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STATE, EX REL. REPUBLIC NATIONAL LIFE INSURANCE COMPANY, RELATOR, V. CHARLES SMRHA ET AL., RESPONDENTS.

293 N. W. 372

FILED JULY 19, 1940. No. 30993.

1. **Insurance.** The provisions of an incontestable clause, section 44-602, Comp. St. 1929, providing that a policy of life insurance shall be incontestable after two years, except for nonpayment of premiums and violation of conditions relating to naval and military service in time of war, are exclusive and, after satisfactory proof of death, bar all other defenses where the contestable period has expired.
2. **Mandamus.** An action for a writ of mandamus will not lie against the department of insurance, or its officers, to compel the approval of a form rider which does not state in concise terms the exact coverage or liability prescribed by existing statutes.

Original proceeding in mandamus by the state, on the relation of Republic National Life Insurance Company, against Charles Smrha. *Writ denied and action dismissed.*

Herman Ginsburg, for relator.

John S. Logan and *Peterson & Devoe,* for respondents.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an original action in which the Republic National Life Insurance Company seeks a peremptory writ of mandamus against the director of the department of insurance and the department of insurance itself, to compel the respondents to approve a form of rider which the company intends to add to its life insurance policy forms for the purpose of restricting its liability in the event of the death of the insured as a result of engaging directly or indirectly in any form of aviation. The defendants demurred generally to plaintiff's petition. The only question for determination is whether the petition states a cause of action.

The petition alleges that relator is an insurance corpora-

tion organized under the laws of the state of Texas and authorized to conduct a general life insurance business in the state of Nebraska. Relator alleges that the forms of its insurance policies and certificates heretofore issued or delivered in Nebraska have been approved by the department of insurance as required by section 44-1103, Comp. St. 1929. The petition further states that, in the future, whenever the underwriting investigation made in connection with the issuance of any life policy discloses that the person to be insured "has been or is likely to operate or ride in any kind of aircraft, the relator intends to restrict, limit and exclude its liability for death arising therefrom under such policies; and relator proposes to execute and issue and attach to each such policy to be issued upon the lives of such persons a rider restricting relator's liability in the event of death of the insured resulting directly or indirectly from operating or being in, on, or riding in any kind of an aircraft." Relator alleges that it has submitted such a rider to the department of insurance and its director for approval and that approval has been arbitrarily, capriciously and wrongfully denied. Relator prays that a peremptory writ of mandamus be issued to compel the approval of the proposed rider by the respondents.

It is not questioned that a life insurance policy may lawfully restrict and limit the risk assumed by the insurer in the absence of statutory prohibition. Respondents urge, however, that relator is prohibited by two applicable statutes from limiting its policy as proposed. In this connection section 44-602, Comp. St. 1929, provides in part: "No policy of life or endowment insurance * * * shall be issued or delivered in this state unless it contains in substance the following provisions: * * * 5. A provision that the policy shall be incontestable after it shall have been in force during the lifetime of the insured for two years from its date except for nonpayment of premiums and except for violations of the conditions of the policy relating to naval and military service in time of war."

The other statute, section 44-603, Comp. St. 1929, pro-

vides: "No policy of life or endowment insurance shall be issued or delivered in this state if it contains in substance: * * * 2. A provision by which the settlement at the maturity of any policy after the expiration of the contestable period thereof, shall be of less value than the amount promised on the face of the policy plus dividend additions, if any, less any indebtedness to the company on or secured by the policy, and less any premium that may, by the terms of the policy be deducted."

The decision in this case must rest squarely upon the interpretation to be given to the two quoted statutes. Relator contends that the provision that a policy should be incontestable after being in force for two years is not a mandate as to coverage or a definition of the hazards to be assumed by the insurance company, and cites *Matter of Metropolitan Life Ins. Co. v. Conway,* 252 N. Y. 449, 169 N. E. 642, and *Pacific Mutual Life Ins. Co. v. Fishback,* 171 Wash. 244, 17 Pac. (2d) 841. We have carefully examined these cases and have come to the conclusion that the better view is to the contrary. The legislature of the state of New York also appears to have disagreed with the interpretation given the New York statute, as is evidenced by the fact that in 1939 the legislature of that state, after the court had held that an insurance company could exclude death caused directly or indirectly from aviation, amended its incontestability statute by adding an exception permitting the exclusion from the coverage of death resulting from aviation under conditions specified in the policy. To us, this is a clear indication that the New York court misconstrued the legislative intent as to the result to be accomplished by the passage of the act.

An interpretation of these statutes requires a consideration of the mischief to be corrected and the remedy provided. The purpose of the legislation was to protect the insurance purchasing public from the practice of contracting to pay a definite sum upon proof of death, and by subsequent provisions subtract from the coverage and the face amount of the insurance contract, thereby affecting a ma-

terial reduction in the amount due, or a complete release from liability. Companies engaging in legitimate insurance business were met in the competitive field by those whose policies contained only a part of the insurance coverage they purported to assume. To meet this unwholesome situation, the legislature required all policies of life insurance issued or delivered in this state to contain certain standard provisions, including the two sections under discussion in the instant case. The first statute, section 44-602, Comp. St. 1929, providing that a life insurance policy shall be incontestable after being in force for two years, except for nonpayment of premiums and the violation of policy conditions relating to naval and military service in time of war, was clearly intended "to create an absolute assurance of the benefit, as free as may be from any dispute of fact except the fact of death." *Northwestern Mutual Life Ins. Co. v. Johnson,* 254 U. S. 96, 41 S. Ct. 47, 65 L. Ed. 155. To place the construction upon the statute contended for by relator would render the statute nugatory in so far as a limitation of the exceptions is concerned. We think that relator is powerless to enlarge the specific exceptions of paragraph 5 of this statute. The two-year limitation applies to every defense other than those excepted or otherwise provided for and fixes a period after which such other defenses shall not be available. *Stratton v. Service Life Ins. Co.,* 117 Neb. 685, 222 N. W. 332. The argument seems very persuasive to us that, as the legislature deemed it necessary to except the conditions relative to nonpayment of premiums and to naval and military service in time of war from the provision making the policy incontestable after two years,—in order that the obligation of the insurer to pay the amount stated on the face of the policy might remain contestable after the expiration of the two years on the ground of violation of the two noted conditions,—the legislature clearly intended to exclude all other conditions which might be asserted as defenses. *Bernier v. Pacific Mutual Life Ins. Co.,* 173 La. 1078, 139 So. 629. The legislature having made only two exceptions in the statute making the policy in-

contestable after two years, the legislative intention is clear that there should be no other exceptions.

The provision of the statute prohibiting settlements of less value than the amount promised by the face of the policy, section 44-603, Comp. St. 1929, was enacted to prevent the substraction of liability and the consequent reduction of the amount to be paid the beneficiary by technical or concealed language in the insurance contract. It purports to make the benefits to be derived from the insurance contract definite and certain upon the death of the insured after the expiration of the contestable period. *Greevy v. Massachusetts Mutual Life Ins. Co.*, 128 Neb. 586, 259 N. W. 656. This brings us to the conclusion that, after the period of contestability has expired, with all premiums paid and no question of naval or military service involved, the sole issue is the death of the insured.

The proffered rider was in the following language: "If any claim shall arise under this policy, or any policy issued in exchange therefor, by reason of the death of the insured and if such death shall have resulted directly or indirectly from operating, or being in or on, or riding in, any kind of aircraft, whether as a passenger or otherwise, the liability of the Company under such policy shall be limited to the reserve less any indebtedness thereunder at the date of death of the insured, any other provision of such policy to the contrary notwithstanding. This limitation of liability shall also apply if this policy or any policy issued in exchange therefor becomes paid up by its terms or is continued in force in accordance with its non-forfeiture provisions. This amendment is attached to and made a part of policy No. ——— of the Republic National Life Insurance Company of Dallas, Texas, upon the life of ———."

The statutes under consideration apply only upon the lapse of the contestable period by their very terms. There are no statutory restraints limiting the coverage or liability in the policy during the contestable period. We doubt not that relator may except the hazard of death caused from aviation from the terms of the policy, and that such an ex-

ception could be enforced if the death of the insured occurred during the contestable period in the same manner as the risk of suicide within two years may not be assumed. The rider tendered to respondents, however, purports to do more than this. It provides that, in case of the death of the insured by participating in aviation, the insurer shall be liable only for the amount of the accumulated reserve. Under the very terms of the policy made a part of the petition, no reserve is set up during the first two years. The insurer therefore absolves itself of any liability in case of death from aviation, and does not even bind itself to pay back the premiums collected. This is a matter, of course, which respondents might well consider. The tendered rider purports to have force during the whole life of the policy, whether it becomes incontestable or not. The respondents will not be required to approve a rider which does not state the exact coverage or liability in concise terms. We think the petition shows that there was ample reason for respondents to refuse to approve the form of the rider. The approval or disapproval of the form is an administrative function of respondents with which we cannot interfere in the absence of allegations charging arbitrary and capricious conduct. The allegations of the petition are insufficient in this respect. Consequently, relator is not entitled to a peremptory writ of mandamus under the facts set out in the petition, and the demurrer to the petition should be sustained. Counsel suggested during the oral argument to the court that the ruling on the demurrer was determinable of the lawsuit, and that this court should proceed to enter its final judgment accordingly. We therefore feel obliged to sustain the demurrer to the petition, deny a peremptory writ of mandamus, and dismiss the action.

