that the defendant Adelson in his petition of intervention, seeking to have his claim allowed as a bank deposit, alleged his right to set off the amount due him on his deposits from the bank against the amount he owed the bank on the notes in suit, and asked to be subrogated to the rights of the receiver of the bank against his co-obligors, but when the case came for trial he withdrew his claim for set-off. The plaintiff, in answer to defendants' cross-petition, alleged that by reason of the conduct of defendants each waived his right of set-off and became estopped from now claiming any right of set-off.

The plaintiff appealed from the judgment of the trial court that Adelson, Jones and Deuker did not become estopped to claim the right of set-off by filing a claim and receiving dividends as depositors. The defendants Adelson, Jones and Deuker have perfected a cross-appeal to the finding of the trial court that they signed the notes sued upon as indorsers and that they were liable as such indorsers. The cross-appellants further assign as error the entry by the trial court of a judgment in favor of the plaintiff against the Farmers Grain & Stock Company. The Farmers Grain & Stock Company was a defendant in the lower court, defaulted, and has not appealed to this court. The questions therefore presented for our determination are: (1) Were the defendants liable as in-

dorsers upon the notes? and (2) were the defendants entitled to a set-off, or were they estopped to make such a claim because they failed to have their right to set-off adjudicated or determined upon their petitions of intervention for the allowance of depositors' claims in the receivership?

Two of the notes involved in this controversy were executed by the Farmers Grain & Stock Company of Polk, Nebraska, and the other by Charles W. Flick. On the back of each of the notes appeared the names of the appellees. The indebtedness was that of the Farmers Grain & Stock Company. The appellees were officers and directors of the Farmers Grain & Stock Company. These notes were indorsed by the appellees for the purpose of raising money to carry on the business of the Farmers Grain & Stock Company. The appellees were interested in extending the credit of the company. An extension of the credit was a good consideration for signing the notes. Extension of credit to a corporation is sufficient consideration for indorsement of corporation's note by an officer. *Citizens State Bank v. Arapahoe Flour Mills,* 126 Neb. 58. The evidence in this case is conclusive that the appellees were ordinary indorsers and liable upon the notes. The evidence does not bring the case within the rule of *Luikart v. Meierjurgen,* 124 Neb. 816.

The next question to engage our attention in this discussion is the right of the appellees in this case to a set-off of the amount of the notes sued upon here against the amount due them from the bank. Two of the appellees had small deposits, but Frank A. Adelson, in addition to a deposit which was allowed as a preferred claim in the sum of $10,370.49, was also allowed a general claim against the bank in the sum of $5,152.50. The argument before the court and in the briefs was largely directed to the proposition that, since the appellees had filed their claims as depositors against the insolvent state bank, they were now precluded from urging a set-off for that their claim had been allowed as a deposit and a dividend paid

thereon. It was argued that this would be an illegal or at least an unfair preference between depositors. It is urged that appellees' failure to urge their set-off at the time they filed their claims against the bank amounted to a selection of remedies, and that they cannot, when suit is brought upon the note, thereafter urge a set-off. It seems so unnecessary to enter into a discussion of the intricate complications arising from such a condition, because at the time of the insolvency of the bank, when the appellees were obligated by reason of their indorsement on the note in suit, the bank was indebted to one of the appellees in a sum almost twice the amount of the note. This indebtedness of the bank to the appellee Adelson was allowed as a general claim amounting to $5,152.50. No right of depositors or of any third person intervenes as to this indebtedness. No dividend has ever been paid upon this claim, and there is no waiver or estoppel with reference to it. Since it was for more than the amount of the note, the judgment of the trial court allowing the appellees a set-off is unimpeachable. It has recently been held by this court that a set-off implies demands between same persons in same capacity at the same time. *Bank of Crab Orchard v. Myers*, 120 Neb. 84. At the time of the insolvency of the bank, the appellees owed the bank and the bank owed the appellees. The plaintiff, who purchased the note after maturity, was in the position of the bank as to the set-off.

The appellees have filed a cross-appeal in which they complain that the trial court erred in allowing a set-off sufficient to cancel the note upon which the appellees were liable as indorsers and at the same time entered a judgment against the Farmers Grain & Stock Company, a corporation, the maker of the note. The record reveals that, at the time of the trial, the Farmers Grain & Stock Company was in default and made no appearance, and therefore the judgment against it was a default judgment. It is their contention that, where a note has been paid by one who is only secondarily liable as an indorser

he will be subrogated to all the rights and remedies which were available to the holder or owner of the instrument to obtain payment from parties primarily liable on the instrument. The Farmers Grain & Stock Company is not a party to this appeal. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223; *Reilly v. Merten,* 125 Neb. 558. The appellees are therefore not entitled to a reversal of the judgment against the Farmers Grain & Stock Company under any circumstances.

AFFIRMED.

JENNIE ZIELINSKI, APPELLANT, V. ROBERT L. DOLAN ET AL., APPELLEES.

FILED MAY 22, 1934. No. 28935.

1. **Negligence.** When separate, independent acts of negligence combine to produce a single injury, each defendant involved therein is responsible for the entire result, even though the negligent act of any one of the defendants alone might not have caused the injury.
2. **Appeal: DIRECTION OF VERDICT.** A motion to direct a verdict at the close of plaintiff's evidence is, in effect, a demurrer to the evidence, and where the trial court sustains such motion, and dismisses the action, the appellate court, in reviewing such decision, will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish and, in addition, give the plaintiff the benefit of the logical inferences therefrom.

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

A. Zaleski and *O'Sullivan & Southard,* for appellant.

M. L. Donovan, Crofoot, Fraser, Connolly & Stryker,

Fradenburg, Stalmaster & Beber, O. T. Doerr, P. M. Klutznick, E. J. Shoemaker, W. W. Wenstrand and *Kennedy, Holland & DeLacy, contra.*

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

PAINE, J.

This is an action for damages for personal injuries sustained by the plaintiff, Jennie Zielinski, at about 8:30 a. m., Sunday, November 22, 1931, when she was struck by an automobile driven by the defendant Raymond Haney, when she was about to alight from a street car at Thirteenth street and Deer Park boulevard in the city of Omaha.

The plaintiff, in her second amended petition, charges that the defendant Raymond Haney was a minor, 15 years of age, at the time of the accident; that Robert L. Dolan was the owner of the Chevrolet roadster involved, and was employed by the Omaha Ice & Cold Storage Company as manager of its South Omaha sales plant, and was directed by said company to deposit money, received from the sale of its ice, in the Packers National Bank, on Saturday evenings and Sundays and holidays, by means of a key which opened an outside deposit box in said bank for such deposits when the bank was not open. That on the day of the accident Mr. Dolan forgot to bring this key to the ice office, and sent the boy, Raymond Haney, to his home in his car to get said key.

That the defendant Kritenbrink Brick Company had been using a number of trucks, hauling loose dirt on the street at the place where the accident occurred, for several months immediately prior thereto, including the preceding day. That through its employees it negligently and carelessly allowed this loose dirt to be spilled over the street, to a depth in places of three inches thick, thereby violating section 3 of ordinance No. 5515 of the city of Omaha, which was then in full force and effect, and provided: "It shall be the duty of any person, com-

pany or corporation engaged in hauling earth over, along or across any part of any paved street or alley in the city of Omaha in pursuance of a permit as heretofore outlined, to use wagons for hauling such earth of such construction as the street commissioner may approve, and to so load such wagons in such manner and to so clean them after unloading, as to prevent the spilling or wasting of earth therefrom in passing over the streets and alleys, and it shall be the duty of such person, company or corporation holding such permit, during the progress of such work, to keep the paved streets and alleys over which dirt shall be hauled by them, free from any dirt that may accidentally, or otherwise, be spilled upon pavements, gutters or sidewalks, and properly clean the same when required by the street commissioner." It was further alleged that it rained and sleeted Saturday night, and up to about 9 o'clock Sunday morning, causing that part of Thirteenth street to become wet, slippery, muddy, sleek, and dangerous to travel, and that the Kritenbrink Brick Company, defendant, by the exercise of ordinary care, should have known and foreseen that spilling of this loose dirt, and failure to remove the same, constituted such a danger under such conditions of wet weather.

That the plaintiff was a fare-paying passenger upon a one-man street car, in which the vestibule at the front was not partitioned off by any inclosure separating it from the rest of the car. That the plaintiff signaled the car to stop at Thirteenth street and Deer Park boulevard, to enable her to transfer to a Tenth street car. That she proceeded to the front end of the car, stepped down into the vestibule, and the motorman opened the exit door. That she stood just ready to alight when the approaching automobile driven by Raymond Haney crashed into the street car door, tore part of the door off, and the step along with it, and caught the plaintiff's right foot and leg between the door and the step, and sheared it off just below the knee to such an extent that it had to be amputated. That this automobile careened and skidded in the

slime and mud from one side of the street to the other, and was going at an excess of 30 miles an hour, and failed to stop, as required by law, when street cars were letting off passengers where there was no safety zone, and, as a result of various acts of negligence, the plaintiff suffered the loss of her right leg, a severe nervous shock, excruciating pain, sustained bruises over her body, and has had to endure several operations upon the leg. That at the time she was 22 years of age; had a life expectancy of 40 years; had been employed by Loose-Wiles Biscuit Company, earning $12 to $18 a week. That she had been permanently injured and crippled, and sustained damages in the sum of $50,000.

That the Kritenbrink Brick Company, hereafter called the Brick Company, filed its answer, alleging that the accident was caused by the negligence and carelessness of Raymond Haney, and denies that it is responsible in any way for said accident. Answers were also filed by several of the defendants.

At the close of the plaintiff's evidence, each of the defendants moved the court to dismiss the cause of action for want of sufficient evidence, and the court sustained the separate motions of the Omaha & Council Bluffs Street Railway Company, a corporation, hereafter called the Street Railway Company, the Brick Company, a corporation, the Omaha Ice & Cold Storage Company, hereafter called the Storage Company, and overruled such motions as to Robert L. Dolan and Raymond Haney. On February 18, 1933, the jury returned a verdict into court in the sum of $5,000, and against Robert L. Dolan and Raymond Haney, and judgment was entered in favor of the plaintiff against the two defendants named. Thereupon, a motion for a new trial was filed by Robert L. Dolan. The plaintiff also filed separate motions for new trial against the Street Railway Company, the Brick Company, the Storage Company, and Robert L. Dolan and Raymond Haney. The only defendants appearing by attorneys, and filing briefs in this court, were the Street Railway Com-

pany, the Storage Company, and the Brick Company.

We will now examine the evidence relating to negligence charged against the Brick Company. John Leeder, a florist, who owned and operated a flower house at the northwest corner of the intersection, where the accident occurred, testified that there is an incline both ways; that Thirteenth street is paved with brick, and that the Brick Company had an electric shovel in operation at Thirteenth and A streets, about a block south of the boulevard; that this electric shovel had been located at that place for about a month, excavating and hauling clay in trucks along the east side of Thirteenth street; that the clay was piled on these large trucks to a depth of about two feet above the sides of the trucks; that they had hauled clay until about 5 o'clock on Saturday afternoon before the accident; that he saw this clay dropping off of the trucks in front of his place of business and along the street; that at one place near this intersection there was a good wheelbarrowful that had dropped off from a truck; that it was yellow clay; that by Sunday morning it was all wet. That he was just coming out of the door of his house, heard a crash, and woman scream, and ran over there. That her leg was badly cut, and the car door was gone. That it was drizzling at the time, and the pavement was wet and very slippery, and he could see where the automobile had tried to stop behind the street car and skidded to the east side of Thirteenth street and then back to the side of the street car, and that the skid marks were easily seen, and immediately after the accident he called Dean Noyes, city commissioner in charge of streets, and told him there was an awful accident, and asked him to have the street flushed, as the street was in terrible condition. He testified that the Brick Company was the only one who hauled this loose clay over Thirteenth street. Bert Munchoff, a married man, lived just opposite the clay bank that the Brick Company was grading down. He testified that on Saturday night, in going home in the mist or rain, he almost fell down in the slush and mud

on the street near this point. He said the trucks of this defendant were hauling during all the week prior to the accident, and that they moved from 3½ to 4 yards of clay to a load, and heaped the trucks high in the center, and more or less dirt fell off of the trucks. He testified that the clay bank opposite his house, which was being graded down, was about 20 feet high. Others testified to the same condition as to the clay being scattered over the street at this place, and the rain which turned it to slime and sleek mud. Others testified that they drove their cars over this spot this Sunday morning, and the cars would skid and slip, even when going slowly, with the most careful driving.

Raymond Haney testified that he was 15 years old at the time of the accident, and did not have a driver's license.

After the plaintiff had rested, the court stated that the plaintiff had not produced evidence to show what caused Haney to lose control of his car, and the plaintiff asked leave of court to withdraw her rest as to the defendant Brick Company, and to call Raymond Haney to the witness-stand to testify to the condition of the street over which he traveled just before the accident. This the court refused to do. An affidavit of Raymond Haney, in support of a motion for new trial, was introduced and made a part of the record, and is found in the bill of exceptions. He stated that, as he came over the top of the hill, at about 25 miles an hour, he noticed the street car was approximately half way down the hill, and he came to a thin layer of mud. When nearing the intersection at the bottom of the hill, the street car seemed as if it were going to continue across, but the motorman suddenly applied the brakes and stopped the car. He applied his brakes and turned the wheels, but the automobile continued to skid towards the curb, and hit the curb, jerked the wheel out of his hands, and skidded back towards the street car. He tried to turn the wheel, to avoid colliding with the street car, but the automobile

continued to skid into and hit the street car. The thin layer of mud was practically continuous on the east side of Thirteenth street. The speed of his car was approximately 20 miles an hour at the time he collided with the street car. The windshield wiper was working all right, and there was mist at the time.

C. E. Wright, sales supervisor of the Hoover Company, Mrs. Charlotte LaTowsky, and John M. Roubal, auditor of the Woodmen of the World, who live in the immediate vicinity, had great difficulty in driving their automobiles, near the time and place of the accident, over the muddy, slippery, and greasy road, caused by this clay spilling off from the trucks of the Brick Company.

It was not necessary that the plaintiff prove that the negligence of the Brick Company was the sole proximate cause of plaintiff's injury. We hold that, if separate, independent acts of negligence combine to produce a single injury, each is responsible for the entire result, even though the negligent act of any one of the defendants alone might not have caused the injury. *O'Neill v. Rovatsos,* 114 Neb. 142; *Schweppe v. Uhl,* 97 Neb. 328; *Robertson v. Chicago, B. & Q. R. Co.,* 108 Neb. 569; *Olson v. Hansen,* 122 Neb. 492; *Koehn v. City of Hastings,* 114 Neb. 106.

The trial court sustained the motion of the Brick Company for an instructed verdict at the close of the plaintiff's testimony. This ruling has given this court considerable difficulty. We believe that sufficient facts were alleged against the Brick Company in the second amended petition to withstand a demurrer. After the plaintiff's evidence is taken, then a motion to dismiss a defendant is, in effect, a demurrer to the evidence. Therefore, the court must consider all the facts testified to by plaintiff's witnesses as established, together with all inferences which can logically be drawn therefrom. *Harris v. Lincoln Traction Co.,* 78 Neb. 681; *Kimble v. Roeder,* 115 Neb. 589. We have even said it was error if there is competent evidence from which the alleged facts may

reasonably be inferred. *Interstate Airlines v. Arnold,* 124 Neb. 546; *Thamann v. Merritt,* 107 Neb. 602.

The judgment of the trial court dismissing the cause as to the Omaha & Council Bluffs Street Railway Company, and also as to the Omaha Ice & Cold Storage Company, is affirmed. We find that the entry of the judgment of dismissal of the Kritenbrink Brick Company was an error, which dismissal is hereby set aside, and said cause is reversed and remanded for a new trial as against the defendant Kritenbrink Brick Company.

AFFIRMED IN PART, AND REVERSED IN PART.

CITY OF SCOTTSBLUFF, APPELLEE, V. WESTERN PUBLIC SERVICE COMPANY, APPELLANT.

FILED MAY 22, 1934. No. 28973.

1. **Municipal Corporations.** Where a contract is ambiguous, and a practical construction is placed thereon by which a city council pays a certain sum monthly to a utility company, a new city administration cannot months later recover such payments.
2. ———: ESTOPPEL. Such payments so made do not, however, estop the present city council from refusing longer to make said payments.

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

Clarence A. Davis, Morrow & Morrow and *Mothersead & York,* for appellant.

Floyd E. Wright and *William H. Wright, contra.*

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

PAINE, J.

This is an action at law, brought by the city of Scottsbluff to recover $1,841.94 with interest, being money paid at the

rate of $100 a month for 18 months and 13 days, beginning April 1, 1930, for a claim filed each month with the city for "operating city water pumps per month." The Western Public Service Company, defendant, counterclaimed and asked for a judgment for $100 a month for such service, beginning October 1, 1931, and ending March 1, 1933. Jury was waived, and after trial a judgment was entered, dismissing the petition of the city and dismissing counterclaim of the company.

On February 14, 1930, the city council of the city of Scottsbluff (hereinafter called the city) by ordinance granted a franchise to the Western Public Service Company (hereinafter called the company) for a period of 25 years to operate and maintain its electric light system. Section 5 of the franchise provided that the company would furnish, and the city agreed to purchase, receive, and pay for, its requirements for street lighting, water pumping, and sewer pumping services, on a certain basis therein set out. It was also provided in said ordinance that the company would install such pumping equipment as may be requested by the city in writing, and that the city would pay the company an annual fixed charge of 6 per cent. on the investment made by the company to cover interest, and pay 9 per cent. to cover taxes, maintenance, and replacement of the equipment, and the original amount of the pumping equipment so installed cost $5,000. Prior to the passage of the ordinance granting the franchise, the question was submitted to the electors of the city at a special election called for that purpose, and was duly authorized.

The franchise went into effect March 18, 1930, and, in pursuance of an oral agreement between the city council and the division superintendent of the company, it was agreed that the city would pay $100 a month to the company for operating the pumps, which charge was in addition to, and had nothing to do with, the cost of the electric current required to run the pumps as shown by the meters, but the $100 a month item covered the upkeep

of the pumps, the oil, fixing them up, keeping them in good repair, and running in a satisfactory manner. On April 1, 1930, the company billed the city for $41.94, covering the first period of 13 days under the new franchise, and thereafter each month made a charge of $100 for 18 months, and the said charge was duly audited by the finance committee, allowed by the city council, and warrants were drawn in payment thereof.

A change in the city administration then took place, and the council promptly stopped paying this item of $100 a month, claiming there was no authority to pay the same under the franchise. However, the company continued to bill the city for this amount each month, the said item of $100 being the part of a much larger bill covering cost of electricity and other items provided by the franchise, and the city rejected this item from the bill before paying the same.

On September 5, 1932, the city filed a petition in the district court and sought to secure a judgment against the company for the $1,841.94 already paid, with interest at 7 per cent. On April 24, 1933, the company filed its answer, admitting that the city had made a written demand upon the company for a refund, which it had refused to honor, and denied any liability thereunder, and, in addition, set up a counterclaim for 18 months' additional service in operating said pumps at the rate of $100 a month, and asked judgment for $1,800.

The first question presented is whether section 5 of the franchise provides for such disputed payment of $100 a month for the operation of the pumps. The city claims that there is no such provision in the franchise, and, further, that the amounts already paid on such claim were paid out without authority, and should be refunded. The company, on the other hand, maintains that all the company was required to do was to set up the pumps and furnish the electric energy to operate all of such pumps, and that, if the city was required to pay the expense of the electric energy for running the pumps, it would also be

required to pay an additional amount for the upkeep, for oiling the pumps, and fixing them up, and keeping them each going properly, and claims that it is evident that there is nothing in the franchise that requires the company to furnish a man to do such labor on the pumps.

The company contends that in 1910 Scottsbluff had a population of 3,500, and at the time the franchise was entered into it had a population of 8,500, and if such rapid growth continued there would during the life of the contract, of 25 years, be a necessity of installing a dozen or two dozen additional pumps, and that nothing in the franchise requires this manual labor in and about each pump to be done and performed by the company.

In the counterclaim the company alleges that there was an oral contract for this $100 a month, which was a contract the city was duly authorized to enter into, but also in the counterclaim it sets up that the charge of $100 a month was a fair and reasonable charge for the services performed, which services the city accepted, allowed, and paid for, thus basing their claim, not alone on contract, but on *quantum meruit*. The franchise provides that all of these pumps shall be purchased and installed by the company, and it is claimed by the city that each and all of these pumps were duly installed upon land belonging to the company, and that the city would have no right to send one of its employees upon the land of the company to work in and about and around these pumps.

It is claimed on the part of the company that the city, in operating its waterworks and sewer system, is doing this the same as any other individual, and not in its governmental capacity as a city, and that for such business so conducted the law does not require the contract to be submitted to a vote of the people.

It is difficult, in a careful reading of the franchise, to find any specific clause which provides, even indirectly, that the city must furnish a man to handle these pumps, but it does provide that they shall be installed by the company, and the company shall furnish the electric energy

to run them, which would, in a way, negative the idea that the city had any duty to perform in the operating of the pumps.

The members of the city council, in office at the time this franchise went into effect, decided to pay this fee of $100 a month.

"A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts." *Hale v. Sheehan,* 52 Neb. 184; *Wilhoit v. Stevenson,* 96 Neb. 751. See, also, *Sibert v. Hostick,* 91 Neb. 255; *Jobst v. Hayden Bros.,* 84 Neb. 735.

It has been held that such a construction by the parties will be enforced, even though it be a peculiar construction. *Woodard v. Baird,* 43 Neb. 310. It was said in 4 Neb. Law Bulletin, 149: "Such applications of the rule may be justified perhaps upon the theory that the conduct of the parties amounts to an implied agreement modifying the contract."

"Where the proper construction of a contract is not free from doubt, recourse may be had to the preliminary negotiations between the parties for the purpose of determining the correct construction to be given it." *Mather v. London Guarantee & Accident Co.,* 125 Minn. 186.

"To reconcile seeming inconsistencies in provisions of a written contract, when segregated from the context, the instrument should be considered in all of its parts, and mutual interpretation of the parties as indicated by what they did under it, as well as fair dealing and intention, if discernible from the writings as a whole, may be also considered." *Petersen v. City of Omaha,* 120 Neb. 219.

The action of the city in paying the $100 a month is binding upon the city in the case at bar, for it was on a claim regularly presented, duly audited by the finance committee, and warrants ordered drawn by the council, and this court can find nothing illegal in such voluntary payments, and having been made, such payments cannot be recovered by the city.

These payments of $100 a month, which we have been

discussing, covered payments already made, many months before, and it might well be said that the water has gone over the dam, and this city council is estopped from recovering payments thus willingly made by a former city council.

However, this court finds no precedents for holding that, because a former city council saw fit to make these payments, the city is therefore bound to continue to make them until the termination of the 25-year franchise, for we cannot find that such payments are definitely specified therein. Having carefully examined the entire record and briefs, we find no reversible error therein, and the judgment of the district court is, therefore,

AFFIRMED.

POWERINE COMPANY, APPELLANT, V. GRIMM STAMP & BADGE COMPANY, APPELLEE.

FILED MAY 22, 1934. No. 28861.

1. **Evidence** examined and *held* sufficient to sustain the verdict.
2. **Evidence**: AUTHORITY OF AGENT. Proof concerning an agent's authority may be made by any one who knows the facts. Oral directions by his employer or superior to an agent are not hearsay, but substantive evidence to prove the authority or lack of authority of an agent.
3. ———: SELF-SERVING DECLARATION. A self-serving declaration is one made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial.
4. **Trial.** Objection made to a question is properly overruled unless the objection is good as against the entire question.

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

Perry, Van Pelt & Marti, for appellant.

Mockett & Finkelstein, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

LIGHTNER, District Judge.

Suit for damages on account of breach of warranty. Judgment for defendant, and plaintiff appeals.

The principal assignments of errors and the only ones discussed in the brief are, first, that the verdict is against the clear weight of the evidence, and, second, that hearsay testimony and self-serving declarations prejudical to the plaintiff were admitted. No complaint is made about the instructions.

Plaintiff's petition sets forth the corporate existence of the parties; recites that on February 28, 1931, plaintiff was solicited by defendant for an order for signs to be used out-of-doors in advertising the products of plaintiff in its trading territory, which covers several states; that at that time the defendant represented to plaintiff that the signs were in all respects suitable for outdoor advertising purposes and would not fade, deteriorate or become unsightly when exposed to weather; that plaintiff believed the representations and relied thereon in entering into a contract on February 28, 1931, with the defendant for the purchase of a quantity of signs; that defendant delivered to plaintiff in Denver, Colorado, 1,776 signs; that plaintiff paid the contract price of $2.24 per sign for the signs, paid freight on the signs in the sum of $390.72, and that plaintiff had the signs erected in widely scattered places throughout its trading territory as was contemplated by the parties at the time the signs were contracted for, and that the erecting of said signs cost the plaintiff the sum of $2.50 per sign, or a total of $4,440; that after the erection of the signs plaintiff learned that the representations of the defendant concerning the signs were false and fraudulent; that the signs were not suitable for outdoor advertising purposes and that the signs quickly faded, deteriorated and became unsightly and uninviting in appearance; that, by reason thereof, the contract was breached

by the defendant and the value of the signs has been lost to plaintiff, and plaintiff has been damaged in the sum of $10,000, for which amount the plaintiff prayed judgment.

Defendant's answer denied the allegations of plaintiff's petition; admitted the corporate existence of plaintiff and defendant; and alleged that on April 15, 1931, plaintiff and defendant entered into a written contract wherein defendant agreed to manufacture and sell to plaintiff and plaintiff agreed to buy a certain quantity of signs; that 2,076 signs were manufactured by defendant and delivered to and received by plaintiff; 300 of the signs were sent to Los Angeles, California, and 1,776 to Denver, Colorado, at plaintiff's request; that the signs were manufactured in accordance with the written agreement, and that defendant has complied with all the conditions imposed upon it by the written contract, and that plaintiff has retained the signs and obtained all the benefits therefrom. A copy of the written agreement is attached to the answer.

For reply plaintiff denied the allegations contained in defendant's answer; and alleged that the contract attached to defendant's answer did not purport to and did not embody all the terms of the contract between plaintiff and defendant; that the same constituted only a confirmation of the order for signs given defendant's salesman on February 28, 1931; that no sample was submitted to plaintiff, but only a mere design showing the lettering; that plaintiff never had an opportunity to learn that defective material was used and no opportunity to learn that the signs were of an inferior quality, but that the said defects were hidden and concealed and plaintiff did not learn the true facts in regard thereto until after the signs had been erected and exposed to weather conditions. Ratification of the representations of defendant's agent and estoppel to deny his authority were also pleaded.

Appellant's first proposition relied upon for reversal is that the verdict is against the clear weight of the evidence. We have carefully read the entire record and find that

there was sufficient evidence from which the jury could have found that no warranty was made, that if a warranty was made plaintiff suffered no damages by reason of the alleged breach thereof; that if a warranty was made and the signs did not comply with it their condition was due to the varnishing by Mr. Newhouse, who erected them for plaintiff, rather than to faulty construction by defendant.

Taking these up in reverse order, we find that there was evidence in the record to the effect that Mr. Newhouse, who was putting the signs up for plaintiff, varnished them without knowledge or consent of defendant, and that if improper varnish was used, varnish that did not have an "affinity" for the paint underneath, it would cause the signs to deteriorate.

As to damages sustained the evidence also was conflicting. The one or two signs introduced in evidence presented a very poor appearance, but there was no uncontroverted proof that all were in the same condition. Furthermore, the witnesses differed as to the value for advertising purposes of a sign that is bright and new looking and one that has grown dull from exposure to the weather or other causes. It is, it seems to us, a question of a speculative nature, one depending on the psychology of the various people who travel along the road. Mr. Grimm, president of the defendant company, testified that he had been dealing in and manufacturing advertising signs for fifteen years, and that a sign that is not shiny and bright has no less advertising value than a sign that is shiny and bright; that a bright, shiny sign creates a glare and detracts from the legibility of the sign. If you look down the street and the sun is shining on a highly varnished sign, it is more difficult to read than a sign with a semigloss, which is the sign advertising people are buying today; the tendency among people using advertising signs is toward semigloss signs or with shell or semidull finish, as it stands out better for that reason; he arrives at this conclusion from inquiries they get from all over the country from sign-buyers. It seems to us that the ques-

tion of damages was one that the jury had the right to settle either way under the evidence in this case.

In regard to the warranty, the evidence quoted in discussing plaintiff's next proposition shows that there was evidence to support defendant's claim that no warranty was made, thus making it a question for the jury. Furthermore, defendant's agent who sold the signs to plaintiff had ceased working for defendant and himself had a suit pending against defendant and was unfriendly to defendant. While he testified that he represented that the signs would stand up from one and one-half to two years in good shape, opposed to this was evidence to the effect that he had no authority to make any such representation, the written order did not make any such warranty, and there was evidence to the effect that, when he complained to Mr. Grimm about the signs in St. Louis after they had been erected, he did not speak of any such warranty or representation, although he naturally would have done so if it had been made, which facts, in view of the unfriendly attitude of such agent, might have justified the jury in believing that the evidence of a representation or warranty, although it could not be directly controverted by the defendant, was a fabrication. It seems to us that there is ample evidence to sustain the finding of the jury on the several different theories above referred to and that this contention of the plaintiff must therefore be overruled.

The second proposition relied upon for a reversal is that the court erred in receiving in evidence, over the objections stated, the following questions and answers, namely (the witness was Mr. Grimm, the president of defendant corporation, and the person referred to was Mr. Rittinger, the agent of defendant who made the sale to plaintiff):

"Q. Did you at any time tell him or any of your company authorize him to guarantee the length of time that a varnish or paint on a sign will stand up and be bright? Judge Perry: The plaintiff objects to the ques-

tion and any answer thereto on the ground it calls for hearsay, is self-serving, and irrelevant and immaterial under the issues in this case. The Court: Overruled. A. No, sir. Q. Did you know or did the Grimm Stamp & Badge Company know at any time until you heard it this morning that there was any guaranty at all on the length of time that these signs you manufactured for the Powerine Company under the order, exhibit No. 3, would be shiny and bright and clear for any length of time? Judge Perry: The plaintiff objects to that question and to any answer thereto on the ground that it calls for hearsay, and is self-serving, and irrelevant and immaterial under the issues in this case, and that it is leading and suggestive. The Court: Overruled. Exception. Q. You may answer. A. No."

There are several theories upon which the testimony was admissible. The testimony is not hearsay in so far as it pertains to what Mr. Grimm himself told or authorized Mr. Rittinger. The fact sought to be proved by the question was the authority of the agent. This can be proved by the written contract of agency, if there was one, or by the oral contract, or by any oral statement or directions to the agent. In 2 Jones, Commentaries on Evidence, 649, sec. 300, it is said: "It is hardly necessary to cite authorities to the obvious proposition that when proof is to be made of a parol contract, or when for other reasons the statements of a person are relevant, such statements may be proved by third persons who were present as well as by the one who used the language. In such case the statements are not hearsay, but substantive evidence." In 2 C. J. 933, it is said: "Testimony as to the fact of the agency, either for the purpose of proving or disproving it or showing the limitations upon the agent's authority, may be given by the principal, or the alleged agent, or by any other person having knowledge of the relation, such as by another agent who has such knowledge." In the same volume in the notes on pages 932, 933, are the following statements of the law:

"Where the question of the authority of an agent to make a contract is in issue, all evidence which tends in any way to show such authority or the limitation upon such authority is admissible. *Keane v. Pittsburgh Lead Mining Co.*, 17 Idaho, 179. * * *

"Where the fact of agency or the authority of an agent is in dispute, and is not evidenced by a written instrument but rests in parol, any evidence tending to prove the agency is admissible. *Robinson & Co. v. Greene,* 148 Ala. 434.

"In view of the negotiable instruments act, providing that the signature of a party may be made by a duly authorized agent, without any particular form of appointment, and his authority may be established as in other cases of agency, an agency with authority to indorse notes may be proved as agency is proved in other cases, and by written authority. *Scotland County Nat. Bank v. Hohn,* 146 Mo. App. 699."

These authorities would justify direct testimony from Mr. Grimm as to what he told or authorized the agent to do, or his knowledge of the alleged warranty.

We doubt if the answers called for by the questions are hearsay. It seems to us that it might be well within the knowledge of the president of the defendant corporation to know if any one had authorized the agent to make the guarantee in question. It might be that the president was the only officer who had any authority whatever to hire agents and give them authority. He might be able to answer as to the knowledge of his company. Cross-examination as to foundation might have revealed lack of the requisite knowledge, but plaintiff made no request to cross-examine as to foundation. The only vice of the question in our judgment is that it probably calls for a conclusion of the witness, but this objection was not made. It is not self-serving in a legal sense, because it does not call for a statement made by some one out of court. The following is quoted from 6 Words and Phrases, Third Series, p. 1012: "A 'self-serving declaration' * * * is one

made by a party in his own interest at some time and place out of court, and does not include testimony which he gives as witness at the trial. *Brosnan v. Boggs,* 101 Or. 472." It also seems to us that the objection was not good as to the whole question, and was properly overruled on that ground alone. "The rule is elementary and based upon sound reason, that objection made to a question is properly overruled, unless the objection is good as against the entire question. 'Where a part of testimony, objected to as a whole, is admissible, it is not error to overrule the objection.' *Schulze v. Jalonick,* 44 S. W. 580 (18 Tex. Civ. App. 296)." *Western Union Telegraph Co. v. Church,* 3 Neb. (Unof.) 22. See, also, *Union P. R. Co. v. Stanwood,* 71 Neb. 150; *Neldeberg v. City of Omaha,* 124 Neb. 511.

Our conclusion is that the evidence is sufficient to sustain the verdict, and that there was no prejudicial error in overruling the objections to the questions referred to. The judgment of the district court is therefore

AFFIRMED.

GRAHAM ICE CREAM COMPANY, APPELLANT, V. GEORGE PETROS ET AL., APPELLEES.

FILED MAY 22, 1934. No. 28652.

1. **Estoppel.** Estoppel means the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question, and where the evidence fails to disclose that the person sought to be estopped conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would be to influence the other's conduct, inconsistently with the evidence he proposes to give, then he has failed to establish estoppel.
2. **Property: INDICIA OF OWNERSHIP.** "Indicia of ownership" is synonymous with circumstantial evidence, denotes facts which give rise to inferences, rather than the inferences themselves; however numerous indicia may be, they only show that a thing

may be, not that it has been.

3. **Principal and Agent:** POWER OF ATTORNEY: CONSTRUCTION. A power of attorney must be construed in accordance with the rules for the interpretation of written contracts generally.
4. ———: ———: ———. Where the intention of the parties appears from the language employed in the power of attorney, that intention should prevail and a strained interpretation should never be given to defeat it. The objects of the parties must always be kept in view, and where the language will permit, that conclusion must be carried out that will support instead of defeat the purpose of the instrument.
5. **Appeal.** When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, sec. 20-1925. But when the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank*, 99 Neb. 317. See *Greusel v. Payne*, 107 Neb. 84; *Jones v. Dooley*, 107 Neb. 162.

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

Hotz & Hotz, for appellant.

Ziegler & Dunn, contra.

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

MESSMORE, District Judge.

This is an appeal from the district court for Douglas county wherein that court found for the defendants below, appellees herein.

The petition of plaintiff, appellant herein, alleges that on November 30, 1927, the district court for Douglas county entered a judgment in favor of plaintiff against George Petros, one of the appellees herein, which judgment, with interest, on October 6, 1931, the date of filing said petition in said court, amounted to $4,221.18; alleges that an execution had been issued repeatedly on said judgment and returned unsatisfied, and that the said George Petros

claims to have no property of any nature or kind upon which levy may be made for the satisfaction of said judgment; alleges that plaintiff has exhausted all its legal remedies and there exists no speedy and adequate remedy at law open to it for the satisfaction of said judgment; alleges that appellee, George Petros, in order to hinder and delay the collection of said judgment against him, formed a corporation known as the "Ambassador Café" under the laws of Nebraska in July, 1931, and that defendants placed all the capital stock of said corporation in the name of Andrew Petros, so that on the face of the records of said corporation the said Andrew Petros appears to own said café and the said George Petros appears merely as an employee therein at a salary of $50 a week; that the said George Petros devotes his sole and exclusive time to the management and operation of said café, signs all the checks as president and upon whose signature alone the bank transacts business with said corporation, receives and receipts for all property of the corporation, hires and discharges all help, and otherwise runs and operates said business as his own, because in truth and in fact it is his own, and the name of Andrew Petros is supplied by the said George Petros merely as a hindrance set up by the said George Petros to prevent plaintiff from collecting its judgment against the stock of said café, all of which is owned by the said George Petros, and the said Andrew Petros has unlawfully and illegally permitted his name to be used for the purpose of aiding and abetting the said George Petros in fraudulently preventing the collection of said judgment; further alleges that, while certain payments might have been made by said café to the said Andrew Petros, these were repayments for money loaned to George Petros and not to said café, and that all of such moneys have been paid out of the assets of said café under the direction and supervision of the said George Petros, with the result that the said Andrew Petros has no right, title or interest in said business nor in the capital stock thereof.

Plaintiff prays that the court enter a decree vacating and setting aside the stock of said Ambassador Café in the name of Andrew Petros and transferring same to George Petros, and that the latter be decreed to be the rightful owner thereof, rather than the said Andrew Petros, and that plaintiff have the proper decree enabling it to make proper levy for the satisfaction of its judgment against the said George Petros and all of the capital stock of said café and against the said Andrew Petros personally in the event he fails, neglects or refuses to make transfer or otherwise abide by the decree of the court.

To this petition the appellees George Petros and the Ambassador Café filed their answer which, for the purpose of this opinion, may be briefly stated as follows: Admit that plaintiff obtained a judgment against George Petros; that an execution has been issued on said judgment and returned unsatisfied; deny each and every other allegation in said petition; admit that George Petros devotes his time to said Ambassador Café and acts as general manager in operating its business; admits his relationship to Andrew Petros as a brother.

To the petition Andrew Petros, appellee, has filed his amended answer in which he renews his objections to the jurisdiction of the court under a special appearance, wherein the ruling was adverse to him, alleging as his principal grounds in said objections to jurisdiction that the proceeding in attachment and garnishment and service on him by publication were without force and effect, for the reason that no sufficient affidavit of plaintiff, as required by law, was filed before the issuance of the order of attachment, and that the affidavit filed by plaintiff for said order of attachment was insufficient to authorize the issuance of such writ, in that plaintiff did not set forth or allege that the said Andrew Petros was indebted to plaintiff in any sum whatever or that plaintiff was entitled to recover any amount against him, and failed to set forth any statutory ground authorizing the issuance of the order of attachment against him, and for the reasons above set out there

was no basis upon which service by publication could be obtained against him; alleges that he is not informed of the judgment obtained by plaintiff against the said George Petros; and denies each and every allegation contained in said petition; also alleges the statement of facts upon which he contends for the defense of estoppel.

To the answers of defendants, plaintiff replied, denying the allegations of the respective answers, denying the existence of the defense of estoppel, and alleging that all of the defendants are estopped to deny the ownership of the Ambassador Café, unincorporated, and the capital stock of the incorporated company as being anything but the property of the said George Petros, and alleging other facts which plaintiff claims constitute an estoppel.

The bill of exceptions contains a great amount of documentary evidence, and details an explanation of the business of the Ambassador Café, which, for the purposes of this opinion, may be summarized as follows: George Petros was engaged in managing the Valley of Sweets in the Henshaw Hotel in Omaha in the years 1920 and 1921, during which time the ice cream for which judgment was obtained against him on November 30, 1927, was sold him by appellant. Subsequent to that time he went to Chicago for a year or so, then returned to Omaha, working in different cafés, one of them owned by a cousin, Louis Petros, up to about the time of the opening of the Ambassador Café. Just before this a conference was held by Louis Petros, George Petros, and Andrew Petros, his brother, wherein it was agreed that Andrew Petros, a resident of Chicago and a practicing dentist, and also in control of other businesses there, was to advance about $800, and that he had advanced about $1,700 on the 26th of October, 1929, when the café was opened and while it was yet unincorporated. From the time of the opening of the café George Petros did its banking business with the South Omaha State Bank for about a year or so, then transferred the account to the Union State Bank until it closed, then transacted business with the First National Bank,

and later returned to the Union State Bank. The café was incorporated for $25,000; George Petros taking no part in the incorporation. The evidence does not clearly disclose that in June, 1931, when the stock was issued, Andrew Petros then made any direct payment, except his general testimony that he at different times had put several amounts into the café business. The books of the café are not very clear in reference to the forepart of the time the business was transacted, but subsequent to that time and by way of explanation Miss R. Hardtmayer, bookkeeper of the corporation, gave a fairly accurate history of exhibits 16, 17, and 18, known as check registers, for the reason that all the business of the café was transacted by checks, according to her testimony. The withdrawals credited to Andrew Petros are not clearly shown, with the exception of the testimony of the bookkeeper that he at different times received checks. There is no indication of the return of the checks except as reflected in part by the books. Other documentary evidence would indicate that Andrew Petros had no authority by the use of his own signature to draw any amount from the bank against the café's account, there being no register card with his signature thereon with the Union State Bank at that time. Other documentary evidence discloses the signing of the contracts for the purchase of supplies and equipment for the café in the sole name of George Petros. Other contracts were signed "Andrew Petros, by George Petros." According to the testimony of the bookkeeper the figures developed in appellant's brief regarding the gross income of the café and as shown by the check registers would indicate that such figures were fairly accurate. Balanced against this gross income as reflected by exhibits 16, 17, and 18, the amount over and above expenses is fairly reflected in the brief of appellant. The record could have been more clear by following through the withdrawals of Andrew Petros, which would lead one to believe from an examination of the record that checks between Andrew Petros and George Petros went back and forth with equal

regularity in some form to indicate always a large balance in the bank account, following a practice commonly known as the "kiting" of checks.

There is other evidence, such as that of Andrew Petros' investment account and his personal account, together with one $1,200 check, dated June 10, 1931, and one $1,250 check, dated June 2, 1931, and other exhibits to show how they were signed, also exhibit 22, a photostatic copy of a lease of fixtures used for the purpose of furnishing ice cream to the Ambassador Café by appellant, and over which there developed some considerable controversy in the record, wherein appellant claims that it did furnish the ice cream and fixtures upon a cash basis and that George Petros paid for such ice cream on a cash basis, as suggested by it. The discussion between appellant and George Petros in the record shows the manner in which the lease and agreement were signed, but the exhibit itself shows it was signed "Andrew Petros, by George Petros," although it is claimed that the exhibit was not the original agreement in so far as the signatures of the parties thereto were concerned, but that the signature was substituted by George Petros. A careful analysis of the facts surrounding the making of the contract, George Petros' view of the conversation and Mr. Graham's view of the conversation fall far short of establishing the defense of estoppel as set forth in the pleadings of appellee, George Petros.

When confronted with the statement of the surplus over and above the expenditures of all and every kind, the explanation of George Petros was that he sent money to relatives in Greece to the extent of about $1,800 or $2,000. This still left a balance that was unaccounted for by any of the exhibits or any of the acts of explanations contained in the record, but two things could have occurred to this balance, either that there was still a credit to the Ambassador Café or it had gone into the account of the owner of the café, Andrew Petros. As indicated above, the withdrawals of Andrew Petros and the establishment

and payment to the account of Andrew Petros of earnings from the café are not clarified by the evidence. This may be due to counsel's failure to properly clear up this matter in the record.

Another corporation was formed known as the "Aksarben Ice Cream Company" with its location directly across the street from the Ambassador Café. It was organized by Andrew Petros, but George Petros had a working interest in it for a while as president. This corporation was a company in competition with appellant company, which had been furnishing ice cream to the Ambassador Café.

Relative to the special appearance objecting to the jurisdiction of the court filed by appellee Andrew Petros and overruled by the trial court, we are not favored in the record with the affidavit required by law nor the order of attachment, and therefore we are unable to pass upon the objections raised by said appellee relative to the jurisdictional questions involved; neither are we favored by any citations by said appellee setting forth any other reasons for objecting to the court's jurisdiction. There might have been some merit to the contention of said appellee on the special appearance had he pursued the same so that this court might have had the opportunity to pass on the question, but in the absence of perfecting the record in this regard we must conclude that said appellee did not consider the question of enough importance to bring it to this court's attention.

In reference to the question of estoppel raised by the amended answer of appellee Andrew Petros and as raised in the reply of appellant thereto, we are convinced by the legal definition of estoppel and by the fundamental conception of the doctrine of estoppel that it does not apply in this case.

Estoppel means "the preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question." Bouvier's Law Dictionary.

The evidence clearly shows that it was not within the confines of the definition of estoppel. No person concerned in this transaction was precluded in any way or manner by his previous acts. It is essential to the validity of the claim of estoppel that the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would be to influence the other's conduct, inconsistently with the evidence he proposes to give. *Burke v. Utah Nat. Bank of Ogden*, 47 Neb. 247; *Rea v. Pierson*, 114 Neb. 173.

This brings us to the remaining question in the case: Is the Ambassador Café and the capital stock thereof the property of George Petros and held in the name of Andrew Petros, and should such property be subjected to the payment of the judgment rendered in favor of appellant, and should the stock of said corporation, the Ambassador Café, be transferred and set over in the name of George Petros to permit a recovery by appellant under said judgment?

There are many discrepancies in the record regarding the transaction of the business of the café. There is no doubt but that George Petros transacted the entire and exclusive business of the café. This brings us to the question whether such acts, together with all the evidence, prove ownership in George Petros. Appellant claims that the indicia of ownership are in George Petros. We find that the term "indicia of ownership" is synonymous with circumstantial evidence, denotes facts which give rise to inferences, rather than the inferences themselves; however numerous indicia may be, they only show a thing may be, not that it has been; constitute marks of identity.

Reference was made to contracts with the Omaha Fixture & Supply Company, which was signed October 7, 1929, by George Petros without reference to Andrew Petros, with the Central Typewriter Exchange, under date of February 24, 1930, signed by George Petros without reference to Andrew Petros, with the Orchard & Wilhelm Com-

pany, dated August 31, 1929, signed by George Petros without reference to Andrew Petros, and with the Hobart Manufacturing Company, dated December 2, 1929, signed by George Petros without reference to Andrew Petros. Other contracts were with the Rendla Supply Company, with the Nebraska Power Company, and with the Sterling Electric Company, which, as testified to by George Petros, were signed "Ambassador Café, Andrew Petros, by George Petros." Several of the contracts mentioned in the evidence and signed by George Petros were made and signed by him prior to the filing of the power of attorney offered and received in evidence.

By this power of attorney, filed in Douglas county with the county clerk on November 23, 1929, Andrew Petros granted to George Petros the authority to "manage, operate and control the Ambassador Café, located 2524 Farnam St., Omaha, Nebr., belonging to the said Dr. Andrew Petros, and he is hereby authorized to pay bills, collect moneys, to draw checks on the account of the said café in his own name, to employ help, pay rents, make leases, purchase supplies, to execute chattel mortgages, and to take full charge and control of any and all business arising out of and necessary to the operation and maintenance of the said Ambassador Café."

A power of attorney must be construed in accordance with the rules for the interpretation of written instruments generally. *Campbell v. Foster Home Ass'n,* 163 Pa. St. 609, 26 L. R. A. 117, 43 Am. St. Rep. 818. Where the intention of the parties appears from the language employed in the power of attorney, that intention should prevail, and a strained interpretation should never be given to defeat it. *Gratz v. Land & River Improvement Co.,* 82 Fed. 381; *Marr v. Given,* 23 Me. 55, 39 Am. Dec. 600; *Muth v. Goddard,* 28 Mont. 237, 98 Am. St. Rep. 553. The object of the parties must always be kept in view, and where the language will permit that conclusion must be carried out that will support instead of defeat the purpose of the instrument. Indeed, according to the estab-

lished rule, powers of attorney will be given a narrow and restricted construction, and will be held to grant only those powers which are expressly specified and such others as are essential to carry into effect the expressed powers. Every general power implies every particular power necessary to its exercise, or performance.

The validity of the power of attorney given in the instant case is not contradicted nor attacked except upon the theory that George Petros entered into the contracts heretofore mentioned by signing his name thereto without reference to Andrew Petros or the Ambassador Café. Under the power of attorney in question he would have the right to sign such contracts as he did without reference to Andrew Petros.

Appellant's charge of fraud, in so far as the same may be effective, pertains to the inaccuracies of the receipts as shown by the exhibits and the withdrawals in so far as appellee Andrew Petros is concerned, which alone are not satisfactorily explained, but which alone would not be sufficient to defeat the right of ownership in view of all the other evidence and circumstances in this case.

Appellant's conception of the indicia of ownership, as defined, fails to carry sufficient direct proof with it to prove the ownership of the property in question in George Petros. The evidence relative to the former transactions of appellant with George Petros and its demand that he pay cash for the products sold the Ambassador Café, together with the power of attorney, in the mind of the district judge overbalanced the evidence of appellant.

When an action in equity is appealed, it is the duty of this court to try the issues *de novo* and to reach an independent conclusion without reference to the findings of the district court. Comp. St. 1929, sec. 20-1925. But when the evidence on material issues so conflicts that it cannot be reconciled, "this court will consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Shafer v. Beatrice State Bank,*

99 Neb. 317. See *Greusel v. Payne*, 107 Neb. 84; *Jones v. Dooley*, 107 Neb. 162.

For the reasons stated in this opinion, we must conclude that the decree of the lower court under all the evidence in this case is correct and should be and is hereby

AFFIRMED.

BANK OF CEDAR BLUFFS V. FRANK LEGRAND ET AL.: N. O. WALTHER, TRUSTEE, INTERVENER, APPELLANT: GERTRUDE LEGRAND, APPELLEE.

FILED MAY 22, 1934. No. 28947.

1. **Jury.** Where an action was commenced as an action at law upon promissory notes, but by an amended petition, filed with leave of court, is changed to one in the nature of a creditors' bill, it became an action in equity, and defendant is not entitled to a jury trial as a matter of right.
2. **Abatement.** An action in equity in the nature of a creditors' bill is abated by the filing by the debtor of a petition followed by an adjudication in bankruptcy.
3. **Partnership.** To constitute a partnership or joint adventure, in a legal sense, there must be an agreement to share the profits and losses.
4. **Evidence** examined and found insufficient to establish a joint adventure.
5. **Bankruptcy.** By the provisions of the federal bankruptcy act vesting title in the trustee to all property transferred by the bankrupt in fraud of creditors (section 70 (a)) and with all the remedies of a judgment creditor holding an execution duly returned unsatisfied (section 47a (2)), it is not necessary that the claims of creditors be reduced to judgment to entitle the trustee to attack such transfers.

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

Hendricks & Kokjer, for appellant.

William Niklaus, H. A. Bryant and *J. E. Mockett, contra.*

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

REDICK, District Judge.

This action was originally brought by the Bank of Cedar Bluffs against Frank LeGrand as an action at law upon four promissory notes aggregating $3,478.65. The petition was filed February 28, 1931. March 6, 1931, plaintiff was given leave to file an amended petition and make additional defendants. The amendment was made in a most irregular manner by withdrawing some of the pages of the original petition and inserting others containing the matter of the amendment. The original petition, therefore, is not contained in the record. At the commencement of the action an affidavit for attachment was filed alleging that the defendant had and was about to transfer his property with intent to defraud his creditors. As some of the notes were not due, the court granted leave to issue the attachment. The writ was issued but does not appear to have been levied upon any property. The amended petition was filed March 6, 1931, in the nature of a creditors' bill and naming as additional defendants Gertrude LeGrand, wife of Frank, and Iva E. Welch, sister of Gertrude, charging that the three defendants had conspired together for the purpose of defrauding the creditors of Frank LeGrand, and especially the plaintiff, and had caused to be placed in the possession of Iva E. Welch the sum of $4,000, the proceeds of certain hogs and cattle belonging to Frank LeGrand and sold on the Omaha market; that said fund was deposited in the United States National Bank of Omaha in the name of Iva E. Welch. The petition prayed for an accounting of the amount due on plaintiff's notes and for an injunction against the defendants transferring or disposing of said fund. On the same day an order was issued and served upon the United States National Bank and Iva E. Welch in Douglas county, restraining them from transferring or disposing of the fund. By some means which plaintiff claims were fraudulent, Iva E.

Welch was induced to sign an answer in the case whereby she disclaimed all interest in the fund in the bank and expressed a willingness to pay it into court. On March 10 this answer was filed and the court ordered the money paid to the clerk of the district court for Saunders county to await the further order of the court, which was done. The title to this fund presents the only question for review.

March 13, 1931, Frank LeGrand, on his voluntary petition, was adjudged a bankrupt by the district court of the United States sitting at Lincoln, Nebraska, and N. O. Walther, who was the president of the Bank of Cedar Bluffs, was elected trustee. March 27, 1931, the claim of the plaintiff bank was allowed in the bankruptcy proceedings.

April 1, 1931, Gertrude LeGrand filed an answer claiming that her husband, Frank, was indebted to her for money loaned, in excess of $6,000, and that the hogs and cattle from the sale of which the fund in question resulted were turned over to her in part payment of such indebtedness. April 28, 1931, Walther, trustee in bankruptcy, was ordered by the referee to intervene in this case, and on October 12, 1931, a petition of intervention was filed attacking the transaction between Frank LeGrand and his wife as fraudulent against the creditors of the bankrupt, and prayed that the funds in court be declared the property of the bankrupt and turned over to the trustee for the benefit of all his creditors.

Three amended answers were filed by Gertrude LeGrand; the first, December 14, 1931, the second, January 9, 1932, and the third, September 7, 1932. These answers are substantially alike, and abandon the defense set up in the original answer, that the funds in question constituted a payment upon the indebtedness of her husband to her, and in substitution therefor alleged in substance that from January 1, 1901, to March 1, 1931, she and her husband were engaged in the occupation of farming and stock-raising, and that about 1907 she received a legacy from the

estate of one Richard Williams in the sum of about $2,300, and in 1916 the further sum of $135 from the estate of an aunt, which money was her separate property; that said money was used in purchasing a farm in North Dakota and the necessary live stock and equipment, and that it was agreed between herself and husband that they would be joint owners of said property and all property thereafter acquired or purchased with said property or the increase thereof or proceeds of the sale thereof and the profits of the joint business; that this farm was sold in 1909 and proceeds invested in a Saunders county farm which was in turn sold and proceeds invested in live stock and farm equipment. She further alleged that for the purpose of protecting her property right, on February 25, 1931, she took possession of said stock and sold it at Omaha for $1,901.13; that some time prior to February 26, 1931, the corn on the farm had been sold and a check in payment therefor in the sum of $2,851.25 had been issued to Frank LeGrand, who was about to convert it to his own use; that she procured the check, cashed it and deposited it with the proceeds of the sale of stock in the United States National Bank at Omaha to the extent of $4,000, for safekeeping, and she claims the fund belongs to her and prays its return. The intervener replied and denied all allegations of the answer and alleged that Gertrude was estopped to claim any part of the fund as against the trustee in bankruptcy.

The action having been placed upon the equity docket by the clerk, on December 19, 1931, on motion of Gertrude LeGrand, it was transferred to the law docket; thereafter two motions by the intervener to transfer the case to the equity docket were overruled, and the case came on for trial to a jury January 12, 1932, but a juror was withdrawn and cause continued and was finally tried to a jury March 1, 1933, which resulted in a verdict finding that Gertrude LeGrand was the owner of and entitled to $2,000 of the fund and the trustee in bankruptcy $2,000 thereof. The intervener filed a motion for new trial, which

was overruled, judgment rendered in accordance with the verdict, and the intervener, as trustee in bankruptcy of the estate of Frank LeGrand, appeals. Gertrude LeGrand files a cross-appeal complaining of that part of the judgment awarding to the trustee a one-half interest in the fund.

The procedure in this case was somewhat unusual. It originated as a simple action at law, but the amended petition of the plaintiff seeking to set aside the transfer of the property, the sale of which resulted in the production of the fund in court, on the ground of fraud, presented questions cognizable only in a court of equity. Doubtless the amended petition disclosed that the plaintiff, not having reduced its claim to judgment, was not entitled to question the transaction between Frank LeGrand and his wife, but Gertrude, by her first answer, sought to justify the transfer as a payment to her upon the indebtedness of her husband. Thereafter, the petition of intervention of the trustee in bankruptcy presented matters of equitable cognizance, and the amended answers of Gertrude set up an equitable defense, and on these pleadings neither party was entitled to a jury trial as a matter of right, though the district court had the privilege of taking the advice of a jury on the questions of fact. Upon the adjudication in bankruptcy of Frank LeGrand the case of the plaintiff abated and therefore the case should have been tried as one in equity between the trustee in bankruptcy, on the one hand, and Gertrude LeGrand, on the other. We will, therefore, consider this appeal as in equity and try it *de novo*.

From the confusion of the pleadings and proceedings in the district court we extract the one proposition necessary for the determination of the rights of the parties. The intervener claims that the transfer of the fund in question by Frank LeGrand to his wife was fraudulent as against the creditors of the bankrupt; Gertrude LeGrand claims that the fund belongs to her as the result of a joint adventure with her husband.

The burden of proving fraud is upon him who asserts

it, but in this case, involving a transfer from an insolvent husband to his wife, the consequence of which is to prevent creditors recovering their debts, there is a presumption of fraud which makes it incumbent upon the wife to produce sufficient evidence to overcome it; furthermore, the transfer in this case having been made within four months of the adjudication in bankruptcy, so far as the same may be founded upon the payment by the husband of a debt to his wife, was void as an unlawful preference. The only defense, therefore, to the claim of the trustee is that of joint adventure.

To prove a joint adventure Gertrude LeGrand presented herself as a witness, and the trustee objected to her competency, being the wife of the bankrupt, under section 20-1203, Comp. St. 1929, which declares that "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding," etc., citing *Stalcup v. Jepsen,* 118 Neb. 240. In that case it was held: "In proceedings in aid of execution upon a judgment against the husband, the wife is an incompetent witness for the judgment creditor for the purpose of showing that she has in her possession and control money or property of the husband which should be applied upon the judgment." Also, "In such case, the wife's attitude as a witness for the judgment creditor would be antagonistic to the husband, and therefore 'against' him within the meaning of that term as used in the statute prohibiting husband or wife from being a witness, one against the other." Also, *Niland v. Kalish,* 37 Neb. 47; *Weckerly v. Taylor,* 74 Neb. 772. These last two cases were creditors' bills seeking to set aside transfers from one spouse to the other as in fraud of creditors, and in all three cases the husband or the wife was called as a witness by the creditor and it was held that the witness was incompetent to testify over the objection of the other spouse. In the present case Frank LeGrand made no appearance as a party or witness or objection to his wife testifying. The true test of competency, however, is whether or not the testi-

mony of the wife is "against the husband" or *vice versa.* If the contest here were between the husband and the wife as to the ownership of the fund in question, undoubtedly neither one would be a competent witness against the other. *Reed v. Reed,* 70 Neb. 775. In the present case the trustee represents not only the creditors but the bankrupt himself, and the effect of the evidence offered by the wife as a witness would be to transfer the ownership of the fund in question from her husband to herself, and to that extent her attitude would be antagonistic to her husband. Frank LeGrand listed the personal property for taxation as his own; listed it in his property statement to the Bank of Cedar Bluffs as a basis for credit June 12, 1930; listed the $4,000 fund in suit in his schedule of assets in the bankruptcy proceeding, and so far as the evidence shows is claiming it against his wife. The statute contains no qualification of the declared incompetency of husband and wife as dependent upon the objection of one or the other, but is based upon considerations of a broad public policy intended to preserve from disruption the hoped-for amicable relations between husband and wife, marriage being considered one of the most important institutions of our civilization. In *Knickerbocker v. Worthing,* 138 Mich. 224, it was held that, under a statute making the husband and wife incompetent as a witness in any action or proceeding instituted by husband or wife in consequence of adultery, the consent of one spouse did not render the other a competent witness. The incompetency of one spouse cannot be removed by the consent of the other. *Barber v. People,* 203 Ill. 543; *Dwelly v. Dwelly,* 46 Me. 377. We are of the opinion that the competency of the witness is not dependent upon the accident as to which party calls her, but rather upon the purpose to be subserved by the evidence, and if the object is to defeat some property right of the other spouse, the position of the witness is antagonistic and the statute declares her incompetent. Where the husband disclaimed all interest in the property claimed by the wife in a creditor's proceed-

ing, it was held the wife was a competent witness, her attitude not being antagonistic to her husband. *Norbeck v. Davis,* 157 Pa. St. 399. We do not decide the point.

Regardless, however, of the question just discussed and giving due consideration to the testimony of Gertrude LeGrand and other evidence offered on her behalf, we think it is entirely insufficient to establish a contract of joint adventure between herself and her husband. Her entire testimony on this point is as follows: "Q. At the time this money was received by you and put into this business, did you have any talk with your husband about it? A. Yes, sir. Q. You may state the substance of that conversation. A. I was to get that out of the property or properties that we had, to get my money back. Q. And you knew he couldn't pay his entire indebtedness out of the property he had on hand? A. Well, I wanted my money. (Question repeated.) A. Not and pay what he owed me. Q. Had he ever paid you any interest? A. No. Q. You were not to bear any of the loss that occurred, were you? A. I didn't intend to. I wanted my money. Q. And there was no agreement about that? A. Never was brought up."

Floyd LeGrand, a son, testified that in 1926 he overheard a conversation between one Williams and Frank LeGrand in which Williams asked what had become of his (the witness) mother's estate, and his father said: "We put it in farm equipment." "That my mother was part owner." Gertrude further testified that they bought the North Dakota farm with her money and $2,000 or $3,000 that Frank had; the farm, 320 acres, was bought for $28 an acre, not all paid for, and after living there a year they sold it for $52 an acre, having built a house for $1,600, and barn, and bought stock and equipment for about $2,000. When they sold out they returned to Saunders county and bought 160 acres at $150 an acre, but were unable to complete payment and let it go back; they then rented and continued farming until March, 1931. The farming operations, purchase and sale of cattle, sale of farm products, except butter and eggs, were all done by and in

the name of Frank LeGrand; Gertrude took no part in the management and is unable to give any details regarding operations, left it all to Frank. The fund in question was the final result of these operations, contributed to by money borrowed of the Bank of Cedar Bluffs and other credits. We think the picture presented by the evidence is the ordinary one of husband and wife pooling their assets for the common advantage, but presenting no prospect, in legal contemplation, of a partnership or joint adventure. It may be that as between Frank or his heirs and Gertrude a trust would result or be implied, to the extent of her contributions, in any property to which they could be traced; but that is not claimed, and would be ineffectual as against creditors who dealt with Frank upon the credit of his apparent ownership, as clearly appears.

A joint adventure is in the nature of a partnership and exists when two or more persons contribute cash, labor or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. There is no evidence in this case of any agreement that the profits of the farming and stock-raising business should be divided between the husband and the wife, and Gertrude LeGrand herself testifies that the question of losses was not brought up, and that all she was to get was her money back. "A 'joint adventure' is defined as an association of two or more persons to carry out a a single business enterprise for profit." *Keiswetter v. Rubenstein,* 235 Mich. 36. "To constitute a partnership, or joint adventure at common law, there must be an agreement to share in profits and losses." *Columbian Laundry v. Hencken,* 196 N. Y. Supp. 523. Appellee cites a number of cases that "If the person receiving the money assumes no obligation for its return and it is subject to the risks of the business the parties have usually been held to be joint adventurers." *Inter alia, Buford v. Lewis,* 87 Ark. 412, *Nelson v. Lindsey,* 179 Ia. 862, and *Irvine v. Campbell,* 121 Minn. 192. But in all of them there was proof of an agreement to share profits.

Appellee contends that the trustee in bankruptcy has no standing to attack the transfer as fraudulent, for the reason that at the time of the commencement of the suit the claim of the Bank of Cedar Bluffs had not been reduced to judgment. This leaves out of view the fact that at the time the petition of intervention was filed the claim of the bank had been allowed in the bankruptcy proceedings, and it would seem that, if a judgment were necessary, the requirement was fulfilled. However, by the bankruptcy act the trustee upon his appointment became vested by operation of law with the title of the bankrupt, as of the date of the adjudication, to all property transferred by him in fraud of his creditors. 30 U. S. St. at Large, 565, ch. 541, sec. 70 (a). And such trustee, "as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." 36 U. S. St. at Large, 840, ch. 412, sec. 8. It would seem from these provisions that the trustee in bankruptcy may attack fraudulent transfers without the claims of creditors having been reduced to judgment.

An objection is made that this appeal should be dismissed because the Bank of Cedar Bluffs is not named as a party. This is not well taken for two reasons: (1) The suit by the bank was abated by the adjudication in bankruptcy. (2) The trustee in bankruptcy represents the bank as one of the creditors of the bankrupt.

The judgment of the district court is reversed and cause remanded, with instructions to render decree in favor of intervener for fund in court.

REVERSED.

SEMINOLE BOND & MORTGAGE COMPANY ET AL., APPELLANTS, V. INVESTORS REALTY COMPANY, APPELLEE.

FILED MAY 22, 1934. No. 28793.

1. **Appeal.** Finding of fact, made by a court in an action at law, is equivalent to the verdict of a jury, and will not be disturbed unless the evidence is insufficient to support such finding.
2. **Parol Evidence** is inadmissible to vary the terms of a written agreement, complete on its face, but such evidence may be received to show that a written obligation has been discharged in accordance with the terms of a contemporaneous parol agreement, when such parol agreement was a condition precedent upon which the written obligation was executed.
3. Case of *Security Savings Bank v. Rhodes*, 107 Neb. 223, analyzed, and *held* not to overrule the principle announced in the second paragraph of the syllabus in *First Nat. Bank v. Burney*, 91 Neb. 269.

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

Howard Saxton and *John E. Eidam*, for appellants.

Cranny & Moore, contra.

Heard before GOOD, EBERLY and DAY, JJ., and BLACKLEDGE and RYAN, District Judges.

RYAN, District Judge.

Plaintiffs brought this action against the defendant to recover on seven promissory notes, totaling $3,351.20, as of March 4, 1929, with interest. A jury was waived and the case was tried to the court. From a judgment in favor of the defendant and from the order overruling the motion for a new trial plaintiffs have appealed.

The notes sued upon are a part of a series of notes executed in Dade county, Florida, on July 6, 1925, and secured by a mortgage upon certain real estate in the city of Miami, Florida. Foreclosure proceedings were had upon this mortgage in Florida in 1928, and, as a result thereof, there was credited upon the indebtedness the sum of $2,400. This action is for the purpose of obtaining a judgment, which would be in the nature of a deficiency judgment upon the mortgage indebtedness. The

answer of the defendant alleged that, at the time the notes and mortgage were executed and as part of the same transaction, a contemporaneous oral agreement was made, whereby the plaintiffs agreed that, after a residence was erected upon the lot in question and a purchaser was found for the premises, they would take a larger first mortgage from the purchaser and release the mortgage executed by the defendant and surrender the notes representing the indebtedness; that, after the residence was constructed and the purchaser found, the plaintiffs violated the terms of said agreement and failed and refused to release the mortgage on the making of the sale, and that, by reason thereof, the plaintiffs cannot recover from the defendant; that the construction of the residence and the sale of the premises worked a release of the mortgage, and that the plaintiffs cannot now recover on account of their breach of their agreement. The defense of usury was also pleaded, but that appears to have been abandoned by the defendant. The plaintiffs appeal and assign as error the reception of evidence of the contemporaneous oral agreement claimed in the defendant's answer. Appellants' brief and argument are directed to the so-called parol evidence rule.

The evidence of the plaintiffs consists solely of depositions and an exemplified transcript of the foreclosure proceedings had in the circuit court for Dade county, Florida. The depositions are two in number, that of C. A. Avant, one of the trustees, who was also the vice-president and treasurer of the plaintiff, Seminole Bond & Mortgage Company. The other deposition was that of E. E. Fleming, who was a practicing lawyer of Dade county, Florida, and testified as an expert witness on the Florida law with reference to interest rates and usury. The only witness for the defendant was one Dr. T. E. Daly, who apparently transacted all of the business with the plaintiffs when the original deal was made. The witness Daly, however, does not appear to have had any direct connection with the defendant, Investors Realty Company. Dr. Daly testified

that his home was in Omaha; that he was in Florida in 1925, and that he met the plaintiff C. A. Avant in the offices of the Seminole Bond & Mortgage Company and had a conversation with him in reference to the lot in question; that he inquired the price of the lot and learned it was $4,000; that he told Mr. Avant that he had $3,000 that he was willing to invest and that he could make arrangements with some other people whom he knew to raise some more money with which to build a house on the lot; that they would give a mortgage upon the lot for the money advanced, provided, when a purchaser was found for the house, that this mortgage should be released, and the purchaser accepted by the plaintiffs, as mortgagor and debtor in place of defendant. He testifies that Avant agreed to do this, and with that understanding Dr. Daly procured the Investors Realty Company to execute the notes and mortgage, a part of which notes are the basis of this action; that the house was completed in the latter part of August; that a purchaser was found by the name of Grafton Wheat; that a conference was had between Avant, Daly, and Wheat, in which Avant agreed that he would increase the first mortgage from $5,000 to $6,000 and let Daly have that money—this amount would apparently represent Daly's original investment of $3,000 plus the balance used to build the house and his profit—and that he would make the deed to Mr. Wheat and take a mortgage from him and release the mortgage given by the defendant. Daly then left and returned to Omaha and was gone some time. When he returned to Miami he found that the plaintiffs had not increased the first mortgage and released the mortgage given by the defendant, but had increased the second mortgage and left the mortgage given by the defendant standing. He complained to Avant about this, but received no satisfaction. He further testifies that the deal would not have been made in the first place, were it not for the agreement that the loan was to be a temporary one and would be released when the house was erected

and sold. The plaintiff Avant in his deposition denies the agreement testified to by the witness Daly, and further testifies that the title to the Florida real estate was acquired from one George L. Long and that the plaintiff company or he, Avant, at no time had any interest in the lot.

Since this is a law action and was tried to the court without a jury and the court has specifically found that there was a contemporaneous oral agreement for the release of the existing mortgage and the refinancing of it upon the sale of the premises, and the evidence is sufficient to support such a finding, the only question raised by the appeal is whether or not parol evidence was admissible to prove the defense set up in the answer.

The rule against the admission of parol evidence in cases in which the subject-matter of the action is a written contract is well known. As is said in 5 Wigmore, Evidence (2d ed.) p. 237, note: "The writing is the contractual act, of which that which is extrinsic * * * forms no part." This rule, however, is subject to many exceptions, and it has been said that "it has full application, however, within very narrow limits," and that the exceptions have been so loosely applied as to threaten the integrity of the rule itself. *Julliard v. Chaffee*, 92 N. Y. 529.

Jones, Evidence (2d ed.) sec. 495, says: "The exceptions to the general rule which exclude parol evidence to explain written instruments apply in respect to negotiable paper, as well as to other contracts. We have seen in a former section that wide range is given to the proof when the issue of fraud is raised. On the same principle, illegality, alteration and want of consideration may be shown. As between the original parties, the conditional delivery of a note may be shown, as that it was delivered in escrow. So it may be shown, as between the original parties, that the note had been discharged by the performance of an oral agreement, or that the delivery was conditioned upon a certain event. * * * It is also ad-

missible to show by parol the capacity and true relations of the parties, such as that a signer of a note is a surety, and that this was known to the plaintiff. * * * Nor is it any violation of the rule to show * * * whether the instrument was given in satisfaction of a former note, or as security therefor; or that the note has been discharged by the performance of an agreement."

In the case of *First Nat. Bank v. Burney*, 90 Neb. 432, plaintiff brought suit upon a promissory note signed by L. L. Burney and W. S. Britton. The answer of the defendant Britton was in substance that, at and prior to the date of the note in suit, the defendant Burney was indebted to the bank in the sum of about $1,000, which indebtedness was secured by a chattel mortgage on live stock; that, shortly before the execution of the note in suit, the defendant Burney informed the plaintiff that he wanted to ship his live stock to Clarinda, Iowa, and sell it upon the market, and that he desired some additional money, with which to purchase sufficient stock to make up a two-car shipment; that, when defendant Britton signed the note, it was orally agreed between the plaintiff bank and Britton and Burney that Burney should purchase sufficient live stock to complete the two car-loads, ship the same to Clarinda, Iowa, sell it upon the market, and return the proceeds to the plaintiff bank, and that the proceeds should be applied by the bank upon the indebtedness of the defendant Burney to the plaintiff, and Burney would then execute a new note for any balance due the plaintiff, and that the liability of the defendant Britton was then to expire and be at an end, and the defendant Britton signed the note merely to guarantee that the defendant Burney would account for and return to the bank the proceeds of the Clarinda sale. This court held that the district court erred in receiving evidence tending to prove the agreement set out in the answer of the defendant Burney. Upon rehearing, reported in 91 Neb. 269, that judgment was set aside and vacated and the judgment of the district court was affirmed. In that

decision this court held: "The existence of a written contract or instrument, duly executed between the parties to an action and delivered, does not prevent the party apparently bound thereby from pleading and proving that contemporaneously with the execution and delivery of such contract or instrument the parties had entered into a distinct oral agreement which constituted a condition on which the performance of the written contract or agreement is to depend"—quoting from *Norman v. Waite,* 30 Neb. 302. See *Oakland Cemetery Ass'n v. Lakins,* 126 Ia. 121; *Davis v. Sterns,* 85 Neb. 121.

In *Oakland Cemetery Ass'n v. Lakins, supra,* it was held: "One (exception) is, parol evidence is admissible to show that delivery was subject to a condition that upon a certain contingency or event the contract should not be binding, and the other, such evidence is admissible to show that a note has been discharged by the performance of an undertaking which it was given to secure. Thus it may be shown that what purports to be a written obligation has been discharged in accordance with the terms of a collateral parol agreement."

Thus we see that this court has greatly relaxed the rule with reference to the admission of parol evidence in suits upon written contracts. The case of *Security Savings Bank v. Rhodes,* 107 Neb. 223, criticizes the decisions above referred to and expresses a preference for the rule announced in the original opinion in *First Nat. Bank v. Burney,* 90 Neb. 432, but an examination of the facts in *Security Savings Bank v. Rhodes, supra,* discloses that the case of *First Nat. Bank v. Burney* was not in point, and that the criticism indulged in by the court was wholly unnecessary to the decision arrived at in that case. In the case of *Security Savings Bank v. Rhodes, supra,* suit was brought by the plaintiff upon a promissory note signed by the defendant and payable to the plaintiff. The defendant in his answer admitted the execution of the note, but alleged that it was orally agreed that another person, not named in the note, should be held responsible,

and that the defendant should not be required to pay it. The court held that the answer of the defendant did not constitute a defense and entered judgment upon the pleadings. The facts alleged in the answer were that the defendant had rendered services for the plaintiff bank and for one Davis, the president of the plaintiff bank. The proportion of the services rendered for each does not appear, but much the greater part appears to have been rendered for Davis individually. It is alleged that Davis undertook to pay the defendant the amount owing him, some $2,700, and arranged that the defendant should make out and sign the note in suit, which was payable to the bank and delivered to the bank and defendant thereupon received the face value of the note. The answer further alleged that Davis made an oral agreement with the defendant, that the defendant would not be required to pay the note, but that Davis would pay it. It further appears that Davis gave his note to the defendant in a like amount. The note became due and was not paid and the suit was brought. It will be seen from the facts alleged in the answer that the defendant claimed an agreement whereby he was not to be liable upon the note in any event. No contingency, which might or might not take place in the future, whereby he would not be bound, is alleged. Moreover, from the fact that Davis executed and delivered his note to the defendant, it might be concluded that it was anticipated that the defendant might have to pay the note. In the case of *First Nat. Bank v. Burney, supra,* the defense relied upon was, as has been stated, that there was a contemporaneous oral agreement that if the defendant Burney shipped the live stock to Clarinda, Iowa, and turned over to the plaintiff bank the proceeds of said live stock, the bank would apply such proceeds upon the note in suit and take a new note from Burney for the balance, and that the liability of the defendant Britton on the note in suit was to expire. The cases are clearly distinguishable, and, as we view them, the criticism of the decisions in *Barnett v. Pratt,* 37 Neb.

349, *First Nat. Bank v. Burney*, 91 Neb. 269, and *Exchange Bank v. Clay Center State Bank*, 91 Neb. 835, as well as the second paragraph of the syllabus of the opinion in *Security Savings Bank v. Rhodes, supra*, are purely dictum and have not changed the law as laid down in the criticized cases.

The contention of the defendant in this case is that this whole transaction was entered into solely because of the contemporaneous oral agreement and except for said agreement would not have transpired; that, upon the completion of the house on the lot purchased and the securing of another purchaser therefor, the indebtedness represented by the notes sued upon was to be transferred to the purchaser and the debt released. Parol evidence was admitted by the court for the purpose of showing that this contemporaneous oral agreement had been fully performed and that the notes in suit had been discharged by that performance. After a careful consideration of the facts in this case and the law applicable thereto, as heretofore laid down by this court, we conclude that the evidence of the contemporaneous oral agreement and of its performance was properly received.

The judgment of the district court is

AFFIRMED.

C. EDWARD SAYRE, APPELLANT, V. MADISON COUNTY, APPELLEE.

FILED MAY 22, 1934. No. 28830.

Paupers. A physician, not hired by the county, may not recover from the county for services rendered to a poor person in an emergency where there exists a duly appointed county physician to care for the poor, the latter physician being able, willing, and ready to serve but not consulted.

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

Robert N. Gadbois and *Kelsey & Kelsey*, for appellant.

Carl H. Peterson and *Moyer & Moyer, contra.*

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

THOMSEN, District Judge.

The question presented on this appeal is whether a physician, not hired by the county, may recover from the county for services rendered to a poor person in an emergency where there exists a duly appointed county physician to care for the poor, the latter physician being able, willing, and ready to serve, but not consulted.

The services were rendered April, 1932, to one, probably not classified as a pauper, but coming within the definition of those entitled to such relief under section 68-114, Comp. St. 1929. The plaintiff's associate conferred with one of the county commissioners, who consented to the diseased person being taken to the Lutheran Hospital at Norfolk, but refused any allowance for surgical service to the applying physician. The county paid the hospital charges. The case was one of great emergency in which, through a timely operation, the poor person's life was saved. According to the testimony, the result might have been fatal had there been any delay.

The essential facts are not in dispute. The county physician's office "was within a stone's throw of the Lutheran Hospital." The county physician had not performed an appendix operation for 12 or 15 years and surgery was not his specialty, but he claimed to be capable of doing such work, and said that he would have performed the operation if he had been called upon, and would have done so without further charge than the fee that the county was paying him. Under the foregoing conditions there can be no recovery. It was the duty of the county to furnish medical aid under the circumstances, but not necessarily to furnish the poor person's choice of medical aid. Statutes of the kind under consideration here should be given a very liberal construction, and county boards should be generous in supplying

the aid which the legislators intended for destitute persons; but when the county provides a physician for that purpose, able and competent to give satisfactory service, and such physician is ready and willing to render such service upon call, then the duty of the county is fulfilled. Under those conditions it is not permissible for the sick one to choose who shall render the service to him. It is stated in *Hamilton County v. Meyers*, 23 Neb. 718, 722: "While in this case public morals might suggest the payment of the claim presented, yet it would open a door which would be liable to great abuse by the unscrupulous." If the county physician had refused or been unable to attend or had been incompetent to take care of the case, a different question might have been presented.

The cause was submitted in district court to a jury. The latter found for defendant. A number of questions are raised with respect to the court giving certain instructions to the jury, but it is unnecessary to discuss these in view of the fact that under the law and the facts no recovery at all could be had.

The judgment of the district court is

AFFIRMED.

PAINE, J., dissenting.

I respectfully dissent from the opinion filed in this case, and desire, first, to set out additional facts disclosed by the evidence.

Dr. H. L. Kindred, a physician and surgeon, of Meadow Grove, was called to see Mrs. Mose Cleveland on the evening of March 31, 1932, and found she had appendicitis, with temperature of 101, pulse 120, and decided she should be operated on at once or the appendix would rupture. Her husband said, "By God, this thing come onto us and I haven't got a dime and no work and no nothing." Dr. Kindred telephoned W. S. Crook, the county commissioner for that district, who asked whether she could not be taken to the state hospital at Omaha, where it would be done free of cost, and when told it was for immediate action, and could not wait, he said to take her

to the Lutheran Hospital at Norfolk, because the county got rates there, and the county would stand the hospital bill, but refused to authorize the surgeon's bill. Dr. Kindred kept ice on her side that night, telephoned to Dr. Sayre, a surgeon at Norfolk, to be ready for operation, and took her to Norfolk, where she was operated upon the next morning.

It was found that the patient had a pus appendix, and both Fallopian tubes were filled with pus and had to be removed, and the wound had to be dressed three times a day, as there was an enormous amount of drainage, but she finally made a good recovery. Dr. Sayre testified that his charge would ordinarily be $250 for this operation, but, it being a pauper case, he filed a claim for only $150, and upon objection by the county board he reduced it to $100, and the bill was then rejected.

It appears that there was a county physician, who had been appointed a short time previous to this, by the name of Dr. T. H. Waters, who was to receive $200 a year. He testified that, while he had not operated on an appendicitis case in possibly 12 to 15 years, if he had been told about this case he would have operated. Dr. Kindred testified: "Q. Do you know who the county physician is, Doctor? A. No; I didn't know you had one. * * * Q. Doctor, during your conversation with Mr. Crook after your examination of Mrs. Cleveland, did Mr. Crook mention anything to you about a county physician? A. He didn't. He didn't mention at any time." Dr. Sayre, the plaintiff, testified: "Q. Doctor, do you know if Dr. Waters is a surgeon? A. I do most of his surgery.. Dr. Salter does some and I do some. * * * Q. Does he do any operating? A. I never heard of him doing any operating at all." W. S. Crook, the county commissioner, does not testify that he mentioned the fact to Dr. Kindred that the county had a county physician.

Here was an emergency surgical case, which the law required the county board to take care of. The physician called testified he did not know that the county had a

county physician until after the operation. He called in a skilled surgeon, and together they saved the life of the patient.

I frankly admit that there are strong precedents which support the main opinion, yet, with a little search, I have found opinions, largely from western states, which strongly support this dissent, and take a stand supported by every humanitarian principle.

"A physician employed by township trustees to render aid to a pauper may recover therefor when the regular county physician is under no obligation to attend the township poor, or is incompetent, or inconvenient of access." 48 C. J. 540.

"Mervia Hahn, a poor, friendless, moneyless person, was dangerously ill in the midst of a civilized community. What was to be done? Should the poor creature die for lack of professional succor because it was the wrong factotum, the township trustee, rather than the mayor of Onaga, who engaged the plaintiff's professional services to relieve her distress? This court has held that the important matter in such cases is to save life and succor the distressed." *Leinbach v. Pottawatomie County*, 116 Kan. 347.

"The general rule is that, in cases of emergency attendance of a pauper, a physician may hold the county liable although he acted without the request or the consent of the persons designated by statute as overseers of the poor, where such poor person requires the immediate attention of a physican, who renders services to relieve the necessity; * * * the physician and surgeon may recover reasonable compensation from the county within the limit of the fund provided by law for such purpose." *Board of Commissioners v. Enid Springs Sanitarium & Hospital*, 116 Okla. 249.

"If such services were rendered without authority from any county official authorized by law to bind the county, it must, of course, appear that an emergency existed which rendered it impossible to await such authorization, and that

the situation was promptly reported to the board of county commissioners or to the proper county official, of the proper county." *Sweet Clinic v. Lewis County,* 154 Wash. 416. See, also, *Mandan Deaconess Hospital v. Sioux County,* 63 N. Dak. 538; *Lacy v. Kossuth County,* 106 Ia. 16; *Newcomer v. Jefferson Township,* 181 Ind. 1, Ann. Cas. 1916D, 181; *Bartlett v. Dahlsten,* 104 Neb. 738; *Board of County Commissioners v. Cole,* 9 Ind. App. 474.

"A physician, summoned to attend a pauper, called in another to assist in the performance of a surgical operation, but no claim was made against the county except by the former. Held, that, such employment not being a delegation of authority, the county was liable." *Taylor v. Woodbury County,* 106 Ia. 502.

"Before a cause of action accrues in favor of a county or its county board * * * against a relative who fails to furnish support to an indigent relative entitled to support under the provisions of said section, it is necessary that such delinquent relative be first directed by order of the county board to furnish support and refuse to do so." *Howard County v. Enevoldsen,* 118 Neb. 222.

In *Caton & Starr v. Osborne County,* 110 Kan. 711, the text states that, if the child of an indigent person was seized with appendicitis, or a mastoid attack, which was likely to end in death if an operation was not immediately performed or special medical treatment given, it would be a gross dereliction of duty on the part of the overseer if he did not promptly provide for such an emergency and furnish proper care and relief. The syllabus in this case holds as follows: "Notwithstanding the provisions made for surgical operations and hospital treatment of the children of indigent persons afflicted with certain deformities and maladies, at the state hospital conducted by the regents of the University, it is still the duty of the overseer of the poor in cases of emergency to promptly provide proper medical or surgical treatment for children of the poor where the lack of emergency relief is likely to result in the loss of life or other serious consequence."

Neslund v. Dawson County, No. 26554, was decided by our Nebraska Supreme Court Commission April 30, 1929, and its finding is only authority in that one case, yet it is quite in point. Neal Bevard, a 13-year-old boy, was struck with a heavy club on the school-grounds in Cozad, and both bones of his right leg broken. The fibula was broken in four places, and the foot had turned black from lack of circulation. The injured boy was the oldest of seven children, and, with the father and mother, lived in a one-room shack with one bed. The county board was in session at the time of the accident, down at Lexington, 18 miles distant, and, upon being called on long distance telephone by a Good Samaritan, one of the commissioners, who answered the telephone, refused to do anything, and rudely restored the receiver to its hook. He was again called by long distance, and answered, "You are not going to put any more of those d—d paupers on the county," and again hung up the receiver. Dawson county had no county physician at the time. Thereupon, the boy was taken to a hospital at North Platte, the bones were reset several times, 25 X-ray photographs taken, and the limb finally saved. The county board refused to pay claims of $295 for hospital, X-rays, and surgeon's fees in this case, but Commissioners Thompson, Wilson, and Wolff rightly affirmed the judgment of the district court in ordering full payment made by the county board.

In the case at bar, although the member of the county board for that district was assured by a reputable physician and surgeon of Meadow Grove, who had been called, that it was a very serious case and required an emergency major operation, the county commissioner did not disclose the fact that the county had a county physician. The surgeon in charge did not know that the county had a county physician, who had only recently been employed; and in a case like this, when the life of a citizen is hanging in the balance, should the scales of justice be too heavily influenced by technicalities? The life of an unfortunate human being should not be measured in dollars.

The two questions raised by this case are these: (1) If an unfortunate person, without means, is seized with a serious illness, and only an immediate operation will save life, should the claim of a competent surgeon, who acts promptly at the call of distress, and saves the life, be rejected *in toto* by a county board? (2) It being common knowledge that the methods and technique in major operations are improving constantly, has a poor person in distress no alternative but to submit to a delicate major operation by a county physician who admits that he has not performed such an operation in 12 to 15 years?

DUANE AESCHLEMAN ET AL., APPELLEES, V. HASCHENBURGER COMPANY, APPELLANT.

FILED MAY 22, 1934. No. 28977.

1. **Death**: PRESUMPTION. Ordinarily a presumption, such as the presumption of natural death, has no weight as evidence. It is merely a legal excuse for not offering evidence. If met with evidence of probative force, it ceases to be a factor in the case.
2. ———: BURDEN OF PROOF. The burden of proof is on the one asserting death due to other than natural causes to establish such fact by a preponderance of the evidence.
3. **Master and Servant**: WORKMEN'S COMPENSATION: ACCIDENTAL DEATH: PROOF. Accidental death, in a compensation case, need not be established to a certainty, but only to a reasonable certainty.
4. ———: ———: EMPLOYEE. Facts and circumstances analyzed in opinion *held* to constitute salesman selling on commission an employee, and not an independent contractor.
5. **Evidence** examined and *held*, death due to accident for which recovery under employers' liability act proper.

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

Rosewater, Mecham, Burton, Hasselquist & Chew and *Loren H. Laughlin*, for appellant.

Reed, Ramacciotti & Robinson and *Roman L. Hruska, contra.*

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

THOMSEN, District Judge.

This is an action brought under the compensation law of the state of Nebraska to recover for the death of E. J. Aeschleman. The latter was employed as a traveling salesman for the Haschenburger Company, defendant.

At about 2 p. m. on February 23, 1932, Aeschleman was found beside his car on the road several miles from the town of Heartwell. Two men (later, witnesses) were traveling in a car westward on this road, when they noticed a two-seated Ford on the ridge off the right-hand side of the road. A ditch, about five feet below the surface of the road, separated the ridge from the road. The ditch was about half full of snow. The Ford was headed westward, straddling the ridge, and leaning sharply in the direction of the ditch. The car was a two-door one. The left door of the car was open, the door window was down, Aeschleman's body was lying on the snow almost at right-angle with the car, his head pointing toward the road, his arms extended; one foot was caught between the brake and clutch pedal, the other leg was doubled under him; a small metal tank, weighing about 35 to 40 pounds, was lying in the snow near the rear left wheel "but a little farther back;" a lever handle, part of the tank, was broken off and lying nearby. The snow did not indicate that the body had been dragged.

Later, an inspection of the car and the marks leading to it was made. The radius rod was found to be either broken or bent, and the right front wheel bent around to an angle of about 90 degrees. The front right fender had a nick on it and some cement paint, and part of its paint was scratched off. About 70 feet to the rear on the highway, a concrete post over a concrete culvert had a nick on it the height of the fender with some of the

paint of this car on the nick. Following the wheel marks leading from this cement post to the east were skid marks for about 30 "steps," indicating a motion backward and forward from the soft part of the road to the hard surface; shortly beyond the post to the west the wheel marks became indistinct, disappeared for six paces, but were picked up again near where the ditch began, and ran through the ditch up onto the ridge for about 40 feet to the car.

The day was clear and bright, but the road was slippery and soft along its sides, the hard gravel portion in the center, about eight feet wide, being described as "slick," "rough" and "wash-boardy." Some ice and snow had accumulated near the right-hand culvert and made a rise up to a level of the culvert apron, and the wheel marks indicated that the right wheels of the car had gone over this rise.

Some indication of the limit of a safe and cautious speed on that road that day is shown by the speed of the witnesses' car—30 to 35 miles an hour. All of the indications are that Aeschleman's car must have been going at a higher rate of speed. Aeschleman's car could not be pulled out by a wrecker; the road maintainer was required to remove it. Aeschleman's car passed about 70 feet beyond where it is evident it had struck the post, passed through the five-foot ditch and for 40 feet onto the ridge, coming to an abrupt stop with a broken or bent radius rod and twisted wheel. The front seats were thrown forward and the ignition was on. Great power was required to have driven the car to the position in which it ultimately rested, and it is reasonably certain that this power was accomplished by the momentum which the car had gained from previous speed. Where the wheel was so severely bent out of line or the radius rod was bent or broken is not known, but the evidence does not show in the wheel marks that any wheel was out of line. So it is reasonable to infer that the mechanical defects arose in the latter part of the trip, and that these

defects stopped the car's flight, and the indications are with reasonable certainty that the ride after the car struck the ditch was one of violence.

The witnesses picked Aeschleman up and carried him to a nearby town. He was breathing hard when picked up, was unconscious, never regained consciousness or said anything, and died within about 10 minutes from the time that he was taken into the car and before the witnesses reached a doctor's office. Both witnesses had been deputy state sheriffs, and one of them was then engaged in the prohibition service. Before Aeschleman died, this witness took the precaution to smell his breath and found no odor on it.

About five hours after Aeschleman's death Dr. Guildner made a casual examination of the body. Aeschleman never wore a hat. Dr. Guildner found a lump on the top of the head extending over a diameter of two and a half to three inches, in the midline from ear to ear. After the embalming, this lump practically disappeared, and this doctor, who was requested to make a post mortem by the compensation insurance carrier, regarded the lump of such slight significance then that he did not mention it in his report. The post mortem was conducted about 30 hours after Aeschleman's death and revealed macroscopically no physical imperfections of any kind. The stomach, heart and brain were removed and the stomach was immediately sent for a test for poisons to the University Hospital at Omaha. Dr. Guildner found no evidence of poisons, but he wanted to exclude every possibility. The brain was sectioned at the post mortem, but was not sent to the University Hospital until a month later. The heart accompanied the brain. These were preserved by being immersed in formalin, but the evidence does not show when the formalin was applied. However, the record does show that the body had been embalmed, but fails to show that the embalming fluid would not adequately preserve the brain substance so as to furnish satisfactory material for a microscopic examination. In the condition it ar-

rived, however, it was not satisfactory for gross examination.

Getting back to the scene of the accident, the inside of the car showed new tears and indented cuts on the upholstering and frame near the door at about the height of a man's head. There is no evidence that any of the windows were open except the one in the left door. The metal tank found at the car was a pressure sterilizer which at the request of his employer Aeschleman had picked up at a Hastings hospital. A metal stand or frame, about three feet high, a part of the sterilizer, was in the car leaning against the front seats. The sterilizer, about two feet long and one foot in diameter, was made of metal. It had a large dent in the center. Snow was on the ground in the ditch beside the left side of the car. There is no evidence that the sterilizer, which was cylindrical, had rolled. It is reasonably certain that there is no way the sterilizer could have left the car except through the driver's window; that it got out of the car before the car came to rest is clear from what is presented. The body of Aeschleman was not dragged, so it is reasonably certain that he fell or was thrown out of the car when the car stopped; that the sterilizer left the car while Aeschleman was still in it. There is no way that it could have left the car through the driver's window without coming in contact with Aeschleman. Its weight was 35 or 40 pounds. No matter what position the sterilizer had occupied in the car, when it was set in sufficient motion to leave the car, its momentum, as a scientific fact would be sufficient to deal a violent blow. The fact that the heavy metal handle of the sterilizer apparently had broken enroute is some indication of its force. The place where Aeschleman's bump occurred is about even with the cut upholstering on the car inside; it is also at a place where it is highly probable and almost certain the tank must have made its departure. We cannot conceive of another place available for its exit. If the tank hit his head a violent blow, it is apparent

that the force exerted could have been sufficient to have caused a fatal injury.

That Aeschleman was normal when his car first began to skid about on the road is indicated by the character of turns which the car made before it struck the post. It is reasonably certain that Aeschleman was skidding in the soft part of the road and that he was attempting to pull the car back and straighten its course on the hard side of the road; that by a narrow margin he succeeded in avoiding the post head-on; that his car was partially out of control during the various attempts at straightening it out. It is also reasonably certain that, if Aeschleman had been unconscious at that time and had had no control over the car, the pull on the right wheel made by the soft road would have been sufficient to have directed the car to the right without any return to the hard surface.

No one saw the accident, and after Aeschleman was taken to town it took about three-quarters of an hour before the witnesses returned to the scene of the accident to inspect the ground and car. The road was a main traveled highway. It had some traffic on it that day. It is reasonable to suppose that other traffic may have made marks on the road and in the soft portions, but the fact that the witnesses traced the skid marks directly up to the place where the paint was knocked off the concrete post, the fact that the material off the post was on the fender, and that material from the fender was on the post, and that the wheel marks after leaving the post were "picked up" with those appearing, after a lapse of six paces, indisputably connecting with the car, would indicate with reasonable certainty that the skid marks seen by the witnesses were those of Aeschleman's car.

That one may have but slight physical indication of a blow of such violence that it would cause death is shown by one of the defendant's witnesses, Dr. Duncan: "Q. You can have a blow on the head sufficient to kill without a fractured skull, can't you? A. Surely. Q. And you

can have a blow on the head sufficient to kill without external discoloration? A. Yes, sir. I think some of the most serious forms of head injury are those not associated with fracture. Q. And you can have a fatal blow on the head which does not produce readily apparent macroscopic evidence to any one but a skilled pathologist? A. Yes, sir." The fact that the bump on the head was reduced to an extent that it was not mentioned in the post mortem is accounted for by the fact that the embalming fluid reduces swellings of this character, and that the post mortem was not performed until about 30 hours after the man had died, and after he had been embalmed. The fact that no evidence of brain trauma was found macroscopically at the time of the post mortem is explained by reason of the fact that embalming fluid has some effect of leaching out some of the red corpuscles of a hemorrhage unless the area were large; but upon microscopic examination Dr. Eggers found in one section of the cortex evidence which he describes as "presumably of traumatic character," which was ante mortem. He explains this by saying: "The area involved in this change was about one-fourth of a square centimeter which is not a macroscopic lesion although it was only recognizable as a microscopic lesion, and I would confirm from the fact that I found this in two or three samples that it must have covered an appreciable amount of brain tissue." The changes which were post mortem were accurately determined by this witness, and his opinion is that what he found was ante mortem and due to injury.

The burden is upon the plaintiff to establish that the man came to his death by reason of accident. The presumption prevails that he died a natural death, but it prevails only so long as there is no evidence on the subject of how he came to his death. So it devolves upon the plaintiff to establish the fact that the deceased did not come to his death by reason of natural causes, and he met this burden by ruling out in his evidence and to some extent by cross-examination about every probable

cause of death known to science. An inspection of all the vital organs at the post mortem disclosed no infection; no evidence of plaques, emboli or infarcts was found. In other means of a probably natural death, defendant relies upon the stoppage of some minute artery which could only be discovered by months of microscopic work. Such evidence would have proved, probably to a certainty, the presence or absence of natural death. However, as hereinafter explained, under all the facts this was a higher burden than plaintiff was required to assume. However, it seems improbable that such cause could have existed, in that the evidence lacks any showing of infection to give rise to floating particles in the blood stream.

In assuming the foregoing burden, the plaintiff also took it upon himself to exclude any possibility of death by poisons. The stomach was sent to the Nebraska University and upon analysis by toxicologists they failed to find any evidence of 51 different kinds of poisons. This is a burden that the plaintiff need not have assumed. It was solely his duty to prove that the man came to his death by reason of accident. To do this it was necessary to produce evidence to overcome the presumption of natural death, and upon introduction of convincing evidence the presumption of natural death would disappear. Ordinarily, a presumption of this character has no weight as evidence. It is a mere legal excuse for not offering evidence. If met with evidence of probative force it ceases to be a factor in the case. *Stumpf v. Montgomery*, 101 Okla. 257, 32 A. L. R. 1490. It is not evidence but merely a rule concerning evidence. See *Alpine Forwarding Co. v. Pennsylvania R. Co.*, 60 Fed. (2d) 734; *McIver v. Schwartz*, 50 R. I. 68; *Smith v. Tompkins*, 52 R. I. 434; *Normandin v. Parenteau*, 150 Atl. (R. I.) 460; *Board of Water Commissioners v. Robbins*, 82 Conn. 623, 639; *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43; *Eggeling v. Chicago, R. I. & P. R. Co.*, 119 Neb. 229; *Commonwealth v. De Francesco*, 248 Mass. 9, 34 A. L. R. 937; *Rhodes v. Pennsylvania R. Co.*, 298 Pa. St. 101; 9 Ency.

of Evidence, 885; also end of annotation in 42 A. L. R. 872, and an interesting discussion of the subject in 46 Harvard Law Review (1932-1933) 1141. The prime, long-established exception to this very sound rule in this state is the presumption of innocence which does have the force and weight of evidence, following the same rule as in *Coffin v. United States,* 156 U. S. 432; *Garrison v. People,* 6 Neb. 274, 285.

If, then, thereafter the defendant could have shown any evidence of probative value that the man came to his death by reason of poisons, self-administered or otherwise, it may have been sufficient to have raised the question of such character of death and made it necessary for plaintiff to outweigh such proof by more convincing evidence of accidental death.

Here we have not the slightest evidence to warrant an inference of self-destruction. Aeschleman was a healthy, good-natured man, 31 years of age, married, and apparently happy in his family life. Dr. Guildner, a customer of Aeschleman, had seen him the night before and again four hours before his death, and testified the meetings had been pleasant; Aeschleman, on departing, saying he would see the doctor the next month. In the decided cases in which the burden to prove accidental death required the plaintiff to assume disproving suicide, evidence of suicide of convincing character had appeared. The presumption of natural death, then, had spent its force and the contest was to overcome the evidence of suicide in order to prove accidental death. *Grosvenor v. Fidelity & Casualty Co.,* 102 Neb. 629; *Dodder v. Aetna Life Ins. Co.,* 104 Neb. 70; *De Bruler v. City of Bayard,* 124 Neb. 566. No burden then rested on the plaintiff to establish that the deceased had not come to his death by reason of poisons intentionally or unintentionally administered, and it was unnecessary for plaintiff to have introduced evidence on the subject.

The medical evidence is sharply conflicting. On the side of the plaintiff is the testimony of Dr. Guildner, the

one who performed the post mortem, and Dr. Eggers, who examined the brain and heart 30 days after the post mortem. Dr. Guildner is a young doctor with about three years' experience. Dr. Eggers, on the other hand, is a man of wide experience. He has the chair of Pathology at the University of Nebraska Medical College, which position he has occupied since 1916. His specialty is pathology. For the defendant two experts appeared: Dr. George W. Covey, who has specialized in internal medicine, diagnosis and pathology, and was pathologist at Base Hospital No. 49 in France; and Dr. Duncan, who has practiced about 20 years, specialized in surgery, being professor of that subject at the Creighton University, and served as a surgeon in the army during the World War. The latter two testified from either hypothetical questions or answered the testimony they heard in the courtroom. The evidence fails to show that either one of the latter ever examined the slides of the brain which Dr. Eggers produced in court. Of these witnesses, those for the plaintiff had the advantage of actual contact with the body, or parts of it. Dr. Guildner's opinion is that Aeschleman came to his death by reason of a blow on his head produced by the sterilizer. Dr. Eggers found a condition in part of the cortex of the brain which it was his opinion was ante mortem and due to injury, and although on cross-examination he said the condition he found might possibly be due to a number of causes, yet he insisted that he had his opinion as to what caused the condition. On practically every subject connected with the examination these witnesses disagreed. They disagreed as to the extent of the injury which a blow leaving visible marks of the character described could cause, as to what the visible effect of a fatal blow would be microscopically and otherwise, and as to the findings from Dr. Eggers' examination of the slides. From the reading of all this medical testimony alone it is clear that no finding could be made as a certainty as to the cause of Aeschleman's death.

We have considered the matter of the credibility of these various witnesses and have noted the fact that Dr. Guildner was the physician for some relatives of the deceased; that he knew the deceased well; that this doctor was a customer of the deceased; but merely because of this relationship it is not the province of the court entirely to disbelieve a witness whose testimony is probable. There is nothing in the record to indicate that he wilfully and intentionally testified falsely. We cannot, therefore, exclude the evidence of Dr. Guildner's finding a bump on the man's head, nor can we exclude his opinion as to the cause of the man's death, merely by reason of the foregoing facts. Dr. Guildner was in better position than any one else to know the man's condition, and, taken as a whole, the plaintiffs' experts coming into actual contact with the things about which they testify were in better position to know than the experts for the defendant, who base their opinions solely upon what was told to them or what they heard. Furthermore, as stated in *Conroy v. Garries,* 126 Neb. 730. "In this situation we think it proper to take into consideration the finding of the trial judge who saw the witnesses and heard them testify and was thus in better position to judge of their credibility than is this court. *In re Estate of Waller,* 116 Neb. 352; *Peterson v. Winkelmann,* 114 Neb. 714; *Jones v. Dooley,* 107 Neb. 162."

Coming now to some details mentioned by defendant: The defendant objected to certain testimony with respect to Dr. Guildner's examination of the slides prepared for pathologist Eggers, but the record shows that the slides were produced in court, and in view of the fact that the defendant apparently had ample opportunity to inspect these slides, we see no error in accepting the testimony of Dr. Guildner with respect to them. It was upon the slides, in conjunction with Dr. Guildner's own examination of the deceased, both before and at the post mortem, that he reached a conclusion that Aeschleman died of concussion of the brain.

The defendant objects to testimony in part based upon conversations with Dr. Eggers. But these conversations related merely to Dr. Eggers' conclusions as to what the slides of different portions of the brain disclosed to him, and to the same facts Dr. Eggers testified while on the stand. An objection is also made that the slides were not prepared by Dr. Eggers, but testimony shows that they were prepared by an expert under the direction and supervision of Dr. Eggers and that the slides about which he testified were those so prepared. It is stated in defendant's brief that Dr. Guildner testified to a large number of slides, "probably ten," and that "these were not produced in court except the three testified to by Dr. Eggers," but we find Dr. Eggers testified with respect to three "brain *sections*," and not to three slides only, and when asked whether the slides so prepared were in his possession, the record shows that he produced them. Nowhere does the record show how many slides Dr. Eggers produced in court, nor that all the slides to which Dr. Guildner testified had not been produced.

It is shown that the deceased was lying with his glasses "setting perfectly on his nose." The record fails to show what variety of glasses these were, whether they were the kind that fit onto the nose alone, or the variety that loop over the ears. In any event, the matter is not important. The position that Aeschleman occupied when found indicates, as certainly as can be shown by circumstantial evidence, that he either fell or was thrown out of the car, and if this violence was insufficient to dislodge his glasses, then certainly the fact that the glasses remained on his nose would not lead to an inference that he had not experienced violence while in the car.

The defendant says the record does not show how long Aeschleman had been lying in the position in which he was found. We see no importance to this detail, but since the road was a main traveled one, upon which at least two cars passed while the witnesses were there, one would naturally assume that cars passed regularly on the

highway, and although not a very weighty inference, yet it is likely that if other cars had passed before the witnesses' car arrived Aeschleman would probably have been seen before. It is unlikely that he would have remained there a long time without his having had some one see him in the position in which he was so clearly visible.

To reach a conclusion on this part of the case, taking into consideration the medical findings and all the physical facts, the speed at which Aeschleman's car must have gone, its tortuous course, the path it followed through the ditch and onto the ridge, the condition of the road, the clearly apparent violence with which the car was treated, the bump on Aeschleman's head, the practical impossibility of the cylindrical vessel leaving the car except through the window and at a height of Aeschleman's head, the position of the cylinder, its weight, the broken handle, the marks in the car, the position which Aeschleman occupied, would lead to an abiding conviction that Aeschleman received injuries from which he died; that his death was accidental; that his death is so established to a reasonable certainty. Ordinarily, varying facts and circumstances which produce proof that establishes a certainty, a reasonable certainty, a probability, or merely a possibility, make it practically impossible to assert definitely the classification into which facts fall, for surrounding each term is a twilight zone into which certainty merges into reasonable certainty, reasonable certainty into probability, and probability into mere possibility. Therefore, facts and circumstances in other decisions are of little benefit in reaching a conclusion of "reasonable certainty."

Coming now to another phase of the case: The appellant contends that Aeschleman was not an employee, but an independent contractor, and for that reason the appellant is not liable for compensation. Of course, if he were classed as an independent contractor, then no liability on the part of the appellant would exist; so it becomes necessary to summarize the evidence.

"Under cases heretofore decided there seems to be no single test as to what kind of an agreement will constitute one an employee within the workmen's compensation act. The measure or method of payment, who it is that selects the place and hours of labor, the particular plan of the work and liability for wrongful failure to properly perform it are often significant, though not necessarily controlling. Generally, the questions of whether or not the alleged employee, by the terms of the agreement, is understood to retain the right to direct the manner and method of the work as it proceeds, and what work shall be done and what not done, are important factors in determining whether or not the one doing the work is an employee." *Johnston v. Smith,* 123 Neb. 716.

Aeschleman was employed by the defendant company as a salesman of pharmaceutical and medical equipment. He was given a definite territory. He was required to make certain calls during each week, and for the most part required to be at the home office at each week-end, at which time he assisted in the work at the office, and at inventory time assisted in taking inventory; he was required to cover his entire territory in a given time and required to make daily reports and personal calls on customers. Among his other duties were to service machines and equipment in his territory and to make collections, not only on his own accounts but on others. The prices at which he sold goods were fixed, and any credit extended by him to customers had to be ratified or approved by the office. He began originally as a price clerk for the company, at which time he received a salary of $175 a month. At the time of his death he was working on a commission basis and receiving an advance of $50 a week, which is the amount he had been receiving for a long time, and although the president of the company at first testified that the matter of charging this advance to his account was merely a matter of computation to determine what net business Aeschleman was producing, yet later he stated that since Aeschleman's commissions

had fallen short by about $1,900 of the amount paid to him regularly, if Aeschleman had had an estate he would have filed a claim for it. The evidence further shows that during the time Aeschleman worked on inventory and in the office, and also on one occasion when he made a week's trip to Wisconsin at the request and in the interests of his employer in order to study service to be given to certain equipment made by a factory there, he was paid the same amount and these amounts were charged to his commission account. He was required to keep in constant touch with the office while out on the road, and occasionally the company would order him to go on emergency service calls. Out of the weekly payments he was required to pay his own expenses. The character of supervision exercised by his employer, the necessity for labor every day, the nature of his work, the service calls and collection duties are all important factors in making the relationship a closer one between Aeschleman and his employer than that mentioned in the cases of *Johnston v. Smith, supra,* and *Christensen v. Protector Sales Co.*, 105 Neb. 389, upon which cases the appellant relies, and bring Aeschleman within the classification of an employee. The fact that Aeschleman had his own car and paid his own expenses, under the conditions, is not so important. *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197; *Showers v. Lund*, 123 Neb. 56; *Cole v. Minnick*, 123 Neb. 871.

We find no merit in the proposition suggested by appellant that the insurance carrier is not liable because the policy provides that it covers only "outside salesmen, collectors, and messengers who do not deliver merchandise," claiming that Aeschleman was delivering merchandise at the time of his death, having picked up the sterilizer at the Hastings hospital. We also note that Aeschleman occasionally delivered pharmaceutical materials out of his sample case, and that these were replaced by his employer. These acts of delivering were merely occasional and unimportant in considering all his work; and the

customary interpretation most favorable to the insured would offer no comfort to the appellant in these incidents. The court further notes that on a former occasion when Aeschleman had hurt himself in stepping into his car the insurance carrier had paid temporary disability; and that the insurance carrier has regularly received from the employer premiums to cover the compensation insurance of this particular employee. There seems some merit in the contention of appellee that these latter facts furnish additional grounds for fixing liability. *Venuto v. Carter Lake Club,* 104 Neb. 782; *Brown v. Bouschor,* 207 Mich. 594; *Kennedy v. Kennedy Mfg. & Engineering Co.,* 163 N. Y. Supp. 944.

The appellant complains that the court allowed interest at 7 per cent. on delinquent payments, the appellant classifying this interest as a penalty. The two cases cited in support of this proposition, *McCrary v. Wolff,* 109 Neb. 796, and *Osborn v. Omaha Structural Steel Co.,* 105 Neb. 216, relate to the 50 per cent. waiting time penalty. No cases are cited which assert that interest is classified as a penalty. Interest naturally follows the allowance of a claim of this character or any amount a court finds due.

The appellant shows that the widow remarried; and because of this fact contends that under the statute the compensation benefits become payable to the children, for the period since the widow's remarriage only; that these appellees, Duane and Charles, are not entitled to compensation for the entire period, and particularly not to the burial benefit. We find no merit in these contentions. Section 48-124, Comp. St. 1929, provides: "If the compensation payable under said sections to any person shall for any cause cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased." This section of the statute further provides that when the widow remarries the compensation benefits shall become payable to the children.

Section 48-122, Comp. St. 1929, provides for a burial allowance of $150 without deduction from other compensation. The appellant cites the fact the widow paid the burial expense and that it exceeded the $150 allowed by the court. No claim is made that appellant or the insurance carrier ever paid this sum to the widow or that they paid any compensation to the widow. Furthermore, the widow is a party to the suit and is not objecting. So, in view of the sections of the statute quoted, we see no inequity in allowing the total compensation and death benefit as allowed by the district court.

The fact that Aeschleman was paid $50 a week and that he paid his own expenses out of this sum is asserted not to be a foundation for determining what his weekly salary was, but we find no other satisfactory means of doing so. If he had been staying at home it would have been necessary for him to have supplied himself out of his salary with practically the same necessaries and comforts of life as on the road, and under the conditions it is immaterial what he may have spent out of the $50 a week for his own living. His income was practically fixed until such time as business improved and the commission from his sales would enable him to receive a larger amount, and in any event the $50 a week was more than doubly sufficient to have been the foundation for the compensation allowance of $15 a week.

We find no error in the district court's decree. It is in all respects affirmed, with the addition of an allowance of a reasonable attorney's fee to the appellees' attorneys for work in this court, which the court fixes at the sum of $200.

AFFIRMED.

LINCOLN ROAD EQUIPMENT COMPANY, APPELLEE, V. C. M. BOLTON: JOHN LAUTENSCHLAGER, APPELLANT.