WRIT DENIED AND ACTION DISMISSED.

EARL A. CHAMBERS, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

293 N. W. 338

FILED JULY 19, 1940. No. 30813.

1. **Master and Servant.** Liability imposed by the federal employers' liability act is liability for negligence of common carrier for damages to any person suffering injury while in the employ of such carrier in commerce between states, resulting, in whole or in part, from the negligence of the officers, agents or employees of such carrier. 45 U. S. C. A. secs. 51 *et seq.*
2. ———. An employee assumes the ordinary risks of his employment and those unusual and extraordinary risks which he knows and appreciates, or which an ordinarily prudent and careful man would have known and appreciated.

   Evidence in the instant case examined and *held* to constitute a question of fact with reference to the assumption of the risk.
3. **Trial.** An instruction on the measure of damages, as contemplated by the federal employers' liability act (45 U. S. C. A. secs. 51 *et seq.*), should include damage for future losses of earning power in the amount thereof reduced to its present worth, and where such language is omitted, and a specific instruction is not requested, an instruction, general in terms, does not contradict the rule finding the true measure of damages, but only lacks definiteness in announcing the rule, and is not prejudicial.
4. ———. Instructions which, when considered as a whole, properly state the law are sufficient.
5. **Evidence.** If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Mothersead & York, J. W. Weingarten and *W. P. Loomis,* for appellant.

Floyd E. Wright and *Straight Townsend, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

MESSMORE, J.

Plaintiff's action is for damages for personal injuries received by him while in the employ of defendant. The jury returned a verdict for $5,000 in plaintiff's favor. Defendant appeals.

This case comes under the federal employers' liability act, and the liability imposed thereunder is for negligence. 45 U. S. C. A. secs. 51 *et seq.* The rights and obligations of the parties under the act depend upon it, and such liability is governed by pertinent opinions of the federal courts, which are binding on state courts. 45 U. S. C. A. sec. 51. Contributory negligence will not defeat a recovery, but will only result in a reduction of the damages in proportion to the amount of the negligence attributable to the employee. 45 U. S. C. A. sec. 53. The doctrine of assumption of risk applies in an action based upon the negligence of defendant. The exceptions within the act have no application to the case at bar and do not control. 45 U. S. C. A. sec. 54. Section 54, with reference to the defense of assumption of risk, was amended August 11, 1939. See 53 U. S. St. at Large, ch. 685, sec. 1. The amendment is not applicable here.

Plaintiff's petition is sufficient in form to state a cause of action. Defendant's answer is a general denial, with the additional defense of gross negligence on plaintiff's part, and the assumption of the risk. The reply is a general denial.

The plaintiff was employed by defendant as supervisory station agent at Scottsbluff, Nebraska. He had been in the employ of defendant for 37½ years, was 61 years of age at the time of the accident, and had been in his present position since April, 1917. He received a salary of $260 a month, and retired September 17, 1938, receiving an annuity of $99.42 a month. In the exercise of his duties, he had complete control and charge of the office and gave directions to all employees having duties to perform in and about the depot. He used a roll-top desk which stood in the west end of the room. The desk obstructed his view of the floor. In front of the desk at a distance of about four feet

was a trapdoor, under which were water and heating pipes, the purpose being to enable those fixing the pipes or connections to get to them. The trapdoor was two feet square, with a cover held on by hinges. There were no guards or rails around the door, as required by defendant's code of safety regulations. When open, this cover rested against the south wall of the room, or the north side of a safe which stood in a bay window. The north side of the safe was about on a line with the south wall of the office. The trapdoor had been in the same place since the depot was built and since the plaintiff had been employed there. It was somewhat to the north of the desk of C. W. Madison, the cashier, leaving a space of some 14 inches between the north edge of the door and the plaintiff's desk when the door was open. Twenty-five feet east of, or almost directly opposite, the plaintiff's desk was a freight window, where trainmen transacted business with the office force.

Just prior to the accident, one Shepard, an employee of defendant living in Bridgeport,—a water service man, having charge of equipment,—entered the only door to the office, located six or eight feet north and east of the plaintiff's desk. Shepard went to the trapdoor, opened it, placing the lid back against the wall and going into the opening to ascertain the best place to make certain pipe connections. The employees present in the office at the time were the telegraph operator, a cashier, and a car clerk. When Shepard opened the trapdoor, he turned to the office force and said he was going into it for three or four minutes. He testified that he looked at the plaintiff, who nodded his head. The telegraph operator verified Shepard's statement, saying that Shepard was about 15 feet from the plaintiff at the time and about 15 feet from her. The car clerk testified he remembered that Shepard remarked to the office force: "Watch out, you fellows, don't fall in this hole, because I am going to be down under here two or three minutes." The cashier Madison did not remember hearing Shepard speak to the employees in the office. During all of this time the plaintiff was at his desk. He did not remember whether Shepard

was in the depot at the time or whether Shepard made any statement. He did not speak to or see Shepard. Glancing up from his desk, he noticed a conductor at the freight window, walked around the left side of his desk in proceeding to the freight window, received a freight bill from the conductor, left the window, and walked back toward his desk. Madison testified that plaintiff might have hesitated slightly, and that he next stepped into the trapdoor, with his left leg falling forward; "He was over on his right knee and his right hand was on the floor in front of him and resting on his right knee," between the opening and Madison's desk north of it. The plaintiff testified that if he had seen the opening he would not have stepped into it; that at the time of going to the freight window he might have been reading some reports.

The accident occurred on October 20, 1937, at about 2:30 p. m. The office was well lighted Plaintiff first consulted a doctor December 31, 1937. He laid off from work February 8, 1938, went to California for two months, returned the first of April, 1938, and worked until September 17, 1938, when he retired.

At the close of all of the evidence, the defendant moved for a directed verdict which the court overruled. Defendant objected to the ruling and contends the verdict and judgment are not supported by the evidence and are contrary to law.

Defendant cites *Hayes v. Chicago, B. & Q. R. Co.*, 131 Neb. 687, 269 N. W. 623, holding: "An employee assumes the ordinary risks of his employment and those unusual or extraordinary risks which he knows and appreciates or which an ordinarily prudent and careful man would have known and appreciated."

"It is elementary that an employee assumes the risks ordinarily incident to his employment, so far as they are not attributable to the employer's negligence. He also assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or provided they are so plainly observable that he must be pre-

sumed to know them and appreciate the danger." *Atchison, T. & S. F. Ry. Co. v. Wyer*, 8 Fed. (2d) 30. Many cases are cited supporting the above rule, which is the proper and applicable rule.

Defendant contends that the opening in the office floor of the depot into which the plaintiff stepped was so obvious and apparent that a person, by the ordinary use of care, would have seen it, and that plaintiff is conclusively and fully presumed to have observed and known it. Defendant calls attention to the case of *Draper v. Louisville & N. R. Co.*, 17 Tenn. App. 213, 66 S. W. (2d) 1003, and cases cited therein, and to *Blackley v. Powell*, 68 Fed. (2d) 457, as cases similar to the one at bar, with reference to the knowledge of the plaintiff of the danger of the defect. The cases cited disclose facts and circumstances that bring to the mind of the employee a knowledge of the defect and make the rule applicable. In the instant case, the opening of the trapdoor was unknown to the plaintiff a very short time before the accident occurred; the opening was at a place in constant use by the plaintiff in going to the freight window. There is a conflict in the evidence as to whether or not the plaintiff was warned of the opening of the trapdoor. He denies that he saw Shepard in the depot or talked to him on the day of the accident. It is true that he was familiar with the premises; however, he had charge of all employees in the office, including Shepard, and the record is void of any instructions given Shepard to go into the opening. The trapdoor was seldom used, and used only at the direction of the plaintiff. He was not obligated to anticipate the action of Shepard. Under such circumstances, the question of the assumption of the risk was for the jury. Most of the cases cited involve the rule as it applies to invitees, and in most instances the obstacles were continuously present, or presented such a statement of facts as to make the rule, as contended for by defendant, applicable.