FILED MAY 25, 1934. No. 28896.

1. **Appeal.** In determining the sufficiency of the evidence to sustain a judgment in an action at law, where the parties waive a jury, the trial court's finding is equivalent on appeal to a jury's verdict, which will not be set aside on issues of fact unless clearly wrong.
2. **Accession.** A mortgaged gasoline engine as an accessory bolted to the frame of a road grader does not necessarily merge therein by accession, where it can readily be identified and disconnected without material injury to either, but may be replevied by mortgagee, if that remedy is justified by the facts and circumstances.

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

Kirkpatrick, Good & Dougherty, for appellant.

Sandall & Webster, contra.

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

ROSE, J.

This action was commenced in the county court of York county to recover by replevin what is called a "Caterpillar Power Unit on Elevating Grader #K-146," the power unit being a gasoline engine or motor. The Lincoln Road Equipment Company, plaintiff, pleaded right of possession of the unit by virtue of a note and duly registered chattel mortgage for $300, a debt long since due and unpaid. C. M. Bolton and John Lautenschlager are defendants. It is alleged in the petition that Bolton executed the note and secured it by a chattel mortgage on the unit; that the entire debt with interest was due and unpaid October 10, 1931; that the mortgaged chattel was wrongfully detained by Lautenschlager; that payment of the note and possession of the unit were demanded and refused. Under petition, affidavit, bond and writ, the sheriff seized the unit and

delivered it to plaintiff. On sufficient pleadings the county court decided the issues in favor of plaintiff. Lautenschlager, from whom possession had been taken, appealed to the district court, where a jury was waived and the cause tried on the pleadings filed in the county court, including Lautenschlager's plea of not guilty. The trial in the district court resulted in findings and judgment that plaintiff was entitled to possession of the unit; that Lautenschlager had wrongfully detained it; that plaintiff recover from him resulting damage of one cent. Lautenschlager appealed to the supreme court.

The principal argument for a reversal is directed to the proposition that the evidence is insufficient to sustain the judgment. Under this head it is contended that the "Caterpillar Power Unit" was annexed to, and by accession became a part of, the "Elevating Grader #K-146," upon which Lautenschlager had a chattel mortgage lien prior to that of the chattel mortgage upon which plaintiff relies. The point urged is that the unit was so annexed that it could not readily be identified and disconnected without injury to the entire road grading outfit. It is argued further that Bolton and plaintiff, without the knowledge or consent of Lautenschlager, detached the power take-off and installed in place of it the power unit, and thus destroyed the first lien thereon, unless it attaches to the accessory.

In determining the sufficiency of the evidence to sustain a judgment in an action at law, where the parties waive a jury, the trial court's finding is equivalent on appeal to a jury's verdict, which will not be set aside on issues of fact unless clearly wrong.

There is evidence tending to prove the following facts: The original grading equipment or outfit owned by Bolton consisted of a caterpillar tractor, a grader and a "power take-off" mounted on the grader. The tractor hauled the grader. The take-off was a mechanical device utilizing power from the tractor to operate an elevator by which loose earth was moved from a plow in the grading process. When Bolton was the owner of the entire original road-

grading equipment, he encumbered it and other similar equipment by a 5,000-dollar chattel mortgage in favor of Lautenschlager November 4, 1930. This mortgage was duly registered in York county November 5, 1930. In this situation, while Bolton was in possession and control of his grading outfit, he bought from plaintiff the gasoline engine or "One Power Unit to be attached to Elevating Grader #K-146," to be used in place of the take-off, giving the plaintiff a note for $300, and securing it by a chattel mortgage on the new power unit or engine alone. The 300-dollar mortgage was dated August 12, 1931, and duly registered in York county August 17, 1931. Pursuant to the contract, plaintiff removed the power take-off, bored holes in the frame of the grader and bolted thereon the new power unit or gasoline engine. Plaintiff did not take possession of the removed power take-off and the evidence does not disclose what became of it. It may be inferred from the circumstances that it was left with Bolton who then had possession and control of the entire original road equipment in Seward county at the time the change was made. There is evidence tending to prove the facts outlined.

While there is testimony that the boring of the holes in the frame of the grader would tend to weaken it, though not materially, there is also testimony that the removed take-off, if replaced, would operate the elevator as efficiently as it did before the change.

There is no doubt about the identity of the new unit or gasoline engine which Bolton bought from plaintiff and mortgaged. It was a separate chattel when sold. It was not welded to the grader mortgaged to Lautenschlager. It was disconnected by the removal of bolts. There is nothing to show that the sheriff had any difficulty in identifying and disconnecting it. Plaintiff had sold it to Bolton. They were contracting parties. Their intention to treat it as a separate chattel for the purpose of a lien, when Bolton was in possession and charge of it in Seward county, may be inferred from the sale of it and the execu-

tion and delivery of the chattel mortgage thereon. In the better view of the evidence it seems to sustain the findings of the trial court that plaintiff's chattel mortgage on the unit was valid; that the mortgaged unit did not merge in the grader; that Lautenschlager's mortgage did not attach to the unit and was not a lien thereon. In this view of the evidence in connection with the findings of the trial court, the decision on appeal is not controlled by the following rule of law:

"Where accessories become a component part of a chattel and so incorporated as to be incapable of separation without injury to the whole, they merge in the principal thing, and become the property of the owner of the chattel." *Motor Credit Co. v. Smith,* 181 Ark. 127. For other cases see note in 68 A. L. R. 1242 *et seq.*

AFFIRMED.

DAN MAYO V. STATE OF NEBRASKA.

FILED MAY 25, 1934. No. 29055.

1. Rape: TESTIMONY OF PROSECUTRIX: CORROBORATION. "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State,* 22 Neb. 332.
2. ———: ———: ———. "In a prosecution for rape, the corroboration of prosecutrix may consist of circumstantial evidence." *Kotouc v. State,* 104 Neb. 580.
3. ———: ———: ———. "'In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established.' *Woodruff v. State,* 72 Neb. 815." *Kotouc v. State,* 104 Neb. 580.

ERROR to the district court for Custer county: BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Squires, Johnson & Johnson, for plaintiff in error.

Paul F. Good, Attorney General, and *Daniel Stubbs, contra.*

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

ROSE, J.

In a prosecution by the state in the district court for Custer county, Dan Mayo, defendant, age 33, was convicted of rape upon a female child 14 years of age on or about May 20, 1932, and for that felony was sentenced to serve a term of five years in the penitentiary. As plaintiff in error in the supreme court, defendant below presents for review the record of his conviction.

The principal assignment of error is insufficiency of the evidence to sustain the conviction. The argument under this head is directed chiefly to the proposition that the conviction depends on uncorroborated testimony of prosecutrix alone and is emphatically contradicted by defendant who testified in his own behalf. This point was elaborately argued and required an examination and a consideration of all the testimony in a long record.

The scene of the felony, if committed, was a "pocket" in a canyon on the Stuckey ranch about six miles east of Oconto in Custer county. Prosecutrix testified directly and positively that defendant had illicit relations with her at the place mentioned late in May, 1932, detailing the circumstances. She testified in substance that as directed by defendant she went into the canyon, and that he came up on horseback shortly afterward, dismounted, tied his horse to a tree and had sexual intercourse with her in the pocket of the canyon where they were alone. If she told the truth defendant was guilty as charged. Was there corroboration within the meaning of the criminal law?

In addition to the testimony of prosecutrix there is

evidence of the following facts: The Stuckey ranch contained large tracts of rough land where there were canyons and ridges. There were two sets of improvements on different parts of the ranch. The father and mother of prosecutrix, the latter and four of her brothers occupied one of the houses, having moved into it March 1, 1931. The other house was occupied by defendant, his wife and three children. In going to and from Oconto defendant passed the home of prosecutrix. The two families were on friendly terms early in 1931, and for more than a year exchanged work and visited and dined with each other at both homes. Defendant often stopped at the home of prosecutrix on his way to and from Oconto; saw her alone at times in canyons, cornfields and hayfields; had been alone with her in an automobile, and on a hayrack; had scuffled with her frequently at her home and on the ranch; had pulled her off a horse and bit her ear. She had said she was crazy about him.

There is evidence of the foregoing believable facts independently of the testimony of prosecutrix. In the situation outlined, as indicated by witnesses other than prosecutrix, she became pregnant. She gave birth to a child March 15, 1933. Defendant admitted on the witness-stand that he rode into the canyon, saw prosecutrix there May 24, 1932, and walked alone with her there to the place she had called the "pocket." A brother of prosecutrix testified he came near them, saw them there alone, and rode out of the canyon behind defendant on the horse, leaving the sister behind. There is also evidence that defendant, after he was arrested, was confronted with the charge in the office of the county attorney in the presence of other persons and did not deny it. The evidence of rape is conclusive. Prosecutrix was too young to consent to an act resulting in pregnancy. Without her testimony, the jury were at liberty to infer from the evidence that defendant had an amorous attachment for her and an opportunity to indulge it, notwithstanding his denials of guilt. While there was no direct corroboration of the prin-

cipal fact, that was unnecessary in view of the circumstances corroborating her story. The following has long been a rule of criminal law:

"In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense. It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn." *Fager v. State,* 22 Neb. 332.

Another recognized rule reads thus:

"In a prosecution for rape, the corroboration of prosecutrix may consist of circumstantial evidence." *Kotouc v. State,* 104 Neb. 580.

Under these principles and a full consideration of the entire record from every standpoint, the conclusion is unanimous that sufficient corroboration was shown by evidential circumstances and that the judgment is supported by sufficient evidence.

Complaint is made of evidence tending to prove other similar acts, but there was no error in this particular since the law declares:

" 'In the prosecution of a charge for rape upon a female child under the age of consent, testimony of subsequent acts of illicit intercourse, related in time to the offense charged, is admissible as corroborative evidence of the principal fact sought to be established.' *Woodruff v. State,* 72 Neb. 815." *Kotouc v. State,* 104 Neb. 580.

All assignments of error have been considered in the light of the evidence on both sides without finding an error prejudicial to defendant.

AFFIRMED.

BETTY FAY CAMPBELL, APPELLEE, V. GLEN SLATER, APPELLANT.

FILED MAY 25, 1934. No. 28963.

1. **Automobiles:** OPERATION: NEGLIGENCE. Operating motor truck at 35 to 40 miles an hour on city street, in violation of city ordinance, in close proximity to school building at time when young school children are on the street and going to their homes, will warrant a finding of negligently driving at an excessive rate of speed.
2. ———: ———: ———. Evidence that driver of motor truck runs against six-year-old child, crossing a city street, and who enters the street when truck is 100 feet or more distant, and where driver's view of the street is unobstructed and he fails to apply his brakes or bring his truck to a stop, will warrant a finding that such driver did not have the truck under proper control.
3. **Negligence:** QUESTION FOR JURY. In a law action, where negligence is an issue and the evidence respecting it is in conflict, the question is for the jury.
4. **Trial:** INSTRUCTIONS. Trial court is not required to give instructions in the form requested. It is sufficient in that respect if trial court fairly and correctly instructs the jury on all the issues.
5. ———: ———. Courts should decline to give an instruction which details and emphasizes the evidence of one of the parties.
6. ———: ———. The trial court should refuse a requested instruction that is not applicable to any issue of fact submitted to the jury.
7. **Damages.** Evidence examined, and *held* sufficient to sustain a judgment for $5,000.
8. **New Trial.** Motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown.

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

Kennedy, Holland & De Lacy, for appellant.

Lower & Sheehan, contra.

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

GOOD, J.

This is a personal injury action in which plaintiff had judgment, and defendant has appealed. Betty Fay Campbell was six years old at the time of the injury, and the action is brought in her name by her father as next friend.

Several acts of negligence are alleged. The only ones submitted to the jury were: (1) That defendant was operating his truck at an excessive rate of speed and in violation of the ordinance of the city of Omaha; (2) that defendant did not have his truck under proper control.

Defendant complains that the court erred in refusing to instruct the jury to return a verdict for defendant, on the ground that the evidence was insufficient to sustain a verdict for plaintiff. The evidence tends to prove the following facts: The collision, giving rise to this action, occurred about noon of the 24th day of September, 1930, on Twenty-fourth street, just north of Castelar street in the city of Omaha. The home of plaintiff's parents was on the west side of Twenty-fourth street and a short distance north of Castelar street. Plaintiff had been attending school on Castelar street and was returning to her home. She proceeded on Castelar street until she came to Twenty-fourth street, turned north on the east side of the latter street and went a few feet; then stepped to the east curb of Twenty-fourth street, hesitated, looked at least in one direction, and started to run in a northwesterly direction across Twenty-fourth street to her home. Defendant was driving his truck north along the east side of Twenty-fourth street. He had a clear view of that street for more than 100 feet before he reached the point where plaintiff left the curb. After leaving the east curb of Twenty-fourth street, plaintiff proceeded a distance of 25 or 30 feet when the collision occurred. The evidence tends to show that she was struck by the truck

and knocked to the pavement, and that she received a fractured skull.

The evidence on behalf of plaintiff indicates that defendant was driving his truck at 35 to 40 miles an hour immediately before and at the time of the collision; that when plaintiff started to cross Twenty-fourth street the truck was 100 feet or more south of plaintiff, and defendant's view of the street was unobstructed. The ordinance of the city of Omaha made it unlawful to travel on that street at a rate of speed in excess of 30 miles an hour. The evidence on behalf of defendant is to the effect that he was traveling but 20 miles an hour and that plaintiff left the curb at the same time the front end of defendant's truck was opposite to her.

It is a rule that in a law action, where negligence is an issue and the evidence respecting it is conflicting, the question is for the jury.

Defendant cites and relies upon a number of cases decided by this court, in which it was held that the evidence did not disclose negligence. It would serve no useful purpose to review those cases because the facts here are so different from the facts disclosed in the cases relied on. The jury evidently believed the evidence of plaintiff, and they could reasonably find that defendant was driving at an excessive rate of speed; that he negligently ran against and injured the plaintiff, who was crossing the street and in plain view; that he could have seen her in time to have applied his brakes and stopped; and that he negligently failed to have his truck under proper control. We think, clearly, the evidence is sufficient to warrant a finding that defendant negligently injured the plaintiff.

Defendant requested 23 instructions and complains of the refusal of the court to give each of six of the requested instructions. It is contended that these instructions embodied the theory of defendant, and that the court did not fairly present defendant's theory of the case.

With this contention we are unable to agree. Defendant's theory was that he was not guilty of negligence;

that plaintiff ran out into the street and against his truck after defendant had reached a point opposite to plaintiff. When we examine the instructions given by the court, defendant's theory seems to us to have been fully covered. It is true that the court did not give the instructions in the form requested by defendant, but it was not required to do so. Several of the instructions requested by defendant, and which the court refused to give, contained elaborate recitals of the evidence as contended by defendant. It is not the province of the instructions to detail and emphasize to the jury the evidence of one party to an action, but only to instruct them with reference to the principles of law applicable to the facts.

A number of the instructions, refusal to give which is complained of, were properly refused because they contained recitals of the evidence as claimed by defendant and emphasized a particular line of testimony. One of the requested instructions which the court refused was directed to an issue of negligence which was not alleged nor submitted to the jury, viz., that defendant was not guilty of any negligence in failing to see plaintiff prior to the time she reached the east curb of Twenty-fourth street. An instruction, not applicable to any issue submitted to the jury, is properly refused.

It is next contended that the verdict is excessive. The verdict was for $6,500. By order of the trial court, a remittitur of $1,500 was entered. The evidence shows that plaintiff suffered greatly from the fractured skull; that prior to the accident she was bright, quick and accurate in her school work; that after the accident (September 24) she was unable to attend school until January 12 following and then only part time for some weeks; that it was difficult for her to concentrate upon her work; that, while she had made a half grade in each semester prior to the accident, subsequent thereto it took three semesters to make a half grade, and two semesters to make a succeeding half grade, in school; that she suffered headaches; that the right hand was partially par-

alyzed; that it was difficult for her to write and control the action of her right hand, and the evidence tends to prove that, while she probably will improve, she may never regain the entire use of her right hand. Under the evidence we are unable to say that a judgment for $5,000 is excessive.

Defendant complains of the refusal of the court to grant a new trial on the ground of newly discovered evidence. The showing in this respect consists of two affidavits by one Matson, whose knowledge of the case was known to defendant's counsel prior to the trial, and no effort was made to obtain his evidence then. There was no diligence shown. Another affidavit was by a boy, 15 years of age. This was more than two and a half years after the accident, and the boy could not have been more than 13 years old, possibly not that, at the time of the accident. His statement in his affidavit is to the effect that he was riding on the rear platform of a north-bound street car on Twenty-fourth street at the time of the accident; that from the rear platform he saw the accident which occurred in front of the street car. There is evidence that there was at least one vehicle, and perhaps two, between the street car and defendant's truck. The evidence that he would give would be only cumulative to that produced by defendant.

It is a rule that application for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed unless an abuse of discretion is shown. It would seem highly improbable, if not entirely incredible, that the witness could have seen, from his position on the rear platform of the street car, the things which he detailed in his affidavit. The trial court may properly refuse to grant a new trial on newly discovered evidence unless it is of such a character that the court may be of the opinion that it could reasonably change the verdict of the jury. It would seem that if defendant had been diligent he could, within two and a

half years, have discovered the witness and had his testimony presented at the trial, if he deemed it of any value. In our opinion, no abuse of discretion is shown in the refusal of the court to grant a new trial on the ground of newly discovered evidence.

The record appears to be free from error. Judgment AFFIRMED.

WILLIAM ELFERS, ADMINISTRATOR, APPELLANT, V. SCHUFF & SONS HOTEL COMPANY, APPELLEE.

FILED MAY 25, 1934. No. 28991.

1. **New Trial.** Where defendant's motion for new trial is sustained, former judgment set aside, and judgment of dismissal of cause of action is entered, plaintiff becomes the "aggrieved party" with right to present motion for new trial. Comp. St. 1929, secs. 20-1142, 20-1143.
2. **Appeal.** In the absence of motion for new trial, supreme court will not review proceedings prior to judgment.
3. ———. Where plaintiff does not file a motion for new trial, judgment for defendant will be affirmed, where answer presents good defense to petition.

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

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

Prince & Prince, contra.

Heard before ROSE, GOOD, EBERLY and DAY, JJ., and LESLIE and RYAN, District Judges.

DAY, J.

This action was brought by William Elfers, as administrator of the estate of his minor son, Henry Elfers, to recover damages for wrongful death alleged due to the negligence in the construction and maintenance of an elevator in the Palmer House, a hotel in Grand Island.

The petition alleged that while Henry Elfers was employed by the defendant as an elevator operator in the hotel on June 4, 1924, he was injured in the elevator, which injuries resulted in his death. The answer denies generally the allegations of the petition. This cause was tried first to a jury, which returned a verdict on April 7, 1926, for $2,558. Upon appeal to this court, the judgment was reversed and the cause remanded, because the evidence was insufficient to support the verdict. (Opinion not reported.) On March 29, 1930, a third amended petition was filed, which was the first time in this case that any reference was made to the workmen's compensation law. Upon motion of defendant hotel company, the court struck therefrom an allegation that it "did not carry any compensation insurance * * * and did not post any notices in or about said premises to the effect that defendant was not carrying liability insurance as required by the laws of the state of Nebraska." On October 5, 1931, plaintiff asked leave in open court to withdraw his second and third amended petitions and elected to try the case on the first amended petition.

Thereafter on March 23, 1932, this case was tried to a jury on the first amended petition and a verdict returned in favor of plaintiff for $5,506.83. A motion for new trial was sustained. On September 28, 1932, over eight years after the accident and after two jury trials, the plaintiff asked leave to amend his first amended petition by inserting the following: "That the defendant failed, neglected, and refused to secure and carry liability insurance, or furnish the compensation commissioner with satisfactory proof of its financial ability to pay compensation, as provided by section 48-146, Compiled Statutes of Nebraska for 1929, and thereby elected not to come under the provisions of the workmen's compensation law of Nebraska." This motion was overruled.

By stipulation, a jury was waived and the case submitted to the trial judge for decision upon the evidence and the record had at the last trial to a jury. The trial judge

found in favor of plaintiff and fixed the amount of recovery at $2,732. The defendant filed a motion for new trial. The trial judge sustained the motion for a new trial, set aside his former findings and judgment, and entered a judgment of dismissal. It is from this judgment that plaintiff now appeals.

At the last trial, the court made a finding and entered a judgment on the pleadings and the evidence. The motion for new trial was sustained, the findings and judgment were set aside and a dismissal entered. A new judgment was entered on the pleadings and the evidence against the plaintiff, who filed no motion for new trial. "The trial court's judgment of dismissal thereupon entered was the same in force and effect as if originally made and entered 'at the close of the evidence.' The plaintiff thereupon became the 'aggrieved party,' vested with the right to file and present a motion for new trial. Comp. St. 1929, secs. 20-1142, 20-1143. This, the record before us discloses, he failed to do. No motion for a new trial in behalf of the plaintiff appearing in this record, the only question for this court presented thereby is the determination of whether the answer of the defendant supports the judgment entered. We are not permitted to go back of this judgment of the trial court to review anything done or any proceedings had prior to the judgment. *Johnson v. Songster,* 73 Neb. 724; *Farmers & Merchants Nat. Bank v. Mosher,* 63 Neb. 130; *Hansen v. Kinney,* 46 Neb. 207." *Hamaker v. Patrick,* 122 Neb. 688.

The answer of the defendant denies generally all the allegations of plaintiff's petition, thus presenting a defense to plaintiff's claim as set forth in his petition. In such a case, this court is required to affirm the judgment.

In view of the history of this protracted litigation over this unfortunate accident, it seems advisable to state, although unnecessary to a decision of the case, that a majority of the judges are of the opinion that the petition does not state a cause of action; that the amendment proposed more than four years after the accident should not

have been allowed, and that the evidence of negligence was insufficient to support a verdict.

AFFIRMED.

MARGARET PINCHES, APPELLANT, V. VILLAGE OF DICKENS, APPELLEE.

FILED MAY 25, 1934. No. 28878.

1. Evidence examined and *held* sufficient to sustain verdict, and that plaintiff was not guilty of contributory negligence as a matter of law.
2. Trial: DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40.
3. Municipal Corporations: DEFECTIVE WALKS: INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE. A person is not guilty of contributory negligence as a matter of law in a suit against a village for injuries sustained on account of a defective way simply because he could have walked at another place, nor because he had been over the same route, but walking in an opposite direction, a short time before.
4. ———: ———: ———: ———: NOTICE. Previous notice of a defect in a walk will not constitute sufficient contributory negligence to bar recovery as a matter of law for injuries received on account of the defect.
5. Negligence: BURDEN OF PROOF. The burden of proof of contributory negligence is ordinarily on the defendant.
6. Municipal Corporations: DEFECTIVE WALKS: CARE REQUIRED OF PEDESTRIAN. The care required of a pedestrian in walking over a traveled way does not mean that he must go around the obstruction or defect, but in passing over it he must use some care and caution beyond the ordinary care exercised by a person walking upon a sidewalk knowing of no defect therein.

7. **Negligence:** QUESTION FOR JURY. Ordinarily, all questions of negligence and contributory negligence are for the jury.
8. **Municipal Corporations:** DEFECTIVE WALKS: INJURY TO PEDESTRIAN: QUESTION OF FACT. Where the testimony shows that there was an accumulation of débris and rubbish mixed with snow and ice on a way generally used by pedestrians, in consequence of which the plaintiff fell and sustained severe injuries, the question whether the village was negligent in failing to remove the obstruction is one of fact, to be determined by the jury from all the circumstances of the case.
9. ———: ———: ———: ———. The question whether a way was defective or in an unsafe condition is generally one of fact and not of law.
10. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. Contributory negligence cannot be imputed to plaintiff as a matter of law from the mere fact that he attempts to cross over a walk upon which there is an accumulation of débris, trash and other substances, provided he was walking at a place generally used by pedestrians, and where on account of the complete obstruction of the sidewalk it was necessary, in order to reach his destination, for the pedestrian to turn off into such walkway.
11. ———: ———: ———. The fact that an accident did not happen on a sidewalk will not bar a recovery if the place where it did happen was customarily used as a walkway to the knowledge of the defendant village.
12. **Appeal.** If the verdict is not excessive, it will not be set aside because it is larger than the amount prayed for, especially where the claim filed against the village was in excess of the amount of the verdict, but the plaintiff will be permitted to amend her petition to conform to the proof by praying for the amount awarded to her by the verdict.
13. **Municipal Corporations:** INJURY TO PEDESTRIAN: CONTRIBUTORY NEGLIGENCE. At a place where a sidewalk was completely obstructed by a stairway, the plaintiff, in order to reach her destination, turned off into a drain or gutter following a route ordinarily used by pedestrians. She had been over the same route walking in the opposite direction a few minutes before. In the drain at the place where she turned off was an accumulation of débris, trash, leaves, muresco, snow and ice. It was not shown that she noticed any dangerous condition when she passed over the walk a few minutes before. She was walking in an ordinary manner and appears to have been observing due care. *Held,* that she was not guilty of contributory negligence as a matter of law, and that the verdict of the jury in her

favor, which was set aside by the district court, should be reinstated.

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

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

Beeler, Crosby & Baskins, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

LIGHTNER, District Judge.

This is a suit by Mrs. Margaret Pinches for injuries on account of defects in the walkway of defendant village. She prayed damages in the sum of $2,500. The jury awarded her $3,000, but the district court set aside the judgment, sustained defendant's motion for a directed verdict, and plaintiff has appealed.

Plaintiff, who at the time was about 45, was injured on March 15, 1932, while crossing a gutter or drain. On that day she had been moving from the block northwest of the principal intersection of Dickens to the southeast part of the block southeast of the intersection. Dickens is a small place of only 135 inhabitants. She had made a number of trips, her usual route was to go south from where she had been living to the intersection, then eastward on the middle of the street until she got back of what is known as "Falk's store," which is on the northwest corner of the block she was moving to, and then cut south through some vacant property and the alley to her new abode. Her brother, Rex Brown, was assisting her with a team and wagon. Shortly after noon, plaintiff needed a short length of stovepipe. The hardware store where she could purchase it is immediately west across the street from Falk's store. She left her new location to get it. In returning with this pipe she did not follow the route she had been using earlier in the day, because the hardware store is on the south side of the street, but after getting the stovepipe, an 18-inch length, she went

directly east across the street and on the sidewalk along the north side of Falk's store. Connected with this sidewalk and immediately north of it is the gutter in which she was hurt. The sidewalk is three feet wide and the gutter is five feet five inches wide. After the sidewalk runs about thirty feet east from the northwest corner of Falk's store, it is completely obstructed by a stairway which rises toward the east along the side of Falk's store to a platform where doors open to the south into a hall. Persons wanting to proceed eastward must turn off of the sidewalk and cross the gutter at this point. The gutter was commonly used by pedestrians coming from or going toward the east, and on the south side of the street east of Falk's store is a row of hitching posts, and people who tied their teams at such posts would cross the gutter and come westward over about the same route to the main intersection of the village. This drain begins flush with the sidewalk and slants downward for three feet two inches to a total depth of six inches and then slopes upward for two feet two inches where it meets the traveled portion of the street. However, just before the drain reaches the place where the stairway begins to rise, it falls at a sharper angle than the sidewalk, leaving an abrupt step-off of three or four inches near the stairway. It was at her second step after turning north to cross the drain where plaintiff fell and was hurt. It appears from the evidence that in going to the hardware store for the pipe she had passed over the same route, but of course in the opposite direction. Plaintiff alleges that defendant failed to keep said ditch in proper condition to allow water and melted snow to drain off, but permitted ashes and other refuse to accumulate in said drain, causing water from melted snow to back up and freeze, forming ice in said drain at the point where the stairs met said sidewalk, creating a dangerous, unsafe and slippery condition, and that, while in the proper exercise of due care and caution, she passed out and around the wooden staircase and into the concrete gutter and in so doing slipped

on the ice and was injured. It appears from the evidence that her hand was badly cut on a glass jar, which was lying with other débris at the place where she was hurt. Plaintiff claims that the dangerous condition had existed long enough to give the village both actual and constructive notice. The answer of the village denies that the drain-way was faultily constructed, denies that it knew that the drain-way was used for a passageway or sidewalk, and denies that it knew of the accumulation of débris referred to by plaintiff and alleges that plaintiff's injuries were through her own lack of care and caution and due to gross negligence on her part.

The court fully and fairly instructed the jury as to all questions of negligence and contributory negligence, actual and constructive notice, and all other questions in the case. A careful examination of the instructions convinces us that there is no error in them. The ruling of the court is to the effect that plaintiff was guilty of contributory negligence as a matter of law. While the district court did not so hold, defendant also seeks to uphold the ruling of the court on the ground that the village authorities did not have notice, actual or constructive, of the alleged dangerous condition of the drain.

The principle to be applied in testing the action of the district court has often been stated, and was again stated on February 27, 1934, in *LaFleur v. Poesch,* 126 Neb. 263, as follows:

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

Section 20-1151, Comp. St. 1929, after providing that contributory negligence shall not in all cases bar a recovery, further provides that "all questions of negligence and contributory negligence shall be for the jury." However, the court has not applied the statute in accordance with its exact wording, but has held that the sufficiency of the evidence is a question for the court, and the court has in many cases examined the facts and determined as a question of law whether the plaintiff is or is not guilty of contributory negligence sufficient to bar a recovery. We have examined most of the cases cited by appellant and appellee. It will be unnecessary to refer to those which lay down general rules, but only to the cases where the facts are similar to those in this case, or which illustrate some principle here involved. Municipal corporations have the duty of keeping streets and sidewalks in reasonably safe condition for travel by the public. *Davis v. City of Omaha,* 47 Neb. 836; *Hanley v. Fireproof Building Co.,* 107 Neb. 544; *Cushman Motor Works v. City of Lincoln,* 97 Neb. 519.

In *Struble v. Village of De Witt,* 89 Neb. 726, it appears from the statement of facts that the plaintiff had passed over the walk possibly twice before the accident, and it was argued that she must have known the condition of the walk and should have walked in the road, as the road was in good condition, and she had, during a part of her walk, where there was no sidewalk, followed the road. The plaintiff was also carrying several packages and the burden of these packages may have contributed to her accident. The court said: "If these circumstances afforded any evidence whatever of contributory negligence, the most that can be said is that it was a question for the jury." The accident happened early in September and this is not, therefore, a case of slippery condition due to ice or snow. A former opinion is found in 81 Neb. 504.

In *Tewksbury v. City of Lincoln,* 84 Neb. 571, plaintiff with another lady was passing over the sidewalk and

bridge on a Sunday afternoon going to church. A sewer drain had become clogged and the city was flushing it and the ice froze on the sidewalk making a dangerous condition. Answering the claim that the plaintiff was guilty of contributory negligence, the court said: "It is suggested that plaintiff was guilty of contributory negligence in stepping on the icy sidewalk and bridge. We find nothing in the evidence by which we can say as a matter of law that plaintiff was guilty of contributory negligence. That question was submitted to the jury under proper instructions, and their finding will have to stand." The court also say: "No precaution was taken to prevent accidents to persons passing over the freezing water, and the testimony on the part of plaintiff is that the spraying and freezing continued on Sunday. On that day it was quite cold, and there was ice upon that part of the bridge over which plaintiff passed, which was not noticed by her, and she fell, inflicting the injury. The sidewalks and streets elsewhere were dry."

City of Wahoo v. Reeder, 27 Neb. 770, is a defective sidewalk case. The walk was old, full of holes, and had been in bad condition for some time. About the 9th of January the plaintiff, in going over the walk which was at this time partly covered with snow, stepped into one of the numerous holes therein and received the injury to her knee complained of. A recovery was sustained. It was held that there was no proof of contributory negligence on the part of the plaintiff to submit to the jury.

In *City of Chadron v. Glover,* 43 Neb. 732, the particular defect in the sidewalk is not shown. One of the contentions was that the injury occurred at a point outside of the line of sidewalk where the sidewalk had been widened back to a rink used for public entertainments. Inasmuch as it appeared that the whole formed a continuous walk open to the public and that the city had exercised control over the whole thereof and permitted the same, its duty to maintain the same is not affected

by the fact that under its ordinance a narrower walk might have been erected.

Village of Ponca v. Crawford, 23 Neb. 662, was a case where a stranger, walking on the sidewalk after nightfall, came to a break in the sidewalk. Instead of turning back he endeavored to descend to the ground at the end of the sidewalk, a distance of about three feet. In so doing in a careful manner, he fell upon a saw bench, which had been left on the ground at the end of the sidewalk, and was injured. It was held that he was not guilty of contributory negligence. The court in discussing the action of plaintiff say: "The act of the plaintiff, suggested as constituting contributory negligence, is that of not turning back and abandoning his walk along the sidewalk and street, when he discovered that the sidewalk did not continue on the same unbroken level. Whether a person of ordinary care and prudence, of the knowledge of and acquaintance with the streets and sidewalks of a village, or the want of either, which the plaintiff was shown to have possessed, would have turned back and abandoned his purpose in proceeding along the street on ascertaining that there was an apparent break in the sidewalk, or would have continued his endeavor to proceed, is a question of fact for the jury, proper for consideration and determination, under proper instructions."

A walkway which is supposed to remain and become a part of the avenues of public travel must be maintained in reasonable condition by the municipality. *Village of Plainview v. Mendelson,* 65 Neb. 85; *Village of Ponca v. Crawford,* 23 Neb. 662; *City of Chadron v. Glover,* 43 Neb. 732.

Notice of the defective condition of a walk will be presumed by lapse of time and is a jury question. *City of Plattsmouth v. Mitchell,* 20 Neb. 228; *City of Grand Island v. Oberschulte,* 36 Neb. 696.

In *Foxworthy v. City of Hastings,* 25 Neb. 133, plaintiff, a stranger to Hastings, slipped and fell on the sidewalk. The accident happened on January 21. The fall

seems to have been due to an accumulation of snow and ice. The court in discussing the case say: "Where the defect in a sidewalk has been occasioned by decay or other cause, the rule no doubt is that the city must have actual notice, or the defect have existed for such a length of time that notice will be presumed. Where, however, the obstruction is caused by falling snow, which has extended over the entire city or state, this is notice to the city authorities of the existence of snow on the sidewalks, and in case of a city of the second class, with ample power to clear the same, it is its duty to do so or cause the same to be done within a reasonable time, otherwise it will be liable for injury occasioned by its neglect. The question whether the city was negligent in not removing the obstruction was one of fact, and should have been submitted to the jury."

Previous notice of a defect will not constitute such contributory negligence as will bar recovery as a matter of law, but such alleged negligence is one for the jury taking all the facts into consideration.

City of Beatrice v. Forbes, 74 Neb. 125, was a case where plaintiff fell by reason of ice. It was held that contributory negligence could not be imputed to him as a matter of law from the mere fact that he attempted to pass over a walk obstructed or otherwise out of repair, to his knowledge, provided the obstruction or defect was such that a man of ordinary intelligence would reasonably believe that with proper care and caution he could pass with safety notwithstanding the defect.

In *Nicholson v. City of South Omaha,* 77 Neb. 710, the accident was not due to snow or ice but to a defective walk. The evidence showed that the plaintiff himself knew of the defective condition of the walk and had passed it on numerous occasions, as it was the only passable way to reach the city from the place of his residence during bad weather and a muddy condition of the ground. He stated that on the night in question he was not thinking of the dangerous condition of the walk at the time

he approached it; that his mind was absorbed by a matter of business upon which he had been engaged during the day and which he was anxious to conclude. He did not claim that his attention was diverted by any passing object or by anything taking place which distracted his attention. The court hold: "It is not the plaintiff's knowledge of the defect in a walk or street that precludes his recovery, but his want of such care as a prudent man would exercise in view of the danger. This is usually a question for the jury." The accident in his case happened at night.

The burden of proof of contributory negligence is on the defendant. *Rapp v. Sarpy County*, 71 Neb. 382; *City of Lexington v. Fleharty*, 74 Neb. 626.

There was, in our opinion, sufficient notice to sustain the verdict. The village knew the sidewalk was obstructed by the stairway and that pedestrians had to cross the gutter. The nature of the accumulation shows that it might have been there for a long time.

Appellee's next proposition is that, where a person falls upon a slippery sidewalk or an obstruction the person knows to exist at the place, he is charged with the duty of using due care and caution. Appellee admits that this does not mean that he must go around the obstruction or defect, but in passing over it he must use some care and caution beyond the ordinary care exercised by a person walking upon a sidewalk, knowing of no defect therein. One of the Nebraska cases cited is *Bell v. City of York*, 31 Neb. 842. In this case plaintiff fell on January 14, on account of the slippery condition of the walk. The judgment was for the defendant city. The court said that the important question of fact as to the condition and reasonable safeness of the walk was left to the careful consideration of the jury, and that the instructions were neither partial nor unfavorable, and that, the jury having found against the plaintiff on the facts, the objection that the verdict was not sustained by sufficient evidence and was contrary to the instructions of the court

was overruled. The court in discussing the case say: "Whether a city is liable for the common accidents to its citizens through ice and snow on the sidewalks will greatly depend on the circumstances of each particular case, but in most cases it is held that, to recover, there must be evidence of an obstacle attending the casualty other than mere slippery walks, that provoked the danger."

City of Beatrice v. Forbes, 74 Neb. 125, is also cited. In this case the court say: "It is insisted by the plaintiff in error that the evidence taken as a whole shows that Forbes was guilty of negligence which proximately contributed to his injury; that he knew the condition of the crossing, and voluntarily assumed the risk of attempting to pass it, and that he cannot now insist that the damages sustained should be borne by the city. There are instances where the court as a matter of law would say that the danger attending the performance of an act was so great and manifest that it was negligence to attempt it, and that no recovery could be had for damages sustained in such attempt. * * * We do not understand, however, that one, on discovering a defect or obstruction in a public street on which he is traveling, or a place therein that might be unsafe, is required to turn back and take some other route to his destination, unless the defect is of such a character as to render it dangerous to the mind of a person of ordinary prudence to attempt the passage, of which the jury are to judge; and especially is this not required where, as in the present case, a large number of people are using the street and passing over the defective way, without injury, to the knowledge of such person. The evidence is conclusive that the crossing was being used by a large number of persons, who passed without accident or injury, and that it was not obviously dangerous to attempt it; but, notwithstanding this, counsel for the city insists in his reply brief that this court should reverse the case upon the theory that as a matter of law the plaintiff was guilty of contributory

negligence." In this case the finding was for the plaintiff and the case was affirmed by the supreme court.

Appellee's last contention is that the mere slippery condition of walks is not sufficient to warrant recovery and cites *Nebraska City v. Rathbone*, 20 Neb. 288. This case holds: "Where the testimony shows that there were accumulations of snow and ice on a sidewalk, in consequence of which the plaintiff fell and sustained severe injuries, the question whether the city was negligent in removing the obstruction is one of fact, to be determined by the jury from all the circumstances of the case." The above quotation is from the syllabus. In the body of the opinion it is said, quoting from the case of *Congdon v. City of Norwich*, 37 Conn. 414: "Accumulations of snow and ice may produce such a condition of the road as to cause it to be dangerous and defective, and in each particular case of alleged defect from such cause the question will depend upon an inquiry of fact, whether under all the circumstances of the case the road was in a reasonably safe condition, and whether those who were bound to keep the road in repair are justly chargeable with negligence and want of reasonable care in relation to it." After the quotation from the Connecticut case our supreme court say: "The question whether a sidewalk was defective or in an unsafe condition is one of fact and not of law. While the courts generally hold that the mere fact that a sidewalk is slippery will not render the corporation liable for an injury occasioned to a person by falling on such walk in consequence of such condition of the walk, yet when there are accumulations of snow and ice on the sidewalks the city may be liable if it has been guilty of negligence in not removing the same."

Bell v. City of York, 31 Neb. 842, is also cited in support of this proposition. It has already been discussed.

The weight of authority in this state seems to be to the effect that a question of fact is presented, which is for the jury. There is evidence tending to show that a path led across the drain at the place plaintiff was walk-

ing and she was therefore justified in walking at such place; that there was an accumulation of leaves, ice and a creamy substance, probably muresco, that extended up on the slope of the drain, rendering it slippery, and which might not be noticed by an ordinary observer. One witness described this accumulation as a lot of ice and snow, débris of different kinds, leaves, trash and papers, and some muresco on the snow, and in the snow a broken fruit jar. The bottom of the fruit jar was intact with some ragged pieces sticking up from the bottom and also the lid of the fruit jar lying there. This accumulation was around four inches deep and would cover better than one-third of the drain; there was a trail from the east sidewalk where the stairs were running through there. You would step down into this drain and possibly take two steps to the east before the trail stepped up out of the drain. There is a path from the stair all the way past the hitching rack to the north and also one going around the back end of the store and down the alley. The place was full of débris, the greater part of it from the place where Mrs. Pinches fell, on east. By débris he refers to papers and leaves. Vern Bruce, another witness slipped at the same place on the 11th of March, and says that there were snow and ice in the bottom of the drain and a cream colored substance mixed with the ice on the side of the drain, which covered a third of the bottom and on the south side of the slope of it; that the snow and ice were two or three inches deep and a path leads from the hitching post through the drain at the place where he slipped. The fact that plaintiff had walked over the place a short time before, coming from the opposite direction, would not apprise her of the danger; at least, it did not apprise her of it, and there is no evidence to show that anything she saw or should have seen would apprise her or a reasonably prudent person of the danger. There is sufficient evidence to indicate that the obstruction had been in the drain for some time. By permitting the entire sidewalk to be obstructed by the stairway above

referred to, the village made it necessary to step off the sidewalk in order to go around the stairway, and the village had the same duty with reference thereto as it had to the sidewalks. "The board of trustees shall have power * * * to require and regulate * * * the building of stairways * * * and all other structures projecting upon or over and adjoining, and all excavations through and under the sidewalks of such village." Comp. St. 1929, sec. 17-207. "To remove all obstructions from the sidewalks, curbstones, gutters and crossroads at the expense of the person placing them there, or the city or village, and to require and regulate the * * * building of * * * stairways * * * and all other structures projecting upon or over and adjoining, * * * and all other excavations through and under the sidewalks in the said city or village." Comp. St. 1929, sec. 17-453. "To prevent and remove all encroachments into and upon all sidewalks, streets, avenues, alleys and other city or village property." Comp. St. 1929, sec. 17-455.

The verdict seems to have been set aside because the plaintiff might have walked at another place and did not, and because she had been over the same place coming from another direction a short time before. We suppose that a pedestrian was never hurt by reason of defective streets or sidewalks but that he could have avoided the danger by going somewhere else, and although there is evidence that plaintiff had been over this route shortly before, there is no evidence that she believed that it was unsafe to cross the drain where she did cross it and none to the effect that she was not observing due care. Every proposition advanced to sustain the action of the trial court is, in our judgment, fully answered by the Nebraska cases. In *Foxworthy v. City of Hastings,* 25 Neb. 133, it was held that the question whether the city is negligent in not removing the obstruction of snow and ice from the sidewalks is one of fact. In *Tewksbury v. City of Lincoln,* 84 Neb. 571, plaintiff could certainly have seen the ice on which she slipped on a Sunday afternoon.

In *Struble v. Village of De Witt,* 89 Neb. 726, plaintiff had been over the dangerous walk at least twice before. In *Village of Ponca v. Crawford,* 23 Neb. 662, the plaintiff came to a break in the walk. He could easily have turned back, but did not do so. In *City of Beatrice v. Forbes,* 74 Neb. 125, it was held that contributory negligence could not be imputed to plaintiff as a matter of law from the mere fact that he attempted to cross over a walk obstructed or otherwise out of repair. In *Nicholson v. City of South Omaha,* 77 Neb. 710, plaintiff knew of the dangerous condition of the walk.

The procedure of the district court was in accordance with that suggested in *Netusil v. Novak,* 120 Neb. 751. The question now is whether the verdict of the jury may be allowed to stand or whether the case should be reversed. Neither party has suggested any error in the instructions, nor in the amount of the verdict except that the verdict was in excess of that prayed for in the petition. We doubt if the plaintiff is bound by the prayer of her petition, especially in a case where she had already filed a claim for $5,000 with the village. The verification does not apply to the amount. Comp. St. 1929, sec. 20-830. At any rate, under our liberal rule she may amend to conform to the proof. Comp. St. 1929, sec. 20-852.

The judgment is therefore reversed and the cause remanded, with directions to reinstate the verdict and judgment in plaintiff's favor.

REVERSED.

ELMCREEK DITCH COMPANY, APPELLANT, V. H. F. ST. JOHN, APPELLEE.

FILED JUNE 1, 1934. No. 28883.

1. **Appeal.** In an action at law tried to the court without a jury, erroneous admission of testimony may be immaterial on appeal, where the judgment below is sustained by sufficient competent evidence.

2. **Bills and Notes:** DEFENSES: FAILURE OF CONSIDERATION. In an action by payee on a negotiable promissory note, against the maker, "failure of consideration" is a defense authorized by statute. Comp. St. 1929, sec. 62-205.
3. ———: ———: ———. The right to make the statutory defense of "failure of consideration" in an action on a negotiable promissory note implies the right to prove that defense by competent evidence.
4. **Evidence.** In an action by the payee in a negotiable promissory note against the maker, oral testimony is admissible to prove the purpose for which the note was given.
5. **Appeal.** In an action at law tried to the court without a jury, the court's finding on a material issue of fact is equivalent on appeal to a jury's verdict.

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

Robert Huston, for appellant.

N. P. McDonald, contra.

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

ROSE, J.

This is an action on a 750-dollar promissory note dated March 17, 1930, and payable March 1, 1931. The Elmcreek Ditch Company, plaintiff, is payee and H. F. St. John, defendant, is maker. The note was executed by defendant and delivered to plaintiff. There is no other party to the action. By answer defendant interposed the defense that the consideration for the note wholly failed. Without a jury the cause was tried to the district court. The defense of failure of consideration was sustained by a specific finding of the district court in favor of defendant on that issue and the action was dismissed. Plaintiff appealed.

Plaintiff sold stock and entered upon an irrigating project for the construction of a ditch about 17 miles long for the purpose of conducting water to irrigable lands between the Platte river near Overton in Dawson county

and lands north of Odessa in Buffalo county. Defendant owned 100 acres of land near what would have been the lower end of the 17-mile ditch, if completed. December 28, 1928, defendant subscribed for 50 shares of plaintiff's stock at $25 a share, to be issued by plaintiff "in connection with said lands in accordance with the articles of incorporation and subject to all the terms thereof, payable as set forth in said articles." The articles of incorporation provide that no stockholder shall receive any benefit from his stock except the use of water for irrigation and that water rights acquired by a subscription for stock shall become appurtenant to the land of the subscriber. Defendant did not pay for the stock but, March 17, 1930, gave the note in controversy for $750, the amount of his subscription. One of plaintiff's by-laws provided:

"The Elmcreek Ditch Company shall deliver water to the land of each stockholder where it can be used for the lands for which subscription has been made, or the amount of such subscription which has been paid shall be returned to the subscriber, as herein provided."

There is oral evidence tending to prove that plaintiff executed and delivered the note on the basis of a representation by plaintiff and an understanding with defendant that the former would furnish water for the irrigation of defendant's land in the fall of 1930. The evidence shows that water has never been conveyed by plaintiff to defendant's land and that the lower end of the ditch is four miles away.

It is argued by plaintiff as a ground for reversal that the trial court erred in admitting oral testimony to contradict the terms of the note. In this connection attention is called to an entry close to the lower edge of the note below the signature—"3 assessments on ditch payment." The entry itself, if material, is open to explanation, but plaintiff contends it indicates on the face of the note the consideration therefor and that oral evidence to the contrary was erroneously admitted. The case was tried to

the court without a jury, and the point is immaterial on appeal, if the judgment is supported by sufficient competent evidence.

In an action between the original parties to a negotiable promissory note, "failure of consideration" is a defense authorized by statute. Comp. St. 1929, sec. 62-205; *Yost v. Yost,* 124 Neb. 608. The statutory right to make such a defense necessarily implies the right to prove it by competent evidence. It has been held time and again, in actions by payees against makers, that oral testimony may be admitted to prove the purpose for which a negotiable promissory note is given. *Spangenberg v. Losey,* 116 Neb. 112; *Musser v. Musser,* 92 Neb. 387; *First Nat. Bank v. Burney,* 91 Neb. 269; *Davis v. Sterns,* 85 Neb. 121. The rule applies to a note given for stock in a corporation in reliance upon a promise of payee. *McElhinney v. Harte,* 98 Neb. 229.

The record contains abundant competent evidence to sustain the finding of the trial court that the consideration for the note wholly failed. Plaintiff is not entitled to a trial *de novo* in the supreme court. The finding of the district court is equivalent to a jury's verdict, which will not be set aside on an issue of fact unless clearly wrong. An error prejudicial to plaintiff has not been pointed out or found.

AFFIRMED.

PEDER ANDERSEN, APPELLEE, V. E. H. LUIKART, RECEIVER OF THE UPLAND BANKING COMPANY ET AL., APPELLANT: CHRISTOPHER WORK ET AL., APPELLEES.

FILED JUNE 1, 1934. No. 28984.

Gifts. To constitute a valid gift *inter vivos*, dominion over and title to the gift must pass to donee by the voluntary, intentional act of donor.

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

Leon Samuelson, P. E. Boslaugh, Edmund P. Nuss, F. C. Radke and *William Gartland,* for appellant.

Thomas Robertson and *J. S. Gilham, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

GOOD, J.

This is an action to foreclose a real estate mortgage. The mortgagors made no appearance, and decree was entered against them by default. Luikart, as receiver for the Upland Banking Company and receiver for the People's Bank of Upland, filed cross-petitions, seeking foreclosure of two mortgages. One of the mortgages was for $5,990, in which the Upland Banking Company was named as mortgagee; the other for $1,900, in which the People's Bank of Upland was named as mortgagee.

In his cross-petitions as receiver, Luikart charges that the principal of plaintiff's mortgage had been extinguished or canceled by a release executed by plaintiff and intended as a gift to the mortgagors. The trial court entered decree for plaintiff, awarding him a first lien; Luikart, as receiver for the Upland Banking Company, a second lien; and Luikart, as receiver for the People's Bank of Upland, a third lien. Luikart, in his capacity as receiver for the two insolvent banks, has appealed. The only question is whether or not plaintiff had canceled his mortgage by making a gift to the mortgagors.

Bertha Work, wife of Christopher Work, is a daughter of plaintiff. Christopher Work owns a farm of 160 acres in Franklin county, Nebraska. Plaintiff had formerly lived in Franklin county and had done business with the Upland Banking Company. In 1914 Work and wife executed and delivered to plaintiff their promissory note for $7,000, due in 10 years, with interest at 5 per cent., payable semiannually, which was represented by 20 coupons

attached to the note. To secure the payment of this note, they executed a mortgage on the farm. That is the mortgage which plaintiff seeks to foreclose. Mortgagors had paid the interest and $1,500 on the principal of the mortgage prior to 1921. In that year plaintiff planned a visit to Denmark, and came from his then home in California to Upland, Nebraska, and arranged with his son-in-law, Work, to pay an additional $500 upon the principal of the 7,000-dollar note. At that time he informed the officers of the Upland Banking Company of his intended trip to Denmark and that he wanted to fix up some paper so that, if anything happened to him, the mortgage and note would go to his daughter, Mrs. Work. The bank officers conferred and prepared a release of the mortgage which contains this provision: "This release is only to be used upon the death of Peder Andersen and is to be left with the Upland Banking Co. in escrow till that time."

It does not appear that Mrs. Work had any knowledge or information at that time of her father's intention to give her the note and mortgage "if anything happened to him," by which he undoubtedly meant in the event of his death, and did not have any knowledge of it for a long time thereafter. Plaintiff was away on his trip abroad for several months, and when he returned he did not, for a long time, ask for the release. In 1925, and after the maturity of the original 7,000-dollar note and mortgage, plaintiff arranged with his son-in-law and daughter for an extension of the unpaid portion of the mortgage. An extension agreement was executed by them, extending the time of payment upon the $5,000 remaining of the principal until 1929, and this extension agreement had attached thereto interest coupons representing interest payments. Some years subsequently the Upland Banking Company loaned Work $5,990 and took a mortgage upon the same land. The officials of this bank knew of the release and that it was in the possession of the bank, together with plaintiff's other papers, including the note

and mortgage. The officers of this bank also knew of the extension agreement and had prepared such agreement for the plaintiff and the mortgagors. One of the former officers of that institution testified that at the time they considered the farm ample security for both the mortgage to plaintiff and the mortgage to the bank. Subsequent to this time the People's Bank of Upland loaned money to Work and took a third mortgage upon the same land for $1,900. So far as appears in the record, none of the officers of this bank at that time had any knowledge or information concerning the release which had been executed by plaintiff. Subsequent to this time Work had made default in paying the taxes upon the farm, and plaintiff asked for a return to him by the bank of the note, mortgage and release. The bank was then in the hands of a receiver. The receiver refused to comply with this request, insisting that the release was held in escrow and could not be surrendered to plaintiff. Thereupon, plaintiff instituted this action in foreclosure, with the result above indicated.

Counsel for cross-petitioner concedes that there is but one question for this court to determine, viz.: Did plaintiff, by the execution of the release in 1921, execute a gift *inter vivos* of the indebtedness owing to him by defendants Christopher and Bertha Work?

Cross-petitioner contends that a person may make a gift of a debt or chose in action and may reserve to himself a life estate or income therefrom for life, and that such a gift is not invalid for lack of consideration, because of a reservation of an interest therein for life, or because it is not to take effect until after his death; and further contends that in such case a stipulation that actual enjoyment of the gift is to be deferred until the donor's death only marks the time when the enjoyment begins and is not a condition, since donor's death is inevitable. Cross-petitioner also contends that, where the gift of a note is complete and irrevocable, the mere fact that the donor thereafter, without the knowledge or con-

sent of the donee, secures the note from the possession of the holder does not reinvest the title in the donor. He cites and relies upon a number of decisions made by this court, among them *Dinslage v. Stratman,* 105 Neb. 274; *Novak v. Reeson,* 110 Neb. 229; *In re Estate of Kamrath,* 114 Neb. 230; *In re Estate of Sides,* 119 Neb. 314; and *In re Estate of Dayton,* 121 Neb. 402. We think, for the sake of the argument, it may be conceded that the propositions contended for by cross-petitioner are sound, but an examination of the cases cited shows that the facts in those cases are quite dissimilar to the facts in the instant case.

In *Dinslage v. Stratman, supra,* it was held: "Where the proof is clear of an intention to make an absolute gift *inter vivos* of a chose in action, arising from a debt not evidenced by a promissory note or other document, an unqualified direction by the donor to the debtor to pay the debt to the donee, instead of to the creditor, is a sufficient delivery of the gift, it being the only delivery of which the chose is susceptible." In that case there was clear and convincing evidence of the purpose and intent of the donor to make an absolute gift *inter vivos.*

Novak v. Reeson, supra, was a case where a father made a loan of $4,000 to one of his sons and required the son to execute four notes in the sum of $1,000 each, payable to each of the father's four daughters, which notes the father delivered to another son, with directions to hold said notes, collect the interest thereon and pay the same to him during his lifetime, and after his death to deliver the notes, one to each of the daughters named therein, and it was held that this was a complete and irrevocable gift of the notes to the daughters.

In *In re Estate of Kamrath, supra,* the question was whether the name of a payee in a certificate of deposit had been altered from Wilhelm Kamrath to Wilhelm Kamrath or Mary Hodges. We think that case has no bearing upon the question here involved.

In the case of *In re Estate of Sides, supra,* it was held that the mere reservation of interest to the donor during his lifetime does not invalidate a gift. In that case a father, in his lifetime, gave money to each of his children by a former marriage and took from each a promissory note for the full amount of money so given, made payable to himself and bearing interest at the rate of 4 per cent. per annum, but containing a written provision that such note should be canceled on the death of the payee and should not be against the maker. In that case the father, during his lifetime, delivered the notes to a third person in trust, with directions to him to collect and remit to the payee the interest on the notes during his lifetime, and upon his death to surrender the notes to the makers, and thereafter never exercised dominion or control over the notes. It was there held that there was a complete gift *inter vivos.*

In *In re Estate of Dayton, supra,* Dayton, in his lifetime, purchased bonds and had them registered in the name of the donee and kept them in his safe deposit box for convenience in collecting accruing interest thereon so long as he lived, but the evidence in that case was clear and convincing that he had purchased the bonds for the donee and had made a gift of them to her, but reserving to himself the interest or income from the bonds during his lifetime.

To constitute a valid gift *inter vivos,* dominion over and title to the gift must pass to donee by the voluntary, intentional act of donor.

In the instant case there is no gift, nor language showing a present intention to make a gift, by the plaintiff to his daughter. He did not communicate to her the fact that he had executed a release. He did not deliver the note or mortgage to her, but kept them in his possession and gave no direction to any one to deliver the note and mortgage to her. The release was executed evidently with the thought in his mind that he might not live to return from his trip to Denmark, and, in that event, the release

should operate. We think the evidence falls far short of being convincing that there was any intention on the part of plaintiff to make a gift to his daughter. Moreover, long after this release was executed the daughter and her husband executed an extension agreement of the mortgage and note, recognizing their full liability for $5,000 and interest thereon. Neither the daughter nor her husband is, in this case, claiming there was any gift, and their testimony taken negatives the idea of any gift.

It is true that in the release it is denominated an instrument in escrow, but there was no agreement between plaintiff and his daughter or his son-in-law that the instrument should be left in the bank as an escrow. We are convinced that the bank was merely the custodian of plaintiff's papers, including the note, mortgage and release, and that plaintiff was entitled to demand possession of them at any time. They were not beyond his control, and there was no intention on his part to part with their control.

The decree of the district court is free from error, and it is accordingly

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. NEBRASKA STATE SAVINGS BANK OF WAHOO: JOHN D. GORANSON, INTERVENER, APPELLANT: MINNIE M. JANSA, EXECUTRIX, INTERVENER, APPELLEE.

FILED JUNE 1, 1934. No. 28920.

1. **Sales.** Generally, a thief can acquire no title to stolen property, nor can title to personal property be acquired through another's larceny or theft.
2. **Bonds: TRANSFER: BONA FIDE PURCHASER.** If bonds having a legal inception and payable to bearer or blank as to payee, or payable to order and indorsed in blank, and otherwise conforming to the statutory requirements as to negotiable instruments, are negotiated after a theft thereof from the true owner, the

purchaser or transferee of such bonds acquires a good title thereto as against the true owner only if purchased before maturity, in good faith, and for a valuable consideration, or under such circumstances as will constitute such purchaser a holder in due course as defined by the Nebraska negotiable instruments act.

3. ———: ———: ———. Evidence examined, and *held* to establish that intervener Minnie M. Jansa, executrix, was not the holder in due course of the coupon bond in suit.

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

J. H. Barry, for appellant.

Schiefelbein & Donato, contra.

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

EBERLY, J.

It may be said that prior to May 10, 1930, the Nebraska State Savings Bank, hereinafter referred to, and the Saunders County National Bank were engaged in banking business at Wahoo, Nebraska. These institutions occupied the same banking rooms and the same persons were the executive officers of each. Both banks became insolvent and closed their doors on the same day. On the date above mentioned, in a proceeding in the district court for Saunders county, because of insolvency, a receiver was duly appointed, who thereupon qualified and took over the business and property of the Nebraska State Savings Bank. On March 17, 1931, Minnie M. Jansa, as executrix of the estate of Anton Jansa, filed in this receivership proceeding her petition of intervention. In this pleading she alleged in substance that her decedent, Anton Jansa, had in his lifetime, on July 7, 1928, "for a good and valuable consideration, in due course of business and before maturity, purchased" a certain real estate bond and note payable to the Nebraska State Savings Bank, identified as MN-853, in the sum of $3,000, dated February 1, 1926, together with interest coupons

numbered 5 and 6 of even date, in the sum of $150 each, together with a half interest or share in a certain real estate mortgage securing the same, dated February 1, 1926, due November 1, 1931, duly recorded in the office of the register of deeds of Saunders county in book 43 at page 621 of the mortgage records of that county, which instrument last referred to described and mortgaged to the Nebraska State Savings Bank the east half of the southeast quarter of section 34, township 14 north, range 5 east of the 6th P. M.; that both the real estate bond and the mortgage were duly executed by Wilhelmina Hruby, a widow, and that Anton Jansa paid $3,060.54 therefor. This intervener further alleged that the Nebraska State Savings Bank had theretofore failed to execute a proper assignment of mortgage, and further alleged that intervener is now the owner and in possession of the above described mortgage note and bond, and prayed that the receiver of the Nebraska State Savings Bank be directed to execute a proper assignment of mortgage to petitioner, and for general equitable relief.

On June 2, 1931, John D. Goranson also filed in said receivership proceeding his petition in intervention and answer to the petition of Minnie M. Jansa. This pleading sets forth at length the execution and delivery to the Nebraska State Savings Bank by Wilhelmina Hruby of two certain real estate mortgage coupon bonds numbered, respectively, MN-853 and MN-853-1, each being in the sum of $3,000, bearing date of February 1, 1926, and both being secured by one real estate mortgage, also executed by Mrs. Hruby, covering the east half of the southeast quarter of section 34, township 14 north, range 5 east of the 6th P. M., in Saunders county, which mortgage was duly recorded; that on April 12, 1926, the Nebraska State Savings Bank of Wahoo, Nebraska, sold, assigned and delivered to this intervener one of the original real estate mortgage bonds above described, together with interest coupons thereto attached, all duly indorsed in blank, said original bond being numbered MN-853, for which this

intervener then and there paid the Nebraska State Savings Bank the sum of $3,000 with accrued interest, from which date this intervener has been the owner of said mortgage coupon bond and the coupons attached. This intervener sets forth in his pleading a copy of a certificate in writing of the purchase of bond of $3,000 by him, executed by the officers of the Saunders County National Bank, and further alleges that such bond and coupons attached thereto were deposited by him at the time of purchase thereof with the Nebraska State Savings Bank, and that this intervener has never parted with his right, title and interest and ownership thereof; denies each and every allegation in the petition in intervention filed by Minnie M. Jansa, executrix; prays that he may be determined to be the owner of real estate bond MN-853, that Minnie M. Jansa, as executrix, may be required to deliver said bond to him, that the receiver of the Nebraska State Savings Bank may be required to deliver to him a suitable assignment of mortgage, and for general equitable relief.

To these pleadings the receiver filed an answer setting forth that there were five claimants for the four bonds designated in the record as MN-853, MN-853-1, MN-854, MN-854-1, of $3,000 each, all of said bonds being executed by Wilhelmina Hruby, secured by mortgage on land in Saunders county, Nebraska; that the receiver claims no interest in any of these bonds, and asks that claimants be required to fully establish ownership and possession of said mortgage bonds to the satisfaction of the court.

The cause was heard by the district court as an equitable proceeding, and the result was a finding and judgment for Minnie M. Jansa, as executrix of the estate of Anton Jansa, determining that she was the owner of real estate bond designated as MN-853 and entitled to receive the assignment of mortgage prayed. From the order of the district court overruling his motion for a new trial, John D. Goranson prosecutes this appeal.

The controlling question for determination on this hearing *de novo* is the ownership at the present time of real estate bond MN-853.

The evidence of Minnie M. Jansa is that after the death of her father, upon her appointment and qualification as executrix of his estate, after January 1, 1930, and before the closing of the Nebraska State Savings Bank, she called at that institution and made demand for her father's papers; that such papers were then turned over to her; that among the papers turned over to her was exhibit A, which is a negotiable instrument designated on its face as "coupon bond," dated February 1, 1926, due November 1, 1931, for the sum of $3,000, signed by Wilhelmina Hruby and payable to the Nebraska State Savings Bank of Wahoo, Nebraska. It is numbered MN-853, and is indorsed: "For value received ——— hereby assign and transfer the within note together with all my right, title and interest in and to the mortgage deed securing the same to ——— without recourse. ———19——. (Signed) The Nebraska State Savings Bank of Wahoo, Nebraska, F. J. Kirchman, President." On the back of this instrument appears the notation: "Secured by mortgage on * * * E½, SE¼-34-14-5. Due November 1, 1931." There is also introduced in evidence a debit slip for $3,000 on which appears the words, "Wilhelmina Hruby mortgage bond. July 7, 1928." A ledger sheet was introduced showing "A. Jansa" checking account with the Saunders County National Bank. This discloses that some time between April 7, 1928, and April 19, 1929, $3,000 was withdrawn from his account. So far as disclosed by the record no other payment was made by Anton Jansa for this bond.

Testifying from the loan register of the savings bank we have F. J. Kirchman stating that, from the loan register in which the entries thereof were identified as made either by himself or under his direction, coupon bond MN-854-1 for $3,000 was also executed by Mrs. Hruby; that this bond (MN-854-1) was originally owned by and

made payable to the Nebraska State Savings Bank; that it was sold to Colon on March 29, 1926, then bought back from Colon a few days later by the Saunders County National Bank; that on July 12, 1926, it was sold to the Bank of Yutan; that on January 3, 1927, it was sold to the Farmers & Merchants Bank of Prague; that on March 7, 1928, it was taken back from the Farmers & Merchants Bank of Prague by the Saunders County National Bank; that on July 7, 1928, it was charged to Anton Jansa. "It was sold to him, that's what I mean, we always charge the account and sell it to him. Then later on there is a lead-pencil memorandum. Olander Freeman, Oct. 31, 1929."

Further, witness F. J. Kirchman testifies: "The Court: Where is this bond 854-1? Mr. Barry: That's the one that Freeman has now. The Court: How do you explain the situation that it was charged to two people? A. Well, as I recall it now, when Miss Jansa came in for these papers, why we gave, we took, it may have been then, or some time previous to that, I don't recall now, but anyhow we took out the Goranson bond. Q. In other words, what you did when Miss Jansa came in after these papers, you took the Goranson bond out and gave it to her? A. That's the fact. Q. That's the real situation? A. Yes, sir. Q. And the bond that Jansa had really purchased you put in the Freeman package, is that it? A. Yes, sir; that's it. Q. And that explains why there is an extra purchaser here for only four bonds? A. That's the idea exactly. * * * Q. As I understand it, you did actually hand this bond to Miss Jansa, as the Jansa bond? A. That's it. Q. And you gave her to understand at that time that— A. Was her bond; yes, sir. Q. The one that her father had purchased? A. Yes, sir. Q. Although, in fact, it was purloined from another package? A. I don't recall now, Judge, whether I gave it to her, or whether I put it in her father's envelope. Q. And then gave the envelope to her? A. Yes, sir."

Later this bond (MN-854-1) was bought by the State Bank of Swedeburg and by that bank sold to Olander Freeman on November 5, 1929, and a check of that amount charged to his checking account in the State Bank of Swedeburg.

Mr. Kirchman also testified as follows: "Q. Now, then, Frank, going back to the bond MN-853, will you kindly give the court the history of that bond? * * * A. The bond was originally owned by the Nebraska State Savings Bank on February 4, 1926, and sold to the Farmers & Merchants Bank of Prague on March 29, 1926, and resold to the Saunders County National Bank of Wahoo on March 31, 1926, and that bank sold one of the bonds of $3,000 on April 12, 1926, to John D. Goranson. Q. Which one of the bonds? * * * A. That was MN-853. Q. Is there any further record of that bond being sold or disposed of? A. That's the last record on the loan register here."

The facts in the record clearly sustain the conclusion that coupon bond MN-853 (a negotiable instrument) was on April 12, 1926, sold by the then owner thereof to John D. Goranson, and delivered at the time of such sale duly indorsed in blank. The purchase price was fully paid by a charge of the amount thereof, $3,028.75, to his checking account in the Saunders County National Bank on the date of the transaction. At the conclusion of the purchase it appears that this bond thus indorsed was left for safe-keeping in the wallet or file of the purchaser which was placed for that purpose in the possession of this bank. In October, 1929, MN-854-1 was surreptitiously withdrawn by the officers of the Saunders County National Bank and sold to the State Bank of Swedeburg. In January or February, 1930, when demand was made by the executrix for her father's papers, F. J. Kirchman, then the managing officer of both the Nebraska State Savings Bank and the Saunders County National Bank, without authority, surreptitiously withdrew from the envelope of John D. Goranson coupon bond MN-853 for

$3,000, with interest coupons attached, and delivered it to the executrix of the estate of Anton Jansa, and at the same time, either expressly or by implication, assured her that this bond was in fact the bond her father had purchased and was his property.

It is also fairly established by a preponderance of the evidence that on July 7, 1928, Anton Jansa purchased from Kirchman, the officer in charge of the Saunders County National Bank, the coupon bond MN-854-1 for $3,000 (a negotiable instrument) for the face, paying therefor in cash. This bond indorsed in blank was likewise deposited with the papers of the purchaser and retained by this bank for safe-keeping. This instrument, as we have seen, was, in effect, stolen by Kirchman and removed from the "file" belonging to Anton Jansa, sold, and the proceeds converted to the use of persons other than Jansa.

Both Goranson and Jansa, in his lifetime, acted in good faith. If negligence should be charged to either, both are equally guilty.

As related to personal property generally, the rule is: "Generally, no one can be divested of his property *in invitum*, where there is not clear warrant of law therefor; and a third person cannot transfer title to property without the knowledge or consent of the owner. Ordinarily the owner of personal property cannot be divested of title without his consent; he can only part with his title by voluntary act or by conduct creating an estoppel. Further, a tortious conversion of personal property does not deprive the true owner of his title; after a conversion of property, title remains in the owner until in some way he receives satisfaction for it. The possession of a property right acquired secretly or by false assertions or unknowingly surrendered by the owner does not deprive him of ownership. Title to personal property fraudulently or feloniously obtained does not pass to a wrong-doer, where the wrongful act is a crime at common law, and where property has been obtained from the owner by such act,

his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it; * * * as the case may be. A purchaser of a chattel or of a chose in action acquires only such title as the seller had." 50 C. J. 784. So, too, a thief can acquire no title to stolen property. *Lightfoot v. Davis,* 198 N. Y. 261. And, likewise, title to personal property cannot be acquired through theft or robbery. *Carden v. Swagger,* 158 Ark. 640.

As to negotiable instruments, the rule above stated is modified, and by an overwhelming weight of authority is established to be that "Bonds having a legal inception and payable to bearer or blank as to the payee, or payable to order and indorsed in blank, are negotiable paper, and the courts are agreed that the purchaser of such bonds, although they have been stolen, acquires a good title thereto as against the true owner, providing he purchased in good faith and for a valuable consideration." 1 A. L. R. 717, note. See, also, *Morgan v. United States,* 113 U. S. 476; *Hotchkiss v. National Banks,* 21 Wall. (U. S.) 354; *Murray v. Lardner,* 2 Wall. (U. S.) 110; *Wylie v. Missouri P. R. Co.,* 41 Fed. 623; *Gilbough v. Norfolk & P. R. Co.,* 10 Fed. Cas. 354; *Parsons v. Utica Cement Mfg. Co.,* 82 Conn. 333; *Rockville Nat. Bank v. Citizens Gas Light Co.,* 72 Conn. 576; *Garvin v. Wiswell,* 83 Ill. 215; *Jones v. Nellis,* 41 Ill. 482; *Greenwell v. Haydon,* 78 Ky. 332; *Consolidated Ass'n of Planters v. Avegno,* 28 La. Ann. 552; *Pratt v. Higginson,* 230 Mass. 256, 1 A. L. R. 714; *Spooner v. Holmes,* 102 Mass. 503; *Commonwealth v. Emigrant Industrial Savings Bank,* 98 Mass. 12; *City of Adrian v. Whitney Central Nat. Bank,* 180 Mich. 171; *New Orleans J. & G. N. R. Co. v. Mississippi College,* 47 Miss. 560; *Boyd v. Kennedy,* 38 N. J. Law, 146; *City of Elizabeth v. Force,* 29 N. J. Eq. 587; *Hibbs v. Brown,* 190 N. Y. 167; *Varick v. Second Nat. Bank,* 47 Hun. (N. Y.) 639; *Manhattan Savings Institution v. New York Nat. Exchange Bank,* 170 N. Y. 58; *Dutchess County Mutual Ins. Co. v. Hachfield,* 73 N. Y. 226; *Newton v.*

Porter, 69 N. Y. 133; *Evertson v. National Bank of Newport,* 66 N. Y. 14; *Seybel v. National Currency Bank,* 54 N. Y. 288; *Welch v. Sage,* 47 N. Y. 143; *Birdsall v. Russell,* 29 N. Y. 220; *Interboro Brewing Co. v. Doyle,* 151 N. Y. Supp. 325; *Cochran v. Fox Chase Bank,* 209 Pa. St. 34; *Mason v. Frick,* 105 Pa. St. 162; *Carpenter v. Rommel,* 5 Phila. (Pa.) 34; *Memphis Bethel v. Bank,* 101 Tenn. 130; *Whiteside v. First Nat. Bank,* 47 S. W. (Tenn.) 1108; *Texas Banking & Ins. Co. v. Turnley,* 61 Tex. 365; *Edelstein v. Schuler & Co.* (1902) 2 K. B. (Eng.) 144; *London Joint-Stock Bank v. Simmons* (1892) 61 L. J. Ch. n. s. (Eng.) 723; *Bechuanaland Exploration Co. v. London Trading Bank* (1898) 2 Q. B. (Eng.) 658.

In the instant case coupon bond MN-853 was originally purchased by and delivered to Goranson. He kept it with his papers in the bank, and never authorized its removal or transfer. He was deprived of its possession by a thief whose acts in connection with the taking amounted to a theft. Considered as personal property, and governed by the general rule, the present possessor secured no rights in the property she now holds against the true owner. To bring the present holder within the exception applicable to negotiable instruments, and thus validate her title thereto, it is essential that she establish that her decedent in his lifetime purchased bond MN-853 in good faith and for a valuable consideration, or that he received title from a "holder in due course." Comp. St. 1929, secs. 62-402, 62-409; *Stephenson v. Perry,* 112 Neb. 294; *Taylor v. Swanson,* 112 Neb. 403; *Howells State Bank v. Hekrdle,* 113 Neb. 561; *Bank of Commerce & Savings v. Randell,* 107 Neb. 332; *Riverton State Bank v. Walker,* 107 Neb. 672; *Hattrem v. Burdick,* 138 Or. 660.

This the executrix has failed to do. She received the property here in suit (MN-853) from her father's agent or bailee in good faith, it is true. But, her father's agent, without authority, had substituted property her father never owned. Kirchman possessed no title or right in and to coupon bond MN-853, either in his own right or as a

representative of the true owner, that could be transferred by him to the executrix. She parted with nothing of value when the substituted property was received by her, and necessarily it was therefore so received subject to the true owner's rights. She is then not a holder in due course, and Goranson in this proceeding is entitled to recover bond MN-853, together with coupons attached thereto.

We have carefully considered the case of *London and County Banking Co. v. London and River Plate Bank* (1888) 21 Q. B. D. (Eng.) 535, cited by appellee, but deem the doctrine therein announced not in harmony with the trend of the American decisions relating to this subject. However, in the case of *Nash v. De Freville* (1900) 2 Q. B. D. (Eng.) 72, a decision was announced which we epitomize as follows:

"The defendant gave three promissory notes to cover his indebtedness to the payee, and subsequently two more notes, in substitution for the first three and to cover future advances. All the notes were payable on demand and were given with the understanding that they should not be negotiated. The payee indorsed all five notes generally to the plaintiffs. After the payee had so negotiated the notes the defendant paid to him the amount due on the last two notes, but the defendant was not aware that the payee had parted with the notes, and did not ask for or receive any of them from him. At a later date the payee obtained the five notes from the plaintiffs by fraud, and handed them to the defendant. In an action by the plaintiffs on the notes: *Held,* that the defendant, when he received back the notes, did not become holder for value, since the previous satisfaction of the notes by him was not a consideration given by him when he received back the notes, and that as they were then overdue he acquired no better title than the payee had while they were in his hands, and that the plaintiffs, being entitled to disaffirm the transaction between themselves and the payee, by which the latter obtained possession of the notes, could recover in the action."

It would seem that in the instant case, in view of the foregoing doctrine, the previous payment in 1928 by Anton Jansa, in a transaction then wholly closed, of the purchase price for coupon bond MN-854-1 was not consideration given by his executrix when she received in substitution therefor coupon bond MN-853 in 1930 without knowledge or participation therein of its true owner.

It necessarily follows that Goranson has never been divested of his title to and property in coupon bond MN-853, for $3,000, and coupons thereto attached, and is now the owner and entitled to the return thereof from Minnie M. Jansa as executrix of the estate of Anton Jansa, deceased, and is also entitled to an assignment in part of the real estate mortgage securing the same from the receiver of the Nebraska State Savings Bank.

It follows that the district court erred in its decree in this case awarding coupon bond MN-853, with coupons attached, to the appellee. Therefore, the judgment of the trial court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

ARTHUR W. DUFFY ET AL., APPELLANTS, V. OMAHA MERCHANTS EXPRESS & TRANSFER COMPANY ET AL., APPELLEES.

FILED JUNE 1, 1934. No. 28745.

1. **Corporations: DIRECTORS: ACCOUNTABILITY.** The directors of a corporation are the trustees of the corporate property for the corporation and the stockholders, and as such are charged with the highest degree of responsibility in dealing with the corporation in their own behalf.
2. ———: ———: ———. "The accountability of a director of a corporation is determined by the strict standards of rectitude that bind a fiduciary." *Howell v. Poff*, 122 Neb. 793.
3. ———: ———: ———. Directors or other officers of a corporation, who are entrusted with its interests and who occupy a fiduciary relation towards it, will not be allowed to sell

property owned by them to it where they act both for the corporation and for themselves. In such case the transaction is at least voidable, at the option of the corporation, and may be set aside.

4. ———: ———: ———. *Held,* where as in this case in the sale of the stock of the corporation, owned by defendant stockholders to the corporation, said defendants, acting for themselves, fixed the price to be paid for the stock, and the terms of payment, and then, as the majority of the board of directors and the sole officers of the corporation, approved and consummated the sale, without the consent and participation of the plaintiffs, minority stockholders therein, the sale, being injurious to the corporation and such minority stockholders, will be set aside and said defendants required to account to the corporation for the money and property received by them in payment for the stock sold.
5. ———: ———: ———. "The officers and directors of a corporation and the shareholders thereof sustain to each other the relation of trustees and *cestuis que trustent,* and public policy forbids those who have accepted such positions of trust to take secret profits antagonistic to their duties as trustees." *Barber v. Martin,* 67 Neb. 445.
6. ———: OFFICERS: ACCOUNTABILITY. The law will not permit an officer of a corporation to make a private profit for himself in the discharge of his official duties, and the officer must account to the corporation for secret profits made, although the transaction in which they are made is also of advantage to the corporation.
7. ———: ———: EXCESSIVE SALARIES. Under the facts in this case, *held,* the plaintiffs are not entitled to recover, for the benefit of the corporation, alleged excessive salaries paid to defendants as officers of the corporation.
8. ———: RECEIVERS: APPOINTMENT. "An application for a receiver for a corporation is directed to the sound discretion of the court and except for an abuse thereof the conclusion reached will not generally be disturbed on appeal." *Howell v. Poff,* 122 Neb. 793.

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

Hotz & Hotz, for appellants.

Finlayson, Burke & McKie, contra.

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

HASTINGS, District Judge.

The plaintiffs are minority stockholders in the defendant corporation, the Omaha Merchants Express & Transfer Company, and the defendants, George W. Johnson, Harry B. Baker and Bertha M. Condit, are the majority stockholders and managing officers of said corporation. The action is brought in equity for the benefit of the corporation, to compel said majority stockholders and officers to return to the defendant corporation money which it is alleged they had unlawfully taken from it, to cancel notes taken by them for the sale of their personal stock to the corporation, through themselves, to reduce excessive salaries, for an accounting, and to restore profits illegally made by the defendants in their personal dealings with the corporation, and for general equitable relief, including the appointment of a receiver. The answer is a general denial. An application for the appointment of a receiver before the trial of the case on its merits was denied. At the close of plaintiffs' evidence the trial court, on motion of defendants, entered judgment of dismissal for want of equity, from which plaintiffs appeal. The defendant corporation is solvent and the rights of creditors are not involved. The case is here for trial *de novo*.

The corporation at the time of the commencement of this action had an authorized capital stock of $107,000 divided into 214 shares of the par value of $500 a share, of which 162.26 shares were outstanding. The articles and by-laws of the corporation show the general nature of its business to be the transportation of goods, wares and merchandise, express and freight in and about the city of Omaha.

Of the capital stock of the corporation, the plaintiff Duffy, at the time of the commencement of this action, owned 31 and a fraction shares, the plaintiffs Elwood,

who are brother and sister and reside in the state of Iowa, owned jointly 33 shares of stock, which they had inherited from their father. The defendants, George W. Johnson, Harry B. Baker and Bertha M. Condit, each owned 31 and a fraction shares, and Lester P. Woodruff, who is not a party to the action, owned four shares.

The specific matters complained of and upon which counsel for plaintiffs claim plaintiffs are entitled to equitable relief are limited to four transactions, which will be considered in the order in which they are discussed in plaintiffs' brief.

The first transaction complained of relates to the sale by the defendants, Johnson, Condit and Baker, of 40 shares of stock owned by them of the defendant corporation, to the corporation, for the sum of $15,000. The facts disclosed by the evidence in reference to this transaction are that said defendants were indebted to the State Bank of Omaha in the sum of $8,804.28, to secure which they had pledged 40 shares of stock jointly owned by them. The bank went into the hands of a receiver. At the time the bank failed defendant corporation had $11,811.37 on deposit in said bank. It owed the bank $5,000, evidenced by its promissory note. The amount of the note was set off against the deposit and on December 18, 1931, a receiver's certificate was issued to the defendant corporation for the balance, in the amount of $6,811.37. During the summer of 1932 the defendants, Johnson, Baker and Condit, entered into negotiations with the receiver of the State Bank to compromise and settle their individual indebtedness to the bank. On July 27, 1932, the three defendants withdrew from the checking account of the corporation in the Omaha National Bank the sum of $7,500 and placed it in a safety deposit box in the First National Bank, to which they alone had access. On August 8, 1932, $3,500 was taken from the safety deposit box by said defendants and deposited and credited to the checking account of the defendant Johnson in the Omaha National Bank, and on the same day a certified check for

$3,500 was drawn on said account by Johnson, payable to the receiver of the State Bank of Omaha. On the 14th day of October, 1932, an order was entered by the district court for Douglas county approving the compromise and settlement of their indebtedness to the bank. By said compromise they were to pay the receiver $3,500 and surrender for cancelation the receiver's certificate of indebtedness issued to the defendant corporation. At that time there had been paid on the certificate two dividends, one for 40 per cent. and one for 10 per cent., leaving a balance on said certificate of $3,405.68. To effect the compromise said defendants gave the receiver the certified check issued by Johnson and turned over to him the receiver's certificate in full payment of their individual obligation to the bank. The defendants sold to the corporation on December 14, 1932, for $15,000, the 40 shares of stock owned by them, which had been pledged as security for their indebtedness at the bank, and on the purchase price gave the corporation credit for the $3,500 which they had appropriated and the full amount of the balance on said certificate of $3,405.68, leaving a balance owing them by the corporation of $8,094.32. This was settled by the defendant corporation paying to said defendants the sum of $2,094.32, and giving to each of the defendants Condit and Baker a note for $2,000 and the defendant Johnson, being indebted to the corporation in the sum of $1,500, this was deducted from the amount coming to him and he was given a note of the corporation for the balance. The stock sold to the corporation had a book value of about 80 cents on the dollar, but no market value.

At the time the transaction complained of took place the defendant stockholders comprised a majority of the board of directors of said corporation and were the officers in sole charge and management of its affairs. The plaintiffs had no part in the transaction, nor did they have any knowledge of it until a short time before the commencement of this action.

The directors of a corporation are the trustees of the corporate property for the corporation and the stockholders, and as such are charged with the highest degree of responsibility in dealing with the corporation in their own behalf. The accountability of the defendants, as managing officers and directors, is to be determined by the strict standards of rectitude that bind a fiduciary. *Howell v. Poff*, 122 Neb. 793; *Bodie v. Robertson*, 113 Neb. 408; *Jacquith v. Mason*, 99 Neb. 509; *Nebraska Power Co. v. Koenig*, 93 Neb. 68; *Barber v. Martin*, 67 Neb. 445.

The defendants, as officers of the corporation, had no lawful right or authority to take the property of the corporation to settle their own private indebtedness. In doing so they betrayed the trust imposed upon them as officers and directors. In the instant case all the directors, except one, and the managing officers of the corporation, were interested in the transaction. In the sale of the stock the defendant stockholders, acting for themselves, fixed the price they were to be paid for the stock and the terms of payment, then, as directors and managing officers of the corporation, approved and consummated the sale. The sale under such circumstances is, at least, voidable.

In 4 Fletcher, Cyclopedia Corporations, 3588, sec. 2339, it is said: "One of the reasons for holding this class of transactions to be voidable is that a person cannot, as a director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, since two persons are a necessary element in the formation of a contract. The fact that he acts as an officer of the corporation on one side, and for himself on the other, can make no difference." See, also, 3 Clark & Marshall, Private Corporations, 2296, sec. 759; 14-A C. J. 92.

"No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than

the principle that the directors, trustees or other officers of a corporation, who are entrusted with its interests, and who occupy a fiduciary relation towards it, will not be allowed to contract with the corporation, directly or indirectly, or to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case, the transaction is, at least, voidable at the option of the corporation, and it may be avoided and set aside, or affirmed and any profits recovered, without proof of actual fraud, or of actual injury to the corporation. Generally, this rule is applied in case of directors but it is equally applicable to other officers." 4 Fletcher, Cyclopedia Corporations, 3589, sec. 2340.

At the time of the sale of the stock to the corporation it had approximately $8,700 of cash on hand and was not in debt. The effect of the sale of the stock was to absorb the greater part of its cash and to leave it indebted to the defendant stockholders in the sum of $4,500. Owing to the financial depression then existing and the credit stringency, the money in its treasury was needed to successfully carry on and conduct its business, and was essential to the enjoyment and realization of the full value of its other property. The effect of the transaction was to postpone payment of dividends and to impair the value of the remainder of the property. The evidence is convincing that the transaction complained of was injurious and prejudicial to the corporation and the minority stockholders. It is manifest that the entire transaction was conceived and manipulated by the defendant stockholders, as the sole officers of the corporation, for their own benefit. They sought profit at the expense of other nonparticipating stockholders, and in so doing were unfaithful to the relation they had assumed, and were guilty, at least, of constructive fraud. The sale of the stock to the corporation cannot be upheld as a valid sale, and should have been set aside by the trial court and the parties restored to their former position as nearly as possible.

The defendant corporation is entitled to have judgment entered by the district court against the defendant stockholders for the sum of $3,500, with interest from August 8, 1932; for the value of the receiver's certificate of indebtedness appropriated and used by them, with interest thereon from the 14th day of October, 1932; for $2,094.32 in cash taken by the defendants on December 14, 1932, with interest from that date; for the cancelation of the $4,500 in notes given by the corporation, if the same are owned by defendants, if not, that judgment be rendered against them for said sum, and also for the $1,500 used in payment of the amount of the indebtedness owed by the defendant Johnson to the corporation, with interest thereon from December 14, 1932. Said decree should provide that the corporation have a lien upon the 40 shares of stock sold to the corporation for the amount found due from the defendant stockholders, and that the certificate be delivered into said court, and upon failure of said defendants to pay said judgment within a reasonable time, to be fixed by said court, said stock be sold and the proceeds thereof applied on said judgment, and if defendants pay said judgment without a sale of said stock that same be delivered to them. It not appearing from the evidence whether said notes of the corporation in the amount of $4,500 are now owned by the defendants, evidence should be taken to ascertain the fact, also evidence should be taken to determine the value of the receiver's certificate at the time it was transferred to the receiver.

The next transaction complained of occurred on or about August 13, 1930, while the plaintiff Duffy was president of and one of the directors of the corporation. The defendant Johnson at that time needed $2,900 to prevent a foreclosure against property owned by him. Johnson owned 11 37/50 shares of stock in excess of what was owned by Duffy, Baker and Condit. In order to raise the money Johnson offered to sell them two and a fraction shares each, retaining for himself two and a fraction of such shares. The price at which he offered to sell was

$725 for each two and a fraction shares. This offer was accepted by Duffy, Baker and Condit, and resorting to a custom previously inaugurated by the plaintiff Duffy, they each borrowed $725 from the corporation. Johnson also borrowed a like amount. They all gave the corporation their note except Duffy. Duffy did not execute his note, but received and cashed the corporation's check and paid the money to the defendant Johnson. New certificates for the two and a fraction shares each were made out, but were never signed by Duffy as president. Subsequently it was decided that the stock should be canceled and the indebtedness of the four to the corporation satisfied through such cancelation. The stock was canceled and the indebtedness satisfied. The amount which the corporation paid for the stock was less than 50 per cent. of its par value, no claim is made that it was worth less. It appears from the evidence it had a greater value.

It is contended by counsel for plaintiffs that this court should direct that judgment be entered against the defendants Condit, Baker and Johnson for $2,900, although the plaintiff Duffy was equally involved. The plaintiffs Elwood were the only stockholders not participating therein. No injury or prejudice was suffered by them or the corporation on account of the transaction, and no benefit would result either to them or the corporation if a judgment be entered against said defendants. The judgment of the trial court in denying such relief was right and will not be disturbed.

It is urged that the defendant Johnson, while a director in the defendant corporation, in the purchase of the property of the Service Transfer Company, a copartnership, composed of the plaintiff Duffy and the defendants Baker and Condit, made a secret profit of $4,375, and that judgment should have been rendered against him by the trial court in favor of the corporation for said sum. The facts in regard to this transaction are not in dispute. About the 31st of March, 1928, the plaintiff Duffy and the defendants Baker and Condit, who were not then stock-

holders in the defendant corporation, purchased from Walter S. Jardine and George F. West 125 13/50 shares of stock owned by them in defendant corporation for the sum of $37,578, and paid therefor in cash by borrowing $40,000 from a bank on their note. At that time defendant Johnson was a director in defendant corporation and the owner of 51 and a fraction shares of stock therein, the plaintiffs Elwood owned 33 shares and Lester P. Woodruff 4 shares. Defendant Johnson purchased from Duffy, Baker and Condit a one-fourth interest in the shares of stock purchased by them from Jardine and West and signed the note to the bank with them for the purchase price of said stock.

Upon the completion of the purchase of the stock of Jardine and West, Duffy, Baker, Johnson and Woodruff were elected officers of said corporation, the plaintiff Duffy, as president, and the defendant Johnson, as vice-president. The board of directors consisted of Johnson, Woodruff and Duffy. Thereafter at a directors' meeting, held on April 10, 1928, the defendant Johnson, as vice-president and director, made a proposal in behalf of the corporation to the plaintiff Duffy, Baker and Condit, proposing that the business of the Service Transfer Company be purchased and merged with that of the Omaha Merchants Express & Transfer Company, then engaged in a similar business in competition with that of the defendant corporation. On April 20, 1928, the Service Transfer Company, through the plaintiff Duffy, submitted a proposal in writing to the defendant corporation to sell all of its property and business, except book accounts owing to the company prior to March 31, 1928, for the sum of $32,500 payable in a series of demand notes carrying interest at the rate of 7 per cent. per annum from April 1, 1928. This proposal contained the condition that no dividends were to be paid by the company until the notes given for the purchase price were fully paid. The offer to sell was accepted for the defendant corporation by the officers and directors of said corporation, the plaintiff

Duffy, and defendants Condit, Baker, Johnson and Woodruff. The defendant corporation, through Duffy as its president, then executed its notes payable on demand, three for $9,375 each and three for $1,458.33 each. Two of the notes, one for $9,375 and one for $1,458.33, were payable to the plaintiff Duffy, and notes in a like amount were payable to the defendants Condit and Baker. At the same time the corporation executed its note to the defendant Johnson for $5,000, payable on demand, and paid him $1,800 in cash in settlement of an action he had commenced against the corporation and Jardine and West, previous to the sale of their stock, to recover salary claimed to be owing to him. Duffy, Condit and Baker then each indorsed to Johnson the notes for $1,458.33 given to them by the corporation; these notes represented the amount that it was agreed between Duffy, Condit, Baker and Johnson that Johnson was to receive for being instrumental in procuring the purchase by the defendant corporation of the property and business of the Service Transfer Company. This represented the only consideration for the transfer of said notes to Johnson. The evidence is that the selling price of the business of the Service Transfer Company was built up to a point where, plus the $5,000 note that Johnson had received in settlement of his action against the corporation, it equaled the purchase price of the West and Jardine stock, and when Duffy, Condit and Baker transferred to him the $4,375 in notes, that left each of said parties and Johnson holding notes of the corporation for $9,375. The corporation completed the payment of all of said notes on July 7, 1932. Nothing appears on the books of the corporation showing that Johnson received the $4,375 in notes.

It is conclusively established by the facts in this case that the defendant Johnson made a profit that was concealed and unknown to the stockholders not participating therein. In *Barber v. Martin,* 67 Neb. 445, we held: "The officers and directors of a corporation and the shareholders thereof sustain to each other the relation of

trustees and *cestuis que trustent,* and public policy forbids those who have accepted such positions of trust to take secret profits antagonistic to their duties as trustees." In 7 R. C. L. 458, sec. 442, it is said: "It is a cardinal principle that an officer of a corporation will not be permitted to make a profit out of his official position, but must give to the corporation the benefit of any advantage which he has thereby obtained; the law will not permit him to make a private profit for himself in the discharge of his official duties; and the officer must account to the corporation for secret profits made though the transaction in which they are made is also of advantage to the corporation." See, also, 14-A C. J. 123; 3 Clark & Marshall, Private Corporations, 2290, sec. 758.

It is contended by counsel for the defendant Johnson that Duffy, as one of the plaintiffs, having participated in the transaction, he cannot maintain this action, even though the defendant Johnson made a profit. It is true that Duffy, as a plaintiff, does not occupy a very enviable position so far as this transaction is concerned, and if he were the only complaining stockholder the judgment of the trial court in refusing relief might be sustained, but this action is brought for the benefit of the corporation. The plaintiffs Elwood, who own a substantial block of stock, did not participate therein, assent to it, or have any knowledge thereof until just prior to the commencement of this action, and they are entitled, in equity, to have said defendant account to the corporation for the benefit that he received. The trial court should have required him to account to the corporation for the $4,375 with interest at 7 per cent. from April 1, 1928.

It is claimed by plaintiffs that the defendant stockholders, as executive officers, received excessive salaries from April 1, 1931, up to December, 1932, and that judgment should have been rendered by the trial court in favor of the corporation against said defendants for all salaries received by them in excess of $3,000 per annum. The evidence is that from April 1, 1928, when the

plaintiff Duffy became a stockholder and managing officer, up to about April 1, 1931, the business of the company was conducted by four officers (one of whom was the plaintiff Duffy) who each received $4,800 per annum. About April 1, 1931, the salary of each of said officers was increased to $6,000. Duffy drew his salary on that basis from April 1, 1931, to April 1, 1932, although for six months of that time he performed but little service. At the annual meeting in April, 1932, Duffy not being present, it was decided that the services of one of the officers could be dispensed with, and the business of the corporation be conducted by three at salaries of $6,000 each per annum. Duffy ceased to be one of the officers at that time and drew no salary from then on. The effect of this was to reduce the total amount of salaries then being paid by the corporation by $6,000 annually.

The plaintiff William D. Elwood was present, representing himself and his sister, at the annual meeting in April, 1932, and testified that he knew from 1929 that the four officers of the corporation were each drawing a salary of $400 a month; that he thought the salary being paid was too much and made some objection to so many drawing a salary. He claims that he did not learn at that time that the officers were being paid at the rate of $500 a month. The records of the corporation were available to him, and had he made the slightest investigation of the books of the corporation or made inquiry he could have ascertained what was being paid.

The rights of creditors not being involved, it was within the power of the stockholders to assent to and agree to any salary they might deem advisable, although such salary or salaries might be more than was ordinarily paid for such services. The attitude of the plaintiffs in this matter is not such as to impress a court of equity in their favor. Duffy was a beneficiary of the raise in salaries from April 1, 1931, to about April 1, 1932. He made no complaint during that time, but drew the salary with regularity, which he now claims was excessive. He has

not made restitution to the corporation for the salary paid him in excess of what he now claims it should have been. No offer is made by the plaintiffs in their petition or otherwise to make restitution to the corporation for the claimed excess in salary that Duffy drew for a year. It appears from a statement in the briefs that the salaries of the three defendants have, since the filing of this appeal, been voluntarily reduced to $350 a month. The action of the trial court in denying a recovery against the defendant stockholders for claimed excessive salaries was right. To have entered judgment against them and allow the plaintiff Duffy, who drew the same salary for a year and who was an active participant in procuring the raise in salaries, to avoid payment on his part would have been unjust and inequitable.

Finally, it is contended by counsel for plaintiffs that a receiver should have been appointed for the defendant corporation. From April, 1928, to December 31, 1932, the corporation did a large business. The officers in charge of it were experienced in the kind of business that the corporation was engaged in. From April, 1928, to July, 1932, they paid off $37,500 of indebtedness incurred in the purchase of the Service Transfer Company and in the settlement of the defendant Johnson's claim for salary. In 1931 the gross income of the corporation was $175,805.51, and for the year 1932, during a time of great depression generally in business, its gross income was $117,294.91. During that year they greatly reduced the expense of conducting the business, and aside from the one transaction, where they used the money and property of the company to pay their own indebtedness and the sale of the 40 shares of stock to take up the obligation incurred thereby, the affairs of the corporation seemed to have been well managed. The power to appoint a receiver should be exercised with the utmost caution and only in case of an emergency, and generally should be avoided, especially where the corporation is solvent and the rights of creditors are not involved. It is apparent

that the plaintiffs, as minority stockholders, are in no danger of loss or injury if a receiver is not appointed. On the other hand, to appoint a receiver would impair the credit of the corporation, interfere with its management by those experienced in such matters, and impose on the court the duty of corporate management, for which it is not so well equipped. All the stockholders would suffer a loss thereby with no accruing benefit to any. We held in the case of *Howell v. Poff, supra*: "An application for a receiver for a corporation is directed to the sound discretion of the court and except for an abuse thereof the conclusion reached will not generally be disturbed on appeal." There was no abuse of discretion on the part of the trial court in denying the application for a receiver.

It follows from what has been said that the judgment is right and should be affirmed, except as to the two transactions pointed out, and as to such the judgment is reversed, with directions for further proceedings and to render judgment thereon conforming with this opinion.

AFFIRMED IN PART, AND REVERSED IN PART.

ORVILLE D. BEEMER, APPELLANT, V. GEORGE E. HAGER, APPELLEE.

FILED JUNE 1, 1934. No. 28632.

1. **Trial**: DIRECTION OF VERDICT. "If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it and direct a verdict against him. In reviewing such action, this court will regard as conclusively established every fact which the evidence proves or tends to establish, and if, from the entire evidence thus construed, different minds might reasonably draw different conclusions, it will be deemed error on the part of the trial court to have directed a verdict thereon." *Bainter v. Appel*, 124 Neb. 40.
2. ———: ———. *Held*, under evidence in this case, as the same must be construed upon a motion by defendant for an

instructed verdict, that different minds might reasonably draw different conclusions therefrom, and the trial court erred in instructing the jury to return a verdict for defendant.

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

O. B. Clark, for appellant.

C. J. Campbell, Frank A. Peterson and *T. F. A. Williams, contra.*

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

HORTH, District Judge.

The appellant, as plaintiff in the district court, and the owner of the fee title to a house and lot in the city of Lincoln, Nebraska, subject only to a life estate therein in one Harriet Randolph, prosecutes this action against George E. Hager, an attorney-at-law of Lincoln, Nebraska, seeking to recover damages from appellee upon a charge that the appellee, together with one John Randolph and Luvilla Stone, unlawfully and maliciously entered into a conspiracy to cheat and defraud appellant of said real estate.

The appellee denies the charge of appellant, pleads the statute of limitations and other matters in avoidance.

Hereafter the parties will be referred to as they appeared in the district court.

At the close of the testimony, the defendant moved for an instructed verdict, demurring to the evidence and to the petition as not stating a cause of action. The trial court sustained the motion, and gave a peremptory instruction in favor of the defendant. The jury, accordingly, returned a verdict for the defendant and judgment was entered dismissing plaintiff's petition. The remarks of the trial court, in passing upon defendant's motion, appear as a part of the bill of exceptions and, from the language used, it is patent that the motion was sustained upon the ground that the evidence does not warrant a recovery by

plaintiff against the defendant. Plaintiff's motion for a new trial having been overruled, he prosecutes this appeal, urging that the trial court erred: (1) In directing a verdict for defendant; (2) in permitting defendant to amend his answer setting up the defense of the statute of limitations, after the issues were joined and the evidence adduced; (3) in withdrawing from the jury the question of fact upon the issues joined, and, (4) in overruling plaintiff's motion for a new trial.

1. The undisputed facts are that Harriet Randolph, the owner of the life estate in the real estate mentioned, failed to pay the general taxes and special paving assessments levied and assessed against said real estate for the year 1922, and said taxes and special assessments becoming delinquent were sold by the county treasurer of Lancaster county, and the owner of the tax sale certificate subsequently paid thereunder the general taxes and special paving assessments assessed and levied against said real estate for the years 1923 to 1926, inclusive, and on June 17, 1927, there was due upon said tax sale certificate the sum of $430.80 and on said date the defendant gave his check for that amount to the agent of the owner of such tax sale certificate and the owner indorsed the certificate, in blank, and delivered the same to the defendant, who on the following day mailed the same to Earle V. Ticknor, together with a letter from defendant reading:

"June 18, 1927.

"Earle V. Ticknor, Atty.,
"Omaha, Nebraska.

"My dear Ticknor:

"In re Harriet Randolph tax matter.

"I am pleased to advise you that the check given us by your clients, Randolph Brothers, has been cleared, and we have taken up the county treasurer's certificate of tax sale, as per your request, and am inclosing you herewith the same to wit, #1313 for $60.90 dated November 5, 1923. The amount paid was $430.80, the difference between the

face of the certificate and the amount paid representing taxes which were paid subsequently upon the certificate and interest thereon.

"We have also collected $35 upon the rent, and have promise of payment of back rent as outlined in our recent letter."

It is also undisputed that on or about November 23, 1927, the defendant accepted employment from Luvilla Stone for the purpose of foreclosing the lien of said tax sale certificate against real estate; that foreclosure proceedings were brought by the defendant as attorney for said Luvilla Stone against Orville D. Beemer, remainderman, and Harriet Randolph, life tenant; a decree foreclosing said tax sale certificate upon said house and lot was entered in said action, a sale of the real estate had thereunder, and Luvilla Stone was the purchaser at said sale; that said sale was confirmed by the court and the sheriff delivered to the said Luvilla Stone a deed to said real estate; that by reason of certain jurisdictional defects in the proceedings, said decree of foreclosure, the sale thereunder and the sheriff's deed were set aside and held for naught.

Aside from these undisputed facts, plaintiff contends that, on or about the 8th day of June, 1927, Harriet Randolph, the owner of the life estate in said house and lot, employed the defendant, as her duly authorized attorney at law, to redeem said real estate from such tax sale certificate and for that purpose she paid to the defendant the sum of $430.80; that the defendant, well knowing these facts, unlawfully and maliciously entered into a conspiracy with one John Randolph and Luvilla Stone to cheat and defraud plaintiff of his title to said real estate and, in pursuance to said conspiracy, defendant failed, neglected and refused to redeem said real estate from said taxes but paid the $430.80 to the owner of said tax sale certificate and procured said owner to indorse the same, in blank, and to deliver such certificate to the defendant, and that, in pursuance to said unlawful conspiracy to cheat and defraud plaintiff, defendant unlawfully delivered said tax

sale certificate to Luvilla Stone, and that on or about November 23, 1927, defendant, while employed as attorney by said Harriet Randolph, accepted employment from Luvilla Stone for the purpose of foreclosing the lien of said tax sale certificate; that the defendant knowingly, maliciously and wilfully prosecuted said foreclosure to decree, purporting to bar plaintiff from all right, title and interest in and to said real estate and caused said real estate to be sold at sheriff's sale, purchased the same on behalf of Luvilla Stone, and the sheriff issued and delivered to defendant a deed purporting to convey said premises to Luvilla Stone and caused said deed to be recorded in the office of the register of deeds of Lancaster county, all of which cast a cloud upon plaintiff's title to said real estate, and he was compelled to expend the sum of $792.70 in attorney's fees, traveling expenses and other items of expenditure in removing said cloud, to plaintiff's damage in the sum of $792.70.

As is said in *Bainter v. Appel,* 124 Neb. 40, the correctness of the determination of the trial court is to be tested by the following established principles: "(a) 'If there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him.' * * * (b) 'In reviewing the action of a trial court in directing a verdict, this court will regard as conclusively established every fact favorable to the unsuccessful party which the evidence proves or tends to establish.' * * * (c) 'Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict.' "

The record in this case contains more than 600 pages of testimony, and for the purpose of determining whether or not the evidence brings the plaintiff within the protection of these principles, it has been read and reread.

In support of his contention that the trial court erred in instructing the jury to return a verdict for the defendant, plaintiff's counsel calls our attention to two items of testi-

mony. The first, a copy of a page from the account ledger of the defendant, reads as follows:

"HARRIET RANDOLPH

1927				1927				
June 17	pd for tax ctf.	55	430.80	June 8	taxes		53	430.80
July 27	ck to Ticknor	69	70.00	11	Rent,	Beemer	53	35.00
27	fees retained	69	25.00	July 22	"	"	71	35.00
Sept.14	fees "	89	20.00	29	"	"	71	15.00
14	check to Ticknor	89	75.00	29	"	"	71	10.00
Nov. 15	fees to Randolph	117	22.50	Aug. 20	"	"	76	35.00
15	check to "	117	70.00	29	"	"	78	25.00
15	Costs retained Stone	117	12.50	Sept.16	"	Sept.	84	35.00
				28	"	back	90	35.00
				Oct. 19	"	Oct.	103	35.00
				28	back	rent	105	35.00"

"STONE, LUVILLA

1927				1927				
Nov. 23	flg. ptn.	119	6.50	Nov. 15	costs	rec'd	117	12.50
Dec. 24	pub. fees	141	17.25	1928				
Jan. 6	proof publi.	143	.50	Mar. 14	"	"	180	60.52
Febr. 3	motion	161	.50	14	fees		180	100.00
Mar. 2	publication	174	12.85					
8	order sale	176	5.00					
14	balance costs	180	29.42					
14	filing deed	180	1.00					
May 2	fees	200	100.00					
1930				1930				
Febr.20	bus fare Lyons	148	7.00	Jan. 30	fees		139	50.00
	lunch "	"	.50	Mar. 5	check		159	160.00"
26	fees	149	200.00					
Mar. 5	flg. answer	154	2.50					

And attention is directed to two questions propounded to and the answers given by the witness Eva Hannan, the stenographer and bookkeeper for the defendant who made the entries in the ledger: "Q. I think you said they were true and correct? A. To the best of my ability. * * * Q. And were made as a part of the business of your employer? A. Yes, sir."

And the second item is the following questions propounded to and the answers given by the witness, Dean Beemer: "Q. What did you say and what did Mr. Hager say? A. I asked Mr. Hager if the taxes on the property

had been taken care of and he said that they had. * * * Q. Did you have any further conversation with him about the taxes? A. Yes. * * * Q. You may state the conversation. A. I told him I was glad the taxes had been paid because it would take a load off of Aunt Harriet's mind. He said, 'Yes; the taxes are paid.' "

Plaintiff also identified and introduced in evidence exhibit 27, being an entry appearing on page 53 of the book of account of the defendant, reading as follows:

"June, 1927

"8 Harriet Randolph, Spencer, Iowa (Earle V. Ticknor, Atty. Omaha) received check of Randolph Bros. for payment of taxes $430.80."

A natural inference to be drawn from this evidence, and the one most favorable to the plaintiff, is that the defendant received from Harriet Randolph, at the hands of Earle V. Ticknor, attorney of Omaha, the check of Randolph Brothers for $430.80 with which to pay the taxes and special assessments upon the house and lot in Lincoln in which the said Harriet Randolph was the owner of a life estate and the plaintiff was the owner of the remainder in fee, and when read in connection with defendant's letter to Earle V. Ticknor, *ante*, it tends to establish the allegations of plaintiff's petition: "That on or about the 8th day of June, 1927, there then being due upon said tax sale certificate above mentioned the taxes and special assessments including accumulated interest, as above mentioned, the sum of $430.80, and the said Thomas W. Moffitt holding a lien on said premises for said amount by reason of said tax certificate, the said Harriet Randolph employed the defendant, George E. Hager, as her duly authorized attorney at law to pay said amount due and to redeem said property from said tax sale certificate and have said lien upon said property canceled and annulled and to collect the rents and profits arising from said property; and at said time last mentioned the said Harriet Randolph paid to the defendant the sum of $430.80 with which to redeem said premises and cancel said lien above mentioned."

Upon his direct examination, when called to testify in his own behalf, the defendant was asked: "Q. Mr. Hager, did you have any conversation with reference to these matters with Mr. Ticknor and Mr. Randolph at that time, the 8th of June, 1927?" The defendant answered: "A. I did. * * * Mr. Ticknor and Mr. Randolph came into my office and said they had two items of business that they would like to have me assist Mr. Ticknor in handling. Mr. Ticknor was the attorney from Omaha. Ticknor explained further that he was a relative of John Randolph and he stated he was a relative of Harriet Randolph and he was also a relative of Mrs. Stone and Orville D. Beemer. * * * Mr. Ticknor stated he had been trying for a number of months to collect rent due from Dean Beemer to Harriet Randolph and he had not made very much headway at it. He stated that Dean Beemer was occupying this property, the life interest of which belonged to Harriet Randolph and she was entitled to the rent and that Orville D. Beemer was the remainderman. He stated to me that because of the fact Dean Beemer had not paid the rents, and they were at that time some $300 or $400 behind, Harriet Randolph had been unable to pay the taxes. He stated that this life interest in this property was the only property that Harriet Randolph had and being unable to collect the rents from Dean Beemer she had been unable to pay the taxes. He said the taxes had been sold to a man by the name of Moffitt. He further stated that the time within which the tax sale certificate might be foreclosed was drawing close to the end, I think he said four or five months, something like that, and that something would have to be done or else they feared that Mr. Moffitt, who held the tax sale certificate, would foreclose it and take the title to the property and that would take away every bit of income that Harriet Randolph had, every possibility of her receiving any income for living expenses. He told me that Harriet Randolph was living at that time at Spencer, Iowa, with Mrs. Stone; that Mrs. Stone was a sister of John Randolph. He asked me if I knew of any

reason why Luvilla Stone could not advance of her own money, buy this tax sale certificate, take an assignment of it and foreclose it in her own name so as to save this property and have something out of which they could support the old lady, Harriet Randolph. He said she had no home of her own and had lived about with various relatives, most of whom were very poor and could not furnish her very much to live upon, and in order to keep the property from passing out of the family entirely, she wanted to know if I knew of any reason why she couldn't pay this and foreclose it. I told them I could see no reason, if she had the money and wanted to invest it in this tax sale certificate, I told them in my opinion she had a perfect right to do so. They told me they had corresponded with Orville D. Beemer and that they had told him of the situation. They told me he had not answered their letters and that he had done nothing about the tax matter or helping take care of the back taxes or special assessments. After discussing the matter in that way for some time they decided that—they told me that Mrs. Stone had authorized them, in case they thought this was the proper thing to do to turn the money over to me and have me buy the tax sale certificate for her. I then telephoned to Mr. Walter Anderson, who represented Mr. Moffitt, and asked him the exact amount necessary to take over and buy the tax sale certificate. Mr. Randolph then wrote a check."

A reasonable inference to be drawn from this testimony is that Mr. Ticknor and Mr. Randolph came to the defendant in behalf of Harriet Randolph and for the purpose of protecting her rights in the house and lot, and that the outstanding purpose in having Luvilla Stone foreclose the tax sale certificate was to deprive the plaintiff of his right, title and interest in and to such real estate. It would have been a useless thing for Harriet Randolph to foreclose the tax sale certificate for the purpose of protecting her title to the real estate. This could have been accomplished by merely filing the tax sale certificate with the

county treasurer and securing his redemption certificate. Giving this testimony of Mr. Hager the construction most favorable to the plaintiff, and assuming, as we do, that the $430.80 paid by the defendant to the owner of the tax sale certificate was money belonging to Harriet Randolph, it tends to establish the further contention of plaintiff that, on or about the 8th day of June, 1927, defendant, with full knowledge of the facts, unlawfully entered into a conspiracy with John Randolph and Luvilla Stone to cheat and defraud plaintiff of his title to said house and lot and that plaintiff was damaged thereby.