Instruction No. 4 is objected to by defendant. This instruction sets forth the burden of proof required of the plaintiff before he may recover. The objection is that it

fails to inform the jury with reference to the assumption of risk, as pleaded by the defendant. It is further contended that instruction No. 4 is in conflict with instruction No. 9. Instruction No. 9 is one on the assumption of risk, setting forth the rule as stated and contended for by defendant, and instructing the jury that if they find the plaintiff's injuries, if any, resulted from a risk which he assumed their verdict must be for the defendant. This instruction is in keeping with defendant's affirmative defense of assumption of the risk.

Instructions which, when considered as a whole, properly state the law are sufficient. See *Casari v. Winchester*, 126 Neb. 463, 253 N. W. 434; *Fielding v. Publix Cars, Inc.*, 133 Neb. 818, 277 N. W. 331.

Defendant objects to instruction No. 11 on the measure of damages, for the reason that the instruction fails to tell the jury that the damage for future losses of earning power is the amount thereof reduced to its present worth. As a basis therefor defendant calls attention to the evidence that plaintiff claimed compensation for permanent disability and testified to his earnings before his injury. Such testimony, with expectancy and present-worth tables, is pertinent to this element of the measure of damages as contended for by defendant. Defendant properly states the rule in cases cited on this point. It did not request an instruction of such a nature, but relies on the rule as announced by this court in many cases,—that it is the duty of the trial court to instruct on the issues of the case, whether requested to do so or not. See *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373; *Carlson v. Roberts*, 133 Neb. 166, 274 N. W. 473. Ordinarily, this rule applies to the issues of a case, and an element of the measure of damages is not an issue but a basis of recovery on the issues.

Our attention, however, has been called to *Kimball v. Lanning*, 102 Neb. 63, 165 N. W. 890, wherein the rule, as heretofore announced, was applied by this court in an instruction on the measure of damages. A careful reading of the cited case is convincing that the court left out of the

instruction the rate of interest, and failed to credit the defendant with $1,000, to which defendant was entitled. This presents a different situation from that in the instant case. It is obvious that *Kimball v. Lanning, supra,* is not in point. Other cases cited by the defendant disclose that proper instructions were requested and refused, and the cases turned on the court's refusing a proffered instruction. The rule pertinent to the question here raised with reference to instruction No. 11 is reflected by the following cases:

The court in *Louisville & N. R. Co. v. Holloway,* 246 U. S. 525, 38 S. Ct. 379, held: "In an action under the employers' liability act on behalf of the widow of a deceased employee, an instruction that the measure of damages should be such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death, *held* correct, as a general instruction." Under the court's holding, the defendant had the right to supplement this instruction, if so desired, by offering an instruction to the effect that, in estimating the amount of such compensation, future benefits must be considered at their present value, and, in the absence of such offer, the general instruction was sufficient.

An instruction on the measure of damages, as contemplated by the federal employers' liability act, should include damages for future losses of earning power in the amount thereof reduced to its present worth, and where such language is omitted, and a specific instruction is not requested, an instruction, general in terms, does not contradict the rule finding the true measure of damages, but only lacks definiteness in announcing the rule. The foregoing is the substance of the court's holding in *Breen v. Iowa & C. R. Co.,* 159 Ia. 537, 141 N. W. 410. The instruction given in that case was a general instruction similar to that on the measure of damages in the instant case.

The defendant predicates error upon the court's failure to strike hypothetical questions propounded to the medical experts, for the reason that the questions were incomplete. The contention is that the expert, on cross-examination, had

assumed that when the plaintiff fell in the opening he received a blow in the right perineum (region between the rectum and genital organs) and in the right groin, and that this blow was the cause of the only injury which the witness found was causing the disability of plaintiff; that is, the doctor based his answer to the hypothetical question on the assumption that plaintiff received a hard blow on the right perineum when he fell; that there was no such fact in the question itself, and no evidence in the record that the plaintiff sustained any such blow. The hypothetical question is supported by the record. The manner of the fall, the position of the plaintiff, his condition before and after the fall, all are testified to.

"If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient." *Shotwell v. First Nat. Bank,* 127 Neb. 676, 256 N. W. 508. See, also, *Landis & Schick v. Watts,* 82 Neb. 359, 117 N. W. 705; *Prince v. Pathfinder Life Ins. Co.,* 133 Neb. 705, 276 N. W. 661. The hypothetical questions in the instant case examined and *held* to be within the conception of the rule herein announced.

All alleged errors, not briefed or argued, are deemed waived. Other assignments of error, not discussed in the opinion, are held to be without merit.

AFFIRMED.

WARD P. FOLSOM, APPELLANT, V. T. B. STRAIN ET AL., APPELLEES.

293 N. W. 357

FILED JULY 19, 1940. No. 30872.

1. Wills. The life beneficiary of a testamentary trust for the payment of income is entitled to the income accumulating on the trust assets from the date of the testator's death, unless it is otherwise provided in the will.
2. ———. This is true even though the trust assets are part of the residuary estate, not capable of being determined or turned

over to the trustee until administration of the estate is completed.

3. ———. He is not entitled, however, to the income on assets which are subsequently used to pay debts, legacies, and expenses of administration, and which do not become part of the residuary estate.

4. ———. The expression "unless it is otherwise provided in the will," in such a situation, means some language or provision in the will that (1) expressly fixes a different date than that of the testator's death when the right to the income shall accrue; or (2) makes other specific disposition of the income accumulating up to the time the property comes into the trustee's hands; or (3) nullifies by definite expression or by clear implication the presumed intention to have the right to income accrue as of the date of the testator's death.

5. ———. A will gave testatrix's residuary estate to trustees, to set up two specific amounts in trust for certain beneficiaries, and to invest the remainder "and reinvest the same in any investments authorized by law in the case of trust funds, with power to vary such investments at the discretion of said trustees, to pay from said net income therefrom in convenient instalments, the sum of $20,000 annually, to my nephew, * * * for and during his lifetime." It also directed the trustees "to keep the funds of the several trust estates * * * separate and distinct and to keep separate accounts for each trust estate." *Held*, that the nephew was entitled to income accumulating on the assets allocated by the trustees to the trust of which he was life beneficiary, from the date of the testatrix's death, though the trust was not and could not be set up until administration had been completed.

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

Tunison & Joyner and *Tinley, Mitchell, Ross, Everest & Geiser*, for appellant.

Beghtol, Foe & Rankin, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The question presented is whether income from a part of the residuary estate of Emily J. Moore, deceased, accumulating during the period of administration, was, under

her will, to go to plaintiff, as life beneficiary of a trust created from such property, or whether it became part of the corpus of the trust.

In a proceeding for construction of the will, brought by the life beneficiary of such residue against the trustees, after administration of the estate had been completed and the executors had been discharged, the district court held that such income was intended to become part of the corpus of the trust, and that plaintiff was entitled only to income accumulating after the trust property had passed into the hands of the trustees. Plaintiff has appealed. The matter is presented to us as a case stated, under our rule 9c, and the question is made to turn solely on the language and provisions of the will.

The controversy arises out of the following portion of paragraph XIX of the will: "All the rest, residue and remainder of my estate, real, personal or mixed and wheresoever situated, I give, devise and bequeath unto my trustees above named and their successors in trust, to invest and reinvest the same in any investments authorized by law in the case of trust funds, with power to vary such investments at the discretion of said trustees, to pay from said net income therefrom in convenient instalments, the sum of Twenty Thousand Dollars ($20,000.00) annually, to my nephew, Ward P. Folsom (plaintiff herein), for and during his lifetime." It is stipulated that the trustees received from the executors sufficient accumulated income from the property involved to be able to pay plaintiff the sum of $20,000 annually from the date of the testatrix's death. Administration of the estate was not completed, nor the assets of the trust delivered to the trustees, until 16 months after the testatrix's death.

The general rule is now firmly settled that the life beneficiary of a testamentary trust for the payment of income is entitled to the income accumulating on the trust assets from the date of the testator's death, unless it is otherwise provided in the will. 2 Perry, Trusts and Trustees (7th ed.) 939, sec. 551. This is true even though the trust assets are

part of the residuary estate, not capable of being determined or turned over to the trustee until administration of the estate is completed. Restatement, Trusts, sec. 234, and Comment *f* on Clause (a). In such a situation, while the right of enjoyment is postponed until the income has come into the trustee's hands, the life beneficiary nevertheless has a vested right in it, as it accumulates, from the date of the testator's death. 70 A. L. R. 638, annotation. He is not entitled, however, to the income on assets which are subsequently used to pay debts, legacies, and expenses of administration, and which do not become part of the residuary estate. *Proctor v. American Security & Trust Co.*, 98 Fed. (2d) 599 (C. C. A., D. C.); Restatement, Trusts, sec. 234 (g).

The expression "unless it is otherwise provided in the will," in such a situation, means some language or provision in the will that (1) expressly fixes a different date than that of the testator's death when the right to the income shall accrue; or (2) makes other specific disposition of the income accumulating up to the time the property comes into the trustee's hands; or (3) nullifies by definite expression or by clear implication the presumed intention to have the right to income accrue as of the date of the testator's death.

The presumption that a testator intends that a beneficiary of income, for a definite period or for life, from all or a part of the assets of his estate, shall receive such income as completely, and for as full a period, from the date of his death, as possible, is not a fictional imputation of intent, but a sound recognition of natural motive. And so, as between a beneficiary of income and a remainderman, to construe the will in a manner that will deprive the beneficiary of part of the income, and enrich the remainderman by assimilating it into the corpus of the trust, will normally be contrary to the general spirit of such a bequest. That result, therefore, will be held not to have been intended, unless such a construction is the only one soundly and reasonably possible. Before it will control over the normal and

salutary intent recognized in the principles which have been stated, it must be one of obvious demonstration and of compelling logic.

Defendants argue, as a reason demonstrating that the testatrix did not intend plaintiff to receive any income accumulating during the period of administration, that since she made provision for payment of debts, and of specific devises and bequests in a particular order, before turning her attention to the creation of the trust and its machinery, she, by implication, must have meant that the trust and its benefits were not to be given consideration or to become operative until all these other matters were accomplished, or, in other words, until administration was completed. This argument, however, is artificial, for the order of the provisions in the will was only a natural and logical sequence in instrument recitation. The trust was to be created out of the residuary estate, and reference would normally not be made to it until all other property had been disposed of.

It is further argued that, because the trustees were to set up three separate trusts out of the residue, when it was delivered to them by the executors, and were "to keep the funds of the several trust estates * * * separate and distinct and to keep separate accounts for each trust estate," the corpus of the trust involved must be held not to have been actually created until the property had been separated by the trustees, and the testatrix therefore could not have intended that any income should accrue in plaintiff's favor until such separation had occurred. Paragraph XVI of the will directed the executors to deliver to the trustees, upon the completion of administration, the residue of the estate. Under paragraph XVII, the trustees were to set aside the sum of $5,000 out of the residue, to be held perpetually in trust for the payment of the income thereon to Wyuka Cemetery, of Lincoln. Under paragraph XVIII, as amended by a codicil, the trustees were to set aside also the sum of $200,000 out of the residue, to be held in trust for Lincoln General Hospital, until the erection of a memorial hospital unit. Paragraph XIX, which has previously been set out,

then provides that the remainder of the estate is given to the trustees, "to invest and reinvest the same in any investments authorized by law in the case of trust funds, with power to vary such investments at the discretion of said trustees, to pay from said net income therefrom in convenient instalments, the sum of Twenty Thousand Dollars ($20,000) annually, to my nephew, Ward P. Folsom, for and during his lifetime."

If the expression "to pay from said net income therefrom" cannot reasonably and soundly be said to have reference to any income accumulated from the property prior to its separation, though actually derived from assets allocated by the trustees to the particular trust, then plaintiff is not entitled to any accumulation of income prior to the separation. But this seems to us a too narrow and wholly unnecessary construction. In the first place, the will makes no other specific disposition of the accumulated income, nor does it expressly attempt to assimilate it into the corpus of the trust. Secondly, income from assets ultimately allocated to the trust, accumulated during the period of administration and actually received by the trustees, is as much income from such assets, or "income therefrom," as income accumulating after the formal setting up of the trust. Finally, the expression "to pay from said net income therefrom" can fairly and logically be regarded as a mere recitation of duties and powers on the part of the trustees, just as are the provisions with respect to investment and reinvestment that precede it, rather than as a designed limitation upon the rights of the beneficiary. The intention for which defendants contend is therefore neither logically demanded nor obviously demonstrated.

We shall not attempt to list or to discuss the authorities which have been cited by the parties. A sufficient number of cases to illustrate the scope of the principles discussed will be found in the annotations in 70 A. L. R. 637, and 105 A. L. R. 1194, to which reference can easily be made. The decision upon which defendants chiefly rely is *Hawaiian Trust Co. v. Von Holt,* 216 U. S. 367, 30 S. Ct. 303, 54 L. Ed.

519, where the residue of an estate was given to trustees, with directions to reduce it to possession; to invest and re-invest; "to segregate, and keep separate and apart (during the life of my wife), the accounts of and pertaining to the realty of my estate from the accounts pertaining to any and all other thereof;" and "out of the net income, rents, issues and profits of and from the realty last aforesaid said Trustees shall pay the equal One Third part or portion thereof, * * * to my said wife, for and during the remainder of her natural life." The court there said: "What he gave was not one-third of the income (of the realty) generally * * * but one-third of the income of the realty 'last aforesaid,' that is, the realty distributed to the trustees. It was one-third of the income of the realty in the hands of the trustees, the income collected by them from it, and of which they were to keep a separate account."

This case, though decided in 1910, appears never to have been cited or relied upon as a precedent in any subsequent decision. There, as in the present case, the income from the portion of the real estate set aside by the trustees, which accumulated during the period of administration and was actually received by the trustees, would seem as much to be "income * * * of and from the realty last aforesaid," as the income that accrued after the trust was set up. Again, as in the present case, the provision for payment could as logically have been held to be a mere instruction or direction for payment on the part of the trustees as an attempted limitation upon the beneficiary's rights.

The decree of the district court will be reversed, and the cause remanded, with directions to require the trustees to pay plaintiff the benefits to which he is entitled under the will, out of the income accumulated from the date of the testatrix's death on the portion of the assets allocated to such trust, and with interest thereon from December 14, 1938, in an amount equal to the earnings subsequently received by the trustees or which they prudently should have received on such income.

REVERSED.

WALTER R. PRESTON, APPELLEE, V. FARMERS IRRIGATION DISTRICT, APPELLANT.

293 N. W. 343

FILED JULY 19, 1940. No. 30933.

1. **Contracts.** A defendant who seeks to excuse nonperformance of a contract on the ground of a supervening impossibility, which he had no reason to anticipate and for the occurrence of which he is not in contributory fault, has the burden of establishing such defense.
2. **Waters.** An irrigation company which seeks to excuse a failure to deliver water pursuant to its contract obligation, because of a natural failure of its water supply, is within the operation of the foregoing rule.
3. ———. In a suit against an irrigation company for damages occasioned by its failure to deliver water pursuant to its contract obligation, plaintiff establishes a *prima facie* case when he proves defendant's failure to deliver the quantity of water required by his contract and the extent of the damage to his crops and land from the failure to receive such a supply.
4. ———. Plaintiff in such a situation is not required to adapt his proof of damages to the factors of excuse or mitigation relied upon by defendant, where the acceptance and effect of those factors are wholly matters for jury determination.
5. ———. The sources and conditions of water supply in this state probably require, as a matter of implied contemplation and reasonable construction, that we recognize as a supervening impossibility, excusing nonperformance of an irrigation company's obligation to furnish water, any natural failure of water supply, where the irrigation company is not in contributing fault, unless there is other controlling language in the contract.
6. **Trial.** Failure to give a tendered instruction is not reversible error where the issue involved is fairly and correctly covered by given instructions.
7. **Waters.** It was not a defense to an action for damages for failure to make delivery of irrigation water under plaintiff's preferred water-right contract in this case that plaintiff had not joined in or contributed to the expense of litigation resorted to by the irrigation company in maintaining its appropriation rights.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Neighbors & Danielson, for appellant.

Morrow & Morrow, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and BLACKLEDGE, District Judge.

JOHNSEN, J.

Plaintiff sued for damages to his crops and land, in the sum of $2,656.74, occasioned by defendant's failure to make delivery of irrigation water under his preferred water-right contract. On the first trial, the jury awarded him damages of only $118.75, and plaintiff appealed. The judgment was reversed for inadequacy of amount, and the case was remanded for a new trial. *Preston v. Farmers Irrigation District,* 134 Neb. 503, 279 N. W. 298. On the second trial, plaintiff recovered a verdict and judgment for $1,477.50, and defendant has appealed.