In determining whether the trial court erred in instructing the jury to return a verdict in favor of the defendant, this court is not called upon to decide whether the plaintiff sustained the burden of proof which rested upon him. The defendant, by moving for an instructed verdict, waived this requirement upon the part of the plaintiff, and, in effect, said there was no competent evidence before the jury from which a finding in favor of the plaintiff could be upheld. Regarding as conclusively established every fact favorable to the plaintiff, which the evidence proves or tends to establish, we believe that different minds might reasonably draw different conclusions therefrom, and that the trial court erred in sustaining defendant's motion for an instructed verdict and in overruling plaintiff's motion for a new trial.

2. The trial court did not abuse its discretion in permitting the defendant to amend his answer.

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

REVERSED.

GEORGE LANDGREN, APPELLANT, V. SARAH S. BOLTON ET AL., APPELLEES.

FILED JUNE 1, 1934. No. 28892.

1. **Vendor and Purchaser:** RESCISSION. Purchaser of property under contract whereby deed and bonds evidencing purchase price were deposited in escrow pending the furnishing of an abstract showing clear title within specified period more than one year thereafter, *held* not entitled, after expiration of more than two years from such period, to rescission because of contingent claim against estate of deceased who had devised property to present owner, arising from alleged liability as stockholder in failed bank, it appearing that the claim might be more apparent than real, and the estate being substantial and solvent, so that the contingency of property involved being liable was so remote as to be negligible, and particularly in view of fact that escrow agreement was continued with consent of property owner, thereby protecting purchaser even in the event that property should ultimately become liable.
2. **Rescission** is not founded on an absolute right, but rather rests in the sound discretion of court based on equitable principles.

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

Waring & Waring, for appellant.

C. C. Cartney, J. P. O'Gara, Perry, Van Pelt & Marti and *Sloans, Keenan & Corbitt, contra.*

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

LANDIS, District Judge.

This is a suit for rescission of a contract. The trial court dismissed the action and plaintiff appeals.

The contract which plaintiff seeks rescission of is one executed by the parties March 5, 1929. It provides that Sarah S. Bolton, a widow, party of the first part, sells to George Landgren, party of the second part, a residence property in the city of Geneva for $5,500. Landgren was given immediate possession of the premises. According to the agreement the Geneva State Bank was to hold the

deed and United States Liberty bonds of the par value of $5,500. Among the provisions of the contract are:

"Whereas, the said George Landgren is of the opinion that the abstract of title to said premises furnished by party of the first part does not show in her a good and merchantable title to said premises, * * *

"That pending the time that first party requires to furnish an abstract showing a clear and merchantable title of record to said premises, the party of the second part hereby agrees and directs the Geneva State Bank to pay to party of the first part accruing interest on said above described securities.

"That in case said first party is unable to furnish an abstract showing a clear and merchantable title of record to said premises, said interest on said securities so paid as above directed shall be in full payment of the use, right of possession, and rental of said premises.

"That the party of the first part shall undertake, as early as practicable, to give to party of the second part an abstract showing payment of all taxes, special assessments, and judgments that are liens against said premises on this date, and in every way a clear and merchantable title of record.

"That in the event party of the first part is unable to furnish an abstract showing a clear and merchantable title of record in her to said premises on or before May 1, 1930, then, and in that case, the said Geneva State Bank is hereby authorized to return said above described deed to party of the first part, and said above described securities to party of the second part, less accrued interest to date of delivery, and second party to surrender up possession of said premises within thirty days thereafter.

"That upon the party of the first part furnishing an abstract showing a clear merchantable title of record to party of the second part, the Geneva State Bank is hereby authorized and directed to deliver said warranty deed to party of the second part, and said above described securities

in the sum of $5,500 to party of the first part in full payment of the purchase price of said premises."

Party of the second part was to pay the taxes, but to be reimbursed therefor if first party was unable to furnish a clear and merchantable title of record to party of the second part.

September 3, 1932, plaintiff instituted his suit for recission, and on February 20, 1933, trial was had. The trial court made the finding: "Specifically finds that the plaintiff is amply protected by the terms of the escrow, which is to be continued with the consent of the defendants, until the alleged claim of the Exchange Bank of Ong, Nebraska, is paid, litigated or otherwise disposed of, or until further order of this court." The judgment entered was that the cause of action as set forth in plaintiff's petition be dismissed, "the court retaining jurisdiction of the cause for the purpose of making such other and further orders at a subsequent session of this court as may be necessary to protect the parties as to the alleged claim of the Exchange Bank of Ong."

Appellant, in his brief, says: "Really, the sole question in this case is whether or not a person is required to take a property with an outstanding unadjudicated claim against it? We submit that no one in the state of Nebraska, at the present writing, can definitely determine whether or not the $10,000 claim of the Exchange Bank of Ong is a lien against the property which Landgren purchased."

The record reflects that the title to the property covered by the agreement of sale stood in the name of Monroe Bolton. His widow, Sarah S. Bolton, was devised this property by the will of her deceased husband. The Monroe Bolton will was probated and his estate administered in the county court of Fillmore county presided over by appellant as county judge. On January 22, 1930, a final decree was entered discharging the executors in the Bolton estate as to all matters except four contingent claims, barring claims, and directing the executors to hold assets of the estate aggregating $70,176.33 until the four con-

tingent claims were satisfied or discharged as well as another claim of the Geneva State Bank. By the time of the hearing of the instant case all these claims were satisfied and fully discharged.

On January 27, 1930, the secretary of the department of trade and commerce, as trustee of the Exchange Bank of Ong, filed a motion in the estate of Monroe Bolton, deceased, for leave to file a contingent claim based upon the ownership of the deceased of bank stock in the failed bank. It was requested that the executors be ordered to retain $10,000 of the assets of the estate to protect claimants. No order was made thereon, except on September 10, 1930, the county judge continued the matter pending a decision by the supreme court of a case asserted in the order as analogous.

The terms of the contract do not make time the essence thereof, and the conduct of the parties discloses that it was not so regarded. Appellant did not exercise any option or make a demand and offer to surrender the property on May 1, 1930, the date fixed in the contract, although some time later did make a conditional offer when the bonds were returned he would restore possession of the property within thirty days. The decree of the county court in the Bolton estate of January 22, 1930, was appealed and affirmed in the supreme court, *In re Estate of Bolton,* 121 Neb. 737.

Appellant acquiesced in appellee's efforts to perfect the title, and the delay in filing receipts for the contingent claims was made necessary, in part, by the appeal, the mandate from which was issued November 27, 1931. On August 3, 1930, appellant insured the buildings on the property in dispute for $5,300 against fire and windstorm. There is no provision in the policy providing for any other interests as they may appear, but appellant therein is insured as absolute and unconditional owner of the property. No fraud is claimed or shown. There is no question raised as to the good faith of the parties. Appellant

paid the taxes and insurance; appellee paid the contingent claims; each party having paid out substantial amounts.

It seems as though the Exchange Bank of Ong claim might be more apparent than real under the peculiar conditions of this case. The Bolton estate is substantial and solvent. The contingency of appellant's property ever being liable is so remote as to be neglible. Even this very remote contingency is protected by the trial court's decree. There has been no placing of the appellee *in statu quo* by tendering of absolute and unconditional possession of the property, and some acquiescence is shown in the record upon the part of appellant in appellee's efforts to perfect the title.

Rescission is not founded on an absolute right, but rather rests in the sound discretion of the court based on equitable principles. 9 C. J. 1161.

Considering this rule and the record, we reach the same conclusion as the trial court, hence judgment is

AFFIRMED.

ANDREW G. VAN HORN, APPELLEE, V. LINCOLN SALES OUTLET COMPANY: CHARLES A. CRIST ET AL., APPELLANTS.

FILED JUNE 1, 1934. No. 28901.

1. **Pleading**: DEMURRER. A demurrer is an admission of the truth of all facts properly averred in the pleading demurred to; it admits, however, only such facts as are well pleaded and all intendments and inferences that may fairly and reasonably be drawn therefrom.
2. **Action**. Plaintiff's petition seeks to recover wages and mileage under an oral contract of employment as general manager of a partnership, thus presenting a law action. Defendants' cross-petition alleges the partnership, the employment of plaintiff as general manager thereof, and the written articles of partnership, wherein plaintiff as such general manager shall draw no salary for his services, and prays for an accounting in equity between the parties. To this cross-petition plaintiff demurs, one of the grounds of demurrer being for the reason that

said cross-petition does not contain matter proper or sufficient to constitute a counterclaim or set-off to the subject of the action set up in plaintiff's petition. *Held*, demurrer should be overruled and the cause tried to the court without the intervention of a jury.

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

J. J. Marx, for appellants.

O. B. Clark, contra.

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

MESSMORE, District Judge.

This is an appeal from the ruling of the district court for Lancaster county, wherein that court sustained a demurrer of plaintiff, appellee herein, to the cross-petition of defendants, appellants herein.

Plaintiff's petition alleges his employment by the Lincoln Sales Outlet Company, a partnership, and Charles A. Crist and Earl R. Crist; that on January 1, 1931, plaintiff at the special instance and request of defendants, and each of them, entered into the employ of defendants as manager of the Lincoln Sales Outlet Company and of the Lincoln Sales Outlet store and continued in said employment until on or about January 1, 1932; that defendants orally agreed to pay plaintiff for his services the sum of $50 a week for each and every week plaintiff was employed by defendants, and in addition thereto the sum of six cents a mile for each mile traveled by plaintiff in his automobile on the business of defendants, and further agreed to pay plaintiff in addition to said six cents a mile traveled the fair and reasonable value of each and every mile traveled by plaintiff in his automobile while he was transporting merchandise for the defendants, and that the fair and reasonable value of each mile traveled without merchandise was six cents a mile and the fair and reasonable value of each mile traveled while transporting merchandise was twenty cents

a mile. Said petition also sets forth the number of miles traveled while hauling merchandise and the number of miles so traveled without transporting merchandise, under said agreement, the period of employment, and the usual prayer for a money judgment.

To the petition defendants filed an answer, setting forth the partnership as alleged in the petition, and that on May 27, 1930, until about July 8, 1931, the partnership consisted of plaintiff, one Charles Venner, and the defendants, Earl R. Crist and Charles A. Crist; that subsequent to July 8, 1931, until on or about January 1, 1932, when plaintiff became connected with a competitive firm, the partners in said partnership consisted of plaintiff and said defendants; admits that plaintiff was general manager of said partnership business from its beginning until he became connected with a competitive business firm; alleges further that under written articles of partnership plaintiff was given general charge of the business of said firm, and was to draw no salary for his services, except to share in the profits of said partnership; admits that under the articles of partnership plaintiff was to receive for his traveling expenses six cents a mile while traveling on the firm's business for the distance actually covered, but no sum or sums whatever for hotel bills; denies each and every allegation and statement contained in the petition, except those expressly admitted, and alleging payment to plaintiff in full of his mileage actually covered in the firm's business.

Defendants also filed a cross-petition, setting forth the same subject-matter as contained in the answer, the articles of partnership in detail, the interests of the parties thereunder, the payments made, and asking for an accounting.

To the cross-petition plaintiff filed a demurrer in the following language: "Comes now the above named plaintiff and demurs to the cross-petition of Charles A. Crist and Earl R. Crist, defendants, heretofore filed herein, for the reason that the matter contained in said cross-petition is not responsive to the issues tendered by the matter set

out in plaintiff's petition, and for the reason that said cross-petition does not contain matter proper or sufficient to constitute a counterclaim or set-off to the subject of the action set up in plaintiff's petition, and does not contain matter proper or sufficient to constitute a defense to the cause of action set up in plaintiff's petition." This demurrer was sustained by the lower court, the defendants appealing from such ruling.

It is obvious from the nature of the cross-petition that the relief asked for therein was equitable in its nature, and the question here is, where an action is brought at law, which on the face of the petition would show that the cause should be tried to a jury, and the answering defendants, by cross-petition, allege relief in equity, which cause would be triable to the court without the intervention of a jury, and a demurrer is sustained to said cross-petition, should the cause proceed below as a law case or should the cause proceed below as an equity case, triable to the court without the intervention of a jury?

Section 20-812, Comp. St. 1929, in part, provides: "The defendant may set forth in his answer as many grounds of defense, counterclaim and set-off as he may have."

Section 20-813, Comp. St. 1929, provides: "The counterclaim mentioned in the next preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

It is the universal rule that a demurrer is an admission of the truth of all facts properly averred in the pleading demurred to; it admits, however, only such facts as are well pleaded and all intendments and inferences that may fairly and reasonably be drawn therefrom.

With the foregoing in mind, the plaintiff in the instant case by demurrer admitted the partnership of which he was a member and admitted that part of the articles of partnership pertaining to his duties as follows: "Andrew

G. VanHorn, party of the first part herein, shall be the general manager of the partnership business, and shall have general charge of the business of said firm, and shall be subject to the wishes of a majority of the partners, and shall consult with and answer questions as the other partners may ask relative to important matters of partnership business; and may be discharged as general manager at any time by the other three partners. Said general manager shall draw no salary for his services as general manager, but shall share in the profits of the partnership as otherwise herein provided."

Analyzing the demurrer further, that said cross-petition does not contain matter proper or sufficient to constitute a counterclaim or set-off to the subject of action set up in plaintiff's petition, the statute in reference to counterclaim and set-off cited above should be taken into consideration on this point. There is much dispute on the meaning of "subject of action," and the courts are not agreed as to its true and accurate definition or analysis. As the cause of action arises out of certain transactions and these transactions are connected with the subject of the action, it is plain that this subject must be in existence simultaneous with the transactions themselves and prior to the time when the cause of action accrued; the subject of the action must be something other than the cause of action.

In the case at bar the affirmative relief asked for by defendants in their cross-petition was one existing in their favor and against plaintiff because of the services rendered by plaintiff, and the subject of the action the compensation to be paid for such services. The direct connection with the partnership is admitted by plaintiff by his demurrer and the articles of partnership which he admits; therefore, it would be connected with the subject of the action, which, in the last analysis, can only mean the legal and direct cause from which plaintiff derived his claim, which in this case would be the compensation to be paid plaintiff for his services, and if it is true that the demurrer admits the partnership relation and the duties of plaintiff

while acting as a partner, then the subject of the action would be the relative rights of all the parties while engaged in the partnership business.

We cannot draw the fine distinction contended for by plaintiff which seeks to segregate the oral contract from the written partnership agreement when he demurs to the cross-petition, as the law is well settled upon the full purport and admission of a demurrer such as the one filed herein by plaintiff against the cross-petition of defendants.

Plaintiff contends there was a dissolution of this partnership when he left it and went to work for another firm. Section 67-127, Comp. St. 1929, provides: "No dissolution of such partnership, by the acts of the parties, shall take place previous to the time specified in the certificate of its formation or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded in the office of the clerk of the county in which the original certificate was recorded, and published once in each week for four weeks in a newspaper printed in each of the counties, or if none are printed in the county, then in the judicial district where the partnership may have places of business." There is nothing in the record to show that plaintiff followed the law in reference to the dissolution of such partnership.

We have read the cases presented by appellee in his brief and find they are accurate statements of the law in most instances; however, in addition to the foregoing, this court has held in *Hotaling v. Tecumseh Nat. Bank*, 55 Neb. 5, as follows: "Where the answer to a petition for the recovery of damages for a breach of contract presents an equitable counterclaim which is traversed by a reply, the issues of fact thus arising are triable to the court without a jury."

In *Jewett v. Black*, 60 Neb. 173, this court held: "Where the answer to a petition in ejectment presents an equitable counterclaim which is traversed by the reply, the issues of fact thus arising are triable to the court without a jury."

The case of *Brown v. Keith*, 1 Neb. (Unof.) 649, was based on an action at law for breach of an oral contract. Defendant's answer set up an equitable defense. On the issue joined the court appointed a referee to try the issues of law and fact instead of submitting it to a jury. Plaintiff contended the case was purely a legal action, but this court held the equitable counterclaim converted the case into an equity action.

The answer standing unattacked by demurrer of course would constitute a defense. The cross-petition raises the right of equitable relief, affirmatively prayed for. We are not deciding what the lower court should or should not have done on the motion to strike the cross-petition, but decide this matter solely on the basis of the demurrer filed. In view of the holdings of this court, we are of the opinion that the demurrer should have been overruled and the cause should be tried to the court as an equity action.

REVERSED AND REMANDED.

FREMONT NATIONAL BANK, APPELLANT, V. FERGUSON & COMPANY, APPELLEE.

FILED JUNE 1, 1934. No. 28945.

1. **Corporations**: POWERS: INDORSEMENT OF NOTES. A corporation organized to pursue numerous lines of business, including the borrowing and lending of money, and whose charter empowers it "to do all acts or things necessary, incidental or convenient to do, or calculated, directly or indirectly, to promote the interests of the company or enhance the value or render profitable any of its property or rights; and in carrying on its business, or for the purpose of obtaining or furthering any of its objects, to do any and all acts and things and to exercise any and all other powers which a natural person could do and exercise," has the power to indorse the notes of another corporation largely indebted to it, for the purpose of improving its chances of collecting its debt.
2. ———: ———: ACCOMMODATION NOTES. Unless expressly or impliedly authorized by its charter, a corporation has no

power to execute accommodation paper, but, when the contract has relation to the corporate business or is reasonably adapted for the protection of its assets, the benefit to the corporation, real or hoped for, excludes it from the classification of accommodation paper.

3. ———: CONTRACTS: ULTRA VIRES. Primarily, the question whether or not a contract will be of benefit to the corporation is for the decision of its managing officers, and their decision will bind the corporation, and the plea of *ultra vires* will be unavailing in all cases where it does not appear that under no circumstances could it so operate.

4. ———: POWERS. The charter of a corporation purporting to give it all the powers that an individual may have must be construed as restricting the exercise of such powers within the limits of the business and purposes of the corporation.

5. ———: CONTRACTS. A contract executed by the president, vice-president, or general manager of a corporation with reference to the general business thereof will be presumed authorized until the contrary appears, and ordinarily a resolution of the directors is not necessary in such case.

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

Abbott, Dunlap & Corbett, for appellant.

Hall, Cline & Williams, contra.

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

REDICK, District Judge.

This is an action by plaintiff upon a promissory note for $5,000, executed by defendant Ferguson & Company, a corporation. The defense is that the execution of the note was *ultra vires* the defendant corporation. Plaintiff replied, denying that the note was *ultra vires,* and entering a plea of estoppel. A jury was waived and trial had to the court, resulting in a finding and judgment for the defendant, and the plaintiff appeals.

The note in suit, dated April 14, 1931, due in one year, was the final renewal in a series of notes beginning in

October, 1923, at which time W. R. Adams and W. R. Adams Company, a corporation, were indebted to plaintiff in the sum of $10,000 for money borrowed, and plaintiff demanded either a reduction or security; whereupon the note was renewed with William H. Ferguson as indorser, and was thereafter renewed every six months in the same manner until April, 1927. In 1926, William H. Ferguson was the owner of large interests in various corporations, farms and dairy farms, and for the more convenient operation of his business on June 8 of that year, formed the corporation defendant, and turned over the greater portion of his property, valued at over a million dollars, to such corporation, receiving in return the entire issue of 10,000 shares of stock, par value $100 each, and thereafter made a present of 1,000 shares each to his wife and two sons, Robert L. and Richard, and one share to Hoyt R. Hawke, the bookkeeper, to qualify him as a member of the board, and retained 6,999 shares. It was a family corporation, and from the beginning William H. Ferguson was president, Robert L., vice-president and treasurer, and Hawke, secretary, who also comprised the board of directors, except for the years 1929 and 1930 Mrs. Ferguson and Richard were elected as additional directors. In April, 1927, when the last note indorsed by William H. Ferguson came due, he was in California, and a renewal note was presented to the plaintiff bank by the Adams Company indorsed by defendant Ferguson & Company, by Robert L. Ferguson, vice-president. This note was accepted by the bank, and the note of which it was a renewal and upon which William H. Ferguson was indorser was taken up and canceled. Renewals of this note indorsed by Ferguson & Company, by William H., president, or Robert L., vice-president, were executed every six months until April 14, 1931, the note in suit for $5,000 (the indebtedness having been reduced to that amount) was executed by Ferguson & Company (maker) by Robert L. Ferguson, vice-president. All previous notes were taken up and canceled.

At the time of the organization of Ferguson & Company as a corporation, it took over and assumed to pay the liabilities of William H. Ferguson in the sum of about $830,000, a list of which claims appears in the record, but it does not contain the liability of Ferguson as indorser on the Adams Company note.

In April, 1927, when Ferguson & Company executed the first renewal note and procured the release of William H. Ferguson as indorser, the latter was indebted to the company for over $24,000, and at the dates of the subsequent renewal notes upon which Ferguson & Company was indorser, William H. Ferguson was indebted to the company in sums varying from about $60,000 to $17,000 when the note in suit was executed. At the dates of the last four renewal notes, from October, 1929, to April, 1931, W. R. Adams Company was indebted to Ferguson & Company in sums varying from $13,000 in October, 1929, and gradually increasing to over $37,000 in April, 1931. In addition, W. R. Adams was personally indebted to Ferguson & Company in about $2,600. The Adams Company was engaged in the fur and hide business in Fremont and had no business connection with Ferguson & Company except in respect of the indebtedness above stated; the nature of the transactions between the Adams Company and Ferguson & Company resulting in the indebtedness is not disclosed by the evidence. Mrs. Adams was the niece of William H. Ferguson.

There is some slight conflict in the evidence upon the point, but the great weight thereof establishes the fact that the first notice plaintiff had that the defendant claimed that the various notes in question were *ultra vires* was after the commencement of the present suit; in fact, as late as April 26, 1932, Mr. Robert L. Ferguson, as vice-president, wrote the plaintiff requesting a further renewal and suggesting a scheme of partial payments, and in the letter made no reference to the defense of *ultra vires*.

The general nature of the business to be transacted by

Ferguson & Company, as stated in its charter, was to operate farms, deal in grain and other agricultural products and their derivatives, deal in poultry, milk, cream and other dairy products, to manufacture brick, and deal in goods, wares, merchandise and commodities of every class and description, to deal in real and personal property of every kind, and stocks, shares, bonds or other evidences of indebtedness of any corporation, "to lend money belonging to the company; to buy, sell, and negotiate, either on its own account or for other persons, individuals and corporations, loans, investment securities and evidences of indebtedness of all kinds and nature, including notes, trade acceptances, mortgages, bailments, bonds, debentures and warrants," etc., and as a final description of its powers, the following: "Without in any particular limiting any of the objects or purposes or powers of the company, it is hereby expressly declared and provided that the company shall have power to do all acts or things necessary, incidental or convenient to do, or calculated, directly or indirectly, to promote the interests of the company, or enhance the value or render profitable any of its property or rights; and in carrying on its business, or for the purpose of obtaining or furthering any of its objects, to do any and all acts and things and to exercise any and all other powers which a natural person could do and exercise and which now or hereafter may be authorized by law."

Upon the above statement of facts, as disclosed by the record, two questions are presented: (1) Was the execution of the note *ultra vires?* (2) Is the defendant estopped from making this defense?

1. We think it appropriate, in approaching the discussion of the first question, to call attention to some well-established principles of corporation law. A corporation, while a separate entity, is a mere creature of the law, and possesses only those powers which are expressly granted to it by its charter, and such other powers as are necessary, appropriate or convenient for the full

exercise of such express powers, in the prosecution of the business and purposes of the corporation. These latter are termed implied or incidental powers and their exercise is justified when the objects and business of the corporation will thereby be promoted, in the judgment of the managing officers. Contracts of a corporation not within its express or implied powers are *ultra vires*. One dealing with a corporation whose articles are duly recorded is bound to take notice of the extent of its powers and the limitations of the law with reference thereto; and if the contract sought to be enforced is apparently one beyond the power of the corporation to make, the burden is upon the one seeking its enforcement to prove its validity; on the other hand, if the contract may or may not be within the powers of the corporation, it is incumbent upon the latter to establish facts negativing such power.

A concise statement of the plaintiff's case is this: The Adams Company was indebted to plaintiff on a promissory note which became due, and plaintiff refused renewal unless security was given; thereupon William H. Ferguson indorsed the renewal note and a number of others, the last of which became due April 20, 1927. Shortly prior to this date Ferguson organized the defendant corporation, which took over his many business interests and assumed his large personal indebtedness connected therewith, of which, however, his liability as indorser to plaintiff was not one. He transferred nearly all of his property and assets to the corporation, and received the entire issue of its stock, which he divided with members of his immediate family. April 20, 1927, William H. Ferguson was in California, and the note heretofore mentioned was renewed with the defendant corporation as indorser. On that date William H. Ferguson was indebted to the corporation in the sum of $24,000. The Adams Company and the defendant had no business connection or common interests; in fact, the Adams Company was engaged in the fur and hide business, one of the few

businesses not expressly authorized by the charter of the Ferguson company, and one which it had not undertaken to pursue. The note of April 20, 1927, was renewed every six months by the Adams Company and indorsed by the Ferguson company until April 14, 1931, when it was renewed or taken up by the note in suit signed by Ferguson & Company, by Robert L. Ferguson, vice-president. In October, 1929, the Adams Company was indebted to the Ferguson company in the sum of $13,000; April, 1930, $15,000; October, 1930, $21,514.12, and April, 1931, $37,514.12, said dates being those of the renewals indorsed by the Ferguson company, except that of April, 1931.

The precise question then for our determination is whether or not the fact of the indebtedness of William H. Ferguson at the time of the first indorsement or the indebtedness of the Adams Company at the time the note in suit was given, or both, furnished a sufficient foundation upon which to rest the exercise of the implied or incidental powers of the defendant corporation in the prosecution of its business. The plaintiff contends that, by reason of the indebtedness referred to, the defendant corporation had such an interest in the Adams Company and its continued commercial existence that it was justified in lending its credit to the Adams Company for the purpose of improving its position as a creditor and bettering its chances of finally collecting its debt. On the other hand, the defendant contends that the various indorsements and final execution by the Ferguson company of the note in suit were merely for the accommodation of the Adams Company and therefore *ultra vires*—citing *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. 742; *Smith v. Nelson Land & Cattle Co.*, 212 Fed. 56; 3 Thompson, Corporations (3d ed.) sec. 2300. The question is not without difficulty and its solution may be aided by examining the holdings of the courts in analogous situations. We will first consider the cases relied upon by the plaintiff.

Woods Lumber Co. v. Moore, 183 Cal. 497. In that

case a corporation, engaged in furnishing costumes under an existing contract to the producer of a motion picture film, guaranteed such producer's bill for lumber necessary to the production of the film, and the contract was held valid as being one essential to the successful prosecution of the business of the corporation. This case does not reach the point, because the guaranty there in question was made in the furtherance of the precise business of the corporation, to wit, the execution of its contract to supply costumes.

Sturdevant Bros. & Co. v. Farmers & Merchants Bank, 69 Neb. 220. There the action was upon a replevin bond signed by the bank as surety, and the contract was held *ultra vires*. It did not appear in that case the bank had any interest in the property replevied, nor any right or claim to protect, but it was said in the opinion: "A banking corporation, it would seem, is empowered to do any act or make any contract, even though under usual and ordinary circumstances such transaction is beyond the scope of its charter powers, if in the particular case the act was engaged in or contract entered into in furtherance of the business of the corporation or to protect it in its property rights or to maintain the integrity of the corporate entity. * * * If, in the case at bar, the defendant bank held a note against the plaintiff in the replevin action and a mortgage on the goods replevied securing the note, it would scarcely be doubted that it might not, for the purpose of collecting what was due it and thus protect its assets, execute as surety the replevin undertaking which the plaintiff in the replevin action was by statute required to give before regaining possession of the property." The case serves to illustrate that a corporation may make a valid contract under some circumstances or in some situations which might be *ultra vires* under other conditions.

Burg & Sons, Inc., v. Twin City Four-Wheel Drive Co., 140 Minn. 101. The defendant corporation guaranteed an account of one of its salesmen for the purchase of

furniture. It appeared that the salesman had a number of "prospects" in view, and was considered by the corporation a very valuable employee, who threatened to quit the employment unless he received assistance, and the guaranty was executed for the purpose of retaining the salesman in the employ of the corporation. Holding the contract valid, the court said: "Of course, defendant corporation had no express power to guarantee or become surety for debts of its employees. But we think it may be said that such a power may be implied, as an incident to the business that the corporation was authorized to do. It can hardly be doubted that it would have had power to make an advance to White on account of salary or commission to be earned. Such a power is at least as broad as becoming surety for an employee's rent, coal, grocery or furniture bill, with the reasonable expectation that there will be no loss because he will earn enough to take care of the bill."

First Nat. Bank v. Pacific Elevator Co., 159 Minn. 94. In that case it was held: "A corporation cannot become a mere accommodation surety for others unless expressly authorized to do so, but a corporation which is a large stockholder in another corporation has such an interest therein that it may become a surety on its obligations." And it was said in the opinion: "While a corporation cannot become a surety on obligations in which it has no interest, it may guarantee the obligations of its subsidiary companies, and this doctrine has been extended to permit it to guarantee the obligations of others where the purpose is to promote or protect its own rights or property interests, or to accomplish some legitimate object of financial benefit to it, and not merely to aid the primary obligor. The cases are cited and analyzed in *Woods Lumber Co. v. Moore,* 183 Cal. 497, and in the annotation found in 11 A. L. R. 554."

Midland Telegraph Co. v. National Telegraph News Co., 236 Ill. 476. In that case the defendant corporation had guaranteed the lease of another corporation and, when

sued, pleaded *ultra vires*. The court found that the guaranty was executed for the benefit and in the regular operation of the business of the guarantor and therefore within its powers.

First Nat. Bank v. Guardian Trust Co., 187 Mo. 494. The trust company had indorsed the note of a railroad company to the bank and, when sued, pleaded *ultra vires*, that it was a mere accommodation maker or indorser which the statute did not authorize. It was held, however: "The evidence shows that the trust company did not place its name on the back of the railroad company's note as a matter of accommodation but that it was induced to do so by reason of its interest in the railroad company, not only as a stockholder, but as a creditor, it having largely financed it, and sold its stock and loaned it money, and these facts were known by the bank. It was further shown that the money loaned to the railroad company on the note upon which the trust company is sued was used to pay pressing indebtedness, and that that payment was not only to the interest of the trust company as a stockholder, but increased its chances of finally realizing upon the debts due it from the railroad company. Held, that, under the circumstances, the defense of *ultra vires* will not avail."

Richeson v. National Bank of Mena, 96 Ark. 594. A lumber company owed the bank $11,650 and about $10,000 to other creditors, and procured a loan from the Hancock Land, Loan & Investment Company for $22,000, which executed a written obligation by which, in consideration of the loan made by it to the lumber company and the agreement on the part of the bank to extend the time of the payment of its indebtedness against the lumber company, it assumed and guaranteed the payment of the lumber company's debt to the bank, and when sued upon the guaranty pleaded *ultra vires*. The court said: "The loan company was engaged in loaning its money, and for its compensation it received the interest which accrued thereon. This benefit it actually received by the

execution of this contract. The bank, by virtue of the assumption by it of the bank's debt against the lumber company, extended the time of payment thereof. It could have taken steps to enforce its collection, but it stayed its hand by reason of the execution of this contract, and thereby it was caused to act to its disadvantage." The holding of the court was epitomized in the third paragraph of the syllabus: "When an *ultra vires* contract entered into by a corporation has been fully performed by the other party, and the corporation has had the benefits thereof, the contract is binding upon such corporation." We do not think this case helps us very much, as Ferguson & Company received no actual present benefit from its contract. True, it obtained an extension of time for its debtor, but that was no benefit to the Ferguson company if it was not liable on the note.

Armour & Co. v. Rosenberg & Sons Co., 36 Cal. App. 773. In this case the defendant corporation guaranteed the account of the American Packing Company to the plaintiff, and in holding the contract *intra vires* the court said: "The American Packing Company, a customer, was in its (corporation defendant) debt to a considerable amount, which debt without the arrangement was a total loss. The agreement for the payment of the debt, and the promise of Lawton (the president of the packing company) to purchase exclusively from the defendant all the bottles required in his business, establish this fact. In both of these particulars the corporation was benefited by the agreement." It was further said: "The question presented by the different assignments of error is whether or not the general manager of a trading corporation has the implied power to guarantee debts or obligations of a customer or other person when such course is deemed by him necessary for the promotion of the business of the corporation. The obligation here guaranteed had relation to the corporation's own interest, and was designed to promote its own business. In such a case the rule now seems to be firmly established that

trading corporations may, in furtherance of their own interests, extend financial aid to their customers"—citing cases.

Modoc County Bank v. Ringling, 7 Fed. (2d) 535. That was an action against the bank on a guaranty of the performance of a contract by one of its depositors; the defense was *ultra vires*. In the opinion the court said: "The bank having already made the advance to a depositor, it was manifestly for the interest of the bank as a business transaction, and in the conduct of its affairs, to secure reimbursement, if possible, and to do this it was presumably deemed advantageous to place itself behind Carter in the transaction. In other words, the agreement of guaranty, so far as appears in this record, was made by the bank in good faith and as incident to the transaction of its ordinary affairs and for its own benefit." And it was held that the bank had the power, as incident to its express power of loaning money, to guarantee the obligations of its own debtors in order to make its own loan more secure.

Second Nat. Bank v. United States Fidelity & Guaranty Co., 266 Fed. 489. In this case it was held that the bank had the power to execute a bond of indemnity to a surety company against loss by reason of its suretyship for a bankrupt on its contract, to enable the trustees in bankruptcy to proceed with and complete the work; and it was said: "The question as to the wisdom of the directors in entering into an agreement of this kind is not involved; the real question being as to whether the banks at that stage of the proceedings had the power to enter into an agreement of this kind for the purpose of self-protection in the collection of their debts. In other words, were they not warranted in taking such steps as were necessary to conserve the assets of the banks, and could their acts in this respect be said to be *ultra vires?*"

A number of other cases are cited as illustrating the implied or incidental powers of corporations in the prosecution of their business. For example: *Horst v. Lewis*,

71 Neb. 365, on rehearing, 71 Neb. 370, holding that a brewing company had power to sign as surety the liquor bond of one of its customers; *Timm v. Grand Rapids Brewing Co.*, 160 Mich. 371, to indemnify a surety on the liquor bond of its customer; *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, to guarantee the rent of a customer; *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, that a railroad company carrying passengers might guarantee that the receipts of a connecting steamboat company would equal a gross amount. There is considerable diversity of opinion in the decisions, occasioned largely by the special circumstances of each case; see annotation in 11 A. L. R. 554.

On the other hand, the defendant cites the case of *Johnson v. Johnson Bros.*, 108 Me. 272, which holds "that a defendant corporation was a large creditor of another company does not show such interest as to constitute a valid consideration for defendant's indorsement of the company's paper." In that case Johnson Brothers, a corporation, had indorsed a number of notes of the Monson Company, and the court having found that there were no such business relations between Johnson Brothers and the Monson Company as should be held to be a consideration for the indorsement of the paper in question, held the indorsements *ultra vires*, and in the opinion it is stated: "Johnson Brothers indorsed the notes to enable the Monson Company to receive the proceeds to use in its business in which, at the most, the indorser had no other interest than that of a voluntary creditor. The suggestion is made in some cases that a corporation may be impliedly authorized to loan its credit to its debtor if by so doing it could make available a debt due it, arising out of a reasonable exercise of its corporate powers, and which otherwise would be lost. It is not necessary, however, here to consider if that suggestion has merit, for it seems clear to us that the facts and circumstances of this case do not bring it within the reach of an application of such a doctrine. The inference seems justifiable that the prac-

tice of using the corporate name of Johnson Brothers for the benefit of the Monson Company had its inception and was continued not because it seemed imperatively necessary so to do in order to protect and secure the then existing indebtedness from that company to it, and save its own assets, but chiefly, if not solely, to advance and promote the affairs of the Monson Company, in which George W. and Ernest A. Johnson were so deeply interested. To hold that a trading corporation, having so improvidently conducted its affairs as to permit another corporation to become its debtor on open account and notes for more than ninety thousand dollars, for goods sold, money paid, advanced and loaned, during a period of nearly fifteen years, was also justified, because of that condition, in issuing accommodation paper for the benefit of such corporation, during the same period, would be, in the language of the late Judge Walton, 'a doctrine as startling as it would be unprecedented.'" The conclusion of the court was that the indorsement of Johnson Brothers was purely for accommodation, giving great weight to the finding of the referee on that point. The case is closely in point so far as the argument of the court is concerned, but its authority as a precedent is greatly weakened by the statement that "It is not necessary, however, here to consider if that suggestion has merit;" and whether we should follow it depends upon a critical examination of the charter of the defendant and the evidence appearing in the record. In that case neither the provisions of the charter nor the evidence is reported.

We think it must be conceded that the nature of the business of Ferguson & Company, as set forth in its charter, covers substantially all of the activities of the commercial world, from dealing in dairy products to the manufacture of brick, from dealing in merchandise and commodities of every class and description to the conduct and management of farms, the lending of money, and the dealing in grain, stocks and bonds, and, as already noted, the charter expressly provides: "The company shall have

power to do all acts or things necessary, incidental or convenient to do, or calculated, directly or indirectly, to promote the interests of the company, or enhance the value or render profitable any of its property or rights; and in carrying on its business, or for the purpose of obtaining or furthering any of its objects, to do any and all acts and things and to exercise any and all other powers which a natural person could do and exercise and which now or hereafter may be authorized by law." It appears to us that it would be a much easier task to catalogue the things that this corporation might not do than those which it was empowered to do under its articles. It is undoubtedly true that a contract of a corporation, to be within its powers, must have some relation to the business of the corporation, and must be entered into in the interest or for the benefit of the corporation, and the provision that it may exercise all the powers which a natural person could do is limited by the other provisions of the charter. *Greene v. Middlesborough Town and Lands Co.*, 121 Ky. 355. When not prohibited they are the same. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809. Whether the contract turned out to have been provident or the reverse, whether or not the corporation actually received any benefit from it or not, are questions which do not relate to the power of the corporation to enter into it. The question of the propriety, necessity or wisdom of entering into the contract is not for us to determine. *Second Nat. Bank v. United States Fidelity & Guaranty Co.*, 266 Fed. 489. Those questions belong to the governing body or, in most instances, the general manager of the corporation. *Modoc County Bank v. Ringling*, 7 Fed. (2d) 535. The party entering into the contract with the corporation need not concern himself with these questions; all he need do is to inquire whether the contract is within the power of the corporation under its charter, and unless or until the contrary appears he may assume that the governing authorities of the corporation have decided that the contract is for its interest and ben-

efit from the fact of its execution. *Modoc County Bank v. Ringling, supra.* The provision in the charter that the corporation has power "to guarantee the notes, bonds, obligations or dividends of any corporation in which this company may own twenty-five per cent. or more of the outstanding stock" is not restrictive of the general powers of the corporation in the transaction of its business. "A corporation cannot engage in a business in violation of an express prohibition. But this rule does not prevent a corporation from engaging in any business which is fairly and reasonably incidental to the carrying on of its principal business." 14-A C. J. 270. "Whatever transactions are fairly incidental or auxiliary to the main business of the corporation and necessary or expedient in the protection, care and management of its property, may be undertaken by the corporation and be within the scope of its corporate powers." *Teele v. Rockport Granite Co.,* 224 Mass. 20. Moreover, the indorsement of the notes in question was not a transaction within the spirit of the language quoted, which evidently contemplates a series of "notes, bonds," etc. National banks are not permitted to own real estate except what is necessary for the banking business, yet they may become such owners as the result of the transaction of the general business of banking. Contracts which are not contrary to the express provisions of the charter are presumed within the powers of the corporation and the burden is upon it to prove that the same is *ultra vires. Gorder v. Plattsmouth Canning Co.,* 36 Neb. 548. "If the means employed are naturally and reasonably adapted or appropriate to the ends for which the corporation was created, they come within its implied or incidental powers." 14-A C. J. 257.

Under the provisions of the charter quoted, the corporation is given power to do any act in the prosecution of its business to enhance the value of its property or rights that an individual may do; this subject, of course, to the restriction implied from the terms quoted, that the contract must have some relation to the purposes and

business of the corporation. The charter expressly empowers the corporation to loan money, and if it had loaned Adams Company $5,000, the transaction would not be open to question; there seems to be no material distinction where it lends its credit, provided always the transaction was connected with the corporate business or for its benefit. How often has it occurred to any one of us that a debtor has approached with a proposition for a further advance in order that he may better his position and finally be able to pay his debt; the question in such case for our decision is whether, under the circumstances, the chances of final payment will be enhanced by the further accommodation. Is there any good reason why a corporation, placed in the same position, may not take the same steps to protect its assets? And should it be permitted to plead its lack of power when the contract was entered into in the expectation that it would result to its benefit? In deciding that a corporation had power to guarantee payment of notes of a prospective customer it was held: "Guaranties given by a corporation in the reasonable prosecution of its business are within its corporate powers." *Blue Island Brewing Co. v. Fraatz,* 123 Ill. App. 26. The note in question appears to have been given to protect the corporate assets. It is said, and it is no doubt the general rule, that a corporation is not permitted to execute accommodation paper unless expressly authorized by its charter, and it is contended by the defendant that the note in question was of that character. But was it? No contract from which a party receives or believes and expects he will receive some financial benefit can be said to be purely for accommodation, and we think it reasonable to assume that in this case Ferguson & Company intended and expected to improve its chances of collection of its claims against Ferguson and the Adams Company by procuring the extension of time by the plaintiff of the note in question. All of the officers and directors of the corporation knew of these transactions covering a period of five years, and made no objection. A

corporation may "take such measures as are reasonably proper to protect its debtors so as to enable it to realize the amount of their indebtedness." *Hess v. Sloane,* 66 App. Div. (N. Y.) 522. "Rule that a corporation can neither make nor indorse commercial paper for accommodation, even though paid therefor, is not applicable where corporation assumes an obligation of another for the purpose of protecting its own interests." *Bacon v. Montauk Brewing Co.,* 130 App. Div. (N. Y.) 737.

It appears from the evidence that the defendant indorsed the note of the Adams Company to the Omaha National Bank for the sum of $10,000, and another for $2,000, and the individual note of Adams to one Ingles for $6,000. These transactions were of the same character as the one under investigation, having for their basis no connection with the business of the defendant except the indebtedness to it of the Adams Company and Adams. In each of these instances there was a resolution by the directors of the corporation authorizing the transaction; it would therefore seem that the corporation considered such transactions within its legitimate powers, thus placing a construction upon its own charter, which is a fact proper to be considered. *People v. Merchants Protective Corporation,* 189 Cal. 531. The absence of specific authorization by the board of directors is not material if the contract was within the general powers of the corporation, the authority of the president or general manager being sufficient. *Woods Lumber Co. v. Moore,* 183 Cal. 497. We think that the corporation is in no position to plead *ultra vires.*

In view of our holding upon the first point, it will not be necessary to discuss the question of estoppel. The judgment of the district court is

REVERSED.

AGATHA M. GOODLETT, APPELLANT, V. HELEN BANNING ET AL., APPELLEES.

FILED JUNE 1, 1934. No. 28964.

1. **Specific Performance.** In an action to obtain a decree for the specific performance of a contract to give or devise an interest in the property of one since deceased, and in which circumstantial evidence is relied on to establish the contract pleaded, the circumstances shown, in part at least, must be such as refer to the making of such contract sufficiently to establish its making and its terms clearly, convincingly and satisfactorily.
2. ———. Evidence examined, and *held* to be insufficient to establish the existence of an oral contract to give or devise an interest in the property of one since deceased.

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

Clarence A. Davis and *Wilber S. Aten,* for appellant.

Frank A. Anderson, York & York, A. W. Storms and *Hamer & Tye, contra.*

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

TEWELL, District Judge.

This action was begun in the district court for Phelps county by Agatha M. Goodlett, as plaintiff, against the heirs of Asa Lucas, deceased, their respective spouses, and the administrator of the estate of said decedent. The object of this action is to obtain specific performance of an oral contract alleged to have been made between the plaintiff and said deceased at Hot Springs, Arkansas, about the month of March, 1912. The contract alleged is to the effect that the plaintiff should live upon the farm owned and occupied by said deceased and perform services as housekeeper for him until he died, and that in return for such services said Lucas upon his death would give to the plaintiff one-half of his estate. Performance by the plaintiff is pleaded. Lucas died intestate a resident of Phelps county on May 13, 1932, without having

made any conveyance to the plaintiff. Two brothers, two of the three living sisters, and three children of a deceased sister of the deceased, all of whom are named as defendants, and who claim to be his only heirs, filed a joint answer to the plaintiff's petition and included therein a cross-petition against the defendant Birdie B. Browning, by which it is sought to quiet title to the estate in said cross-petitioners. The defendant Birdie B. Browning, who claims to be a daughter of deceased and his sole heir, filed answer to the plaintiff's petition, and to the cross-petition. The defendant Mary F. Steele, one of the three living sisters of said deceased, made no appearance. The issues tried were only those raised upon the allegations of the plaintiff's petition. The trial court found against the plaintiff and dismissed her petition as against all alleged heirs who filed answer. Decree was entered against defendant Mary F. Steele, granting performance of the contract alleged so far as her interest in the estate might extend. Plaintiff is sole appellant. The issues joined upon the cross-petition are not presented by the appeal.

The sufficiency of the evidence to establish the making of the contract alleged is involved. No evidence was offered by the defendants. The estate of the deceased Lucas consists of several parcels of real estate and also farm implements, live stock and other personal property.

Robert Goodlett, a son of plaintiff, testified that he first met the deceased at Hot Springs, Arkansas, in the winter of 1911, when he was about 12 years old; that the plaintiff moved from Hot Springs, Arkansas, to the Lucas farm in Phelps county, Nebraska, in the spring of the year 1912, and lived there until Lucas died; that he had lived on the Lucas farm with his mother and Lucas continuously from the year 1914 to the date Lucas died. This witness also testified that on September 1, 1931, while he, the plaintiff, and the deceased sat alone in an automobile, near the depot in Kearney, Nebraska, his mother wrote the following upon a blank bank check:

"Sept. 1, 1931. This is to acknowledge Mrs. A. M. Goodlett as my pardner on the farm since April 1912, and has been steady and faithful for which I owe her one-half of my estate."

This son testified that Lucas then signed his name to the check and gave it to his mother. An instrument of such import appears in the record. The portion thereof that precedes the word "which" therein appears upon the back of the check, and the balance thereof upon the face of the check. The name "Asa Lucas" appears on the line prepared upon the check form for the signature of the maker, where it would ordinarily appear if the check form had been signed when blank by Lucas in order to allow any one to complete the check by filling out the blank spaces above his signature. The son, Robert Goodlett, also testifies that in 1925 he read some letters, bearing a date in 1912, that he found in his mother's trunk on the Lucas farm, and that they were in stamped and postmarked envelopes that were addressed to his mother at Hot Springs, Arkansas, and that these letters were in the handwriting of Asa Lucas. This witness testified that the letters stated: "Instead of going to St. Louis, come on up and be housekeeper, and do as we agreed upon, and then go fifty-fifty, and if you stay until he is through with it, to get half of all his property." None of these letters was produced, and both the plaintiff and her son testified that they had searched for them and could not find them.

Mrs. Florence Holzer, a sister of the plaintiff, testified that she with her son and daughter visited the Lucas farm from in January, 1929, to sometime in March, 1929, and that, on account of her desire to have her son stay upon the farm to improve his health, she talked to Lucas, while on a trip to Kearney, Nebraska, alone with him, concerning his consent to the son's stay. This witness testified that in this conversation Lucas said, "If it's all right with Mrs. Goodlett, * * * it's all right with me, because you know the agreement is that she is to get half of everything I own."

Archie Hasbrouck, a neighbor to Lucas from 1915 to the time of his death, testified that about the month of September, 1931, he asked Lucas what he was going to do with his place when he was done with it, and that Lucas said, "Mrs. Goodlett got half of it."

Lew Sealing, a neighbor to Lucas for about 12 years testified that on a trip to Minden, Nebraska, with Lucas, he asked Lucas if Mrs. Goodlett would come in for half of Lucas' property, and that Lucas replied; "Yes; she'll come in for half." This conversation occurred, according to this witness, when he and Lucas were alone, and only a day or two before Lucas suffered the stroke of paralysis from which he shortly thereafter died.

From the testimony of the witnesses heretofore mentioned and from that of others, the evidence fairly establishes the fact that the plaintiff did all classes of work commonly done by a farmer's wife while living upon a farm, and, in addition, on some occasions worked in the fields, did chores, tended live stock, and did other classes of work usually regarded as being only that of a man. No evidence, other than that above outlined, relates to any admissions, declarations or statements of the deceased concerning the making of any such contract as that alleged, or concerning any provisions of such a contract. The son, Robert Goodlett, is shown to have married in 1926 and to have lived upon the Lucas farm with his wife continuously after 1926. At least, from the year 1928 to the date Lucas died, this son operated the farm and paid Lucas a portion of the crop as rent. The evidence does not show what circumstances, financial or social, surrounded the plaintiff at the time the contract is alleged to have been made, and does not show whether or not any payment of money was made to her by Lucas during her stay upon his farm. The plaintiff is not shown to have known Lucas, except for a very short time prior to the date the contract is alleged to have been made. Lucas is not shown to have held any ill feeling toward any persons liable to inherit his property.

In actions of this nature and in which circumstantial evidence is relied upon to establish the contract pleaded, the circumstances shown, in part at least, must be such as refer to the making of such contract sufficiently to establish its making and its terms clearly, convincingly and satisfactorily. 58 C. J. 1203; *Overlander v. Ware,* 102 Neb. 216; *Hajek v. Hajek,* 108 Neb. 503; *McEntarffer v. Payne,* 107 Neb. 169. An examination of the evidence as above outlined will disclose the fact that one could not determine from the evidence what the terms of the contract between the plaintiff and the deceased were, assuming that a contract of some kind was made. The writing upon the bank check, and also the statements made to the witness Hasbrouck, and those made to the witness Sealing, are in no way inconsistent with the nonexistence of a contract of any nature. The rule relating to the weight to be given alleged declarations of a deceased in chance conversations is discussed in 58 C. J. 1203, and cases cited in the footnotes thereunder, and in *Johnson v. Kern,* 117 Neb. 536. We do not find sufficient proof of the contract alleged in plaintiff's petition to convince the court that such contract was ever made. Without the plaintiff's petition, the record would not disclose what contract was claimed to exist.

Much space is devoted in the briefs to the question of whether or not sufficient proof of the loss of the letters mentioned in the testimony of Robert Goodlett and sufficient proof of search therefor existed to allow that witness to testify as to the contents of such letters. We have treated the testimony as to the contents of these letters as having been properly admitted, and therefore need not discuss its admissibility.

The decree of the district court is

AFFIRMED.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. CLAUDE L. NETHAWAY ET AL., APPELLANTS.

FILED JUNE 8, 1934. No. 28751.

Mortgages. "A decree of foreclosure, in so far as it directs a sale of the mortgaged property, is in no manner affected by a modification touching the personal liability of one of the defendants." *National Bank of Commerce v. Kinkead*, 61 Neb. 264.

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

Charles W. Haller, for appellants.

Finlayson, Burke & McKie, contra.

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

PER CURIAM.

This is a suit for the foreclosure of a real estate mortgage in which a decree was entered October 17, 1931. A request for stay was then filed and allowed. After this, the plaintiff paid the taxes which according to the provisions of the mortgage were secured by it. July 25, 1932, an order of sale was issued. On August 27, 1932, upon the motion of the plaintiff, a supplemental decree was entered by the court finding that certain taxes were paid by the plaintiff subsequent to the entry of the decree which by virtue of the terms and conditions of the mortgage were properly a part of said mortgage indebtedness and secured thereby. The effect of this decree was to increase the amount due from the defendants to the plaintiff by the amount of the taxes which were paid subsequent to the decree. August 30, 1932, the defendants filed a new request for a stay of nine months under the statute. Comp. St. 1929, sec. 20-1506. On the same day a sale was held and the property sold to the plaintiff, which sale was confirmed November 18, 1932.

The defendants contend that they had a right to a stay of execution from the date of the supplemental decree.

The modification of the decree merely increased the personal liability of the defendants to the plaintiff. It did not affect the decree of foreclosure of the mortgaged property. "A decree of foreclosure, in so far as it directs a sale of the mortgaged property, is in no manner affected by a modification touching the personal liability of one of the defendants." *National Bank of Commerce v. Kinkead*, 61 Neb. 264. The defendants were not entitled to a second nine months' stay because of the modification. There is no reversible error disclosed by the record.

AFFIRMED.

EVA SPITTLER, APPELLEE, V. ROBERT CALLAN, APPELLANT.

FILED JUNE 8, 1934. No. 28970.

1. **Automobiles.** "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right." Comp. St. Supp. 1931, sec. 39-1148.
2. **Trial:** INSTRUCTIONS. "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not." *Blue Valley State Bank v. Milburn*, 120 Neb. 421.
3. **Appeal:** REFUSAL OF INSTRUCTIONS. "The refusal of the court to give instructions requested by the defendant upon issues presented by the pleadings and evidence, and not covered by the instructions given by the court upon its own motion, may be ground for reversal of the judgment." *Blue Valley State Bank v. Milburn*, 120 Neb. 421.

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

Kennedy, Holland & DeLacy, for appellant.

Fogarty, Meile & Kennedy, M. J. Gardiner and *Emmet L. Murphy, contra.*

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

GOSS, C. J.

Plaintiff had a verdict and judgment for $2,000. On hearing the motion for a new trial the court ordered a remittitur of all in excess of $1,200. Plaintiff complied, and defendant appealed.

The action arose out of a collision of the car in which plaintiff was riding and the car of defendant. The collision occurred at the intersection of Fifty-first street and Poppleton avenue in Omaha, between 8:30 and 9:00 o'clock p. m., June 5, 1932. Both streets are paved. The car in which plaintiff was riding was going north on Fifty-first street. It was a Chevrolet roadster with a rumble seat, was owned by Mr. Heft, but was driven by Mr. Zack. All the occupants were in the front seat, Zack at the wheel, Mrs. Shepard in the middle, and Heft at the right, with Mrs. Spittler on his lap. Defendant was driving his 1928 Chrysler coach west on Poppleton avenue, with his wife in the seat beside him and their two children in the rear seat. To reach the intersection both cars traveled over pavements that ascend between four and five feet to the hundred.

Each party claims to have reached the intersection first and blames the collision on the other. Plaintiff asserts that the "front corners of the two cars collided near the manhole" (which was in the exact center of Poppleton avenue and four feet east of the center of Fifty-first street). Defendant testified that the front of the Chevrolet car struck his car "just about where the left front fender fastens onto the running board." We are not left in doubt as to the truth of this particular statement. Photographs of the two cars were introduced by defendant, and plaintiff's counsel expressly stated that he offered no objections. These show that the rear part of defendant's front left fender was rolled and crumpled tightly against the car and the latter was considerably indented as to the hood and body in front of the cab. There appears no injury to the front of defendant's car except as to the front part of the fender which was bent by the

impact on the rear part of it, pulling the front of the fender to the left and over the wheel. The Chevrolet picture shows that its front bumper was missing and its right front fender was jammed backward so that the front of it reached almost to the top of the wheel. The right door was torn off and the rear right fender was somewhat crumpled toward the car. These two items evidently occurred when, after the initial impact, the Chevrolet car turned west and the Chrysler car turned northwest, bringing them together at their rear fenders for a moment. This also probably accounts for indentations on the left rear fender of the Chrysler, shown in the picture. These pictures clearly indicate that the car in which plaintiff was riding struck defendant's car back of its left front wheel or at least back of the center of that wheel.

Defendant requested, and the court refused, an instruction as follows:

"You are instructed that it appears from the evidence that the car in which the plaintiff was riding was being driven North on Fifty-first street, and that the defendant's car was being driven west on Poppleton avenue. Now you are instructed that under such circumstances the defendant's car was the car to the right, and you are instructed that by the statutes of Nebraska it is provided that—'When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.' You are instructed that it is further the law that the vehicle in the intersection first has the right of way. Now you are instructed that, in considering the question whether the defendant was guilty of negligence, you may take into consideration the statute above quoted, and the fact that the defendant's car was the car to the right, and all other circumstances as shall be the evidence in the case."

The statute quoted in the proposed instruction is found at the beginning of section 39-1148, Comp. St. Supp. 1931. There was evidence on behalf of defendant warranting a

finding of the jury that he approached and entered the intersection at approximately the same time as the other car and indeed there was evidence from which the jury might find that defendant's car entered the intersection first. He was entitled to an instruction on this phase of his theory of the case. His proffered instruction covered it. The court refused it. The only instruction the court gave on this particular point was embodied in the court's instruction No. 8, covering other features as well, but containing these words:

"Ordinarily the first car entering an intersection has the right of passage across an intersection and it is the duty of drivers of automobiles to keep a careful lookout and control of their cars so that the first cars at intersections shall enjoy the right of continuous passage, and it is the duty of those driving cars that are second at the intersection to slow up and give way to the rights of the first cars at the intersections."

The legislature intended to try to do away with some of the causes of collisions at intersections. So they framed this rule giving the right of way to the car on the right provided it either *entered* or *approached* the intersection first. The instruction given by the court omitted the statutory call that, of two cars *approaching* an intersection at approximately the same time, the car on the left shall yield the right of way to the one on the right. Because of this omission the court's instruction was erroneous. Not having properly covered the point in the instruction given on the court's own motion, the failure of the court to give the instruction requested by defendant, or one of like import, was prejudicially erroneous.

"It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not. * * *

"The refusal of the court to give instructions requested by the defendant upon issues presented by the pleadings and evidence, and not covered by the instructions given by the court upon its own motion, may be ground for

reversal of the judgment." *Blue Valley State Bank v. Milburn,* 120 Neb. 421.

Because of the error pointed out, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

MARY DOON, APPELLANT, V. ALFRED ADCOCK, ALIAS BERT ADCOCK, ET AL., APPELLEES.

FILED JUNE 8, 1934. No. 28943.

Appeal. The only question which can be presented on appeal to the supreme court in a civil action, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment.

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

Lower & Sheehan, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

EBERLY, J.

This was an action to recover for injuries sustained by plaintiff as the result of a collision between an automobile in which plaintiff was riding and a truck then standing in the highway. The facts alleged by plaintiff in her amended petition without doubt constitute a cause of action. The answer of defendants sets forth in appropriate language, first, a general denial; second, an admission that plaintiff was in an automobile which collided with the rear of the truck; also allegations that the injuries of which plaintiff complains were not caused by the negligence of the defendants or either of them, but by the

negligence of plaintiff's host, the driver of the automobile in which she was then riding; that plaintiff, her host, and other occupants of the automobile, at the time of the collision, were engaged in a joint enterprise, and that the alleged negligence of the host was imputed to plaintiff by reason thereof. While no reply was actually filed, it is suggested that the case was tried in the court below on the theory that a reply had been filed, in which all the allegations of new matter contained in the answer were denied.

The transcript discloses that a trial on the merits was had on the issues presented by the pleadings; that a jury was duly impaneled; that evidence was introduced on both sides; that a verdict was returned for the defendants; that judgment was entered on the verdict, and plaintiff's motion for a new trial was overruled.

The record discloses that no bill of exceptions in this cause was ever settled or allowed by the trial judge, or filed in the office of the clerk of the district court from which this appeal was prosecuted. In fact, a record, certified to only by the court reporter, containing all evidence received on the trial in the district court has been heretofore quashed by order of this court.

On the argument here, the sufficiency of the pleadings of both plaintiff and defendants, on which the case was tried in the district court, is conceded. The errors set forth in the brief of plaintiff, upon which she relies, relate wholly to the action of the trial court in the admission or rejection of evidence, and in the giving of instructions and the refusal to give certain requested instructions.

This jurisdiction has long accepted the principle that proceedings in courts of record are presumptively correct, and error therein must be affirmatively established; and it is only for errors appearing on the face of the record that the judgment of the district court can properly be reversed. *Frey v. Drahos*, 7 Neb. 194; *Aspinwall v. Sabin*, 22 Neb. 73; *Ferber v. Leise*, 101 Neb. 374.

So, also, where there is no bill of exceptions containing the testimony, it will be presumed that the verdict rendered is sustained by sufficient evidence. *Landman v. City of Benson,* 91 Neb. 479.

We are further committed to the view that errors in procedure committed by the trial court, in order to be deemed material, must be such as prejudice the complaining party and in effect deprive him of a fair trial of his controversy. Also, in the absence of a bill of exceptions, instructions to the jury will be presumed to be free from error, unless they contain statements of law which could not be correct in any possible case made by the proofs under the issues tendered by the pleadings. *Home Fire Ins. Co. v. Weed,* 55 Neb. 146; *McGraw v. Chicago, R. I. & P. R. Co.,* 59 Neb. 397.

It will be remembered in this connection that parties by their conduct on the trial may include a disputed fact within the issues of the case, although the fact does not appear at issue in the pleadings. 14 Standard Ency. of Procedure, 524.

So, too, in the absence of a bill of exceptions, it is manifest the appellate court cannot determine that any instruction, however erroneous, was prejudicial, since the evidence may have been such as would have justified the trial court in directing the verdict which was returned by the jury.

As a result of these decisions hereinbefore referred to, as well as the impracticability of determining the materiality of any technical error in giving or refusing instructions, the rule applicable to an appeal in a civil action, where no bill of exceptions is contained in the record, is now usually stated as follows: The only question which can be presented to the supreme court, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment. *Lincoln Land Co. v. Commonwealth Oil Co.,* 109 Neb. 652; *Gaines v. Warrick,* 113 Neb. 235; *Chapman v. Person,* 126 Neb. 340; *Joyce v. Tobin,* 126 Neb. 373.

In the instant case the pleadings support the judgment for the defendants, and in the absence of a proper bill of exceptions, the judgment of the trial court must be

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, V. STATE BANK OF RAVENNA, E. H. LUIKART, RECEIVER, APPELLEE: DAVID F. JUNGLES, INTERVENER, APPELLANT.

FILED JUNE 8, 1934. No. 29083.

1. Appeal: BILL OF EXCEPTIONS. "The only question which can be presented on appeal to the supreme court in a civil action, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment." *Doon v. Adcock*, *ante*, p. 335.
2. ———: ———. "Where there is no proper bill of exceptions in the record, a question will not be determined which requires consideration of evidence which has not been made a part of the record." *Patterson v. Kerr*, *ante*, p. 73.
3. ———: ———. Affidavits in support of a motion, not included in the bill of exceptions, will not be considered by this court.
4. ———: ———. "Finding of fact or ruling upon motion, based upon evidence, is presumptively supported by evidence, in absence of bill of exceptions." *Travelers Ins. Co. v. Sawicki*, 239 N. W. 726 (122 Neb. 108).

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

Lloyd W. Kelly and *B. J. Cunningham*, for appellant.

James L. Brown, *F. C. Radke* and *Barlow & Nye*, *contra.*

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

DAY, J.

David F. Jungles filed a petition of intervention in the above case to secure an adjudication of his claim against the insolvent bank. The trial court entered a judgment dismissing the case, and the intervener appeals.

The business transactions out of which this claim arose occurred about twelve years ago. The bank was adjudged insolvent in 1931. The hearing on this petition for intervention was set for trial in the district court on September 22, 1933. The intervener filed a motion for a continuance, which was overruled, the court finding that it was "for dilatory purposes and not in good faith." The intervener did not see fit to try the case, and the petition of intervention was dismissed. The question presented in this appeal involves the correctness of the trial court's judgment in overruling the motion for a continuance. In order to determine this question, it is necessary to examine the evidence. There is no bill of exceptions in this case. In a very recent case, this court said: "The only question which can be presented on appeal to the supreme court in a civil action, in the absence of a bill of exceptions, is the sufficiency of the pleadings to support the judgment." *Doon v. Adcock, ante,* p. 335. "Where there is no proper bill of exceptions in the record, a question will not be determined which requires consideration of evidence which has not been made a part of the record." *Patterson v. Kerr, ante;* p. 73.

It has been contended by the appellant that, since the affidavits setting forth the facts upon which this issue was decided are included in the transcript, they should be considered. However, this court has taken the position that affidavits in support of a motion, not included in the bill of exceptions, will not be considered by this court. *First Trust Co. v. Glendale Realty Co.,* 125 Neb. 283. There is sound reason for this rule, since it is contemplated that the trial judge shall settle the bill of exceptions and certify to this court the evidence upon which issue was determined. If the rule were not so, new issues could be presented in this court.

We are therefore unable to review the ruling on the motion for a continuance for that it requires an examination of evidence which has not been preserved in a bill of exceptions. "Finding of fact or ruling upon motion,

based upon evidence, is presumptively supported by evidence, in absence of bill of exceptions." *Travelers Ins. Co. v. Sawicki*, 239 N. W. 726 (122 Neb. 108). The judgment of the trial court is presumed to be correct.

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, PLAINTIFF, V. LAWRENCE B. GOLDMAN, DEFENDANT.

FILED JUNE 8, 1934. No. 28593.

1. **Attorney and Client.** When an attorney collects funds of a client, he holds such funds as a trustee for, and not as a debtor of, such client.
2. ———. It is the duty of an attorney at once to notify his client if he has made a collection for him, and to make remittance thereof as soon as he reasonably can do so.
3. ———. The practice of retaining a client's funds for an indefinite period deserves the severest censure.
4. ———. An attorney, as an officer of this court, must so conduct himself as to assist in maintaining confidence in the integrity and impartiality of the courts.
5. ———. An attorney who, directly or through others employed by him, carries on a systematic solicitation of damage suits, a business commonly known as "ambulance chasing," is guilty of unethical and unprofessional conduct, subjecting himself to the discipline of this court.

Original proceeding by the state, on the relation of the attorney general, to disbar the respondent. *Judgment of disbarment.*

Paul F. Good, Attorney General, and *William C. Ramsey,* for plaintiff.

Lawrence B. Goldman, pro se.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

PAINE, J.

A complaint for disbarment was filed in this court by

C. A. Sorensen, attorney general, against the defendant, and served upon him by the sheriff of Douglas county on August 27, 1932, and later an amended complaint was filed.

Carroll O. Stauffer, a former district judge, was appointed referee, and a trial was begun before him on November 13, 1933. The bill of exceptions of the evidence taken before him consists of 3 volumes of 1,221 pages, including 94 exhibits, largely of photostatic copies of checks, attorneys' liens, letters, receipts, and notes.

At the beginning of the trial, the first witness called was Mary Grabarkiewicz, who testified that she lived in Milwaukee, Wisconsin, and sustained an accident while going through Axtell, Nebraska, in May of 1932, and was taken to the Brewster Hospital at Holdrege, where she remained six weeks, and then was taken to a private house for further treatment; that, while she had never met or heard of the defendant before, on June 8 he came to Holdrege and solicited her to employ him in her claim for damages, and induced her to accompany him to Omaha in his automobile. She there remained in the St. Joseph Hospital for some time, and later in Stuntz Hall.

That on July 11 she signed an attorney's employment contract, agreeing to pay the defendant 33 1/3 per cent. of any amount recovered. While he had represented to her that he thought he could secure $5,000 damages, yet on August 3 she signed a contract of settlement and release, and a check was thereupon delivered by a Burlington representative for $2,100, payable to "Miss Mary Grabarkiewicz and her attorney, L. B. Goldman," payable at the Continental Illinois Bank & Trust Company or the First National Bank of Chicago. She was induced to indorse this check in blank, and delivered the same to the defendant, who promptly cashed the same. She thereafter telephoned repeatedly to his office, and on those occasions when she reached him was promised several times that he would make settlement with her "tomorrow." Finally, on August 18, he gave her his check for

$1,300 on the Union State Bank of Omaha, adding $100 for her trouble. Payment was refused on the check for want of sufficient funds. On September 24, 1932, Henry J. Beal, county attorney, filed an information against the defendant in the district court for Douglas county for embezzlement of said sum of $1,200.

Another charge was filed against the defendant by the attorney general because of a transaction with a client, Maurice W. Snyder, who sustained injuries about December 21, 1931, while employed as a brakeman near Grand Island, Nebraska, and was solicited to, and did, employ defendant, and is based upon these facts: A check was received in full settlement from the Burlington railroad on May 9, 1932, and the defendant induced his client, Maurice W. Snyder, to indorse the same in blank, and defendant thereupon collected the proceeds thereof, and retained a portion thereof belonging to his client. There was filed in this court on May 18, 1933, an affidavit of said Maurice W. Snyder, setting out that the balance of $550, owed to him by the defendant, has been settled by promissory notes of the defendant, and that the affiant is confident that said notes will be paid in due course, and that the said Snyder is unwilling that the said Goldman be disbarred on account of any transaction with him, which affidavit is sworn to before Herman Corenman, notary public.

After the trial the referee filed his report in this court, embracing his findings of fact and conclusions of law. He found that, although repeated demands were made, the defendant did not pay to Mary Grabarkiewicz the $1,200 due her until after the original complaint was filed in this action, and until after a complaint for embezzlement had been filed against him, and that he failed and refused to pay to his client, Maurice W. Snyder, the sum of $2,100 due from said settlement, and that he had only partially paid the same at the time of the hearing before the referee herein, and was still indebted in a sum in excess of $400 and interest.

With reference to that part of the complaint set out in paragraph 3, the referee finds, in brief, that the defendant, personally and through hired agents, employees, and runners, has continuously made a practice of what is commonly known as "ambulance chasing," being the active and urgent solicitation of contracts for legal services in collecting damages for personal injuries sustained by clients in automobile collisions, railroad wrecks, and other mishaps; that such solicitation has been made by the defendant among persons theretofore having no acquaintance and no personal business or professional conduct with the defendant, and who, but for such solicitation, would not have engaged the services of the defendant as attorney.

The evidence discloses that the defendant, by one pretext or another, succeeded in getting the checks for the payment of clients' damages into his possession, indorsed by his clients, and that his method, as shown by the proof in this case, was then to consider this entirely as a civil debt and, if he could settle the same by post-dated checks or by any subterfuge or inducement or succeed in getting his clients to take his own unsecured notes for the amount justly due them, he considered that such settlement absolved him of any wrong-doing in the matter, and that such settlement, made by checks or notes, even if the same were not collectible according to their terms, changed the obligation to a civil liability on his part, which could not be availed of by the attorney general in proceedings to disbar him.

The matter is not only pending upon the report of the referee, with a motion of the attorney general for judgment thereon, but also upon a motion of the defendant asking for 30 days longer within which to file additional briefs. However, the defendant on May 1, 1934, filed a 29-page brief in his behalf. In this brief he insists that he is presumed to be innocent, and that proof necessary to revoke a license to practice law must be clear and convincing to a reasonable certainty; that is, to be practically

equivalent to proof beyond a reasonable doubt. It is also insisted by the defendant in his brief that, if there is any reasonable doubt from either the law, the rules, the pleading, or the evidence, as to the existence of the power of this court to deprive the defendant of his valuable right to practice law, that doubt should be resolved against the exercise of such authority.

On April 4, 1934, Howard Saxton and John E. Eidam filed their written withdrawal as attorneys for the defendant in this case, and the case was argued to this court on May 7, 1934, by the defendant *pro se* and the attorney general.

Fortunately, cases of this nature are very rare, but when the proof is clear this court has not hesitated to discipline attorneys who have failed to live up to the high standards of the legal profession, and in the past the recommendations of the referees appointed in similar cases have, with rare exceptions, been adopted.

No office offers greater opportunity for honorable service than that of an attorney, and he is required to uphold the ideals of this profession. Into his hands, without bonds, are entrusted the savings of the widow, the inheritance of the helpless orphan, the settlement of estates, and the only guaranty that this trust will be honorably executed by him is the character of the lawyer, as established by his reputation and conduct. As soon as a lawyer so conducts himself that confidence can no longer be placed in him with safety, his usefulness to his clients, the court, and the state has ceased. When he betrays helpless clients, and deprives them of their property, which he was employed to secure, by converting the same to his own use, it matters not what subterfuge he uses, such act will not be countenanced by this court.

In an old case of *Ex parte Bayley,* 9 Barn. & Cress. (Eng.) 691, decided July 3, 1829, Lord Tenterden, the chief justice, said: "I am of opinion that this case is not to be decided by any strict rule of law. The court exercises a jurisdiction over attorneys, and that is to be exercised

according to law and conscience, and not by any technical rules."

"Since the passage of the act of 1895 (ch. 6) the power to license to practice in the courts of Nebraska has been taken from the district courts and lodged exclusively in the supreme court." *In re Admission to the Bar,* 61 Neb. 58.

"This court alone can pass upon the qualifications of applicants for admission to the bar, and has sole power to annul such admission." *In re Disbarment Proceedings of Newby,* 76 Neb. 482. See *State v. Fisher,* 103 Neb. 736.

Our court has held, *In re Newby,* 82 Neb. 235, that disbarment proceedings are not criminal in their nature, but that culpability must be established by a clear preponderance of the evidence; while in *Morton v. Watson,* 60 Neb. 672, this court said that a disbarment proceeding was neither in form nor substance a civil or a criminal action. *People v. Goodrich,* 79 Ill. 148; *State v. Burr,* 19 Neb. 593; *In re Dunn,* 85 Neb. 606; *Boston Bar Ass'n v. Casey,* 211 Mass. 187, 39 L. R. A. n. s. 116, Ann Cas. 1913A, 1226.

It is not essential that a conviction of an attorney for a crime committed be first had as a basis of disbarment on account of the acts charged.

The measure of good faith which an attorney is required to exercise with his client is of a much higher standard than is required in business dealings where the parties trade at arm's length and engage in a battle of wits to outtrade each other, where the advantage is sought and attained at the expense of candor and ofttimes truth.

The burden is on the attorney to show that the transaction is fair and equitable, and that the client is fully informed of his rights and interests in the matter. An attorney cannot withhold from his client information acquired as his attorney and use the same to extort increased compensation from him, and is not allowed to coerce his client into a contract that he would not enter into if he had full information. All dealings between an attorney

and a client who claims to have been wronged are closely scrutinized by the court.

From the moment a client's money comes into the possession of an attorney, it should never be viewed as creating a relation of debtor and creditor, but such money should always be considered by such attorney as trust funds, and promptly paid in full, strictly according to the terms of the contract. 2 R. C. L. 966, sec. 42; *Armstrong v. Morrow,* 166 Wis. 1, Ann Cas. 1918E, 1156; *Berman v. Coakley,* 243 Mass. 348, 26 A. L. R. 92; *Garceau v. McNamara,* 125 Minn. 130; *Moore v. Rochester Weaver Mining Co.,* 42 Nev. 164, 19 A. L. R. 830; *State v. Scoville,* 123 Neb. 457; *State v. Kennedy,* 124 Neb. 789; *State v. Black,* 125 Neb. 382.

Where an attorney receives money belonging to his client, and wrongfully deprives his client thereof by refusing to give it up on the demand of the client, this will be considered as conduct violating the oath of an attorney.

"Misappropriation by an attorney of money belonging to his client is such a disregard of duty as to warrant disbarment." *State v. Priest,* 123 Neb. 241. See *State v. Kennedy,* 124 Neb. 789.

It is the absolute duty of an attorney to notify his client of a collection made on his account, and to make remittance to him, less proper charges, as soon as he reasonably can do so after the receipt of the client's money. The practice of retaining this money, upon one pretext or another, for an indefinite period, deserves the severest censure. *People v. Smith,* 290 Ill. 241.

An attorney is not an officer of the state, in a constitutional or statutory sense of that term, but he is an officer of the court, exercising a privilege during good behavior.

It is well settled that a court which has the power to license attorneys to practice law has inherent power to disbar them from further practice by a judicial act. *In re Greathouse,* 189 Minn. 51.

"The purpose of a disbarment proceeding is not so much to punish the attorney as it is to determine in the

public interest whether he should be permitted to practice." *State v. Priest,* 123 Neb. 241. See *State v. Ireland,* 125 Neb. 570.

This defendant is charged with "ambulance chasing." In examining this matter, we find that the oath required of an attorney for admission to practice law, as set out in section 7-104, Comp. St. 1929, is very simple, and reads as follows: "You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability." And the next section specifically defines the duties which an attorney must discharge, among which we find one in which he agrees to abstain from all offensive practices.

The American Bar Association is a national organization, having a very large membership of leading attorneys from every state in the Union, and it adopted at its thirty-first annual meeting in Seattle, Washington, on August 27, 1908, canons of professional ethics for the purpose of maintaining confidence in the integrity and impartiality of our courts, and setting out in detail the duties of lawyers in the conduct of professional business with their clients, and canon 28, so adopted, reads as follows:

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate

policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred."

We realize that attorneys have often complained that, if they were not aggressive along these lines, the claim agents of certain corporations would have already secured releases from the injured parties. This court cannot discipline laymen, but their unwarranted conduct does not excuse unethical practice on the part of attorneys.

It is insisted that this court has never determined whether "ambulance chasing" is unethical. The conduct of the defendant in this case brings the question squarely before us, and we now hold that such practice is unethical and unprofessional, and subjects such attorney to the discipline of this court. *In re Greathouse,* 189 Minn. 51.

We believe that an order of temporary suspension would be inadequate in this case, and that it would be a grave injustice to other members of his profession to permit defendant to continue to practice law in Nebraska. The referee in this case recommends an order of disbarment, and we approve and confirm the same, and direct that his admission to practice law shall be canceled and annulled, and his name stricken from the roll of attorneys licensed to practice in Nebraska.

JUDGMENT OF DISBARMENT.

DAY, J., concurs in the result.

PERLEY M. GREEN, APPELLANT, V. JOHN A. GARDNER ET AL., APPELLEES.

FILED JUNE 8, 1934. No. 28882.

New Trial. A litigant is not entitled to a new trial on the ground that he has been prevented from procuring a bill of exceptions to effect an appeal, unless he has been so prevented without fault on his part.

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

J. G. Thompson, for appellant.

Herman G. Schroeder, contra.

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

LANDIS, District Judge.

Perley M. Green, plaintiff, instituted this suit to obtain a new trial of an accounting action against John A. Gardner and Hans Hansen (since deceased), on the ground of inability to obtain a bill of exceptions because of the loss of exhibits 10, an invoice, and 16, a note. From a judgment dismissing his action plaintiff appeals.

The final judgment was entered in the accounting action January 22, 1929. In the decree the court specifically mentions exhibits 10 and 16, determines the rights of the parties with respect thereto, and appoints a receiver to take charge of the remaining assets of the company. On January 26, 1929, Green's motion for new trial was overruled. Shortly thereafter the court reporter was advised by attorneys representing each side that no appeal would be taken and at that time each party received a return of their respective exhibits. September 7, 1929, the receiver filed his final report. September 24, 1929, the court approved the report. October 24, 1929, judgment of distribution of the moneys in the receiver's hands was entered. October 24, 1929, appellant filed a motion for new trial, which was overruled, and the receiver pro-

ceeded to execute the judgment by paying out the sums as ordered.

Appellant failed to appeal from the final judgment of January 22, 1929, but through his attorney announced his intention not to do so, thereby permitting the return of exhibits which are lost. Now by independent suit he seeks a new trial. There is no showing of fraud or accident whereby he was deprived of his constitutional right to be heard in the court of last resort and that he himself was without fault. Instead of timely and proper assertion of legal rights, he seems to have decided not to assert them and then, after the litigation is determined, acted upon and finished, to have changed his mind. A person may be litigious with no grievance to redress in court.

Appellant having failed to show grounds for equitable relief, the judgment entered by the trial court is right, and is

AFFIRMED.

BESSIE GLICK, ADMINISTRATRIX, APPELLEE, V. STATE AUTOMOBILE INSURANCE ASSOCIATION, APPELLANT.

FILED JUNE 8, 1934. No. 28979.

1. Garnishment. Provision in liability insurance policy that, "in the event a suit * * * shall be begun * * * by virtue of this contract, such suit * * * shall be brought only against the Automobile Underwriters of Des Moines, Iowa, attorney in fact, * * * but no suit * * * shall be begun or maintained, however, unless said attorney in fact shall have heretofore been given ten days' notice in writing of the intention to bring such suit * * * under this contract," *held* not binding on judgment creditor of insured, and not to preclude such creditor from proceeding in garnishment against said association after judgment against insured on account of injuries resulting from automobile accident, and execution has issued and been returned unsatisfied.
2. Evidence examined and *held* sufficient to sustain verdict.

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

Chambers & Holland, Allen & Requartte and *George B. Boland,* for appellant.

Richard F. Stout, Herbert W. Baird and *Frederick J. Patz, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

LESLIE, District Judge.

This action is an appeal from answer of defendant as garnishee in the case of Glick v. Poska, in the district court for Lancaster county.

Plaintiff alleges that on the 8th day of April, 1930, she commenced an action in the district court for Lancaster county against one Bert Poska for recovery of damages for the wrongful death of her husband, Clarence T. Glick, in an automobile accident in Lincoln, March 3, 1930; that judgment was entered in favor of plaintiff December 17, 1930; that defendant appealed therefrom to this court without supersedeas bond; that subsequently execution issued and was returned unsatisfied; that, while said case was pending in the supreme court, garnishment issued against defendant insurance association, and that it made answer that it issued a policy of liability insurance to the defendant Poska, but that it had no property, credits, or assets in its possession belonging to said judgment debtor. From this answer plaintiff appealed, and in her petition alleged that defendant garnishee was at said time indebted to said judgment debtor in the sum of $10,000 on account of its contract of insurance issued to said debtor.

Defendant, by its answer to plaintiff's amended petition, admits that it issued a policy of liability insurance to Poska, and that the plaintiff recovered judgment against him in the sum of $11,000 for the accidental death of her husband in an automobile accident; that an appeal was taken from said judgment to the supreme court by said

defendant Poska; that no supersedeas bond was filed, and that, while said case was pending on appeal in the supreme court, garnishment summons was served upon the defendant, and its answer was that it had no property in its possession belonging to the said Poska.

For further answer the defendant alleges that plaintiff is not entitled to recover under the terms of its policy issued to said judgment debtor, Poska.

Defendant alleges also that on the 5th day of May, 1931, the said Poska filed suit in the district court for Lancaster county against defendant insurance association for reformation of policy; that said cause was removed to the United States district court, Lincoln division, and that it was determined by said court on the 14th day of March, 1932, that the said Poska was not entitled to reformation of the policy of liability insurance; that the judgment in said cause has not been reversed, but that an appeal has been taken by said Poska to the United States circuit court of appeals, and is still pending.

Trial was had to a jury and verdict was for the plaintiff in the sum of $11,662.66. Subsequently the court, on motion of plaintiff, allowed her attorneys a fee of $1,400, to be taxed as part of the costs. From this judgment defendant appealed to this court.

Numerous assignments of error are relied upon by the defendant for reversal of the judgment. These assignments have been carefully reviewed by the court, but it is only necessary to discuss (1) the legal effect upon this case of the pendency of the proceeding in the federal court; (2) the provisions of the policy which it is contended by the defendant insurance association precludes plaintiff from maintaining this action; and (3) the sufficiency of the evidence.

We shall consider first the legal effect of the proceeding pending in the United States district court. In that case the judgment debtor, Poska, brought suit in equity against this defendant in the United States district court to reform the policy to conform to the alleged

oral understanding of the parties as to what the terms of the policy were to be as to the extent of coverage. Poska contended in his petition that he made application to the agent of defendant insurance association for a policy that would indemnify him against loss by any person not employed by the assured from accidents occurring by reason of the operation of any automobile owned by the said plaintiff and while used for business or pleasure purposes; that the defendant insurance association, through its agent, agreed to write such a policy, and at the time of the delivery of the policy in question to Poska gave him assurances that by the terms thereof he was given general coverage, regardless of whether insured was using the automobile in connection with his business or otherwise.

By the language of the policy the judgment debtor was given only limited coverage, the policy reading that the assured is indemnified "against loss from liability * * * from accidents occurring while this policy is in force and caused by reason of the * * * operation * * * or use of any automobile * * * incidental to and necessary in the conduct of the business of the assured." The United States district court found that the evidence did not justify reformation of the policy, and plaintiff's bill was dismissed. An appeal, however, was taken to the United States circuit court of appeals. Plaintiff Glick, Administratrix, was not a party to these proceedings in the United States courts; but, quite apart from this, in the instant case judgment was rendered in the district court for Lancaster county before the case of Poska v. State Automobile Insurance Association was filed in the United States district court. In the proceeding in the United States district court it was sought merely to reform the policy to conform to what the insured claims was the oral agreement as to the extent of protection the insured judgment debtor would have under the policy. In the instant case the trial court submitted to the jury, by appropriate instructions, whether at the time of the accident the in-

sured was using the car incidental to the conduct of his business, and also the following special interrogatories:

"Was Bert Poska driving his automobile at the time of the accident * * * on business incidental to the conduct of the garage business? Answer: Yes."

"Did Bert Poska and * * * the agent of the defendant * * * definitely * * * agree that the policy of insurance * * * should insure Bert Poska while operating automobiles for pleasure? Answer: No."

Clearly the case in the federal court could not, by the application of any known rule of law, have any bearing upon the instant case. If the court, instead of refusing to reform the contract, had reformed it, and the trial had been had in the state court subsequent instead of prior to such reformation, the status of the parties in the instant case would not have been changed in the least, and the case would have been submitted upon the same issues and instructions. Defendant concedes that, if the car was being used by insured at the time of the accident in connection with the business of his garage, defendant would be liable. The jury specifically found that the automobile was being so used by insured, and their verdict was for plaintiff upon that theory. The judgment against the insured not having been superseded, and execution against judgment debtor having been returned unsatisfied, plaintiff was entitled, so far as the pendency of any other litigation was concerned, to maintain this action against the insurance association.

We will next consider the provision of the policy which defendant urges in support of its contention that plaintiff cannot maintain this action. It is, in substance, as follows:

"In the event a suit or other proceeding at law or in equity shall be begun * * * under or by virtue of this contract, such suit or proceeding shall be brought only against the Automobile Underwriters of Des Moines, Iowa, attorney in fact, * * * but no suit or proceeding shall be begun or maintained, however, unless said attorney

in fact shall have heretofore been given ten days' notice in writing of the intention to bring such suit or proceeding under this contract."

Defendant contends that this action is not maintainable against the defendant because of this provision of the policy. Whether this provision of the policy is enforceable as between the assured and the insurance association, it is not necessary to determine. Obviously, it is not binding on a judgment creditor in a proceeding of this character. To hold to the contrary would be to say that the insurance association and the insured could by agreement between themselves limit or regulate the manner by which funds belonging to the judgment debtor, in possession of the defendant, could be attached.

The only other assignment of error which we need discuss is the sufficiency of the evidence. The deceased was employed as a switchman by the Burlington Railroad Company at Lincoln. On the night of the accident resulting in his death, he was at home until 10 o'clock on account of a party that was being given in honor of the anniversary of the marriage of deceased and his wife. Poska was in attendance at the gathering. About 10 o'clock deceased was called to report for service. Bessie Glick, wife of deceased, testified as follows: "Q. Mrs. Glick, do you recall the evening that this fatal accident occurred? A. Yes, sir. * * * Q. What is the fact whether Bert Poska was there that evening? A. He was. * * * Q. Mrs. Glick, what is the fact as to whether * * * your * * * husband * * * had been negotiating with anybody for the purchase of an automobile? A. He had. Q. With whom? A. With Mr. Poska. * * * Q. And over what period of time? A. Oh, for two or three months, I should say. * * * Q. When do you recall the first time that you heard any conversation between Bert Poska and your husband with reference to the purchase of an automobile? A. Soon after we received a judgment for his accident. * * * Q. Mrs. Glick, did you have other conversations or were you present at other conversations with Mr. Poska

and your husband with reference to the purchase of an automobile? A. Yes, sir; I was. Q. And when did that occur? A. Oh, at numerous times, and especially that night. * * * Q. Go ahead and state the conversations you were present at and heard. * * * A. I was in the kitchen preparing my husband's lunch. Mr. Poska came out to the kitchen for a drink, and he and my husband started talking about this car, and he turned to me and says, 'I am going to sell your husband a car to-night.' My husband said, 'How about the knock that was in it yesterday?' And Mr. Poska said that he had that taken care of that very day and he would show him that night. And I argued with them; I didn't want my husband to put up that much money into the car, and before he left the kitchen I told him I didn't want him to." Other witnesses testified to hearing the deceased, Poska and Mrs. Glick talking. Poska testified that he had, prior to the night of the accident, been trying to sell the car he was driving that night to Glick. He denied, however, that he had talked to him about the matter that evening. He also testified that Glick, who was a brother-in-law, asked him to take him to the station or the yards, but denied that anything was said between them after leaving the house relative to the car. We think the cause was properly submitted to the jury for its determination, and that the evidence is sufficient to sustain the verdict.

A fee of $400 will be allowed attorneys for appellee for services rendered in this court, and the amount allowed by the trial court for services rendered there will not be disturbed.

Finding no error in the record, the judgment of the trial court is

AFFIRMED.

L. P. LARSON REAL PROPERTY COMPANY, APPELLEE, V. NORRIS-LYDDON PRODUCE COMPANY, APPELLEE: LUEHRS-CHRISTENSEN LUMBER & COAL COMPANY, APPELLANT.

FILED JUNE 12, 1934. No. 28998.

Mortgages: MECHANICS' LIENS: PRIORITIES. Except in cases where the vendor himself promotes the improvement or causes it to be made, the lien of one who furnishes material for the repairs and alteration of a building upon land in the possession of the vendee under an executory contract of purchase is subordinate to the lien of the vendor who retains the legal title to secure deferred instalments of the purchase price. *West v. Reeves*, 53 Neb. 472.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

Howard W. Loomis, contra.

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

GOSS, C. J.

The decree postponed the mechanic's lien of Luehrs-Christensen Lumber & Coal Company, herein called the cross-petitioner, until the sale should first satisfy plaintiff's two mortgages. Cross-petitioner appealed.

The evidence shows that on or about November 19, 1931, plaintiff sold to defendant certain lots on which was located a vacant building, and put defendant in possession. The terms were set forth in a written contract, a copy of which was retained by each party. But at the time of the trial both copies had been lost and so there was some oral testimony as to their contents. On April 1, 1932, in pursuance of the contract, plaintiff deeded the property to defendant and defendant gave plaintiff two purchase money mortgages on the property, one to secure a note for $5,000, due December 1, 1936, the other to secure a note for $11,500, payable in 116 monthly pay-

ments of $138 each. On failure to pay interest on the first mortgage and to keep up the payments on the second, this suit resulted. Defendant did not answer, though served, but defaulted. There is no dispute as to the amount to be due on the mortgages of plaintiff or on the lien of cross-petitioner.

Plaintiff and defendant had agreed that plaintiff should install an elevator and its cost was included in the purchase price of the real estate. It was installed by plaintiff's own contractor soon after the possession of the real estate was turned over to the defendant.

On the day the contract of sale was signed, defendant engaged cross-petitioner to furnish whatever materials it would need to make repairs and alterations contemplated by it to make the building suitable for its purposes. It employed its own contractor for that work. There was nothing in the contract of sale of the property requiring defendant to make any repairs and alterations. Plaintiff's contractor did not take out any separate city building permit to install the elevator, but on November 21, 1931, defendant's contractor, Hansen, made application "for a permit to repair a factory building (install elevator, stairs and partitions)," describing the property involved, and the building inspector recommended that a permit be granted. In the testimony and briefs both parties assume that the permit was granted, but we do not find the permit in the evidence. We assume that it was issued. Hansen testified that he and Sorman, plaintiff's contractor, took the permit jointly because their work was on the same building. He makes it clear that Sorman's contract was only to install the elevator for plaintiff and he, Hansen, did all the other work for defendant and that there was no other dealing between them or in the execution of their contracts other than the matter of the permit. Plaintiff had no connection with the permit and no knowledge of it, did not purchase any materials from cross-petitioner for the repairs and alterations, and did not authorize their purchase, receive them

or supervise their use. In fact, defendant had possession and dominion of the property under the executory contract of sale from November 19, 1931, which ripened into a deed on April 1, 1932, executed and delivered in compliance with and according to the terms of the contract. In carrying out that contract the mortgages in suit were made and delivered by defendant and became liens on the property.

The mortgages were given to pay the purchase price of the real estate. In the syllabus to *West v. Reeves*, 53 Neb. 472, Judge Sullivan said: "The lien of a person who furnishes material for the erection of a house upon land in possession of the vendee under an executory contract of purchase is subordinate to the lien of the vendor who retains the legal title to secure deferred instalments of the purchase price, except in cases where the vendor himself promotes the improvement or causes it to be made." In the body of the opinion he wrote: "This conclusion is sustained by the following decisions: *Birdsall v. Cropsey*, 29 Neb. 672; *Irish v. Lundin*, 28 Neb. 84; *Pickens v. Plattsmouth Investment Co.*, 37 Neb. 272; *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719."

The materials furnished by the cross-petitioner from November 19, 1931, to April 1, 1932, were subject to plaintiff's executory contract for the sale of the property and those furnished from April 1, 1932, to October 3, 1932 (which was the last item on the lien), were subject to the liens of plaintiff's purchase money mortgages, contemplated by and given in pursuance of the executory contract.

A few days before the decree was entered the cross-petitioner filed an application requesting the court to require the sheriff to lease the premises involved under the provisions of sections 52-106 and 52-107, Comp. St. 1929. These statutes are in no way applicable to the facts here.

The judgment of the district court is

AFFIRMED.

SEGREE JOHNSON ET AL., APPELLEES, V. MARY E. KINDIG ET AL., APPELLANTS.

FILED JUNE 12, 1934. No. 28837.

1. **Principal and Agent.** In a suit to foreclose a mortgage, a mortgagor pleading payment to a person who is neither mortgagee nor the latter's assignee has the burden of proving that payment was made to an agent authorized to receive it.
2. ———. The mere fact that a loan broker collected interest on bonds and turned it over to the bondholder may be a circumstance tending to prove agency to do so but does not of itself prove authority to collect the principal.
3. ———. In a suit to foreclose a mortgage, the mere fact that a loan broker collected a partial payment on the principal debt and subsequently delivered the money to the creditor does not necessarily establish agency to collect payment in full.
4. **Estoppel.** "Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566.
5. **Principal and Agent.** Preponderance of evidence *held* to prove that loan brokers who had collected interest and a partial payment on a bond secured by mortgage and had subsequently turned the collected money over to the bondholder was not authorized as agent to receive payment in full.
6. **Interest.** Lawful interest, where the rate is not fixed by statute, is the subject of contract as limited by law, and is not allowable at a different rate by a court of equity.

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

Charles E. Bruckman and *L. S. Dunmire*, for appellants.

Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

ROSE, J.

Segree Johnson and Ella O. Whitnak, plaintiffs, sued Mary E. Kindig, William Delehunty, Francis L. Young-

blood, Villa Lucier and Albertena Junker, defendants, to foreclose a mortgage on 80 acres of land in Adams county. Mary E. Kindig, widow, defendant, was the sole mortgagor, and in an answer to the petition she pleaded payment out of proceeds of a second mortgage on the same land. The other defendants, with the exception of Youngblood, who is a nominal party only and not hereinafter considered a defendant, alleged they owned the second mortgage and prayed for a decree satisfying the first mortgage and adjudging the second mortgage to be the first lien.

This case is one of a lamentable series in which loan brokers received and embezzled funds entrusted to them for the payment of debts secured by mortgage. It belongs to a class of cases in which the court is powerless to relieve both of two adverse litigants from losses caused by the fraud of third persons. The controlling question presented by the pleadings is: Were the loan brokers agents who were authorized to receive payment for the holders of the bonds secured by the first mortgage?

Upon a trial of the cause the district court decreed that the first mortgage was the first lien on the 80 acres of land described in the petition and that the second mortgage was the second lien. Foreclosure of the first mortgage was ordered. Defendants appealed and plaintiffs took a cross-appeal, claiming more interest than the district court allowed.

The only mortgagor, Mary E. Kindig, defendant, executed two bonds November 28, 1921, due five years thence, one for $2,000 and the other for $1,000. Ernest Hoeppner was named payee in both bonds which were secured by a mortgage on 80 acres of land in Adams county. The mortgage was duly recorded. Payee assigned both bonds and the mortgage securing them to Svend Johnson February 4, 1922. Mortgagor paid $500 on the debt May 19, 1925. By means of an extension agreement between her and the assignee, dated November 17, 1926, the time for the payment of the remainder of

$2,500, was extended to November 28, 1931. On November 28, 1926, assignee, Svend Johnson, died. By his will Segree Johnson, widow, and Ella O. Whitnak, daughter, plaintiffs, became owners of the bonds secured by the first mortgage, reduced, as the debt was, to $2,500.

For the purposes of paying her debt of $2,500, and borrowing additional money, the same mortgagor, Mary E. Kindig, procured from Hoeppner & Uerling, December 19, 1930, a 3,800-dollar loan, evidencing the new debt by three 1,000-dollar bonds and one 800-dollar bond, all secured by a new mortgage for $3,800 on the same 80-acre tract described in the first mortgage. The four new bonds and the second mortgage were payable to Youngblood, who, December 29, 1930, assigned two of the 1,000-dollar bonds to William Delehunty, defendant, the other 1,000-dollar bond to Villa Lucier, defendant, and the 800-dollar bond to Albertena Junker, defendant.

From the proceeds of the 3,800-dollar loan, mortgagor, Mary E. Kindig, paid to Hoeppner & Uerling the amount of the unpaid debt and interest due on the bonds secured by the first mortgage, but they never turned the money over to plaintiffs. The loan brokers, however, did pay to plaintiffs the interest on the principal debt until the brokerage firm went into the hands of a receiver March 2, 1932, on account of insolvency.

Plaintiffs, who own the bonds secured by the first mortgage, never received payment of the debt owing to them by mortgagor and the first mortgage has never been satisfied of record. Plaintiffs never surrendered their bonds or their mortgage to mortgagor nor to any one for her and still hold them. Foreclosure of this first mortgage is the relief sought by plaintiffs.

The burden was on mortgagor and the defendants who are holders of the bonds secured by the second mortgage to prove that payment of the bonds secured by the first mortgage was made to some one authorized to receive it. *Davis v. Polak,* 126 Neb. 640. There was no direct evidence that Hoeppner & Uerling had authority to receive

payment for plaintiffs, but it is contended that circumstantial evidence proved ostensible authority upon which mortgagor had a right to rely. It is true the loan brokers were engaged in lending money, in selling bonds and in collecting for holders of securities interest and principal; that mortgagor paid them semiannual interest as coupons therefor matured; that a payment of $500 on the principal was made; that an extension of time for payment of the first mortgage was executed; that plaintiffs indirectly received the benefit of such payments. It does not follow, however, that a preponderance of the evidence proves that Hoeppner & Uerling had authority from plaintiffs to receive for them the unpaid principal. The mere fact that a loan broker received interest on bonds and turned it over to the bondholder may be a circumstance tending to prove agency to do so, but does not necessarily prove authority to collect the principal. *Conroy v. Garries,* 126 Neb. 730. Neither does the mere fact that a loan broker received a partial payment on the principal debt and subsequently delivered the money to the creditor establish agency to collect payment in full. All the facts and surrounding circumstances must be considered. A familiar rule of equity which has been stated by courts in different forms reads as follows:

"Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.,* 104 Neb. 566. See, also, *Rehmeyer v. Lysinger,* 109 Neb. 805; *First Nat. Bank v. First Nat. Bank,* 111 Neb. 441; *Deleski v. Peters Trust Co.,* 115 Neb. 547; *Nebraska State Bank v. May,* 117 Neb. 262.

Who incautiously trusted the perpetrators of the wrong? From whom did the loan brokers procure the means to defraud innocent third persons? Who, by observing the law and exercising ordinary business judgment, could

have prevented the fraud and the resulting injuries? Equity raises these questions. Mortgagor knew, when parting with her money, that Ernest Hoeppner, mortgagee, did not then own the bonds or have them in his possession. On their face they were not payable at the office of Hoeppner & Uerling, but at Hastings. Mortgagor admitted she trusted Hoeppner. She trusted her son Arthur to make for her payments of interest and principal. When he paid an instalment of interest, he did not get the interest coupon evidencing the amount due. He knew the interest coupons were not then in possession of Hoeppner & Uerling and that it took several days after a payment to get the interest coupon. He knew also that the loan brokers did not have the bonds and he never received them. He accepted from Hoeppner & Uerling a receipt for his mother's money, instead of the bonds, with the knowledge of himself and his mother that they had been assigned to Svend Johnson. The son knew that business usage required him to get the bonds when paying the principal, because he asked for them at the time and was told it would take some time to get them. He thus incautiously put into the hands of the loan brokers, his own agents, the means of embezzlement and of the resulting injury to the holders of the unpaid bonds secured by both mortgages. He and his mother had not been informed of the actual business relations existing between the loan brokers and the holders of the bonds and were not justified, under the circumstances disclosed by the evidence, in assuming the former's authority to act for the creditors in collecting the unpaid debt. Implications of ostensible authority were overcome by probative evidence that mortgagor and her son made Hoeppner & Uerling their own agents to seek the holders of the bonds, to make payment, to get the bonds, to release the first mortgage of record and to return the papers to the debtor.

Plaintiffs, the holders of the bonds secured by the first mortgage, did nothing to mislead mortgagor or the hold-

ers of the bonds secured by the second mortgage into believing that Hoeppner & Uerling were authorized as agents to make the collections. The first mortgage stood on the public records unsatisfied. The assignment thereof had been duly recorded. Plaintiffs kept possession of their unpaid bonds and their unpaid interest coupons. They did not surrender a bond or a coupon until it was paid. They did not trust the loan brokers with any unpaid bond or unpaid interest coupon in these transactions or mislead defendants into assuming the agency upon which they now rely. The trial court, therefore, made no mistake in decreeing the first mortgage to be in full force and to be the first lien and the second mortgage to be the second lien on the land described in the first mortgage. It follows that defendants are not entitled to any relief on their appeal.

The cross-appeal of plaintiffs, however, discloses an error to their prejudice in the failure to allow them all the interest authorized by contract and statute. Lawful interest, where the rate is not fixed by statute, is the subject of contract as limited by law, and is not allowable at a different rate by a court of equity. Comp. St. 1929, secs. 45-101 and 45-103; *Havemeyer v. Paul*, 45 Neb. 373; *Connecticut Mutual Life Ins. Co. v. Westerhoff*, 58 Neb. 379; *Portsmouth Savings Bank v. Yeiser*, 81 Neb. 343; *Calloway v. Doty*, 108 Neb. 319. The cross-appeal is sustained, the judgment reversed as to interest and otherwise affirmed and the cause remanded for the specific purpose of correcting the error by allowing interest according to contract and statute.

JUDGMENT ACCORDINGLY.

CARRIE M. KNOPF, APPELLEE, V. EDWIN E. PERKINS ET AL., APPELLANTS.

FILED JUNE 12, 1934. No. 28838.

1. **Principal and Agent.** "One who pays a negotiable bond secured by mortgage to the mortgagee who does not have possession of the bond has the burden of proving the authority of such mortgagee to receive payment." *Davis v. Polak*, 126 Neb. 640.
2. **Bonds: PAYMENT.** "Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment." *Davis v. Polak*, 126 Neb. 640.
3. **Estoppel.** "Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566.
4. **Principal and Agent.** Preponderance of evidence *held* to prove that a loan broker who had collected interest on a negotiable note secured by mortgage and had turned the collected money over to the holder of the note was not authorized as agent to receive the principal.

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

Charles E. Bruckman and *L. S. Dunmire*, for appellants.

Stiner & Boslaugh and *Edmund P. Nuss, contra.*

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

ROSE, J.

This is a suit to foreclose a 10,000-dollar mortgage to the extent of $2,100 on lots 16 and 17, block 24, city of Hastings. The mortgage was executed September 22, 1927, by defendants, Edwin E. Perkins, Kizzie Perkins, David M. Perkins and Kittie M. Perkins, mortgagors, to secure several negotiable notes aggregating $10,000, maturing September 22, 1932. The notes were payable to the order of Ernest Hoeppner at the office of Hoeppner

& Uerling, and Hoeppner was named in the mortgage as mortgagee. The notes were sold to different persons. By mesne assignments plaintiff became the owner and holder of a 2,100-dollar note in the series. September 22, 1930, defendants paid Hoeppner & Uerling, the loan brokers, $10,300, the sum of the entire principal debt and unpaid interest. The loan brokers paid each bondholder his due with the exception of plaintiff who received nothing. Her portion of the payment or the sum of $2,100 was appropriated by the loan brokers to their own use. They went into the hands of a receiver March 2, 1932. Plaintiff brought this suit to enforce payment of her note by foreclosure of the mortgage securing it.

Mortgagors, defendants, pleaded payment in full to Hoeppner & Uerling at their office September 22, 1930, without notice or knowledge that any one else owned any of the notes, and alleged that payment was so made with the promise of Hoeppner & Uerling to cause the mortgage to be satisfied of record, and that Hoeppner & Uerling were either owners and holders of the notes or were acting as agents for the owners and holders with power to collect both principal and interest.

Upon a trial of the cause the district court found that Hoeppner & Uerling received from mortgagors for plaintiff $2,100 and misappropriated the same and were at the time agents for both plaintiff and mortgagors; that the loss occasioned by the misappropriation of $2,100 should fall equally on creditor and debtors. Mortgagors were ordered to pay plaintiff $1,135 within 90 days and upon failure to do so foreclosure was ordered. Mortgagors appealed, insisting on satisfaction of the mortgage, and plaintiff took a cross-appeal, contending for payment of her 2,100-dollar note in full with interest and for an order of foreclosure in the event of default.

The principal question presented by the record is raised by the issue as to the agency of Hoeppner & Uerling to receive for plaintiff payment of the principal debt evidenced by her note which was negotiable and transferable

by indorsement and delivery. When the makers and mortgagors put $10,300 in the hands of the loan brokers, or mortgagee, to pay their entire loan, plaintiff's note by its own terms had not yet matured and was not in their possession. The exercise of an option to make payment at that time was necessary. Under the circumstances the burden was on the makers and mortgagors to prove authority of Hoeppner & Uerling to receive payment. *Davis v. Polak,* 126 Neb. 640. In the case cited it was held:

"Ordinarily, no duty rests upon the indorsee or holder of a negotiable note or bond to notify the maker of such ownership; but the duty is upon the maker to seek out the holder of such instrument when making payment."

There was no direct proof of agency for the purpose of receiving payment. It is true that both principal and interest were payable at the office of Hoeppner & Uerling, but this did not prove they were agents of plaintiff. Interest coupons were attached to plaintiff's note. She kept all of them in her possession and did not surrender any unpaid coupon or the unpaid note. To the debtors the loan brokers gave notice in advance when an instalment of interest on the principal debt of $10,000 would become due and interest thereon was paid promptly to them at their office, but the evidence does not show that plaintiff had knowledge of such notices. Interest coupons were not surrendered when paid by mortgagors to Hoeppner & Uerling but were returned to the debtors at a later date. When an interest coupon attached to plaintiff's note matured she detached it, took it to the office of Hoeppner & Uerling, received payment and surrendered it. She would naturally go there for her interest, because it was payable there according to the terms of the contract. To her it was immaterial whether interest was paid personally by the debtors or by some one for them. In the answer to the petition it was alleged that payment was made to Hoeppner & Uerling under their promise to cause the mortgage to be satisfied of record and that they

were either owners of the notes or agents of the owners with power to collect both principal and interest. Edwin E. Perkins, one of the makers of the notes and a mortgagor, according to his own testimony, told Uerling that he had left a check for $10,300 with a girl in the office and would like to have the abstract brought down to date and the mortgage released, assuming it was there. This mortgagor in making the payment did not demand the note; did not ask for the mortgage; did not inquire if Hoeppner & Uerling still owned the paper; knew the notes were negotiable and transferable by indorsement. It seems clear from the evidence and surrounding circumstances that mortgagors made Hoeppner & Uerling their agents to pay their debts to the creditors and to procure the satisfaction of the mortgage. Mortgagors themselves incautiously furnished the means and the opportunity for the embezzlement. Plaintiff did nothing to lead them into believing that Hoeppner & Uerling were her agents with authority to receive for her payment of the principal debt evidenced by her note. If mortgagors had exercised the same caution and business judgment in making payments and had refused to part with their money until the notes were surrendered according to law and business usage, there would have been no loss as the result of embezzlement which occurred after Hoeppner's death in June, 1930. The loss should fall on mortgagors, according to the better view of the evidence and the following rule of equity:

"Where one of two parties to transactions must suffer a loss through the misconduct or the wrongs of a third person, the superior equities will be determined from all of the material circumstances, and the burden will be allowed to fall where equity and justice place it." *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566.

The judgment is reversed and the cause remanded to the district court, with directions to enter a decree of foreclosure in favor of plaintiff for the full amount of her claim, including the interest provided by the contract.

REVERSED.

RALPH BURNHAM V. STATE OF NEBRASKA.

FILED JUNE 12, 1934. No. 29042.

1. **Criminal Law**: PLEA IN ABATEMENT: BILL OF EXCEPTIONS. A bill of exceptions, duly settled and allowed, preserving the evidence introduced on the hearing of issues of fact formed by a plea in abatement in a criminal case and the state's answer thereto, is a prerequisite to a review of the action of the trial court in overruling such plea.
2. ———: ———. "Matters cannot be presented by plea in abatement which are triable under a plea of not guilty." *State v. Bailey*, 57 Neb. 204.
3. ———: FORMER CONVICTION: PROOF. Where the statute authorizes an increased penalty upon a second or subsequent conviction, the record of the former conviction in the proper court is, of course, admissible to establish such conviction.
4. ———: ———. The admission of proper evidence of such previous conviction on the trial of a criminal offense charged, so as to involve increased penalties upon a second or subsequent conviction, and submission thereof to the trial jury with appropriate instructions by the trial court, is approved.

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

George W. France, for plaintiff in error.

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

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

EBERLY, J.

This is an appeal by Ralph Burnham from a conviction and sentence, as for a second offense, under the provisions of section 53-103, Comp. St. 1929. Plaintiff in error, who will hereafter be referred to as defendant, presents but two assignments of error in his brief for our consideration, viz.: "1. The court erred in overruling the defendant's plea in abatement. 2. The court erred in permitting the state to introduce in evidence before the jury the records of the district court tending to prove the prior conviction."

As to the first assignment of error, it may be said that on September 19, 1933, the defendant filed in this case, then pending in the district court for York county, his plea in abatement challenging the sufficiency of the information theretofore filed for the reasons therein set forth, which included allegations that the sentence imposed for the offense charged in the information as the "first or previous conviction" was void.

To this plea the state thereupon filed an answer in which it was alleged that the state of Nebraska, "for reply to the plea in abatement of the defendant filed herein, denies every allegation, averment and conclusion set forth in said plea except as shown by the records of this court."

The issue thus formed was tried to the court on September 21, 1933, and "evidence taken and matter argued by counsel, and the court takes the matter under consideration."

On September 25, 1933, "The court, after careful consideration of the evidence and the pleadings, * * * finds for the state and against the defendant." But the evidence adduced by the parties and considered by the court, in determining issues presented by the plea in abatement and the answer thereto, is not preserved in the bill of exceptions.

To review a decision of the trial court upon appeal in a criminal case upon a question of fact, where evidence was submitted and considered, it is essential that such evidence be preserved in a proper bill of exceptions, duly settled and allowed.

It follows, therefore, that defendant's first assignment of error may not be considered.

However, it may be said that the facts as alleged which defendant relied on to sustain his plea in abatement (being the claimed invalidity of the conviction for the "first offense" as set forth in the state's information) are wholly insufficient. This is true for the reason that the validity of the "first conviction" thus challenged by the defendant's plea in abatement was properly triable under

the issue of "not guilty." We are committed to the rule that "Matters cannot be presented by plea in abatement which are triable under a plea of not guilty." *State v. Bailey*, 57 Neb. 204.

The defendant's second assignment of error in his brief is based on the contention that the records of the clerk of the district court of the alleged and supposed prior conviction should not have been offered or introduced in evidence before the jury, and that, when the issue is presented as to whether there has been a prior conviction, it is a question of law to be determined by the court alone and without the intervention of a jury.

The rule established by the authorities is: "Where the statute authorizes an increased penalty upon a second or subsequent conviction, the record of the former conviction in the proper court is of course admissible to establish the former conviction." 7 Ency. of Evidence, 758.

The allegation of a prior conviction, in the present information, was a material allegation. It was traversed by defendant's plea of "not guilty." By this plea an issue of fact was created which imposed on the state the burden of presenting to the triers of fact, the jury, a proper judicial record disclosing a conviction and sentence, and identifying the defendant in the instant case as a defendant in the record thus introduced. The sufficiency of this evidence was necessarily, under proper instructions of the trial court, to be submitted to the jury for determination, and the district court committed no error in so doing.