The nature of the rights vested in plaintiff, as the holder of a preferred water-right contract, is discussed in *Vonburg v. Farmers Irrigation District,* 132 Neb. 12, 270 N. W. 835, and *Ledingham v. Farmers Irrigation District,* 135 Neb. 276, 281 N. W. 20. By the terms of plaintiff's contract, defendant, through assignment and succession, agreed to convey and deliver to plaintiff, at any point along defendant's canal, not more than forty miles from the diversion point in the North Platte river, "eighty square inches of water, continually flowing through and during the irrigation season of each and every year * * * in perpetuity," which right was to be "forever free from any and all assessments or taxes of any nature or for any purpose whatsoever." It was provided also that the holders of the preferred water-right contracts could not be required to prorate with subsequent stockholders in the canal, and that defendant would hold plaintiff "harmless and free from loss and damages through or by any neglect whatsoever * * * to deliver the water, as hereinbefore covenanted and agreed."

Defendant's canal is approximately eighty miles in length, but all the lands to which the water under the preferred-right contracts is applied are located within the first twenty

miles of its course. The controversy here involved arises out of the fact that in 1934, by virtue of a water shortage in the North Platte river, defendant undertook to require the holders of the preferred rights to prorate with those having subordinate rights along the canal. In *Vonburg v. Farmers Irrigation District, supra,* this was held to be a violation of the vested rights of the holders of the preferred water-right contracts.

The first contention urged by defendant as a ground for reversal is that plaintiff did not prove that there was a sufficient supply of water to have enabled him, together with the other preferred-right holders, to have received the quantity to which he was entitled under his contract, and that the verdict therefore is not supported by the evidence and is contrary to law. There was evidence on the part of plaintiff to show that, with the exception of a few days in July and August, the supply of natural-flow water in defendant's canal during the irrigation season was equal to or exceeded the amount which the preferred-right holders were entitled to have delivered to them under their contracts. Plaintiff's position was that, by rotation with the other preferred-right holders during this period, as they would have done, he could have received his full supply of water throughout the irrigation season, except for two or three days in July and August, had defendant not arbitrarily denied it to him. Defendant insists, however, that, whatever the quantity of water in the canal may have been, plaintiff did not attempt to prove the amount of the probable carriage loss from evaporation and seepage, and so did not establish what the actual amount of natural-flow water was that could have been delivered to him, and that he therefore did not sustain the burden of proof which rested upon him.

Ft. Lyon Canal Co. v. Bennett, 61 Colo. 111, 156 Pac. 604, is cited in support of defendant's contention. In that case it was said: "Whether there was a sufficient volume of water in the canal at the time plaintiffs needed it was a vital issue * * * upon which they had the burden of proof."

That was an action in tort, against a third party with whom no contractual privity existed, for negligent interference with a lateral that led from the water canal to plaintiff's lands. Here, the action is one for breach of a contract to deliver water, in which defendant seeks to justify nonperformance, in part at least, on the ground of a "supervening impossibility" (Restatement, Contracts, sec. 457), in the nature of what is sometimes loosely referred to as a "vis major" or an "act of God." The burden of exonerating itself from the obligation of a contract on such a ground rests on the defendant. *Buel v. Chicago, R. I. & P. R. Co.*, 81 Neb. 430, 116 N. W. 299. An irrigation company which seeks, on the ground of a supervening impossibility, to excuse its failure to deliver water pursuant to the terms of its contract obligation is within the operation of this rule. 3 Kinney, Irrigation and Water Rights (2d ed.) 3124, sec. 1693; 67 C. J. 1438, note 67; 15 R. C. L. 481, sec. 34. In this case, therefore, the burden rested upon defendant, and not on plaintiff, to show the quantity of water that it was possible to have delivered to him after taking into account all pertinent factors, including carriage loss from evaporation and seepage. Plaintiff established a *prima facie* case when he proved defendant's failure to deliver the quantity of water required by his contract and the extent of the damage to his crops and land from the failure to receive such a supply.

In *Tapper v. Idaho Irrigation Co., Ltd.*, 36 Idaho, 78, 98, 210 Pac. 591, 597, the court said: "The appellants made a *prima facie* case by proving the contract and failure to deliver water in accordance with its terms and consequent damages to their crops together with the amount thereof. It was incumbent upon respondent to prove the failure of the water supply on account of an extraordinary drouth, and also that it delivered to appellants their just proportion of the water supply which it had." There are a number of other Idaho cases to the same effect. *Edholm v. Idaho Irrigation Co., Ltd.*, 37 Idaho, 116, 214 Pac. 1036; *Preis v. Idaho Irrigation Co., Ltd.*, 37 Idaho, 109, 215 Pac. 466;

Meservy v. Idaho Irrigation Co., Ltd., 37 Idaho, 227, 217 Pac. 595. We would not go the length of holding, as does the Idaho court, that only an extraordinary drouth will excuse the failure to perform such an unconditional contract, because the sources and conditions of water supply in this state probably require, as a matter of implied contemplation and reasonable construction, that we recognize as a supervening impossibility, excusing nonperformance, any natural failure of water supply, where the irrigation company is not in contributing fault, unless there is other controlling language in the contract. But this, of course, does not affect the application of the rule with respect to burden of proof.

We accordingly hold that plaintiff was not required to produce proof of the extent of the carriage loss in defendant's canal, in order to sustain the burden of proof which rested upon him in this case. Defendant, as a matter of fact, offered evidence on the point, in an effort to convince the jury that it could not legitimately have furnished plaintiff more water than it did; but the testimony of its expert was based upon factors of judgment and opinion, and not upon demonstrated measurements of evaporation and seepage losses, so that it was not conclusive upon the jury. Defendant attempted to prove also what it considered was the extent of plaintiff's legitimate damages. The jury were at liberty to consider all this evidence in determining the extent of plaintiff's loss, and they had the right to make deduction for such portion of the crop failure as they might deem attributable to a supervening impossibility to furnish water, for the occurrence of which defendant was not in contributing fault. Plaintiff was not bound to adapt his proof of damages to the factors of excuse or mitigation relied upon by defendant, where the acceptance and effect of those factors were solely matters for jury determination. The proof offered by plaintiff as to the extent of his damages was sufficient under the circumstances to sustain the burden resting upon him and to support the verdict which the jury returned. Apparently, the jury did not accept either the evidence on behalf of plaintiff or that on behalf

of defendant with absoluteness, nor were they bound to do so.

The second contention urged as a ground for reversal is that the court failed to instruct the jury that plaintiff could not recover for any damage to his crops that had occurred prior to July 1, 1934, or to give the instruction to that effect that was tendered by defendant. This contention rests upon a conflict in the evidence as to the condition of plaintiff's crops at the time when the obligation to furnish water under the contract began. Instruction No. 4, however, given by the court, told the jury, in substance, that, in determining the value of plaintiff's crops, it was required to take into account the state of the crops when the injury for which suit was brought began, and this was sufficient to prevent any possibility of the jury being misled. We have repeatedly held that the failure to give a tendered instruction is not reversible error where the issue involved is fairly and correctly covered by given instructions. *Miceli v. Equitable Life Assurance Society, ante,* p. 367, 293 N. W. 112.

Defendant's final contention is that the court erred in striking paragraph 7 of its answer and in refusing to receive evidence in support of it. We quote defendant's argument from its brief. "It was contended by defendant in paragraph 7 of its answer that all natural-flow water discharged into defendant's canal during July, August and September was water obtained by reason of litigation between Mitchell Irrigation District and defendant, and that this water would not have been available in the event defendant had not participated in this litigation. Plaintiff was not a party to this litigation, plaintiff did not bear any part of the expense of this litigation, and plaintiff was not a party to the agreement with Mitchell Irrigation District. He was in no way entitled to participate in the benefits accruing by reason of defendant's agreement with Mitchell Irrigation District." The water involved was obviously natural-flow water from the North Platte river which defendant claimed was wrongfully being diverted by the

Mitchell Irrigation District, in violation of defendant's appropriation rights. The fact that defendant was forced to resort to litigation to maintain its rights and that plaintiff did not contribute to the expense of the litigation did not change the character of the water, nor plaintiff's right to it. Under his contract, plaintiff was entitled to have delivered to him a certain quantity of the natural-flow water from the North Platte river, covered by defendant's appropriation, "forever free from any and all assessments or taxes of any nature or for any purpose whatsoever." Paragraph 7 of the answer, therefore, did not state a defense.

Defendant is not entitled to a reversal on any of the contentions urged.

AFFIRMED.

LAURA WILCOX, APPELLEE, V. JOHN W. WILCOX ET AL., APPELLANTS.

293 N. W. 378

FILED JULY 26, 1940. No. 30849.

1. **Trusts.** "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement, Trusts, 5, sec. 1, e.
2. ———. "Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

   "(a) the transfer was procured by fraud." Restatement, Trusts, 135, sec. 44.
3. **Record** examined, and *held* to sustain the finding and judgment of the trial court.