The two assignments of error heretofore discussed constitute all that appear in defendant's brief, properly set forth as required by our rules. Such rules require that the brief of the appellant shall set out particularly the errors asserted, and the assignment not so made and definitely discussed in the brief will not ordinarily be considered. *Mauder v. State*, 97 Neb. 380.

It follows that, no error appearing in the record, the judgment and sentence of the trial court is correct, and is

AFFIRMED.

R. O. BROWNELL, RECEIVER OF THE BANK OF WATERLOO, APPELLANT, V. C. A. SUNDERLIN ET AL., APPELLEES.

FILED JUNE 12, 1934. No. 28849.

Case Followed. This case is ruled by *In re Estate of Wilson, ante*, p. 106, to which reference is made for discussion of the principles of law involved.

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

F. C. Radke, Barlow Nye, James H. Hanley and *Thomas J. O'Brien*, for appellant.

Abbott, Dunlap & Corbett, contra.

Heard before ROSE and PAINE, JJ., and LIGHTNER, REDICK and THOMSEN, District Judges.

REDICK, District Judge.

Action by the receiver of a failed bank against the stockholders to recover upon their double liability. The petition alleges the appointment of plaintiff as receiver and that one James C. Robinson and others were stockholders at the time of the failure; that James C. Robinson died May 2, 1928, and the defendants L. R. Robinson and E. T. Robinson were duly appointed administrators of his estate by the county court of Douglas county, Nebraska; that November 28, 1928, was fixed as the last day for filing claims, and that on said date an order was entered barring all claims not filed; that no application was ever made for an extension of time for filing claims, and that no claim, either absolute or contingent, has been filed in said estate by the plaintiff herein or any one on his behalf, and that final decree was entered in the estate January 31, 1930, assigning the property of the estate to the heirs and discharging the administrators; that all corporate property of the bank has been exhausted, and that there still remains unpaid of its debts and liabilities the sum of $37,860.30, and prayed judgment against defendants in an amount equal to the par value of the

capital stock held by them. The defendants L. R. and E. T. Robinson, administrators, filed a demurrer to the petition on the ground that the same did not state facts sufficient to constitute a cause of action in favor of the plaintiff. The demurrer was sustained and, the plaintiff declining to proceed further, the action was dismissed, and plaintiff appeals naming said administrators appellees.

The only question presented for decision, by the record, is whether or not the liability of a stockholder in a bank while it is a solvent and a going concern is a contingent claim required to be filed against the estate of a deceased stockholder within the period fixed by the county court for filing claims. This question was thoroughly discussed, and decided by this court adversely to the contention of appellees, in the recent case of *In re Estate of Wilson, ante,* p. 106. In accordance with the principles laid down in the above case, the decree of the district court is reversed and the cause remanded, with instructions to the district court to enter judgment that the claim of plaintiff has become absolute, and for all other relief to which he may be entitled.

REVERSED.

E. A. SHRIVER, APPELLANT, V. IRA T. SIMS ET AL., APPELLEES.

FILED JUNE 12, 1934. No. 28839.

1. **Principal and Agent: AUTHORITY OF AGENT.** Ordinarily, an agent for collection of a debt secured by a mortgage is not impliedly limited in the method he should pursue in collecting the money, if the result of his efforts leaves his principal unaffected by such negotiations, the money in the hands of the agent, and the mortgage extinguished by the payment.
2. ———: ———. Ordinarily, an agent authorized to collect a debt in money only may bind his principal though the agent accept property other than money, if ultimately the agent receives the face value in money as a result thereof.

3. ———: PAYMENT TO AGENT. No duty rests upon a third person, who pays money to an agent designated to receive it, to see that the money reaches the principal, if the third person is without notice of any improper purpose or intention on the part of the collecting agent.
4. ———: AUTHORITY OF AGENT. Every delegation of authority carries with it implied authority to do all acts reasonably necessary and proper to be done in order to carry into effect the main authority conferred.
5. **Mortgages:** PAYMENT. Upon payment of a debt, the debtor is ordinarily entitled to a return of all securities held by the creditor.
6. ———: ———. "When the money for the payment of a note secured by mortgage has reached the hands of an agent authorized to collect it, the debt is paid, and the mortgagor is entitled to have the mortgage, given to secure the debt, canceled." *Boyd v. Pape*, 2 Neb. (Unof.) 859.
7. ———: ———. Ordinarily, the payment or satisfaction of a mortgage debt extinguishes the mortgage. Failure to release the mortgage of record may subject the mortgagee to penalties, but has no effect to keep the mortgage in existence.
8. ———. A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. The debt is the principal thing; the property the incident.
9. ———: ASSIGNMENT: RECORD: NOTICE. Recording assignment is not notice to mortgagor so as to invalidate payment to mortgagee. Comp. St. 1929, sec. 76-234.
10. **Principal and Agent:** MORTGAGES: PAYMENT. Evidence examined and *held* loan broker was agent of assignee of mortgagee; that circuitous method of agent's securing in money amount of mortgage debt constituted payment; that mortgage was extinguished when money for principal came into agent's possession.

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

J. E. Ray, Earl L. Hunter, Charles E. Bruckman and *L. S. Dunmire,* for appellant.

Herman G. Schroeder and *Stiner & Boslaugh, contra.*

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

THOMSEN, District Judge.

This case presents the perplexing problem of where the loss shall fall among three innocent persons, the mortgagor and two mortgagees, for the defalcation of a loan broker. Briefly, the following essential facts are shown by the record.

The defendants Anderson are the owners of real estate in the city of Hastings. The plaintiff, Shriver, was the owner and holder of a mortgage for $7,500 on this property. John H. Uerling, of the loan firm of Hoeppner & Uerling, had been collecting the interest on this mortgage. Months before the mortgage matured, Uerling got the mortgage and note from Shriver for present collection of the principal. Uerling sold the note and mortgage to the defendants Turpit with the agreement that new papers which the Andersons would execute would be substituted for the old. Uerling then persuaded the Andersons to execute, without payment of commission, a present renewal of the mortgage. This was done by executing a new note and mortgage. Substitution of papers with the Turpits was then made. Uerling kept the old papers in his possession until pressed by the Andersons for a release. The old mortgage was not formally released, but Uerling marked the old papers and note "paid" and gave them to the Andersons. The Turpits paid Uerling $7,500, the full amount of the note and mortgage. Uerling, now insolvent, never paid the $7,500 to Shriver, and the latter brought these foreclosure proceedings on his mortgage. The district court held the old mortgage to have been satisfied by the $7,500 which Uerling received from the Turpits. The question presented is: Is the mortgage of Shriver a subsisting one?

All the details of dealings are unnecessary to a solution. However, the record leads to but one conclusion: That Uerling acted as agent for Shriver and no one else. With all the parties Uerling was the aggressor. In order to obtain the mortgage and note, he represented to Shriver that the Andersons wanted to pay. He induced the An-

dersons to renew the mortgage about five months before the mortgage was due, upon the representation that money might be hard to get on due date, and upon the false representation that an out-of-town person, whom the Andersons knew, would lend the money then. When the Andersons demurred and stated that they might want to pay the mortgage off at maturity, and that they did not want to pay any commission, he said they might pay it off any time and "Forget the commission. I am doing this for the other fellow." To the Turpits he represented that he had the Anderson loan for sale, and to the Turpits, having the money available for an investment, he delivered the Shriver papers with the agreement that a new loan would be made. So far as the record shows, it was only Shriver who had had prior dealings with Uerling. Uerling had collected the interest on this mortgage for Shriver and had collected the principal of other loans for him. The Andersons apparently met Uerling for the first time in a business way when the first interest coupon on the mortgage, which they had assumed and agreed to pay in purchasing the building, came due. On that occasion Uerling called upon them with the coupon. Thereafter they paid the interest at Uerling's office, Uerling always producing the coupons; occasionally Uerling would call at their place of business with the coupon when the interest was due. The Andersons paid no commission to Uerling; neither did the Turpits. To the Andersons, practically speaking, Uerling was a mere officious intermeddler; to the Turpits he was merely, as it were, a sales agent. As to the parties, not one was known to the other, not one inquired of the other. Probably no other result would have followed if the Turpits and the Andersons had communicated, but it is probable that Uerling's embezzlement could not have arisen if Shriver and the Andersons had communicated. But Shriver and the Andersons were strangers. It may have required some effort and time on the Andersons' part to locate the owner of the mortgage. The old mortgage had been made

by a former owner of the property, and the present plaintiff acquired the mortgage by assignment through the estate of his father. But the Andersons were active in seeking a release. So persistent were they that, when the effectiveness of excuses began to seem doubtful Uerling satisfied them by marking the old mortgage and note "paid" and giving them the papers.

Shriver could well have been more diligent. Although he occasionally inquired as to whether or not the Andersons had paid the mortgage, and even after the due date of the mortgage had passed, conditionally accepted from Uerling another mortgage, which turned out to be a second mortgage on other property for $3,500, which Uerling had falsely represented to be a first and a part of the Anderson settlement, he pursued the matter no further. He did not inquire of the Andersons at all, although he knew on what property his mortgage existed and must have known who occupied the building. As a matter of fact, he did nothing for his own protection after turning the papers over to Uerling. Although it was untrue that the Andersons wanted to pay the loan at the time that representation was made by Uerling to Shriver, yet Shriver did permit Uerling to take the papers for the very purpose of collecting the mortgage; in other words, Shriver authorized Uerling to get the money. The Andersons had no part in the false representation nor in inducing Shriver to part with the mortgage and note. The Andersons owed no duty to Shriver, since Uerling had possession of the papers for the authorized purpose of collection, and even if the assignment of the mortgage to the present plaintiff had been recorded, such record would not have been notice to the Andersons and obliged them to search the record for the present owner of the mortgage before making payment.

"In case of negotiable securities, the holder alone is the one *prima facie* entitled to receive payment." *Williams v. Keyes,* 90 Mich. 290, cited in *Stark v. Olsen,* 44 Neb. 646, at page 658. See, also, section 76-234, Comp. St.

1929, which provides that the recording of an assignment is not notice to mortgagor so as to invalidate payment made to mortgagee.

That Uerling was the agent of Shriver for the purpose of collecting the money is conceded by appellant in his brief. It is clear that Uerling was not the agent of either one of the others in any sense. However, the appellant contends that Uerling exceeded his authority as a collecting agent; that he sold the mortgage and note. The process followed, however, makes the result the test of whether or not it was a sale or collection. Uerling received $7,500 in his hands, the proceeds of the mortgage, the amount which Shriver expected to receive and Uerling was authorized to accept. While he had the money, he recovered and held in his possession the old note and mortgage. The latter papers he turned over to the Andersons; impliedly and necessarily authorized to do so in the process of collection. We are aware of no implied limitation on the power of an agent as to the manner in which the money he is authorized to collect for his principal is to be obtained, if the agent does nothing to harm his principal or leave any character of liability on the latter, and the mortgage is extinguished by such transaction. His duty is to collect the money. Unless his express authority is limited, all lawful means of aiding the debtor in making payment is proper. If, eventually, the agent gets the money into his possession, leaving his principal unaffected by his negotiations, and the mortgage is extinguished, he is acting within the scope of his implied and actual authority and, so far as the debtor is concerned, the agent has completed his duties. That moment, then, the legal relationship of the debtor and principal ceases. In effect, the method followed by Uerling was no different from a situation in which the Andersons would have secured a lender who, in consideration of a new mortgage and new note, had paid them $7,500 and the Andersons in turn had paid that money to Uerling in consideration of the return of the old papers and the

satisfaction of the old mortgage. Though Shriver did not directly authorize Uerling to do what he did, yet Uerling collected the money, the thing he was authorized to do. A principal rarely directs all the details of a transaction; ordinarily, he is interested only in the results. An agent may be authorized to collect a debt but not to receive a check in payment, and yet, if he accepts a check and ultimately receives the face value of it in money, the principal is bound. See section 178, Restatement, Agency, and the Nebraska annotations to this section; *Lorton & Co. v. Russell & Holmes,* 27 Neb. 372; *Phoenix Ins. Co. v. Meier,* 28 Neb. 124.

"The rule stated in this section (178) includes the receipt of anything by the agent in substitution for money if the money due is actually received by the agent." Restatement, Agency, sec. 178-a. See, also, *Griffin v. Erskine,* 131 Ia. 444, 9 Ann. Cas. 1193, and last paragraph of annotations in 9 Ann. Cas. 1198; 2 C. J. 629, note 40.

Again, a third person owes no duty, when he pays money to an agent designated to receive it, to see that the money reaches the principal, if the third person is without notice of any improper purpose or intention on the part of the collecting agent. Restatement, Agency, sec. 165-d, and Neb. Ann. sec. 165; 2 C. J. 635.

Incidental to the right given to Uerling to collect the money was his implied authority to surrender to the Andersons the mortgage and notes, for "every delegation of authority carries with it implied authority to do all acts naturally and ordinarily done in such cases which are reasonably necessary and proper to be done in order to carry into effect the main authority conferred." Meecham, Agency (2d ed.) sec. 715. See 21 R. C. L. 853, sec. 33.

"If securities have been given by the debtor he is entitled to their return. If the debt is evidenced by a document, as in the case of a note or bond, the debtor is entitled to it." Restatement, Agency, sec. 72-g, Neb. Ann. sec. 72. See 2 C. J. 634; *Sprigg v. Beaman,* 6 La. 59; *Boyd v. Pape,* 2 Neb. (Unof.) 859.

"When the money for the payment of a note secured by mortgage has reached the hands of an agent authorized to collect it, the debt is paid, and the mortgagor is entitled to have the mortgage, given to secure the debt, canceled." *Boyd v. Pape, supra.*

The fact that the Andersons did not obtain a release of the mortgage, but merely a return of the mortgage papers, would not affect their rights in any way.

"The payment or satisfaction of the mortgage debt avoids the mortgage deed. * * * The failure to enter satisfaction upon the margin of the record may subject the mortgagee to penalties, but has no effect to keep the mortgage in existence." *McNair v. Picotte,* 33 Mo. 57. See, also, sections 76-229, 76-230, and 76-233, Comp. St. 1929.

A mortgage is a mere security. It has no efficacy if unaccompanied by a debt or obligation. The debt is the principal thing; the land the incident. *Davidson v. Cox,* 11 Neb. 250. See, also, 35 Cent. Dig., Mortgages, sec. 1; 16 Dec. Dig. (2d) Mortgages, sec. 1; *Duell v. Leslie,* 207 Mo. 658; *Donovan v. Boeck,* 217 Mo. 70; Jones, Mortgages (3d ed.) sec. 269. A mortgage is extinguished by the payment of the debt. The mortgagee has no property in such mortgage after such payment. *Carter v. Taylor,* 40 Tenn. 30; *Pease v. Pilot Knob Iron Co.,* 49 Mo. 124; *Hendricks v. Hess,* 112 Minn. 252; *Tobin v. Tobin,* 139 Wis. 494; *Curley v. Ford,* 168 Ill. App. 525; *Lydon v. Campbell,* 198 Mass. 29; id., 204 Mass. 580; *Doyon & Rayne Lumber Co. v. Nichols,* 196 Wis. 387. See, also, 35 Cent. Dig., Mortgages, sec. 852; 16 Dec. Dig. (2d) Mortgages, sec. 298 (4); 41 C. J. 785.

From the foregoing we reach the conclusion that, since Uerling was authorized to collect the debt and the process he followed resulted in enabling him to get into his possession the money which he was authorized to get, without any liability remaining for his principal, the mortgage of the appellant is paid and extinguished.

We note that in its decree the court did not pass upon the rights, if any, acquired by the appellant, under all the

conditions, in the Glantz mortgage of $3,500 which Uerling later gave to Shriver, leading the latter to believe that it was part of the Andersons' payment. In this the court was also right. It is a matter for Shriver's decision and involves rights or liabilities between other persons than the present litigants.

The conclusion we reach is the same as that of the district court, and its judgment and decree is in all respects

AFFIRMED.

CHARLES B. KIRBY ET AL., APPELLANTS, V. OMAHA BRIDGE COMMISSION ET AL., APPELLEES.

FILED JUNE 13, 1934. No. 29144.

Bridges. Record examined, and *held* that the construction of the bridge across the Missouri river, as here contemplated, is within the statutory powers expressly granted to the city of Omaha, will involve no illegal expenditure of its public funds, and will in no manner increase the burden of municipal taxation or adversely affect the rights of its taxpayers. Further, that the "revenue bonds," intended to be used in payment for this improvement, in the manner and form in which they are proposed to be authorized and issued, will not create nor become a general obligation of such city.

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

James E. Rait, for appellants.

Seymour L. Smith, Kenneth S. Finlayson and *L. J. TePoel, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

EBERLY, J.

This suit was instituted by Charles B. Kirby and Elizabeth J. Lindsey, resident taxpayers of the city of Omaha,

against the city of Omaha and certain individuals named who are members of the city council thereof, Roy N. Towl as mayor thereof and *ex officio* member of the Omaha bridge commission, the Omaha bridge commission, a corporation organized and existing under and by virtue of chapter 14, art. 12, Comp. St. 1929, and the individuals named as members constituting the same, as in the amended petition set forth. So far as we are concerned with this pleading on appeal, we are confined to the substance thereof, as stated in appellants' brief, viz., "that the defendants will, unless enjoined, issue $1,650,000 in bonds of the city of Omaha, or so much as may be necessary, and will sell the same to the United States of America and with the proceeds thereof will proceed with the erection of a bridge across the Missouri river at South Omaha, Nebraska;" further, that "these bonds purport to be revenue bonds payable solely out of revenues to be derived from tolls charged for the use of the bridge (so constructed), but plaintiffs say such tolls will be insufficient and that the obligation imposed upon the city of Omaha by the laws of Nebraska and the act of congress under which the bridge is to be erected require the city of Omaha to obtain a fund sufficient to amortize said bonds, and that, in the event that such funds are insufficient, the bonds will then become a general liability and obligation of the city of Omaha."

The intent of the proper authorities to issue and sell the bonds to the extent and for the purpose alleged is admitted in the answer, but the additional allegations contained in the petition are denied by the defendants. The issue thus presented is, in substance, will the "revenue bonds" of the city of Omaha, if issued as contemplated, constitute the general obligation of the city of Omaha?

There was a trial on the merits in the district court for Douglas county, which resulted in a decree finding "generally in favor of the defendants upon all issues presented," and further finding "that the proposed construction of the bridge across the Missouri river, as shown by

the pleadings and the evidence, will not involve any illegal expenditure of the public money of the city of Omaha, and said construction of the proposed bridge will not create a general liability or obligation of the city of Omaha for the payment of the bonds to be issued therefor, and that said bonds in the manner and form in which they are proposed to be authorized and issued do not become a general obligation of the city of Omaha." Plaintiffs' cause of action was thereupon dismissed, and they appeal.

The limitation of the issue for decision, as above suggested, is required. For, while it is the undoubted rule that, "when bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction," still, "to entitle a taxpayer or other person to sue for such an injunction he must show that he is interested in the matter and will be damaged if the improper acts are not prevented by injunction, and that he has no other adequate remedy." 32 C. J. 268.

These principles may be said to be in harmony with the pronouncements of this court in a similar class of taxpayers' suits involving analogous if not identical issues, wherein we have approved as a general doctrine the following: A private person seeking the aid of equity to restrain an act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public, which either entails an illegal expenditure of public funds or involves an illegal increase in the burden of municipal taxation. *Chizek v. City of Omaha,* 126 Neb. 333; *Kittle v. Fremont,* 1 Neb. 329; *Shed v. Hawthorne,* 3 Neb. 179; *Ray v. Colby & Tenney,* 5 Neb. (Unof.) 151; *Hill v. Pierson,* 45 Neb. 503; *Clark v. Interstate Independent Telephone Co.,* 72 Neb. 883; *George v. Peckham,* 73 Neb. 794; *Bischof v. Merchants Nat. Bank,* 75 Neb. 838; *Letherman v. Hauser,* 77 Neb. 731; *Lee v. City of McCook,* 82 Neb. 26;

Woods v. Lincoln Traction Co., 83 Neb. 23; *Gleason v. Loose-Wiles Cracker & Candy Co.*, 88 Neb. 83; *Powers v. Flansburg*, 90 Neb. 467; *Brown v. Easterday*, 110 Neb. 729; *World Realty Co. v. City of Omaha*, 113 Neb. 396.

Nor are the principles thus announced in any manner inconsistent with *Interstate Power Co. v. City of Ainsworth*, 125 Neb. 419, or *Carr v. Fenstermacher*, 119 Neb. 172. The point here under consideration was not formally discussed in either of these decisions. It may be noted, however, that in the *City of Ainsworth* case it is stated in the opinion that the plaintiff, Interstate Power Company, "is a taxpayer in the defendant city, in which it owns and operates an electric distribution system." As owner of a competing business it was thus threatened with an injury peculiar to itself. For reasons set forth in that opinion, it was as such accorded full relief. In the *Fenstermacher* case the two plaintiffs allege, as their qualifications to bring the action, "that they are resident taxpayers and users of electricity furnished by means of the plant." While it may be questioned whether these allegations are sufficient to disclose a threatened injury peculiar to themselves, and different from other taxpayers, the cause was considered on its merits and for reasons stated in the opinion relief was denied.

As a preface to our examination of the questions presented by this appeal, it may be said that this cause arises out of what is commonly known as the "United States recovery program." This program has for one of its objectives the providing of gainful employment for those who have been deprived of the opportunity to labor by the "depression." In it are involved the proper cooperation of the state and federal authorities to the end that by the construction of self-liquidating works of internal improvement people in want may receive the benefits that the public works administration was intended to assure. The legislative enactments involved, both federal and state, may rightfully be taken for the purposes of construction as highly remedial in their nature, and necessarily construed in that light.

During the year 1933 public works administration funds were allocated for the construction of this highway bridge by proper federal officials. The project was approved by both the Omaha bridge commission, hereinafter referred to as bridge commission, and also by the corporate authorities of the city of Omaha. On December 5, 1933, the city council of Omaha, by a unanimous vote, passed a resolution declaring its purpose to finance this project from the sale of "revenue bonds" to be authorized and issued pursuant to section 2, ch. 27, Laws 1931. This act in terms empowers the council of the city of Omaha, in its discretion, to issue revenue bonds payable solely from the earnings of the bridge to be constructed, without a vote of the electors, where, as in this case, such bridge is to be built more than a mile from an existing highway bridge, and which act also in terms negatives any general liability on or because of such bonds on the part of the city issuing the same. It may be stated that all steps required by legislation applicable to be taken by the parties concerned, to accomplish the construction of this proposed internal improvement, have been regularly taken up to and including the approval by the proper United States officials of certain plans, specifications, drawings, and maps of the location of this proposed bridge submitted to such officials for that purpose by the bridge commission as assignee of Charles B. Morearty.

The authority for the proposed construction of this bridge on the part of defendants is derived from chapter 176, Laws 1929, entitled "An act authorizing and empowering cities of the metropolitan class to acquire by purchase, condemnation, bargain and sale, lease, sublease, gift or otherwise, and to construct and contract for the construction of bridges or viaducts within the city limits and five miles outside thereof, within the state of Nebraska, and any adjoining states," etc. This act of 1929 was amended by the enactment of chapter 27, Laws 1931, which was duly passed and approved March 9, 1931. This legislation of 1929 provides for the creation of a bridge

commission, and it is not questioned that the Omaha bridge commission was properly created pursuant to its provisions.

Under the provisions of this enactment (Comp. St. 1929, sec. 14-1201) "Any city of the metropolitan class, including those governed under a home rule charter, is hereby authorized and empowered to acquire by purchase, condemnation, bargain and sale, lease, sublease, gift or otherwise; any existing bridge or viaduct including approaches and avenues, rights of way or easements of access to approaches, necessary real and personal property incident thereto and franchises, special privileges, leases and contracts in connection with such bridges or viaducts, and to so acquire any bridge or viaduct and aforesaid facilities and property constructed in the future; and is also authorized and empowered to construct and contract for the construction of, and to acquire by purchase, lease, sublease, gift or otherwise, bridges or viaducts including all of aforesaid appurtenances, facilities and property; and is also authorized and empowered thereafter to repair, maintain, extend, renew, reconstruct, replace or enlarge and to mortgage or lease and to use and operate any such bridges or viaducts as toll or free bridges, either or both from time to time," etc.

As to the exercise of the powers thus vested, it is provided (Comp. St. 1929, sec. 14-1202): "Any power in this act granted to such city may be exercised by the city independently or in cooperation with or aid of similar action by any other city or any county in Nebraska, or any city or county in an adjoining state, or the state of Nebraska, or any adjoining states, or state, or the government of the United States when such other political unit has been authorized by law to exercise the necessary powers. Such joint action may be directly by the governing body of the city through the medium of a joint bridge commission subject to the same conditions provided in this act for independent action."

The method of financing provided (Laws 1931, ch. 27, sec. 1) includes the following: "To finance any of the purposes or powers provided for in this act, the governing body of any such city shall in the first instance determine whether any purchase, condemnation or construction authorized by the act shall be financed by bonds which are general obligations of the city * * * or by revenue bonds as provided for in this act and which are charges solely against the revenue to be derived from such bridge through the collection of tolls, * * * provided, no election and no vote of electors shall be required upon the question of acquiring or constructing any bridge or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge located more than one mile from any existing bridge, other than a railroad bridge, if the governing body of such city shall determine by a vote of a majority of its members to dispense with such election or vote of electors as to such question. This grant of power to issue bonds is in addition to any other power which may now have been or hereafter may be conferred upon such city, and shall be free from the restrictions now imposed by the charter of the city upon the issuance of bonds and incurring of indebtedness, and subject only to the provisions of the Constitution of Nebraska. * * * For all purposes of financing, the total cost of any improvement authorized by this act may include every item of expense in connection with the project, and among other items shall also include the cost of acquiring every interest of every nature and of every person in any existing bridge, the cost of constructing the superstructure, roadway and substructure of any bridge, the approaches and avenues or rights of way of access thereto and necessary real estate in connection therewith, toll houses and equipment thereof and of the bridge, franchises, easements, rights or damages incident to or consequent upon the complete project expenses preliminary to construction, including investigation and expenses incident thereto, and prior to and during construc-

tion the proper traffic estimates, interest upon bonds and all such other expenses as after the beginning of operation would be properly chargeable as cost of operation, maintenance and repairs."

In addition, section 14-1210, Comp. St. 1929, as amended in 1931 (Laws 1931, ch. 27, sec. 2), provides in part: "Cities of the metropolitan class are hereby authorized to provide funds for the purposes of this act by the issuance of revenue bonds of such cities, the principal and interest of which bonds shall be payable solely from the special funds herein provided for such payment and as to which, as shall be recited therein, the city shall incur no indebtedness of any kind or nature and to support which the city shall not pledge its credit nor its taxing power nor any part thereof. * * * Provided, no election and no vote of electors shall be required upon the question of acquiring or constructing any bridge or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge located more than one mile from any existing bridge, other than a railroad bridge, if the governing body shall determine by a vote of a majority of its members to dispense with such election or vote of electors as to such question. * * * The bonds authorized by this section may, at the option of the governing body of such city, be supported by mortgage or by deed of trust."

It is obvious that the statutory provisions above quoted fully authorize the acts of the city sought to be enjoined, and what has been done by the defendants, as shown by the record, finds ample justification, not only in the portions quoted, but by the entire enactment as amended.

However, by the provisions of an act of congress, entitled "An act to authorize the construction of certain bridges and to extend the times for commencing and completing the construction of other bridges over the navigable waters of the United States," approved June 10, 1930, it is provided that "Charles B. Morearty, his heirs, legal representatives, and assigns, be, and is hereby,

authorized to construct, maintain, and operate a bridge and approaches thereto across the Missouri river, at a point * * * at or near South Omaha, Nebraska," etc. (Public document No. 330.) Section 4 (g) of this act also provided: "The right to sell, assign, transfer, and mortgage all the rights, powers, and privileges conferred by this act is hereby granted to Charles B. Morearty, his heirs, legal representatives, and assigns; and any corporation to which or any person to whom such rights, powers, and privileges may be sold, assigned, or transferred, or who shall acquire the same by mortgage foreclosure or otherwise, is hereby authorized and empowered to exercise the same as fully as though conferred herein directly upon such corporation or person."

All rights created by this federal legislation and vested in Charles B. Morearty have been transferred to the city of Omaha, which is proceeding to the construction of the bridge as already indicated. These instruments of conveyance are unchallenged as to form, and questioned only because of alleged incompetency of the city of Omaha to accept and take thereunder.

Appellants contend that all sections of this bridge act authorizing the issuance of "revenue bonds" and providing that they "are charges solely against the revenue to be derived from such bridge through the collection of tolls" (Comp. St. 1929, sec. 14-1209) and "shall be payable solely from the special funds herein provided for such payment and as to which, as shall be recited therein, the city shall incur no indebtedness of any kind or nature and to support which the city shall not pledge its credit nor its taxing power" (Comp. St. 1929, sec. 14-1210) are wholly void because irreconcilable with that part of section 14-1212, Comp. St. 1929, which provides that "a fund sufficient to pay the interest and principal of any bonds issued under this act" (and to amortize the same as required by the federal act) *shall be collected by the city,* for the reason that the portion of section 14-1212 above quoted is the last position of the state.

Conceding that, where there is an irreconcilable conflict between different sections of the same statute, the last words stand and those in conflict therewith are repealed (*Albertson v. State,* 9 Neb. 429; *Ryan v. State,* 5 Neb. 276), we are, however, here dealing with remedial legislation to be construed liberally. So construed, no irreconciliable conflict appears. The legislative subjects of sections 14-1209 and 14-1210, Comp. St. 1929, as originally enacted, relate to the method of the issuance of bonds by which the proposed bridge is to be financed. Section 14-1212, as originally passed in 1929, is confined to the rates of tolls, together with elements affecting the same. It also provides remedies for "owners of outstanding bonds issued to finance the bridge" in relation to the determination of tolls. These are all in addition to, but not necessarily in conflict with, the general provisions of sections 14-1209 and 14-1210, Comp. St. 1929. The rule is: "If possible, a statute should be so construed as to render it a consistent and harmonious whole; if different portions seem to conflict, they should, if practicable, be harmonized, that construction being favored which will render every word operative rather than one which makes some words idle and nugatory." 25 R. C. L. 1008, sec. 247.

But by an act embracing a comprehensive title, sections 14-1209 and 14-1210, Comp. St. 1929, and other sections of the act of 1929, were amended and substantially readopted by the legislature of 1931. See Laws 1931, ch. 27. Section 14-1212, Comp. St. 1929, remains as it was enacted in 1929. If we are mistaken in the conclusion just stated, and if sections 14-1209 and 14-1210, as now existing, are in fact repugnant to any of the provisions of section 14-1212, the controlling principle is that, where there are irreconcilable sections in the statutes, the later enactment will control. 59 C. J. 1052; *State v. Board of County Commissioners,* 109 Neb. 35.

Thus, appellants' contention as to the validity of the controlling statutory provisions is foreclosed by the history of the legislation.

It will be remembered that this record discloses that the intent and purpose of the city of Omaha, as appears from all proceedings taken or proposed, are that the principal and interest of the bonds issued to finance the construction of the proposed bridge shall be payable solely from the special funds created by the charging of tolls to the users of the bridge, and that the city shall and thereby does create no indebtedness of any kind or nature, and to support which the city shall not and does not pledge its taxing power nor any part thereof. This is within its statutory powers expressly granted. These terms, conditions and limitations will expressly appear on the face of the "revenue bonds" it proposes to issue and sell. In fact, in the absence of an authorization by the electorate, it is limited by the terms of the statute to the restricted action it proposes to take. Obviously, what is created is not a general obligation of the city, nor can the burden on the taxpayers be in any manner affected thereby. *Carr v. Fenstermacher,* 119 Neb. 172; *Peake v. New Orleans,* 139 U. S. 342; *Bates v. State Bridge Commission,* 109 W. Va. 186; *Alabama State Bridge Corporation v. Smith,* 217 Ala. 311; *State v. Moorer,* 152 S. Car. 455; *Barnes v. Lehi City,* 74 Utah, 321; *City of Winner v. Kelley,* 65 Fed. (2d) 955; *Franklin Trust Co. v. City of Loveland,* 3 Fed. (2d) 114; *Town of Windfall City v. First Nat. Bank,* 172 Ind. 679; *Quill v. City of Indianapolis,* 124 Ind. 292; *White River Savings Bank v. City of Superior,* 148 Fed. 1; *Winston v. City of Spokane,* 12 Wash. 524; *Meyer v. City and County of San Francisco,* 150 Cal. 131; *Baker v. City of Seattle,* 2 Wash. 576; *Village of Park Ridge v. Robinson,* 198 Ill. 571; *Searle v. Town of Haxtun,* 84 Colo. 494; *Shields v. City of Loveland,* 74 Colo. 27.

Lastly, we have carefully examined the contention of appellants that the city of Omaha is not a competent assignee of the "Morearty franchise," but are unable to accept their argument. The United States is not a challenging party. The words of the federal act, in connec-

tion with the context, we do not construe as limiting possible assignees to persons or private corporations. Under the statutes of our state, the city, and its bridge commission, or either of them, is expressly authorized to acquire the franchise to construct the bridge in question, without limitation as to the method by which such powers shall be exercised and the franchise secured. Therefore, they may legally acquire such franchise from a party, private or corporate, or from such party's assignee. 43 C. J. 1337; *Leeds v. City of Richmond,* 102 Ind. 372; 3 McQuillin, Municipal Corporations (2d ed.) sec. 1220.

The conclusion follows that the findings and judgment of the district court are in all respects correct, and are

AFFIRMED.

LIDA M. HOGSETT, APPELLEE, V. CINEK COAL & FEED COMPANY ET AL., APPELLANTS.

FILED JUNE 15, 1934. No. 29142.

Master and Servant: WORKMEN'S COMPENSATION LAW: "SEASONAL EMPLOYMENT." As used in section 48-126, Comp. St. 1929, the term "occupation involving seasonal employment" refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year.

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

Gaines, McGilton, McLaughlin & Gaines, for appellants.

Mulvihill & Gilson and *Sheridan & Sheridan, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

GOOD, J.

This is an action to recover compensation under the workmen's compensation law for the death of plaintiff's husband in an accident arising out of and in the course

of his employment. Plaintiff had judgment, and defendant has appealed.

The only question for determination is the amount of the compensation to which plaintiff is entitled, and that depends upon whether the employment in which her husband was engaged at the time of the accident causing his death was seasonal, within the meaning of the workmen's compensation law. If it was seasonal, then the weekly wage of the employee would be one-fiftieth of the total wages earned by him during the year immediately preceding the accident. Comp. St. 1929, sec. 48-126. If the employment was not seasonal, then the weekly wage would be determined by the amount of the average weekly wage which he was receiving at the time of the accident.

Defendant was engaged in the retail coal and feed business in the city of Omaha. The employee began his work for defendant in October, 1932, and continued in that employment until the accident in February, 1933. In the delivery of coal and feed, the defendant owned three trucks and kept two truck drivers regularly employed during the year, but in the season for the heavy deliveries of coal defendant employed a third truck driver, to operate its third truck, and also employed other truckers who owned their trucks. Defendant received large quantities of coal, commencing in July of each year, much of which was stored in bins, and began heavy deliveries of coal to its customers about the first of August, and heavy deliveries continued from that time until late in the following winter. Beginning with the early spring months there were very light deliveries of coal from that time until August following. During the period from August until the following February or March, according to the severity of the weather, defendant employed three truckers and hired additional truckers who owned their trucks. From the late winter or early spring until the following August defendant employed only two truckers.

It appears that when plaintiff's husband was first employed he was unloading coal from cars into bins; that

he continued this work for a considerable time and then, for some reason, was given the position of truck driver, driving the extra truck. Under this state of facts, we must determine whether the employment was seasonal, within the meaning of the workmen's compensation law.

Many words and phrases used in the workmen's compensation law are therein given a statutory definition. "Seasonal" and "seasonal employment" are not so defined. They must be deemed to have been used in the sense that they are commonly and popularly understood. The word "seasonal" pertains, of course, to the four seasons of the year—spring, summer, autumn and winter—but is popularly used in a somewhat wider sense. We speak of the planting season, the harvesting season, hop-picking season, peach and apple-picking season, the berry-picking season, and many other like expressions. All of these have reference to a particular and somewhat definite period of the year. Natural ice harvesting can only be carried on in the colder months. Berry-picking must be carried on when the berries are ripe and ready for market; so with peaches, apples and other fruit crops. The planting season is usually in the spring months; the harvesting season in the summer months; and we think it is in this sense that the term was used. Shoveling and delivery of coal are not confined to any season of the year but are carried on throughout the year. There may be a larger use of coal in the winter, particularly for domestic use, but nevertheless the business is carried on even for domestic use throughout the year, at least in this latitude, and for industrial purposes coal is used practically as extensively in the summer as in the winter season. The handling and delivery of coal cannot, therefore, be regarded as a seasonal employment. To be more specific, the work of plaintiff's husband, at the time of the accident, was driving a truck and delivering coal. His work previous to employment by defendant had been that of a trucker. The trucking business may be more active at certain seasons of the year than at others, but it is one

that is carried on throughout the year. We think the term "seasonal employment," as used in the compensation law, has reference to an employment which must have been completed during some rather definite period of the year.

In *Froehly v. Harton*, 291 Pa. St. 157, it was held:

"A woman engaged as a dishwasher in an amusement park open only three months in the year is not engaged in a seasonal occupation within the meaning of the workmen's compensation act.

"A seasonal occupation is an employment pertaining to a season or a specific part of a year; hence it may be said that a seasonal occupation is an employment pertaining to or of that kind of labor exclusively performed at specific seasons or periods of the year. The word is different in meaning from the words 'casual' and 'intermittent.'

"Seasonal occupations are those vocations which cannot, from their very nature, be continuous or carried on throughout the year, but only during fixed portions of it. On the other hand, labor or occupation possible of performance and being carried on at any time of the year, or through the entire twelve months, is not seasonal."

In the case of *Damm v. Schreier Contracting Co.*, 257 N. Y. Supp. 705, 235 App. Div. 478, it was held that highway construction labor, which was only carried on in that state during a portion of the year, probably from spring until late autumn, was seasonal. But in another case the same court held that a county, carrying on highway construction work, and utilizing the winter months to manufacture road materials and repair machinery and equipment, was not engaged in a seasonal trade, business or occupation, since the work was carried on throughout the year. *Hogan v. Onondaga County*, 225 N. Y. Supp. 57, 221 App. Div. 636.

In *Blatchley v. Dairymen's League Co-operative Ass'n*, 232 N. Y. Supp. 437, 225 App. Div. 167, it was held that one engaged in ice-harvesting, the season for which was only about 90 days, was engaged in a seasonal occupation.

In *Lincoln Gas & Electric Light Co. v. Watkins*, 113 Neb. 619, it was held: "As applied to occupations, the word 'seasonal,' as used in section 3049, Comp. St. 1922, refers to occupations which are governed by and are ordinarily performed only in certain seasons of the year." In that case a young man worked for his employer only during his vacation, while attending the university, but the work he was performing could be carried on at any time of the year, and his particular time was limited to his opportunity to engage in the work. That, however, did not make it seasonal.

We frequently speak of the holiday season. Many retail merchants employ extra clerks to wait upon the increased patronage which they enjoy during the holiday season, but the work performed is that which is carried on throughout the year and is not seasonal. As was pointed out in *Froehly v. Harton, supra*, while the particular work of dishwashing could only be carried on at the amusement park during the three summer months in which it was open to the public, nevertheless, dishwashing was carried on through the country every day in the year, and the occupation, for that reason, was held not to be seasonal.

Since the employment of plaintiff's husband was not seasonal, her rate of compensation must be determined by the wages received by him in his employment by defendant. His wages during that term averaged $12.50 a week. Under the statute, she is entitled to compensation at the rate of $8.33 a week for the period fixed by statute,—350 weeks.

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

REVERSED.

WILLIAM A. HINES, APPELLANT, V. MARTEL TELEPHONE COMPANY, APPELLEE.

FILED JUNE 15, 1934. No. 28949.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: "INDEPENDENT CONTRACTOR." Generally, the term "independent contractor" signifies one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to control of his employer except as to the result of the work.
2. **Negligence:** INJURY TO EMPLOYEE: ASSUMPTION OF RISKS. In an action brought by a contractor against the contractee, it is a valid defense that conditions by which the injury in question was occasioned were known to and appreciated by the plaintiff, and that he is consequently chargeable with an implied assumption of the risks arising from those conditions.
3. **Evidence** examined, and *held* to sustain the action of the trial court in the direction of a verdict for defendants.

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

Beghtol, Foe & Rankin, for appellant.

Chambers & Holland, contra.

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

EBERLY, J.

This action sounds in tort, and arises out of an accident which occurred September 29, 1930. In the capacity of a telephone lineman at the time stated, plaintiff was in the act of climbing a telephone pole, which broke off under his weight and fell to the ground, causing the injuries in suit. In the district court, at the close of plaintiff's evidence, a verdict was instructed for the defendant, and from the order of that court overruling his motion for a new trial, plaintiff appeals.

At the time of this accident plaintiff, Hines, was in the employ of the defendant, Martel Telephone Company, and the services then being performed by him were pursuant to a contract in writing which provided, in part, "That

the party of the first part (Martel Telephone Company) hereby employs the party of the second part (William A. Hines) to operate the telephone exchange of the Martel Telephone Company and to do all the necessary work keeping the lines and switchboard in good repair and working order. Party of the second part is to furnish all of his own tools, and is to furnish his own conveyance and his own gasoline in keeping the lines in repair and in good working order," in consideration of which, at the time of the accident, Hines was receiving $145 a month.

It also appears that after the accident of September 29, 1930, Hines instituted an action based on such accident against the Martel Telephone Company to secure an award of compensation under the terms of the Nebraska workmen's compensation act. In this proceeding a final judgment was entered in the district court for Lancaster county, after a hearing on the merits, in which it was adjudged by that court "That William A. Hines is not entitled to the benefits of the workmen's compensation law of the state of Nebraska, by reason of his said accident, for the reason that at the time of his said injury he was an independent contractor, and not an employee of the Martel Telephone Company, a corporation, within the meaning of the compensation law." It appears that no appeal was ever prosecuted from this determination.

This instant action was thereafter instituted by Hines expressly as an independent contractor against the telephone company as contractee to recover damages by reason of the injuries occasioned by the accident. On this appeal the action of the trial court is challenged as not sustained by the evidence, and contrary to law.

The record discloses that Hines, at the time of the trial in the district court, was 47 years of age; that his occupation was that of a telephone lineman; that he had continuously followed that line of work since 19 years of age; that he had had experience in climbing telephone poles and placing telephone wires on them ever since he commenced the work. He had observed the decay of tel-

ephone poles, knew their ordinary life, was familiar with the dangers to linemen by reason thereof, and was acquainted with the usual and approved precautions taken as to testing telephone poles by those engaged in his line of work before climbing the same in the performance of their duties. He came to Martel, Nebraska, with his family after entering into the contract with the defendant, arrived there in March, 1929, and took over the job. He was thereafter in immediate charge of the plant, and the only experienced telephone man connected with the defendant company at that place. For over a year he was the only man who climbed poles in line of duty connected with this organization. He knew at least for more than a year previous to the accident that the company had no records as to when their telephone poles were "set," and had no qualified servants (unless himself) charged with the duties of inspecting poles to determine their condition as to decay. It also appears that the telephone pole, the breaking of which caused his fall and injuries, was rotted and decayed at the ground line to such an extent that its natural strength was destroyed.

On the day of the accident it was planned to remove certain "cross-arms" from certain telephone poles and to replace them with "brackets." A helper and a truck for this purpose were furnished by the company. The party started from the "shop" where material, tools, and shovels were stored. There is no satisfactory proof that the work planned to be performed on this occasion was not work contemplated by the terms of plaintiff's contract of employment, and for which he was compensated under the terms thereof. Plaintiff also knew that the work contemplated at this time required the climbing of telephone poles, and that the approved practice required that each pole be tested prior to the lineman ascending the same. The company had no "pike pole," but did own shovels. Plaintiff made no suggestion as to taking the shovels, but did take his climbing belt and tools. The truck employed was owned by a Mr. Spellman, a retired farmer, 90 years

of age, and without experience in the telephone business. In plaintiff's evidence he is referred to as the "manager." When the party in the truck, consisting of Spellman, plaintiff, and Frye, the helper, arrived at the scene of the replacement, Mr. Hines testified the following occurred: "I don't think there was anything mentioned there only they said, 'Which one do you want?' and I said it didn't matter to me, and I believe they said, 'Well, you take this one or the next one,' and I said, 'Well, I will take this one if that is all right with the rest of you,' and they said, 'All right, go ahead and take it.' "

The cross-arm was removed from the first pole the plaintiff climbed, and brackets were substituted thereon without any difficulty. When plaintiff ascended the second telephone pole for the purpose of removing the cross-arm thereon, it broke off at the ground line, and plaintiff, falling to the ground, sustained the injuries for which recovery is sought.

By the law of this case, as well as by the force of plaintiff's pleading, this recovery is sought exclusively as by an independent contractor.

"In the law of negligence, the expression (independent contractor) is used, not merely in a descriptive sense, but as well to designate a relationship, in the presence of which, when established, the law undertakes to prescribe distinctive rights and liabilities. Generally the term signifies one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work, * * * one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result." 31 C. J. 473.

Plaintiff's contract "to operate the telephone exchange * * * and to do all the necessary work keeping the lines * * * in good repair and working order" manifestly included in its scope poles, wires and fixtures. *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 39 Fla.

25. He had been continually engaged in the telephone business as a lineman for more than 27 years; he was experienced and admittedly possessed of knowledge as to the life of telephone poles, the effect of decay thereon, and the dangers to be apprehended in ascending and working on them, which he fully appreciated. In addition, he well knew he was strictly the only telephone man on the job. Obviously, under these circumstances, the contractor was under no duty to warn him of the dangers of his work which were to him well known. *Budny v. American Candy Co.*, 151 Wis. 261.

Plaintiff also knew that no one in the employ of the defendant company, except himself, was charged with making inspections of telephone poles or performing work which required the operator to ascend such poles, when required so to do in order that the lines be kept "in good repair and working order." It seems a well-established principle that one cannot recover damages for an injury caused by defects which he himself had contracted to repair. *Broderick v. St. Paul City R. Co.*, 74 Minn. 163; *Saxton v. Northwestern Telephone Exchange Co.*, 81 Minn. 314.

It would seem that under the terms of his written contract, so far as essential to the keeping of defendant's telephone lines in good repair and working order, the duty of making the necessary inspections was imposed on plaintiff as an independent contractor, even to a greater degree than that imposed on an employee by virtue of his employment where the relation of master and servant exists. Indeed, we are committed to the view that "A person who contracts to perform labor or services for another is presumed to have so contracted in view of the risks ordinarily incident to or connected with the employment. He assumes all such risks." *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556. See, also, *Creighton v. Keens*, 89 Neb. 637; *Anderson v. Union Stock Yards Co.*, 77 Neb. 196. So, too, where an experienced lineman accepts employment, knowing that the company made no

separate inspection of poles, he assumes the attendant risk of poles breaking. *Lynch v. Saginaw Valley Traction Co.*, 153 Mich. 174. And, likewise, one in the capacity of an independent contractor, contracting for work which necessarily involves and contemplates the climbing of telephone poles, assumes the risk of poles breaking, and should make his own proper tests for soundness before attempting to climb. *McIsaac v. Northampton Electric Lighting Co.*, 172 Mass. 89; *Cumberland Telephone Co. v. Loomis*, 87 Tenn. 504; *Britton v. Central Union Telephone Co.*, 131 Fed. 844.

As to the pole, the breaking of which caused the injuries for which recovery is sought, Hines testified as follows: "Q. And you did shake it? A. Yes. Q. And it didn't give in any manner that would indicate to you that you thought it was rotten? A. No, sir. Q. Why did you shake it? A. That is something that is customary in all line work—on old poles that way to test them. Q. That is the customary thing for a lineman to do, isn't it, to shake a pole before he climbs it? A. Yes. Q. And you did that for the purpose of ascertaining whether or not the pole was safe to climb, didn't you? A. Yes, sir. Q. Now, you didn't rely on anybody else's word as to whether that pole was safe, did you? A. No, sir; I didn't. Q. You made a test yourself which you thought was sufficient to satisfy you as to whether the pole was safe or not? A. Yes, sir. Q. And after you made that test you climbed the pole? A. Yes, sir."

It also appears that by the approved use of the shovel by plaintiff the decayed portion of the pole at or below the ground level would have been discovered. The company had provided shovels which Hines, though knowing the work he was about to be engaged in and fully appreciating its dangers, wholly failed to take with the party for use in securing his safety. Because of his own neglect to use approved precautions to insure his safety against dangers obviously known to him, the accident happened and the injuries were sustained.

The controlling principle applicable to the situation, it may be said, is that, in an action brought by a contractor against the contractee, it is a valid defense that the conditions by which the injury in question was occasioned were known to and appreciated by the plaintiff, and that he is consequently chargeable with an implied assumption of the risks arising from those conditions. 44 A. L. R. 1122, note. See, also, *Hotchkin v. Erdrich*, 214 Pa. St. 460.

It is therefore obvious that under the admitted facts of the record before us, no recovery can be sustained, and the instruction of the trial court directing the return of a verdict for defendant was proper. *Fremont Brewing Co. v. Hansen*, 65 Neb. 456; *Rhine v. Schall Co.*, 96 Neb. 355; *Laf Ferry v. Chicago, B. & Q. R. Co.*, 114 Neb. 219.

The judgment of the district court is correct, and is

AFFIRMED.

LIDA MCFRY ET AL., APPELLEES, V. CITY OF LINCOLN: ADAM J. YOST, APPELLANT.

FILED JUNE 15, 1934. No. 28993.

Nuisance: INJUNCTION. Record examined, and *held* (1) the injunctional order as issued is valid and enforceable; (2) the evidence is ample to sustain the conviction and sentence for contempt.

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

Chambers & Holland, for appellant.

Littrell & Patz, contra.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

EBERLY, J.

By an order made and entered on August 3, 1932, in a cause then pending in the district court for Lancaster

county, the defendant, Adam J. Yost, doing business under the firm name and style of the Peoples Coal Company, a corporation, its agents and servants were perpetually enjoined from so conducting and maintaining a coal yard, located on lots 25, 26, 28, 29 and 30 of Hartz & Brace's subdivision to the city of Lincoln, "as to be a nuisance to the neighborhood, and from so conducting said yard as to keep and deprive the plaintiffs from the proper and reasonable enjoyment of their premises as before the expansion of said coal yard (during 1931); and the said defendant and its agents and servants are hereby separately and severally enjoined from so conducting the said yard that the dust and dirt therefrom caused by the handling of coal on the premises of the said coal company shall escape therefrom and circulate through the neighborhood in such wise as to deposit large quantities of the same upon the premises and buildings of the plaintiffs and in such wise as to penetrate the said buildings and soil the interiors of the same and interfere with the reasonable comfort of their homes."

Subsequently complaints were filed in said cause in the form of affidavits sworn to by certain of the plaintiffs in this action (accompanied by a motion) charging Adam J. Yost, who appears to be the manager and in charge of the business of the defendant coal company, with violation of the decree of injunction, in that he wilfully permitted and caused the escape from the premises of this coal company of large quantities of coal dust and the circulation of the same through the neighborhood in such wise as to deposit large quantities of dust upon the premises and buildings of plaintiffs in a manner and to the extent strictly forbidden by the decree.

Citation was issued and served upon Adam J. Yost. He appeared and trial was had. Evidence was presented in behalf of both plaintiffs and defendant. On the suggestion, and by agreement of the parties, the trial judge personally viewed the premises. The court upon consideration of all the evidence, including that received by per-

sonal view of the premises, determined the disputed question of fact against the defendant, and at the close of the hearing it was ordered that Adam J. Yost, making no sufficient answer, pay a fine of $25 and costs, and further ordered that said defendant be committed to the county jail in case said fine is unpaid.

From the court's order denying his motion for a new trial the defendant appeals as in a civil action. No petition in error is filed. His principal contentions are: (1) That the injunctional order is vague, uncertain and indefinite in its terms and will not support a finding of guilt; and (2) that the evidence is insufficient to support the conviction.

We assume, but do not determine, that the case is here for review. *State v. Dodd,* 99 Neb. 800; *Thompson v. Nelson,* 4 Neb. (Unof.) 687.

We are satisfied that the injunctional order is not fatally defective or indefinite. Section 20-2121, Comp. St. 1929, defines as a contempt a wilful disobedience of a lawful order of a court. See, also, *Hydock v. State,* 59 Neb. 296.

Considering the evidence with due regard to the rules of strict construction applicable to criminal prosecutions, and without the indulgence of presumptions and intendments to sustain the conviction, we find the evidence ample to support the sentence of the trial court.

The judgment and sentence of the district court is, therefore,

AFFIRMED.

LAURA E. SHANDY, APPELLEE, V. CITY OF OMAHA, APPELLANT.

FILED JUNE 15, 1934. No. 29107.

1. **Master and Servant: WORKMEN'S COMPENSATION LAW: "REGULAR TERM OF OFFICE."** A regular term of office, as the term is applied to government employees in the workmen's compen-

sation law (Comp. St. 1929, sec. 48-115), means such a term of office as has a fixed and definite duration and a date of termination known and fixed by law or other general regulation.

2. ———: ———: "OFFICIAL." Fireman of the city of Omaha *held* not to be an "official" in the service of a governmental agency created by the state, who shall have been elected or appointed for a regular term of office, as these words are employed in the workmen's compensation act.
3. Statutes: CONSTRUCTION. In the interpretation of reenacted statutes, the courts will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had and by reenactment intend that they should again have the same effect.
4. Master and Servant: WORKMEN'S COMPENSATION LAW. The receipt and acceptance by appellee of pension benefits provided by law, exceeding in amount the death benefits provided under the workmen's compensation act, will not operate to bar appellee's claim thereunder.

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

Seymour L. Smith, Philip N. Klutznick and *Harold C. Linahan,* for appellant.

O'Sullivan & Southard, Arthur J. Whalen and *W. H. Herdman, contra.*

James C. Kinsler, amicus curiæ.

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

EBERLY, J.

This is a proceeding under the workmen's compensation law. The judgment of the district court was for the applicant. From the order of the trial court overruling its motion for a new trial, the city appeals.

The record before us discloses the following facts: Thomas N. Shandy was a member of the paid fire department of the city of Omaha, with the rank of captain. He died on or about February 8, 1933, from injuries received

in the course of and while performing his duties as such fireman in the Millard hotel fire in the city of Omaha. He left surviving him his widow, the applicant, appellee, with whom he was living at the time of his death. Under the home rule charter of the city of Omaha, appellee became entitled to, and is now receiving, a pension of $102.50 a month from that city. On the hearing before the compensation commissioner, on the petition filed by appellee for compensation, the maximum award was made in her behalf. On appeal to the district court a similar award was entered.

Two contentions are made in behalf of the city on appeal, viz.: (1) The deceased was not an employee within the meaning of the workmen's compensation act, and at the time of his injury and death did not have a compensable status, for the reason that he was an official of a governmental agency created by the state and had been appointed for a regular term of office. (2) The receipt and acceptance of pension benefits by appellee from the city of Omaha, exceeding the amount of the death benefits provided under the workmen's compensation act, bar the appellee from relief under the act to which reference is last made.

Apellant's first contention was before us in the case of *Rooney v. City of Omaha*, 105 Neb. 447. There, however, the office of a policeman was under consideration, and not a fireman as here presented. Still the provisions of the charter of the city of Omaha relative to the appointment and discharge of firemen are substantially identical with those relating to the appointment and discharge of policemen. Comp. St. 1929, secs. 14-601 to 14-619, and 14-701 to 14-708. It follows that the questions involved must be deemed identical.

In the *Rooney* case this court announced, on December 23, 1920: "A regular term of office, as the term is applied to government employees in the workmen's compensation law (Rev. St. 1913, sec. 3656), means such term of office as has a fixed and definite duration and a date

of termination known and fixed by law or other general regulation." The conclusion there was that a policeman in his employment did not hold his position by virtue of "a regular term of office," within the meaning of the compensation law.

In passing, reference might be made to the following authorities which involve the construction of statutory terms substantially identical with our own, and in which the views expressed are in harmony with the majority opinion in *Rooney v. City of Omaha, supra.* See, *State v. District Court,* 134 Minn. 26; *State v. District Court,* 134 Minn. 28; *Markley v. City of St. Paul,* 142 Minn. 356; *Segale v. St. Paul City R. Co.,* 148 Minn. 40.