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

William L. Randall and *John E. Hedrick,* for appellants.

William E. Lovely, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PER CURIAM.

The defendants appeal from a decree of the district court, ordering and directing defendants to convey forthwith by proper deed certain real estate, described in plaintiff's petition.

The plaintiff's amended petition alleges, in substance, certain facts relied upon as constituting false and fraudulent representations, made to the plaintiff by defendant John W. Wilcox, to induce the plaintiff to consent to the use of certain moneys belonging to her, to be entrusted to and used by John W. Wilcox, her son, to purchase real estate and repair the same, the son representing to the plaintiff, his mother, that he would provide her with a home and maintenance for the balance of her life. The decree is in accordance with the facts herein stated. The answer is, in effect, a general denial.

The record discloses that plaintiff, 70 years of age, had been a widow since 1906, and had the care and custody of her seven children, five boys and two girls, the eldest 14 years old at the time of their father's death and the youngest 10 months. The family lived at Syracuse, Nebraska, on a farm, and in 1909 moved to Franklin, Nebraska, where the plaintiff purchased an acreage for $1,200, from which she made a living for the family. Later she traded this acreage for property in Brownville, Nebraska, and lived there until three of the boys, in 1917 and 1918, entered the United States army. She then rented the property and took up nursing, making a living for the minor members of the family still at home. In 1920 she purchased property in Wymore for $1,900, paid $900 down and gave a mortgage on the real estate for $1,200.

The record discloses certain contributions made by some of the children at different times for her support and

maintenance and for that of a grandchild. Controversy arises as to contributions made by defendant John W. Wilcox from and after 1920 when he lived with plaintiff in Wymore, where he was employed on the railroad as a brakeman, earning upwards of $150 a month. He remained in Wymore until 1926; then went to Omaha, where he lived with a sister. Plaintiff remained in Wymore for six years after John left. Plaintiff's testimony is that John made no contributions during the six years that she remained in Wymore, and when he lived with her he contributed an ordinary amount for board and room. The testimony of John W. Wilcox with reference to the amount he contributed to reduce the mortgage on the Wymore property is not impressive. The history of the different mortgages on the Wymore property will not be detailed. During all of the time, until it was sold in April, 1938, only $400 had been paid on the mortgage, and there remained $800 to be paid. John stood in a confidential relationship to his mother with reference to the home in Wymore, and what should be done with it in any event; by such relationship plaintiff believed John, not being married, would take an interest in the Wymore property and help to pay for it; that he could handle it better than she could, and if the property should eventually be sold, the money received therefrom would be placed in a property as a home for her, so on June 14, 1937, she deeded the Wymore property to John. It was sold in April, 1938, and $750 was received for the equity. Prior to this sale, the plaintiff had consulted a real estate dealer about buying property in Omaha. Finally, a purchase of real estate in Omaha was made, May 27, 1938, $500 was paid down and $200 expended for repairs. The property was taken in the name of defendant John W. Wilcox; he attended to the repairs and the purchase and signed the mortgage evidencing the balance of indebtedness. He was able to secure the mortgage on the representation that he was steadily employed. The purchase price for this property was $2,000.

It is clear from the record that plaintiff made consider-

able inquiry with reference to the purchase of the property, the purpose for which she desired to use it, and the fact that it would be her home, and that her money would constitute part of the purchase price. The property is used as a rooming house. On June 12, 1938, John W. Wilcox made a written agreement, which is in part as follows: "I, John W. Wilcox, on this 12th day of June, 1938, wish it known that my mother, Mrs. Laura Wilcox, is to have a home with privileges, with me, in property known as * * * as long as she lives. * * * This statement and agreement above made is because of indebtedness to my mother, Laura Wilcox." The statement, "indebtedness to my mother," could only mean that John recognized his obligation to his mother for money received from her property at Wymore, and used as a down-payment as part of the purchase price of the Omaha property. January 3, 1939, John W. Wilcox married the defendant Esther Wilcox.

Conflict arises in the evidence as to the amount, if any, contributed by defendant John W. Wilcox to his mother, in compliance with the written agreement. His answer to this is: His mother received all moneys paid as rent from the home for her support, the amount varying from $50 to $62 a month. The plaintiff testified that her son asked her to leave the premises, called her vile names, and told her to go on relief and try for old-age assistance. All of these charges John denies. He was unable to secure steady employment in Omaha and attempted to sell the Omaha property within one month from the date of its purchase. The testimony of defendant John W. Wilcox is evasive, equivocal and indefinite in every particular. We conclude the facts create a constructive trust.

"A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement, Trusts, 5, sec. 1, e.

"Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

"(a) the transfer was procured by fraud, duress, undue influence or mistake." Restatement, Trusts, 135, sec. 44.

A case similar to the one at bar and cited by the plaintiff is *McIntire v. McIntire*, 75 Neb. 397, 106 N. W. 29. The decree set aside a conveyance of a similar nature to that involved in the instant case, made by a mother to her son and daughter-in-law upon an express promise to support her. Subsequently, she was ejected from the home and compelled to seek support elsewhere. The decree of the district court canceling the conveyance was affirmed on general equitable principles.

The judgment of the trial court is

AFFIRMED.

FRED WHIPPLE V. EDMUND E. NELSON.
293 N. W. 382

FILED JULY 26, 1940. No. 30843.

1. **Contempt.** Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged in to sustain a conviction. It is necessary to establish guilt beyond a reasonable doubt.
2. ———. Unless the disobedience of an order of court is wilful, there is no contempt.

ERROR to the district court for Frontier county: CHARLES E. ELDRED, JUDGE. *Reversed.*

Perry, Van Pelt & Marti, for plaintiff in error.

Frank B. Morrison, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This case presents the question: Was the plaintiff in error guilty of contempt of court?

The defendant in error will hereinafter be called the plaintiff, and the plaintiff in error will hereinafter be called the defendant.

Plaintiff and defendant are adjoining landowners along Medicine creek in Frontier county, Nebraska, the plaintiff's land being east and below the land of the defendant. At one time Medicine creek made a "U" turn on the land here involved. Some years ago a ditch was cut across the top of the "U" which shortened the channel and permitted the farming of land which had formerly been the main and auxiliary channels of the creek. Clifford canyon comes from the hills to the south and west, and in times of heavy rain forms a natural watercourse that emptied into the creek at the base of the "U" of the old channel. The defendant built a ditch, connecting with Clifford canyon, running east, south of the old creek channel, and ending at about the fence line between the plaintiff's and the defendant's land and at a point south of and near the old channel. In an action between the plaintiff and defendant, the trial court on March 28, 1939, found that the ditch was not constructed along the natural drainage course theretofore existing, that the ditch as constructed caused the surface waters accumulated in Clifford canyon to be conducted to and upon plaintiff's land at a point that was not a natural watercourse, and enjoined the defendant "from maintaining said ditch as now located and from causing surface water accumulated in and by said ditch to be cast upon the lands of the plaintiff." Thereafter, on June 16, 1939, the plaintiff filed his affidavit in the case, charging that the defendant had disobeyed the injunction, in that he has continued "to operate the drainage ditch * * * and to cause surface waters accumulated in and by said ditch to be cast upon the lands of the plaintiff and has refused * * * to prevent the accumulation of surface water and the water from Clifford canyon to pass through said ditch and onto the lands of the plaintiff."

Defendant was cited for contempt. He demurred and answered. After hearing was had, he was found guilty of contempt as charged in the affidavit.

Procedural questions advanced by the defendant may be here disregarded.

Subsequent to the entry of the injunction, defendant consulted his attorney, and upon his advice consulted the county surveyor as to what to do to comply with the order. He was advised to and did put two dams in the ditch, one at the end near plaintiff's land and one about 40 rods west therefrom at a point just east of the last draw coming out of the hills on his land. In building the latter dam, about 35 feet of the bank of the ditch was removed, which formed a spillway into the old channel bed. This left the ditch connecting with Clifford canyon, and running to a point where it discharged any waters therein into the old channel bed on defendant's land. In June unusually heavy rains occurred in the canyon, and at the time of the heaviest discharge of water therefrom, the water overflowed the dike at the upper end; several times water ran out of the ditch at the spillway fan-wise upon defendant's land and into Medicine creek; some of it followed the old watercourse to the plaintiff's land; and some of it washed out a part of the west dam and went on down the ditch to plaintiff's land, and on at least two occasions deposited débris on plaintiff's land and flooded a part thereof.

The plaintiff cites the statement in *Whitaker v. McBride,* 5 Neb. (Unof.) 411, 417, 98 N. W. 877, that a sentence imposed for contempt cannot be reviewed in a proceeding to which the state is not a party. There, as here, the state was not a party in the proceedings before the trial court. Proceedings for contempt of court may be reviewed in this court by the filing of a petition in error as in a criminal case. *Gentle v. Pantel Realty Co.,* 120 Neb. 630, 234 N. W. 574. This court has repeatedly reviewed contempt proceedings under the procedure here followed. The above language from *Whitaker v. McBride, supra,* is specifically disapproved in so far as it may be construed to deny a review of

a conviction for contempt by petition in error because the state is not a party.

Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged in to sustain a conviction. It is necessary to establish guilt beyond a reasonable doubt. *Gentle v. Pantel Realty Co., supra; Hydock v. State,* 59 Neb. 296, 80 N. W. 902; *State v. Barlow,* 132 Neb. 166, 271 N. W. 282.

Our statutes provide:

"Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of the following acts: * * * *Wilful* disobedience of or resistance wilfully offered to any lawful process or order of said court." Comp. St. 1929, sec. 20-2121.

"Disobedience of an injunction may be punished as a contempt by the court." Comp. St. 1929, sec. 20-1072.

The above provisions, while now appearing in separate sections of the statute, were part of the Code of Civil Procedure originally enacted in 1866. Vol. 2 Complete Session Laws of Neb. 1866-77, pp. 148, 177. They are to be construed together. *Gentle v. Pantel Realty Co., supra.* It follows that the disobedience of the injunction must be *wilful* before the breach thereof may be punished as a contempt. *Hawthorne v. State,* 45 Neb. 871, 64 N. W. 359.

The order here involved does not affirmatively tell the defendant what acts he must perform. However, the purpose of the order is clear, and that is that the ditch must not be so maintained as to cause surface water accumulated in and by said ditch to be cast upon the lands of the plaintiff.

What the defendant did here may be reconciled with a good faith attempt to comply with the purpose of the order. He consulted with the county surveyor on how to meet the problem, followed his advice, and apparently honestly believed that he had so handled the situation that there would be no recurrence of the evil. It was not sufficient, as cir-

cumstances have shown. A valid court order must be obeyed. The defendant must so change the structure of the ditch that the purposes of the order will be accomplished.

However, the evidence does not disclose a wilful violation of the order and "unless the disobedience of an order of court is wilful there is no contempt." *Hawthorne v. State, supra.*

The judgment of the trial court is reversed, and the plaintiff in error is discharged.

REVERSED AND PLAINTIFF IN ERROR DISCHARGED.

FEDERAL FARM MORTGAGE CORPORATION, APPELLANT, V. HENRY CLAUSSEN ET AL., APPELLEES.

293 N. W. 424

FILED JULY 26, 1940. No. 30868.

1. **Mortgages.** The effect of chapter 41, Laws 1933, amending section 20-2141, Comp. St. 1929, is to deny a deficiency judgment to the mortgagee in a foreclosure action and to leave unaffected other remedies for the collection of the debt.
2. ———. The purpose of section 20-2142, Comp. St. 1929, is to protect the debtor and to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage and to prevent the possibility of two judgments being rendered against him for the same debt.
3. ———. Section 20-2142, Comp. St. 1929, construed to mean that if a creditor brings an action in foreclosure to enforce payment of the debt, he must pursue that remedy to its end and exhaust the relief afforded by that remedy before resorting to an action at law, "unless authorized by the court" to pursue an action at law and also one in equity at one and the same time.
4. ———. After exhausting the remedy by foreclosure, the equity proceeding is no longer pending and there is no further purpose or right of the court to control the beginning of an action at law. Where that situation occurs, if remedies at law exist, an action at law may be had without the requirement of securing permission of the equity court.
5. ———. Under section 20-2142, Comp. St. 1929, district courts do not have authority, unlimited as to time, to tell one creditor who has prosecuted a foreclosure that "you may" and another "you may not" sue at law for your deficiency.

APPEAL from the district court for Knox county: ADOLPH E. WENKE, JUDGE. *Reversed.*

Franklin L. Pierce, William W. Graham and *F. A. Barta,* for appellant.

W. D. Funk, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

Plaintiff prosecuted a mortgage foreclosure to completion. A balance of $2,500 remained unsatisfied after the proceeds of the sale were applied to the decree. The note and mortgage were executed and delivered January 27, 1934. The note was filed in the action when the decree was taken. Plaintiff filed a motion for leave to withdraw the note for the purpose of instituting suit against the makers for the deficiency. Treating the motion as an application for leave to withdraw the note from the files and for leave to bring a separate action at law against the "persons personally liable on the indebtedness evidenced by said note to recover judgment for the deficiency," the trial court denied the motion.

Section 20-2141, Comp. St. 1929, was by chapter 41, Laws 1933, amended to read as follows: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof." This does not deprive a mortgagee of the right to elect to proceed initially by suit upon the note instead of by foreclosure (*Federal Farm Mtg. Corporation v. Hughes,* 137 Neb. 454, 289 N. W. 866; *Federal Farm Mtg. Corporation v. Thiele,* 137 Neb. 626, 290 N. W. 471) nor does it deny the mortgagee the right to maintain an action at law to recover judgment for the deficiency (*Federal Farm Mtg. Corporation v. Cramb,* 137 Neb. 553, 290 N. W. 440). The effect of chapter 41, Laws 1933, as construed in the *Cramb* and *Thiele* cases, is to deny a deficiency judgment to the mort-

gagee in a foreclosure action and to leave unaffected other remedies for the collection of the debt.

Section 20-2142, Comp. St. 1929, provides: "After such petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." This section was not repealed or amended by chapter 41, Laws 1933. *Federal Farm Mtg. Corporation v. Thiele, supra*; *Federal Farm. Mtg. Corporation v. Cramb, supra.*

What, then, is the power of the court under the language "unless authorized by the court?"

A review of many decisions of this court establishes the following as the proper construction of section 20-2142, Comp. St. 1929: The purpose of the statute is to protect the debtor and to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage and to prevent the possibility of two judgments being rendered against him for the same debt. If a creditor brings an action in foreclosure to enforce payment of the debt, he must pursue that remedy to its end and exhaust the relief afforded by that remedy before resorting to an action at law, "unless authorized by the court" to pursue an action at law and also one in equity at one and the same time. However, after exhausting the remedy by foreclosure, the equity proceeding is no longer pending and there is no further purpose or right of the court to control the beginning of an action at law. If remedies at law exist, an action at law may be had without the requirement of securing permission of the equity court. District courts do not have authority, unlimited as to time, to tell one creditor who has prosecuted a foreclosure that "you may" and another "you may not" sue at law for your deficiency. *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490; *Hargreaves v. Menken,* 45 Neb. 668, 63 N. W. 951; *Maxwell v. Home Fire Ins. Co.,* 57 Neb. 207, 77 N. W. 681; *Brayton v. Oaks,* 2 Neb. (Unof.) 593, 89 N. W. 646; *Mer-*

rill v. Miller, 2 Neb. (Unof.) 630, 89 N. W. 606; *Waugh v. Newell,* 62 Neb. 438, 87 N. W. 143; *Mann v. Burkland,* 68 Neb. 269, 94 N. W. 116; *Armstrong v. Patterson,* 97 Neb. 229, 149 N. W. 408 (reversed on rehearing on other grounds); *Quesner v. Novotny,* 116 Neb. 84, 215 N. W. 796.

In the case here presented it is conceded that a deficiency judgment cannot be granted in the foreclosure action; the remedy in equity therefore is exhausted; there is nothing further in the foreclosure action that the court can do; that action is finally determined. An action at law if brought by the plaintiff to recover the deficiency will therefore be the only action pending, and but one judgment can be recovered for the deficiency and that in the action at law.

The foreclosure action being completed, the plaintiff may sue at law to recover judgment for the deficiency without pleading or proving that it has been authorized by the court to bring the action. The question of the necessity for court authorization was not presented in the *Cramb* case, for the reason that authorization of the equity court had been obtained.

The trial court has the right to protect its files. However, it should not, and we assume will not, deny the plaintiff the right to withdraw the note if plaintiff deems it necessary to produce the note to properly prove its case in an action at law to recover a judgment for the deficiency.

REVERSED AND REMANDED.

JOHNSEN, J., dissenting.

My concern is with the question whether chapter 41, Laws 1933, now section 20-2141, Comp. St. Supp. 1939, can soundly and effectively be made to accomplish the purpose for which it was enacted. That question does not seem to me to have received a sufficiently careful analysis, either in this case or in the cases of *Federal Farm Mtg. Corporation v. Cramb,* 137 Neb. 553, 290 N. W. 440, and *Federal Farm Mtg. Corporation v. Thiele,* 137 Neb. 626, 290 N. W. 471, which have preceded it.