Nevertheless, the city of Omaha, in effect, asks for a reconsideration of this queston decided in the *Rooney* case. Its claim is that principles expressed in the minority opinion in that case are correct, and should now be formally adopted by this court. We are unable to accede to this demand. The controlling question here is more than the mere technical correctness of the majority opinion in the *Rooney* case, viewed in the light of the situation that prevailed when that pronouncement was made. The present record involves not merely the force and effect of this decision as a precedent, after it has stood unchallenged for more than a decade, and during that period necessarily influenced and controlled subordinate courts in dealing with questions to which it was applicable, but also giving force and effect to subsequent expression of legislative intent clearly and unmistakably made.

On the subject of the compensable status of appellee's intestate, the Nebraska workmen's compensation act in force at the death of Shandy provided: "The provisions of this act shall apply to the state of Nebraska and every governmental agency created by it, and to every employer in this state employing one or more employees, in the regular trade, business, profession or vocation of such employer. Provided, that railroad companies engaged in

interstate or foreign commerce are declared subject to the powers of congress and not within the provisions of this act." Comp. St. 1929, sec. 48-106.

The act also defines "employee" as follows: "The terms 'employee' and 'workman' are used interchangeably and have the same meaning throughout this article. The said terms include * * * and shall be construed to mean: (1) Every person in the service of the state or of any governmental agency created by it under any appointment or contract of hire, express or implied, oral or written, but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for regular term of office, or to complete the unexpired portion of any regular term." Comp. St. 1929, sec. 48-115. It is quite obvious the deceased at the time of his death was fairly within the statutory description as an "employee," unless embraced within the exclusionary provision, viz., "but shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for regular term of office, or to complete the unexpired portion of any regular term." This court, as already suggested, has squarely determined this question in the negative in the *Rooney* case.

However, wholly apart from the force of that decision as a binding precedent, it may be said that in the proper interpretation of the foregoing statutory language, as applied to the facts in the instant case, the observance of application of certain well-established canons of statutory construction become important. The rule appears well supported by authority that "The courts will take judicial notice of whatever may affect the validity or meaning of a statute. They will take notice of events generally known within their jurisdiction," and of matters of common knowledge within the limits of their jurisdiction. 2 Lewis' Sutherland, Statutory Construction (2d ed.) 606, sec. 310. See, also, *Redell v. Moores,* 63 Neb. 219; *McShane v. Douglas County,* 96 Neb. 664; *In re Estate of Bayer,* 116 Neb. 670, 678. The course of legislation may also be considered. *Campbell v. Youngson,* 80 Neb. 322.

So, also, "In the interpretation of reenacted statutes, the courts will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which such statutes originally had, and by reenactment intend that they should again have the same effect." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 780, sec. 403, and cases cited under note 98.

It will be noted, however, that compensation was denied in the *Rooney* case solely because "a policeman, in the regular service of the Omaha police department, is not employed for the 'gain or profit' of the city, as those terms are used in the workmen's compensation law, and is, therefore, not within the operation of the act." *Rooney v. City of Omaha, supra.*

This in turn was necessitated by the fact that section 48-115, Comp. St. 1929, as originally adopted and then in force included in the third subdivision thereof the words: "It (employee) shall not be construed to include any person whose employment is * * * not for the purpose of gain or profit by the employer." Rev. St. 1913, sec. 3656. However, the first succeeding legislature convening after the announcement of the decision in the *Rooney* case, by the enactment of chapter 122, Laws 1921 (approved April 21, 1921) eliminated the words last above quoted from the statutes.

In this connection it will be noted that section 1, ch. 122, Laws 1921, reenacts as an amendment the exact words which were construed by this court in paragraph 1 of the syllabus in the *Rooney* case, and it repealed and removed therefrom the exact words, "It (employee) shall not be construed to include any person whose employment is * * * not for the purpose of gain or profit by the employer." This amendment was approved April 21, 1921. And solely because of the presence of these words in the compensation act, this court had denied compensation in the *Rooney* case to a policeman, and to a school janitor in *Ray v. School District of Lincoln,* 105 Neb. 456.

The legislature of 1921 knew the interpretation which the majority of this court had placed upon the words they set out in the amendment of 1921, and by reenactment continued. That interpretation by the court must, therefore, be deemed to have been adopted by the legislature, as within the reason of the rule that the legislature will be presumed to know the effect which such statutory terms originally had, and by its affirmative action in the reenactment or continuance of the same to have expressed the intent that they should have the same effect.

If this conclusion is justified by the facts, the legislative intent so expressed is binding upon this tribunal, irrespective of the views of the members of this court on this as an original question when it was decided in *Rooney v. City of Omaha, supra,* and it follows that plaintiff is entitled to the benefits of the workmen's compensation act unless barred by the receipt of a pension from the city.

But we may not accept appellant's contention that the receipt and acceptance of pension benefits by appellee exceeding in amount the death benefits provided under the workmen's compensation act bar the appellee from compensation. None of the provisions of our laws on which the city relies to sustain this defense in express terms negatives the right of a pensioner to recover under the provisions of the workmen's compensation law, or declares the receipt of a pension to be a bar to such recovery. The pension statutes applicable to members of the fire department of metropolitan cities were first enacted in 1895 (Laws 1895, ch. 39) and thereafter amended in 1909 (Laws 1909, ch. 60). The workmen's compensation act was passed and approved in 1913. By the terms of chapter 116, Laws 1921, entitled "An act to incorporate metropolitan cities, and pertaining to the government, powers and duties of such cities," introduced by Senator Berka and others, and approved April 20, 1921, the pension provisions heretofore enacted were substantially continued. By the terms of chapter 122, Laws 1921, approved April 21, 1921, the terms of the workmen's compensation act, as we have already seen, were by amend-

ments broadened so as to embrace within their benefits policemen and firemen of metropolitan cities. Obviously, the course of legislation negatives appellant's contention. But this contention on the part of the city of Omaha is not only opposed to the course of legislation and the general policy of our workmen's compensation act, but it is inconsistent with the express provisions of the latter enactment. Thus section 48-130, Comp. St. 1929, provides: "No savings or insurance of the injured employee, or any contribution made by him to any benefit fund or protective association independent of this article shall be taken into consideration in determining the compensation to be paid hereunder; nor shall benefits derived from any other source than those paid or caused to be paid by the employer *as herein provided,* be considered in fixing the compensation under this article." (Italics ours.) This section as enacted in 1913 constituted section 30 of chapter 198 of the session laws of that year. As orginally enacted the words "as herein provided" obviously designated and restricted payments by employers that might be taken into consideration in fixing compensation payable under the act to payments made in accordance with its terms. This construction finds support in the following provision contained in section 48-148, Comp. St. 1929, viz., "but liability for compensation under this article shall not be reduced or affected by any insurance of the injured employee, or any contribution or other benefit whatsoever, due to or received by the person entitled to such compensation."

We are therefore constrained to accept the view that the payment of pensions to firemen or their dependents under the laws relating to metropolitan cities in no way affects the claims of such persons under the workmen's compensation act or their right to recover under the provisions thereof.

It follows that the judgment of the district court is in all respects correct, and it is

AFFIRMED.

REDICK, District Judge, dissents.

FRANK LIERMANN, APPELLANT, V. JOHN LEWERENZ, APPELLEE.

FILED JUNE 15, 1934. No. 28999.

Trial: DIRECTION OF VERDICT. If each party moves for a directed verdict at the close of the plaintiff's evidence, the court is not required to decide the issues of fact if, in its judgment, a full trial will better serve the interests of justice, for the court is allowed to exercise its discretion in ruling upon said motions, and may overrule both of them.

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

A. R. Oleson, for appellant.

Cook & Cook, contra.

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

PAINE, J.

This is an action to recover $436.21 for expenses of funeral, etc. Edward Lewerenz, the son of the defendant, was at the time of his death 28 years of age. He had married the plaintiff's daughter several years before, and had been engaged in farming for himself. He was taken ill, sold his farm property, and in February, 1930, left in an automobile, with his wife and his brother, for Denver for medical treatment. He had been there but a short time when the defendant received a letter requesting that some member of the defendant's family come to Denver. The defendant was 70 years of age, lived on a farm, and as his other son had accompanied his brother, Edward, it left him at home "to do the chores." The defendant, therefore, went to the home of the plaintiff, advised him of these facts, and asked the plaintiff to go to Denver. The plaintiff said: "I suppose it will be necessary for me to take some money along to pay expenses." To this remark the defendant replied that he thought perhaps it would be necessary, and that that could be straightened out upon his return, "as Edward had money in the bank." The plain-

tiff, appellant, on the other hand, contends that the defendant told him to go out and pay the bills and upon his return he would repay him, which the defendant emphatically denies.

In the petition, the father-in-law of the deceased sues the father of the deceased, alleging that he went to Denver in compliance with the request of the defendant, and that the defendant's son died the day following his arrival there, and that plaintiff thereupon paid $383.21 for funeral charges, and $53 for hospital charges, making a total amount of $436.21, for which he asks judgment, with 7 per cent. interest from March 4, 1930.

The answer admits the illness of defendant's son; admits that plaintiff went to Denver, and paid out the items charged, but denies that he ever agreed to repay plaintiff for such expenditures. The answer further states that the son was of full age, married, had sufficient money and property to pay all of his hospital and funeral expenses, but that, instead of applying such money for such purpose, the widow, with the knowledge, connivance, and insistence of the plaintiff, appropriated such moneys to her own use; further interposes the statute of frauds, as the alleged promise, not being in writing, is void because it is to answer for the debt and default of another.

The plaintiff testifies that he did not want to go to Denver, but the defendant insisted on his going, and made a promise to pay for any expenses on behalf of Edward, the defendant's son, who was sick. On the other hand, the defendant testifies: "I said pay out the money yet and when he came back that could be straightened out. I never did tell that I would pay him back." Then the question was asked: "Didn't you so testify in county court you thought he might die before he could get out there to see about it?" and his answer is, "Maybe I did." The son's estate was never administered, as the son had paid out all of his money for sickness and expenses, and he had no money at the time he died.

At the close of plaintiff's testimony, both parties moved the court for a directed verdict, and appellant insists that in such a case it is the duty of the court to dismiss the jury and decide the case, but in this case the court overruled both motions for a directed verdict, and continued on with the evidence of the defendant, and allowed the case to go to the jury.

The plaintiff's first proposition relied upon for a reversal is: "Where both parties at the close of plaintiff's evidence move the court for a directed verdict without reservations, it is the duty of the court to render its decision without submitting the cause to the jury"—citing, in support thereof, *Adams v. City of Omaha,* 119 Neb. 753.

The majority rule is that, where each of the parties requests the court to direct a verdict in his favor, and makes no other or different request that the jury shall be allowed to determine any question of fact, the parties will be presumed to have waived the right to a trial by jury. However, if such a motion is coupled with a request for other instructions, then there is no waiver of submission of the case to the jury, but if neither party desires to have any question determined by the jury, then the court may decide the facts. *Manska v. San Benito Land Co.,* 191 Ia. 1284, 18 A. L. R. 1430; *Stevens v. Mutual Protection Fire Ins. Co.,* 84 N. H. 275, 69 A. L. R. 624.

However, the motion for a directed verdict is always addressed to the sound discretion of the court, and it is not mandatory upon the court to direct a verdict, the court having a perfect right to submit the case to the jury if so desired, and there is no error in it. It was clearly within the discretion of the court to grant or refuse the requests made, or either of them.

In the case at bar, the trial was continued, and at the close of all the evidence, when each side had rested, neither of the parties renewed the motion for a directed verdict, and it was submitted to the jury, which returned a verdict for the defendant.

We realize that in some states it is held that, when motions for directed verdicts are made by both parties, in a case where a jury may be waived, the court must decide the questions of fact as well as law. *Joseph Milling Co. v. First Bank of Joseph,* 109 Or. 1, 29 A. L. R. 358.

However, we do not adopt this rule in Nebraska, and we believe it better practice to leave the trial judge free to act as in his judgment will best serve the interests of justice.

In the case at bar, the trial judge decided that the case depended upon a question of fact, and decided to submit such questions to the jury at the close of all the evidence. There being a sharp conflict in the evidence, and the jury having by their verdict decided those questions, we feel bound thereby, and do not agree with the appellant that it is against the weight of the evidence.

We have carefully examined the objections made to the instructions, but appellant did not tender better instructions, and finding no reversible error therein, the judgment of the trial court is hereby

AFFIRMED.

STATE, EX REL. PAUL F. GOOD, ATTORNEY GENERAL, RELATOR, V. HARRY P. CONKLIN, RESPONDENT.

FILED JUNE 18, 1934. NO. 29204.

1. Courts. Except in the exercise of appellate jurisdiction, the supreme court is one of limited and enumerated powers.
2. ———. Original jurisdiction in *quo warranto* is conferred upon the supreme court of Nebraska by the state Constitution.
3. Quo Warranto: NATURE OF PROCEEDING. *Quo warranto,* as used in the constitutional provision conferring upon the supreme court original jurisdiction, when directed to an executive state officer, is a civil proceeding to try the right or title under which he claims to hold the office, not to test the legality of his official acts.
4. ———: EXECUTIVE STATE OFFICERS. An eligible, duly elected executive state officer who properly qualified by oath and bond

and entered upon the duties of his office is not removable by *quo warranto* for subsequent felonies of which he has not been convicted in criminal prosecutions in a court of competent jurisdiction.

5. **Jury.** In *quo warranto* in the supreme court to oust an executive state officer from office, he is not entitled to a jury trial as a matter of right.
6. **Courts.** The supreme court may decline to entertain original jurisdiction to oust an executive state officer from office, where the information fails to state facts sufficient to constitute a cause of action in the nature of *quo warranto*.

Original proceeding in *quo warranto* by the state, on relation of the attorney general, to oust respondent from the office of commissioner of public lands and buildings. *Proceeding dismissed.*

Paul F. Good, Attorney General, Daniel Stubbs and *William H. Wright,* for relator.

Beghtol, Foe & Rankin and *Lee Basye,* for respondent.

Heard before ROSE, GOOD, EBERLY, DAY and PAINE, JJ., and LESLIE and RYAN, District Judges.

ROSE, J.

This is an action in the nature of *quo warranto.* It was brought originally in the supreme court by the state of Nebraska on the relation of the attorney general to remove Harry P. Conklin, respondent, from the executive state office of commissioner of public lands and buildings for alleged criminal acts as a public officer.

The grounds upon which a writ of ouster is sought may be summarized as follows: March 18, 1933, respondent entered into a conspiracy with his deputy, Herbert Wehn, and a public employee named George Lane, to defraud the state and in pursuance of that conspiracy and unlawful purpose obtained from the state by false pretenses $1,151 and appropriated to his own use the state funds so procured; May 12, 1933, executed and delivered to the auditor, secretary of state and treasurer a fraudulent voucher for excessive compensation of state house janitors and

other state employees and thereafter committed a similar offense each month until and including February 20, 1934; procured the issuance and payment of state warrants on the excessive vouchers, exacted from employees, and converted to his own use the difference between lawful compensation and excessive vouchers, thus defrauding the state of the amount so exacted and converted; February 1, 1933, and on subsequent dates, corruptly and lawlessly exacted for appointment and retention of state employees various sums of money itemized in the information; February 23, 1933, and on subsequent dates, collected and converted to his own use $539.50 in rentals for rooms used for a restaurant in the state capitol building; received for ice manufactured by and belonging to the state and converted to his own use $36.

It is charged in the information that each of the unlawful acts pleaded by relator was committed by respondent pursuant to the conspiracy with Wehn or with both Wehn and Lane. The details of the official misconduct with which respondent is charged are pleaded in the information, but the foregoing statement is sufficient to indicate the grounds on which his removal from office is demanded.

The authority of the supreme court to remove respondent from office on the grounds charged in the information is challenged on his behalf by objections to jurisdiction. If the facts pleaded by relator are insufficient to state a cause of action in the nature of *quo warranto*, it is unnecessary to entertain jurisdiction. Except in the exercise of appellate jurisdiction, the supreme court is one of limited and enumerated powers. *State v. Hall*, 47 Neb. 579. Original jurisdiction of the supreme court in *quo warranto* came from the Constitution, which provides:

"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. See *State v. Boyd*, 31 Neb. 682.

What *"quo warranto"* means in this grant of original jurisdiction, when the writ is directed to an executive state officer, indicates the measure of the powers conferred upon the supreme court, except as extended by other provisions of the Constitution. The supreme court itself, in the exercise of original jurisdiction, can make no new law nor add any new ground to oust an executive state incumbent from office. No exigency or emergency can justify a judicial usurpation to oust an executive state officer for crimes committed by him in the exercise of official power but of which he has not been convicted. The general understanding of *"quo warranto,"* as the term is used in that part of the Constitution quoted, is that it is a writ employed to try the right or title under which a public or corporate office or franchise is claimed, not to test the legality of a public officer's acts. Bailey, in his work on extraordinary legal remedies, says of *quo warranto:*

"The writ is employed to try the right of a person claiming to an office, not to test the legality of his acts." 2 Bailey, Habeas Corpus, 1253, sec. 318.

Referring to *quo warranto,* the supreme court of Illinois held:

"This writ is generally employed to try the right a person claims to an office, and not to test the legality of his acts." *People v. Whitcomb,* 55 Ill. 172, 176.

On the same subject the supreme court of Texas said:

"Neither under the statute nor common law can one who has been declared elected to an office, and who has entered upon the discharge of its duties, be deprived thereof for bribery until he has been convicted of that offense." *State v. Humphries,* 74 Tex. 466.

Provisions of the Constitution of Kentucky made dueling a disqualification for the holding of a public office. Under the disqualifying provisions a public officer was indicted for usurping an office. A demurrer to the indictment was sustained and the prosecution dismissed. Upon appeal the supreme court of Kentucky said:

"A citizen who denies that he is guilty of having violated those provisions, and is willing to take the oath of office, may enter upon and discharge the duties thereof without subjecting himself to an indictment for usurpation of office until he has been first indicted, tried, and convicted for the disqualifying offense." *Commonwealth v. Jones,* 10 Bush (Ky.) 725.

The supreme court of Nebraska entertained original jurisdiction in an action in the nature of *quo warranto* to determine the eligibility of James E. Boyd to be elected to and to hold the office of governor. The writ was allowed to try the right or title under which he claimed the office, but did not involve the legality of any act of his as chief executive. It was explained in that case that original jurisdiction was conferred by the constitutional grant relating to *quo warranto,* the opinion stating:

"While the Constitution declares that contests of the election of officers of the executive department are to be tried by the legislature, the same instrument, as already stated, confers jurisdiction in *quo warranto* upon the supreme court. It was not the intention of the framers of the Constitution that the remedy by contest should impair the right of the judiciary to inquire into the authority by which any person assumes to exercise the duties of an office of the executive department, and to remove him therefrom, if he is constitutionally ineligible to be elected to or hold such office. We have no doubt that this court has jurisdiction of the case." *State v. Boyd,* 31 Neb. 682, 706.

The *Boyd* case is cited by relator, but its inapplicability to the present action is obvious. Eligibility to be elected to and to hold the office of governor and title thereto were the issues. In the present case, ouster is demanded for offenses committed by respondent as a public officer after he was elected, qualified and inducted into office. In the present instance, eligibility, election, qualification by oath and bond, induction into office and entering upon official duties are not questioned. These prerequisites to office-

holding are shown on the face of the information, the second paragraph of which alleges:

"That the respondent was duly elected the commissioner of public lands and buildings of the state of Nebraska for the term commencing the 5th day of January, 1933; that the respondent qualified as such state officer, subscribed to the oath of office therefor, and entered upon the duties thereof on said 5th day of January, and has at all times since and now is assuming to act as said officer and claiming the right to hold said office and to exercise and discharge the powers and duties thereof."

The ancient writ of *quo warranto* was a criminal process and was once the ruthless instrument of political and ecclesiastical tyrants in England, but it has been changed to a civil remedy. Speaking of the modern remedy by information in the nature of *quo warranto*, as distinguished from a criminal action, Chief Justice Waite said:

"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.' * * * And such, without any special legislation to that effect, has always been its character in many of the states of the Union. * * * In some of the states, however, it has been treated as criminal in form, and matters of pleading and jurisdiction governed accordingly. Such is the rule in New York, Wisconsin, New Jersey, Arkansas, and Illinois, but in all these states it is used as a civil remedy only." *Ames v. Kansas*, 111 U. S. 449, 460.

The history of *quo warranto* was reviewed to some extent in *State v. Moores*, 56 Neb. 1, wherein it was held that a trial by jury is not demandable by respondent as a matter of right. Removal of respondent is not demanded for lack of title or for usurpation in the first instance, but for unlawful acts committed by him as an officer after he was legally inducted into office. The granting of relief pursuant to the information would sub-

ject him in a civil action without a jury to a trial for criminal offenses.

Contingencies under which offices created by the Constitution become vacant have not been overlooked. They are as follows:

"All offices created by this Constitution shall become vacant by the death of the incumbent, by removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind." Const. art. III, sec. 23.

The information does not charge the existence of a vacancy on any ground thus enumerated in the Constitution. Though the proceeding was commenced in good faith in the interest of the public, the facts alleged are insufficient to state a cause of action in the nature of *quo warranto*. There is no sufficient reason for entertaining jurisdiction.

DISMISSED.

COHEN BROTHERS, INC., ET AL., PLAINTIFFS, V. JAMES P. SPEARMAN, COUNTY CLERK, ET AL., DEFENDANTS.

FILED JUNE 18, 1934. NO. 29242.

Original action to determine the validity of chapter 156, Laws 1933, pertaining to taxation of personal property, and for an injunction. *Injunction allowed.*

Fradenburg, Stalmaster, Beber & Klutznick, for plaintiffs.

Paul F. Good, Attorney General, Daniel Stubbs and *R. G. Nickerson,* for defendants.

N. P. McDonald, Stiner & Boslaugh, Halligan, Beatty & Halligan, Cleary, Suhr & Davis, Robert G. Simmons and *Hall, Cline & Williams, amici curiæ.*

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

PAINE, J.

Plaintiffs in this case consist of a corporation, and of a number of stockholders in said corporation, said corporation being located in Sarpy county, Nebraska; and plaintiffs bring the action on behalf of stockholders of like corporations similarly situated, and on behalf of all other persons similarly situated.

It is alleged that leave to file a petition in the supreme court was first had and obtained, and that the action relates to public revenue in the state of Nebraska, and also to governmental subdivisions. This is a companion case to that of *Moeller, McPherrin & Judd v. Smith,* p. 424, *post,* and makes a similar attack upon the constitutionality of House Roll No. 9, Laws 1933, ch. 156, and prays for a writ of injunction against the defendants, James P. Spearman, county clerk of Sarpy county, Chris Hansen, assessor of Sarpy county, William Thiefoldt, precinct assessor of Gretna precinct, Sarpy county, enjoining them and their successors from assessing or taxing any of the moneys and accounts receivable, due or to become due, or attempting in any way to enforce the provisions of House Roll No. 9.

To this petition an answer was filed by the attorney general and verified by Chris Hansen, assessor of Sarpy county. The allegations of the petition and the answer present the same questions for determination as in the companion case, and upon the findings and judgment therein entered the prayer of the petition for injunction against the defendants is hereby granted.

INJUNCTION ALLOWED.

GOOD and EBERLY, JJ., concur in the result.

MOELLER, MCPHERRIN & JUDD, PLAINTIFF, V. WILLIAM H. SMITH, STATE TAX COMMISSIONER, ET AL., DEFENDANTS.

FILED JUNE 18, 1934. No. 29255.

1. **Action:** DECLARATORY JUDGMENTS ACT. Any taxpayer who has an actual and justiciable controversy with other parties in-

volving his status or rights, as affected by any Nebraska law, is entitled, under the uniform declaratory judgments act, to have determined such questions, involving his legal relations, as relate to the validity or construction of said law.

2. **Evidence.** This court will take judicial notice of the proceedings of the constitutional conventions of this state, and also of the journals of the senate and house of our legislature.
3. **Statutes.** An act must not be broader than its title, and where the subject of the legislation is not clearly expressed in the title, the act will be in contravention of section 14, art. III of the Constitution.
4. ———. Where the title to a bill is to amend a particular section of an act, no amendatory legislation, not germane to the subject of the section proposed to be changed, is permissible.
5. **Taxation.** Classifications for taxation purposes must be based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.
6. ———. House Roll No. 9 (Laws 1933, ch. 156) violates section 1, art. VIII of the Constitution, which provides that taxes shall be levied by valuation, uniformly and proportionately, upon all tangible property, and thereby discriminates between taxpayers.
7. **Statutes.** When sections of a legislative act are unconstitutional, and such sections were an inducement to the passage of an act in its entirety, then the entire act is void, notwithstanding a saving clause therein.
8. **Constitutional Law.** The legislature has the power and authority to define words used in any act to clarify the meaning and purpose of the act.
9. ———. This power is, however, limited, and subject to a reasonable construction. It cannot be used to nullify and circumvent provisions of the Constitution by the simple expedient of defining terms used therein in an arbitrary, wrong and improper manner not in accord with standard dictionaries, or common usage.
10. **Statutes.** A saving clause, providing that in case any part shall be found unconstitutional, it shall not affect the validity of the remaining portions of the act, is simply a declaration of legislative intent as to separability. This is an aid to judicial interpretation, but is not in any sense an inexorable command.
11. ———. Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections.
12. ———. Where the title of a bill is to repeal certain sections of a statute, the legislature cannot by said bill reenact the substance of the sections so declared repealed in the title, nor

can amendments be made to the sections declared to be repealed.

13. ———. It is admitted that the penalty provided in section 11 of the act is not mentioned in the title of the act. This, we have held, is not a defect unless the penalty covers the punishment of matters not indicated, nor within the contemplation of anything set out in the title of the act, which is true of section 11 herein.

Original action, under the uniform declaratory judgments act, to determine the validity of chapter 156, Laws 1933, pertaining to taxation of personal property. *Judgment for plaintiff.*

Shotwell, Monsky, Grodinsky & Vance, for plaintiff.

Paul F. Good, Attorney General, Daniel Stubbs and *Henry J. Beal,* for defendants.

Jessen & Dierks, Robert G. Simmons, Hall, Cline & Williams and *Clarence T. Spier, amici curiæ.*

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

PAINE, J.

This is an original action, brought in this court under the uniform declaratory judgments act, as approved April 24, 1929, and found in chapter 75, Laws 1929, sections 20-21,140 to 20-21,155, Comp. St. 1929.

It was instituted, upon leave granted by this court, by Moeller, McPherrin & Judd, a copartnership, of Omaha, against William H. Smith, state tax commissioner, and Sam K. Greenleaf, county assessor of Douglas county, and an order for service required defendants to answer within ten days.

The petition recites in detail certain personal property, such as common stock, notes, book accounts, bank deposits, owned by the plaintiff, and subject to taxation. It then sets out in detail the title and contents of House Roll No. 9, being chapter 156, Laws 1933, and alleges that many taxpayer corporations, partnerships, and individuals in the state occupy a similar position to that of the plain-

tiff herein, and to permit the officials of Douglas county, and of all the other counties in our state, to assess and levy such illegal taxes upon personal property, in conformity with the provisions of said House Roll No. 9, will create a multiplicity of actions to secure the removal of the clouds upon the title and property so taxed; that every county in the state is contracting and undergoing great expense to secure the returns based upon the provisions of the said House Roll No. 9, and will undergo additional expense in computing and recording the returns made under the provisions of House Roll No. 9; that it is of great public interest that the constitutionality of said House Roll No. 9 be passed upon by this court at the earliest possible moment in order that the plaintiff and other persons, partnerships, and corporations, similarly situated in the state of Nebraska, be saved from irreparable harm and injury that will be suffered by them unless the relief prayed is granted.

The plaintiff claims that, as a taxpayer whose rights, status, or other legal relations are affected by House Roll No. 9, it is entitled, under the uniform declaratory judgments act, to have determined in this action the validity, force, and effect of said law, and to obtain a declaration of its rights, status, or other legal relations thereunder. Plaintiff prays that this court decree that House Roll No. 9 is unconstitutional, null and void, and of no force and effect.

The answer of William H. Smith was filed by the attorney general, admitting certain paragraphs of the petition, and admitting that defendant will proceed to assess the property of plaintiff, and all others similarly situated, in accordance with House Roll No. 9, and that such assessment will be used by the taxing officials in making the levy for taxation purposes for the year 1934, and denies all allegations not admitted.

The plaintiff thereupon filed a motion, setting forth that the defendant by his answer admitted all of the essential allegations of fact set out in the petition, and moved the

court for judgment on the pleadings, as prayed in plaintiff's petition.

This action relates to the public revenue of the state, and also of all of its governmental subdivisions. The answer filed by the defendants leaves, as the only issue to be decided by this court, the constitutionality of said House Roll No. 9.

This court has held that the uniform declaratory judgments act was applicable to actions wherein there was an actual controversy with justiciable issues presented by proper parties, such as appear in this case. *Lynn v. Kearney County,* 121 Neb. 122. In *Muskegon Heights v. Danigelis,* 253 Mich. 260, two of the principal taxpayers were drafted to defend an action brought by the city under the declaratory judgments act. See, also, *Zoercher v. Agler,* 202 Ind. 214.

All real and personal property was required to be taxed, uniformly as to rate and as to valuation, prior to the new Constitution of 1920. *State v. Osborn,* 60 Neb. 415. By an amendment in 1920, the Constitution was changed to read: "But taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises and taxes uniform as to class may be levied by valuation upon all other property." Const. art. VIII, sec. 1.

This provision was obviously intended to separate tangible from intangible property for the purpose of taxation, and would permit a different rate of taxation upon tangibles. The high taxation on tangible property offered inducement to allow intangibles to be covered up and escape any taxation, so the constitutional convention endeavored to permit a lower taxation on intangibles.

The 1921 legislature promptly took advantage of this constitutional enactment to define tangible property as that having physical existence, excluding money, and to declare that all other personal property, including money, was intangible personal property, and fixed different rates of taxation for the two kinds. Comp. St. 1929, sec. 77-104.

In 1925 the legislature provided for the taxation of all

money and bank deposits at one rate, 2.5 mills, and class B intangibles at a higher rate. Laws 1925, ch. 165. The legislature of 1929 raised class B intangibles to 8 mills. Laws 1929, ch. 168.

House Roll No. 9 raises taxation on money to 5 mills, and provides that all other personal property, except bank shares, shall be taxed at the same rate as real property. Many of the members of the 1933 legislature desired to repeal the intangible tax law then in existence, but when such a bill was before them, it failed of passage; then followed certain amendments and modifications designed to change the intangible tax law, and the result is House Roll No. 9, now under consideration. Upon its passage, several members refused to support it on the ground that it was not a repeal of the intangible tax law, and the governor permitted the act to become a law without his signature thereon.

These observations are not made for the purpose of inquiring into the proper exercise of legislative power, for this court assumes that legislative discretion was properly exercised, and no criticism thereof is intended.

Objection is first made to House Roll No. 9 on the ground that the act is broader than the title thereto. The provisions of our Constitution relative to the title of an act are to be liberally construed, and if the provisions of an act are clearly comprehended within the objects and purposes of the act as expressed in the title, then the act is to be held constitutional.

Section 14, art. III of the Constitution provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." Among the reasons for this rule is that it is only fair and honest to give the members of the legislature, as well as taxpayers and the public generally, the real subject of the legislation that is under consideration. Other reasons are given in *Conservative Savings & Loan Ass'n v. Anderson,* 116 Neb. 627.

Now, let us examine the title to House Roll No. 9. It is ostensibly an act to repeal 12 sections of Comp. St.

1929, and, in addition, to repeal two sections of Comp. St. Supp. 1931, all of which relate to intangible property tax, and this clearly indicates that the intangible property tax provisions, as set out in those 14 sections, are wiped out. The title then provides that four sections of Comp. St. 1929 are to be amended to provide for the taxation of banks, building and loan associations, insurance and surety companies, fire insurance companies, together with the taxation of foreign corporations doing business in Nebraska. However, a careful examination of the act itself shows that House Roll No. 9 does anything but carry out these simple provisions as expressed in the title, and that it legislates upon other topics not embraced in the title.

Section 2 of the act provides that corporations shall pay a tax assessed upon its shares of stock. Such stock certificates belong to the stockholders individually, and in the title of the act there is no mention made of a right to tax the stockholders of a corporation. This provision provides that, when the corporation has paid the tax assessed upon its shares of capital stock outstanding, it shall have a lien upon such shares for the tax paid, except in the case of shares of stock in a building and loan association, upon which shares the tax shall be assessed to, and paid by, the individual owners thereof. No one has pointed out where, in the title of this act, the individual owners of shares of stock in building and loan associations, or in other corporations, are notified in the title that the act will affect their holdings and tax their property as individuals.

Section 4 provides a similar tax upon the individual stockholders of every bank.

Section 5 provides that every owner, whether as individual, agent, trustee, executor, administrator, guardian, or in any other representative capacity, must list all intangible property called in the act, class 2, tangible property, for taxation. A most careful reading of the title of this act gives no hint of any such law as this to follow.

Section 6 of the act provides that money deposited in the banks shall be taxed. This, of course, includes the deposits of all individuals as such, and this also is open to the objection that there is nothing in the title of the act from which one might infer that a specific tax is to be levied upon the money of an individual.

Section 8 of the act provides that the local agent of fire insurance companies shall render a statement of the business done during the preceding calendar year, with the premiums collected, and that such gross receipts shall be assessed and taxed, and that such agent is personally liable for the tax of such fire insurance companies. Where is there any provision in the title of this bill that in any way indicates that the bill will provide a personal liability upon fire insurance agents for the taxes due from their companies under this bill? It certainly is not mentioned in the title of the act, and we cannot see any provision under which it could be contemplated.

It is contended that the provision in section 9 of the act, which requires certain foreign corporations to furnish a list of their Nebraska stockholders to the tax commissioner, is not within the title, which only provides for the taxation of such corporations.

Section 11 corresponds to section 77-712, Comp. St. 1929, which was enacted as a section of Senate File No. 65 in 1921. Near the end of the title of that act appear these words, "and to provide penalties for the violation thereof," Laws 1921, ch. 133, but in House Roll No. 9 appears no such statement in the title.

It is contended that, even if a title does not refer to a penalty provision, such a provision, punishing those who violate the provisions of the act, might still be proper if germane to the act. *Rosenbloom v. State,* 64 Neb. 342; *Westbrook v. State,* 120 Neb. 625. However, the penalty provision in House Roll No. 9 goes far beyond that, and applies to persons, firms, or corporations who aid and abet a violation of the act; whereas, the title relates to corporations, and this goes beyond the holding in *State*

v. Power, 63 Neb. 496, and is clearly without the constitutional provision and void.

The title of House Roll No. 9 shows that section 77-707, Comp. St. 1929, is one of the sections repealed, as set out in the title, and there is nothing in the title, or in the act itself, to indicate that this section 77-707 has been reenacted in full elsewhere in the bill as section 11, and it is contended that the portion which is reenacted, after the title states that it has been repealed, is unconstitutional and void. In our opinion, that part of the title of House Roll No. 9 which reads, generally, to provide for the taxation of banks, domestic building and loan associations, loan and trust, loan, trust, and investment companies, together with insurance companies, surety companies, and foreign corporations, is not broad enough to include the imposition of a penalty upon individual persons who may counsel or advise a taxpayer, and no penalty can validly be imposed other than those which relate to or are included in or suggested by the bill. *Birdhead v. State,* 105 Neb. 296. It has been held by this court many times that if any section is the inducement for the passage of an act, and that section is unconstitutional, then the entire act failed. It is certainly possible that some members of the legislature had in mind this provision, punishing by both fine and imprisonment individuals who may counsel or advise taxpayers wrongly in reference thereto, as an inducement for their favorable action on the bill. If section 11 was an inducement for the legislature to pass the entire act, then, as this provision falls, the entire act would fall, notwithstanding the provisions of section 12.

Section 77-104, Comp. St. 1929, which House Roll No. 9 purports to amend, provided that tangible property included all personal property possessing a physical existence, but excluding money, and then defined intangible property as all other personal property, including money. Section 2 of House Roll No. 9 attempts to amend this by providing that tangible property shall consist of two classes,

and that class 1 shall be all personal property possessing a physical existence, and then provides that class 2 of tangible property shall include stocks, notes, securities of foreign countries, accounts, judgments, liens of any kind, bonds, and all demands for labor, or other valuable thing, due or to become due. This introduces a new query, which is: May a legislature, under the guise of defining a word, do so with a definition which contravenes our Constitution, and which is not true or legal in fact? Class 2 of tangible property, as defined in House Roll No. 9, is intangible property as defined by the leading dictionaries. Webster's New International Dictionary: "Intangible. Not tangible; incapable of being touched or perceived by touch; impalpable; imperceptible." "Tangible. 1. Capable of being touched; also, perceptible to the touch; tactile; palpable. 2. Capable of being possessed or realized; readily apprehensible by the mind; real; substantial; evident."

Can the legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? Tangible is the direct opposite of intangible; and can the legislature, under the guise of calling it two separate classes of tangible property, include all intangible property under class 2 of tangible property? In our opinion, there is a limit to the legislature's power to nullify and circumvent constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word.

The Constitution of Nebraska clearly provides for two kinds of personal property for purposes of taxation, and the legislature has abrogated one of these by the device of calling it a class under the other. The legislature could not directly blot out a provision of the Constitution; has it not, by House Roll No. 9, attempted to do it indirectly?

If the Constitution gives one definition of a legal term, and a statute another, it is the duty of a court to declare that the Constitution governs.

Classifications for taxation purposes must be based on a real and substantial difference, having a reasonable relation to the subject of the particular legislation. *State Bank v. Endres,* 109 Neb. 753.

Without extending this opinion beyond proper bounds, it is impossible to discuss all of the attacks made upon each section of House Roll No. 9. We have tried to show that many of the sections, as herein set out, were clearly unconstitutional. Our attention is called by the attorney general to the saving clause in section 12, providing that, if any part of the act is held unconstitutional, such decision shall not affect the validity of the remaining portions of the act.

Mr. Justice Brandeis, in *Dorchy v. Kansas,* 264 U. S. 286, said: "A declaration in a statute that it shall be conclusively presumed the legislature would have passed the statute without any part of it found invalid by the courts, provides a rule which may aid in determining the legislative intent, but is not an inexorable command."

When sections of a legislative act are unconstitutional, and such sections were an inducement to the passage of an act in its entirety, then the entire act is void, notwithstanding a saving clause therein.

One of the purposes of the act was to establish a new plan for the taxation of intangibles by the simple device of calling such personal property tangible. The various sections are so interwoven with that one theory that it would be impossible to leave a few sections standing by themselves. Such a finding would leave the law, under which the state tax commissioner and county assessors must proceed, in such a chaotic condition that it would be absolutely impracticable and unenforceable, and doubtless lawsuits would arise which would hamper and delay the collection of the needed revenues to run our state and each of the subdivisions thereunder.

We hold that House Roll No. 9 is void, among other reasons, because not all of its objects are expressed in its title, and the act is very much broader than its title.

Amendments have been made in this act which are in no way germane to the subject-matter of the sections amended.

Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections. *State v. Tibbets,* 52 Neb. 228.

Where the title of a bill is to repeal certain sections of a statute, the legislature cannot by said bill reenact the substance of the sections so declared repealed in the title, nor can amendments be made to the sections declared to be repealed. *Trumble v. Trumble,* 37 Neb. 340.

It is admitted that the penalty provided in section 11 of the act is not mentioned in the title of the act. This, we have held, is not a defect unless the penalty covers the punishment of matters not indicated nor within the contemplation of anything set out in the title of the act, which is true of section 11 herein.

Support for the findings herein may be found in *Hubbell Bank v. Bryan,* 124 Neb. 51; *State v. Ord State Bank,* 117 Neb. 189; *Central Nat. Bank v. Sutherland,* 113 Neb. 126; *State Bank v. Endres,* 109 Neb. 753; *State v. Junkin,* 85 Neb. 1; *Williams v. Standard Oil Co.,* 278 U. S. 235; *State v. Dawson County Irrigation Co.,* 125 Neb. 836; *Day v. Metropolitan Utilities District,* 115 Neb. 711; *Ives v. Norris,* 13 Neb. 252; *State v. Poynter,* 59 Neb. 417; *State v. Painter,* 117 Neb. 42; *Elmen v. State Board of Equalization and Assessment,* 120 Neb. 141; *Webster v. City of Hastings,* 59 Neb. 563; *Millard v. Roberts,* 202 U. S. 429; *McShane v. Douglas County,* 96 Neb. 664; *Wayne County v. Steele,* 121 Neb. 438; *State v. Bauman,* 126 Neb. 566; *City Trust Co. v. Douglas County,* 101 Neb. 792; Cooley, Constitutional Limitations (6th ed.) ch. 7; 6 R. C. L. 70, sec. 67.

It is the declaratory judgment and decree that House Roll No. 9, Laws 1933, ch. 156, is unconstitutional and void, and of no force and effect, thus leaving the former statutes on taxation in full force and effect, as they existed

prior to the passage of House Roll No. 9.

JUDGMENT FOR PLAINTIFF.

GOOD and EBERLY, JJ., concur in the result.

FRANK BULWAN V. STATE OF NEBRASKA.

FILED JUNE 22, 1934. No. 29187.

Burglary. Wine and the jug containing it, in the private dwelling-house of the owner, constitute property of value, subject to the crime of breaking and entering with intent to steal.

ERROR to the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed: sentence reduced.*

Guy A. Hamilton, for plaintiff in error.

Paul F. Good, Attorney General, and *Daniel Stubbs, contra.*

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

GOSS, C. J.

Defendant brings error proceedings because of a conviction and sentence for breaking and entering a residence with intent to steal property of value.

The information was laid under section 28-538, Comp. St. 1929, being a part of a long and inclusive chapter on "Crimes and Punishments." The evidence was sufficient to justify the jury in finding that defendant (and others not on trial) forcibly broke a door, entered the farm home of Leo Koehn and took therefrom a five-gallon jug containing wine. The state proved that the jug was worth $1.50. There was no specific proof of the value of the wine, nor whether the wine was intoxicating, nor whether Koehn's possession of it in his home was unlawful. Defendant did not testify.

Defendant argues that neither the jug nor the wine is property and quotes, in support thereof: "There shall be

no property rights of any kind whatsoever in any liquors, vessels, appliances, fixtures, bars, furniture and implements kept or used in violation of any provision of this act." This excerpt is quoted from section 53-137, Comp. St. 1929, and is a part of the original liquor act adopted in 1917 in aid of the constitutional amendment prohibiting, after May 1, 1917, the manufacture, sale and keeping for sale or barter, of intoxicating liquors. The act specifically repealed sections 3844 to 3894, Rev. St. 1913, being the former liquor laws. Laws 1917, ch. 187. Section 53-101, Comp. St. 1929, includes wine among the liquids defined as intoxicating. Section 11 of the act, now section 53-111, Comp. St. 1929, authorizes a person to keep or possess in his private dwelling-house intoxicating liquor in an amount "reasonably sufficient for his personal use and needs." This section further provides that "the possession, in and of itself, of any intoxicating liquor * * * in a private dwelling-house *by the person against whom the violation of the act is charged* shall constitute *prima facie* evidence that such liquor was kept by such person with the purpose of unlawful sale, use or disposition in violation of law." (Italics ours.)

It will be noted that the possessor of intoxicating liquor has a right to keep an amount reasonably sufficient for his own needs and the statute does not negative his property rights in the liquor or its container unless the liquor be kept or used in violation of the provisions of the liquor act. Possession in a private dwelling-house is not *prima facie* evidence that liquor is kept in a home for an unlawful use except by the person "against whom the violation of the act is charged." Leo Koehn was the possessor of the wine. He was not charged with any violation of the liquor laws and was not even a witness at this trial of defendant for breaking and entering. At common law the jug and its contents were property. Their qualities as property could, it may be conceded, be destroyed by the legislature, but it cannot be held that the legislature intended so to change their meaning unless it did so clearly

and unequivocally. Especially is this true in cases like this wherein the state seeks to protect its citizens in their homes from the offense of burglary of which murder is so often a resulting crime.

In support of his position defendant cites *People v. Spencer* (1921) 54 Cal. App. 54, in which that court held that wine of the content charged in the information was the subject neither of larceny nor burglary. The information had in terms charged burglary of wine containing more than one-half of one per cent. by volume of alcohol, said wine having been manufactured since January 20, 1921. The trial court had sustained a demurrer to the information and the appellate court affirmed the judgment. We do not find that the supreme court passed upon the case.

This California decision is contrary to the almost unanimous weight of authority. In *People v. Otis,* 235 N. Y. 421, the court affirmed a conviction for the larceny of whisky illegally possessed. It held: "The provision of the National Prohibition Act (sec. 25) that 'no property rights shall exist in liquor illegally possessed' is not intended to license theft of such liquor but solely to protect government officials in the exercise of their duties. It is merely a police regulation adopted to aid the enforcement of the prohibition law and to be applied to that end in view. The intention of congress went no further." The case was taken to the supreme court of the United States on certiorari but was finally dismissed for failure of the petitioner to prosecute. *People v. Otis,* 266 U. S. 608.

In *Burgess v. State,* 161 Md. 162, it was held: "Contraband liquor is the subject of larceny, the purpose of the Volstead Act, in providing that 'no property rights shall exist' in liquor illegally possessed, being to limit civil rights, not criminal liability." That case is reported in 75 A. L. R. 1471. On page 1479 is an annotation supplementing an early annotation and citing new cases on the subject from a dozen jurisdictions. We quote one paragraph from the note:

"The unanimous view of the earlier cases, to the effect that intoxicating liquors which have become outlawed by reason of a prohibition against their being held for unlawful purposes may yet be the subject of larceny, since property rights in such liquors have been forfeited only to the extent that they cannot be unlawfully sold or transferred, has been further adopted in all the jurisdictions passing upon that point, with the single exception of California."

In the instant case the information did not charge the intent to take either the jug or the wine, but charged in effect the intent to take property of value. The specific value of the jug was proved on the trial. No specific value of the wine was testified to, but the evidence shows that defendant and his associates took it, divided it up into smaller containers, and that some, at least, of the wine was consumed. By using it they established that it had value. So both the wine and the jug were property of some value. The intent to take them was established by the fact that defendant took them when, as the jury found, he broke and entered the private dwelling of their owner. We are of the opinion that wine and the jug containing it, in the private dwelling-house of the owner, constitute property of value, subject to the crime of breaking and entering with intent to steal.

All other errors assigned, including instructions and rulings on evidence, have been examined and found not prejudicial. We think, however, that the sentence of two to three years is excessive. Under authority of section 29-2308, Comp. St. 1929, the sentence is reduced to one year. As so modified, the judgment of the district court is affirmed.

AFFIRMED: SENTENCE REDUCED.

S. J. PESTER ET AL., APPELLANTS, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED JUNE 22, 1934. No. 28928.

1. **Municipal Corporations**: LOCAL IMPROVEMENTS. The extension of a city water main in the city of Lincoln through the alley from Forty-fourth street to Forty-eighth street, in water district number 141, and the assessment of real estate therein for benefits are matters of local and municipal concern.
2. ———: CHARTERS. In matters relating exclusively to local and municipal affairs, the Lincoln home rule charter prevails over conflicting provisions in a statute containing legislation on the same subject applicable to cities of different classes generally.
3. ———: IMPROVEMENTS: ASSESSMENTS: OBJECTIONS: WAIVER. Nonjurisdictional objections to assessments of real estate for benefits arising from the extension of a water main in the city of Lincoln may be deemed waived, if not made to the city board of equalization at the appointed time pursuant to legal notice given.

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

Robert S. Stauffer and *Sterling F. Mutz,* for appellants.

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

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

ROSE, J.

Originally this was a proceeding before the board of equalization of the city of Lincoln to vacate special benefit assessments for a municipal water main extending through the alley from Forty-fourth street to Forty-eighth street between Greenwood street and Adams street in water district number 141, city of Lincoln. Plaintiffs are owners of lots on which the assessments were levied. The board of equalization dismissed the proceeding. The dismissal was reviewed in the district court by petition in error on behalf of plaintiffs and the board of equalization was sustained. The judgment of the district court and the special

assessments are assailed by plaintiffs in the supreme court by petition in error.

It is insisted by plaintiffs that the assessments are erroneous because they exceeded the benefits accruing to the property in the water main district; because five lots in the district were omitted from the assessments, thus increasing the burden on the others; because all the real estate in the district was not assessed as required by statute; because plaintiffs were already supplied with water from other mains and consequently are not benefited by the new main; because each 50-foot lot in the district, excepting the five lots omitted, was assessed at $65.49, which exceeded the statutory limit of 50 cents a front foot by $40.49. Plaintiffs rely on the following provisions of a general statute applicable to cities and villages:

"Upon the completion of any extension of any water main in any such district, or the enlargement of any water main in any such district, the actual cost thereof shall be duly certified to the council or board of trustees of such city or village, and thereupon it shall be the duty of such council or board of trustees to assess such cost, not exceeding the sum of fifty cents per front foot, upon all real estate in said water main district. The cost of any such extension or enlargement in excess of said fifty cents per front foot, heretofore authorized to be assessed and levied against the real estate in the water main district, shall be paid out of the 'water fund' of such city or village, if there be such fund, and if such city or village has no 'water fund,' then the same shall be paid out of the general fund." Comp. St. 1929, sec. 18-705.

These provisions do not seem to apply to Lincoln, a city governed by its home rule charter. The language quoted is part of an act passed in 1907, the last section of which provides:

"The city council, or other authority in the city or village in this state, having general charge, supervision and control of all matters pertaining to the water supply of

such city or village, may, by resolution, elect and determine to proceed under the provisions of this article in the matter of ordering and making and causing to be made extensions or enlargements of water mains in such cities or villages, but are not required to do so, and until the adoption of such resolution, this article shall not be operative or in force in any such city or village." Comp. St. 1929, sec. 18-707.

There is nothing in the record to show that the city of Lincoln adopted a resolution making the act of 1907 operative therein. In the present instance the procedure, assessments and equalization conformed to the home rule charter. The extension of the water main through the alley from Forty-fourth street to Forty-eighth street between Greenwood street and Adams street in water district number 141 and the assessment of real estate therein for benefits were matters of local and municipal concern. Consequently the home rule charter prevails over the statute applying to cities and villages generally. *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51; *Sandell v. City of Omaha,* 115 Neb. 861; *State v. Johnson,* 117 Neb. 301; *Salsbury v. City of Lincoln,* 117 Neb. 465.

The other assignments of error are without merit for the following reasons: In the first instance questions relating to benefits, to assessments, to lots omitted as not benefited, to claims that lot owners were already supplied with water from other mains, and therefore not benefited, were matters for the city council to determine. The water main extension was regularly installed. Pursuant to notice according to the home rule charter, the board of equalization convened as such to equalize and adjust the special assessments and to hear such objections and complaints as are now made, found and determined that the assessments made by the city council did not exceed the benefits and were properly levied, and adjourned. Plaintiffs did not appear before the board of equalization at the time appointed for the hearing of their complaints and objections and did not make them until long after the opportunity to

do so had expired. They are therefore concluded by the final action of the board of equalization on nonjurisdictional objections and complaints. The judgment of the district court is in harmony with these views of the evidence and the law and is therefore

AFFIRMED.

FOREST P. NEAL, APPELLANT, V. UNION TRANSFER COMPANY, APPELLEE.

FILED JUNE 22, 1934. NO. 28937.

Appeal. Where the jury renders a verdict in favor of defendant in an action for damages and the evidence is insufficient to sustain a judgment in favor of plaintiff, assigned errors in admitting testimony on behalf of defendant and in charging the jury are immaterial on appeal to the supreme court.

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

H. T. White, Patrick & Smith and *Kennedy, Holland & DeLacy*, for appellant.

Abbott, Dunlap & Corbett and *Wear, Garrotto & Boland, contra.*

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

ROSE, J.

This is an action to recover $26,000 in damages for alleged negligence resulting in personal injuries to plaintiff. In Omaha, October 21, 1931, about 5 o'clock p. m. the right rear wheel of an automobile truck owned by defendant ran over plaintiff's right foot. The action was brought to recover resulting damages. Jackson street in Omaha runs east and west and Tenth street runs north and south. The two streets cross each other at right angles. Plaintiff walked south on the sidewalk on the west side of Tenth street and stepped into Jackson street

and the truck came south on Tenth street and turned west into Jackson street. The collision occurred after the truck turned west. Plaintiff pleaded care and prudence on his part for his own safety and charged defendant with negligence as follows:

"That said trailer and truck were negligently and carelessly operated by said defendant company and its agent and employee, in that it was operated without a proper lookout for the safety of persons crossing said street and that no warning was given of its approach or of its intention to turn, and it was further carelessly and negligently operated in that it was turned so shortly that the said trailer swung over out of the path of the main truck and ran into, against and over the plaintiff, who had retired from the path of the main truck as soon as he saw it but had not time to retire from the path of the trailer operated carelessly and negligently as aforesaid."

The answer to the petition contains a general denial and a plea that the proximate cause of the injuries to plaintiff was his own negligence.

Upon a trial of the issues the jury rendered a verdict in favor of defendant. The action was dismissed and plaintiff appealed.

Rulings in admitting evidence in support of the defense and in instructing the jury are assailed by plaintiff as erroneous. It is insisted by defendant that a verdict in its favor should have been directed by the trial court for insufficiency of the evidence to prove any actionable negligence pleaded by plaintiff. If this position of defendant is tenable, the assigned errors of which plaintiff complains are immaterial.

The testimony of plaintiff and of his witness, Thomas Casey, proves the following facts: The truck was a large one, the front end of which was a tractor. There was no trailer following the truck. The sight of plaintiff's left eye was impaired. He could not see to the left without turning his head. Just before the accident he walked south on the sidewalk on the west side of Tenth street

toward Jackson street, intending to cross it. In the same direction, the truck, in Tenth street, going south also, came as far south as plaintiff, near the north curb line of Jackson street, and turned west therein. The tractor of the truck passed in front of plaintiff who had taken two or three steps into Jackson street from the sidewalk line and then stepped backward two or three steps and waited for the truck to pass. Plaintiff heard and saw the truck coming; first saw it near the alley north of Jackson street; saw it again when it was 30 feet from Jackson street; later saw it in Tenth street when it was about even with him; saw it when it started to turn west into Jackson street; had his eye on it all the time. The truck turned slowly. The tractor end of the truck passed him safely. It looked as though he grabbed at the side of the truck to keep from falling. The right rear wheel of the truck described a shorter segment of a circle than the front wheel and caught his foot. He holloed and the truck stopped with the wheel on his foot and backed off. Plaintiff is bound by the evidence of these facts. The proof of them came from him and a witness called by him.

There was no plea that the truck was operated at an excessive speed and plaintiff's witness, Casey, proved the contrary. The allegations that the truck was operated without a proper lookout is not supported by the evidence. The failure of the driver of the truck to give warning of his approach or of his intention to turn west at Jackson street, if supported by sufficient testimony to sustain an affirmative finding, did not cause or contribute to the accident, since plaintiff himself testified that he saw the truck before it came to Jackson street, kept his eye on it, saw it when it commenced to turn west and stopped to let it pass. Plaintiff, therefore, had in advance all that warning signals could have given, if any were omitted. The evidence is insufficient to sustain a finding that the rear wheels of the truck turned more sharply toward plaintiff, out of the path of the tractor, than was indicated by the natural movement of the entire motor vehicle as plaintiff himself saw it when turning into Jackson street.

The truth of the record is that actionable negligence on the part of defendant was not shown. Plaintiff did not make a case and defendant did not make it for him. Since the evidence is insufficient to sustain a verdict in favor of plaintiff, assigned errors in admitting testimony in favor of defendant and in instructing the jury are immaterial on appeal.

AFFIRMED.

MORRIS MORTENSEN V. STATE OF NEBRASKA.

FILED JUNE 22, 1934. No. 29146.

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

McNeny & Sprague and *Herbert A. Smith,* for plaintiff in error.

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

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

DAY, J.

Plaintiff in error was convicted in the district court for illegal possession of intoxicating liquor. One Wright accompanied the sheriff and his deputy in a search of the premises and found the liquor in the barn. The only assignment of error relates to the refusal of the trial court to permit the defendant to prove that Wright had previously been convicted of a felony. Evidence of previous conviction may be considered only as affecting credibility of witness. *Vanderpool v. State,* 115 Neb. 94. For this purpose, "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1929, sec. 20-1214. Wright was not a witness. There is no reversible error in the record.

AFFIRMED.