The purpose of the legislature in enacting chapter 41, Laws 1933, is unmistakable. It was to prevent mortgage

debtors, who had lost their homes through foreclosure, from being bogged down with subsequent deficiencies that might shatter their morale or deprive them of the opportunity for rehabilitation. The opinion in this case and those in the *Cramb* and *Thiele* cases, *supra,* take the view that, whatever may have been the legislative intent, all that the statute actually does is to take away the power of the court to enter a deficiency judgment in the foreclosure proceedings, and that it does not affect the right to institute an action at law for a deficiency. If this is all that chapter 41, Laws 1933, accomplishes, it fails to serve any practical purpose whatsoever. In fact, its effect then is to increase, instead of to lessen, the financial burden of a harassed mortgage debtor, by forcing him to be subjected to the additional costs and expenses of another separate proceeding. Such a purposeless and burdensome result would be regrettable, and I cannot believe that, on the basis of sound legal principles, it is necessary to allow the statute thus to fail in its objective.

For convenience, I set out the language of the statute. Before its amendment by chapter 41, Laws 1933, section 20-2141, Comp. St. 1929, read: "When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor." As amended, the section was made to read: "When a petition shall be filed for the satisfaction of a mortgage, the court shall have the power only to decree and compel the delivery of the possession of the premises to the purchaser thereof."

It seems to me that the section in its present form can properly be said to bar the institution of an action at law

to recover a mortgage debt deficiency after foreclosure proceedings have once been commenced or are completed. In the first place, even before the enactment of the 1933 amendment, when a mortgagee commenced a foreclosure proceeding, he no longer had an absolute and unconditional right to maintain an independent action at law. Section 20-2142, Comp. St. 1929, provides: "After such (foreclosure) petition shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." Up to the adoption of the opinion in the present case, as I read the decisions, the court had consistently held that, after foreclosure proceedings were commenced, it was essential to plaintiff's right to maintain a subsequent action at law, to plead and prove court authorization, whether such action was sought to be brought while the foreclosure proceedings were pending or after they had been completed.

In *Meehan v. First Nat. Bank of Fairfield,* 44 Neb. 213, 62 N. W. 490, after foreclosure sale and confirmation, the mortgagee brought action against the indorsers of the note, for the unsatisfied balance of the mortgage debt, without obtaining court authorization. The court reversed a judgment for plaintiff and held: "The lack of authorization to bring such an action is not a defense necessary to be pleaded, but the contrary should be alleged, or at least proved by the plaintiff, as, without such authorization, the action cannot be maintained."

In *Brayton v. Oaks,* 2 Neb. (Unof.) 593, 89 N. W. 646, it was said: "After the foreclosure proceedings were ended the plaintiff filed his petition, in this action at law * * * without having obtained authority from the court to institute such suit. * * * The plaintiff * * * having failed to show by his petition that he had applied for and obtained the consent of the court of equity to commence this action * * * the demurrer thereto was properly sustained."

In *Waugh v. Newell,* 62 Neb. 438, 87 N. W. 143, the mortgagee sued the mortgagors at law for the deficiency after

foreclosure sale. Defendants contended that the court had no jurisdiction, because the institution of the action had never been authorized by the equity court. Plaintiff contended that such authorization was not necessary "because, in the foreclosure proceeding, service was obtained upon defendants by publication, and that, therefore, no deficiency judgment could have been entered against them and that the reason of the statute would in consequence fail." The court held that under no circumstances could plaintiff "proceed in an action at law to recover a judgment for the remainder due upon the note or obligation, without leave obtained of the court having jurisdiction of the action of foreclosure to commence such action at law."

In *Mann v. Burkland*, 68 Neb. 269, 94 N. W. 116, the opinion says: "* * * it is contended by plaintiff in error that if the effect of the section quoted is to prevent him from prosecuting his action at law after foreclosure proceedings are finally terminated, the section is unconstitutional. * * * We are unable to discover merit in * * * these contentions."

The majority opinion cites the cases from which I have quoted, but it does not discuss them. To me, they are in irreconcilable conflict with the position now sought to be taken that, "The foreclosure action being completed, the plaintiff may sue at law to recover judgment for the deficiency without pleading or proving that it has been authorized by the court to bring the action." One other case will show, with perhaps even greater clarity, the unsoundness of the court's present position in relation to past judicial logic. In 1897 the legislature attempted to accomplish the same purpose as that sought to be achieved by chapter 41, Laws 1933, by striking out the words "unless authorized by the court," from what is now section 20-2142, Comp. St. 1929, so that the statute would simply read that, after foreclosure proceedings had been commenced, "no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof." In *Moore v. Neece*, 80 Neb. 600, 114 N. W. 767, this amendatory act was held unconstitutional, because the sen-

ate had made some changes in the bill, after its adoption by the house, which had not been formally concurred in by the house. In the situation presented in that case, if the rule were as the majority opinion now states it to be, there would have been no necessity, nor would the court have had the right, to pass upon the constitutionality of the statute.

I do not, of course, object to a change in the law, which is progressive, but in this case the judicial step seems to me to have moved backward. The majority opinion deprives a mortgage debtor of a protection which has hitherto existed in his favor, and at the same time wipes out the only possibility of effectuating chapter 41, Laws 1933, as I shall discuss more fully a little later. My point here is that, on the question of court authorization as a condition precedent to the right to commence an action at law, the granting of such leave has always been regarded as a matter for the exercise of sound legal discretion on the part of the court.

In *Mann v. Burkland, supra,* the court said: "The statute contemplates an application for authorization to institute an action at law to be addressed to the court having jurisdiction of the foreclosure proceedings, consideration thereof by it, and, if deemed proper in the premises, a formal order granting the prayer of the applicant."

In 42 C. J. 302, the rule is similarly stated: "The court is not absolutely bound to grant the application, but may refuse, in the exercise of a sound discretion." There is a long line of decisions in New York that support this statement, but I shall refer to only two or three of them for purposes of illustration.

In *Equitable Life Ins. Society v. Stevens,* 63 N. Y. 341, it was held: "Under the provisions of the Revised Statutes prohibiting an action at law, unless authorized by the court, to recover a debt secured by a mortgage during the pendency of an action to foreclose the mortgage, or 'after a decree rendered thereon,' the court is not absolutely bound to grant an application for leave to commence an action to recover a deficiency arising upon a sale under a judgment in a foreclosure suit wherein no provision was made for a

deficiency, but may, in the exercise of a sound discretion, grant or refuse it, in accordance with the equities of the case."

In *Matter of Steiner v. Day,* 161 App. Div. 742, 147 N. Y. Supp. 200, the court similarly said: "The propriety of granting leave to bring an action to recover a portion of a mortgage debt while a prior suit of foreclosure is pending, or after final judgment therein, is to be determined upon equitable principles."

Stehl v. Uris, 206 N. Y. Supp. 296 (210 App. Div. 444), illustrates a situation where the court exercised its discretion to refuse authorization to bring a subsequent action at law. The facts appear from the following paragraph of the syllabus: "Where mortgagor's executors extended time of payment of mortgage, and foreclosure resulted in deficiency, but no effort was made to hold executors personally liable, court will not grant leave to sue executors on bond for deficiency 9 years after foreclosure and 12 years after alleged liability accrued, when executors have no assets of estate from which they can reimburse themselves."

To summarize, it is clear to my mind that, until the decision in the present case, it has been the rule in this state that if a mortgagee wished to avail himself of the unequivocal right to sue at law, he was bound to pursue this route before instituting formal foreclosure. This would, of course, give the mortgagor the benefit of the delay incident to such a procedure. If he chose to place himself in the arms of an equity court, and to pursue the more direct route of getting control of the property, with such possible incidents as receivership, etc., his right to further recourse at law was within the sound regulation of the equity court, and that court might properly, in some situations, under equitable principles, such as estoppel and other unrecognized considerations, deny him the right to proceed at law, either during the pendency of the foreclosure or after sale and confirmation. Under no circumstances would he have the right to proceed, once he had submitted himself to equity jurisdiction, without authorization from that court,

which it might soundly grant or refuse. In this connection, I think the language of the court in *Equitable Life Ins. Society v. Stevens, supra,* is pertinent: "The assumption that the proceeding at law is prevented by the court of equity is erroneous. It is prohibited by the statute. Power is given to the court in proper cases to relax that prohibition; but when called upon to do so, the court should be governed by principles of equity in granting or refusing the application."

I am not here concerned with whether the district court's refusal to grant plaintiff leave to sue at law in this case would have been a proper exercise of discretion, prior to the enactment of chapter 41, Laws 1933. The point toward which I am heading is that, if this discretionary power was required to be exercised and leave granted before a right to sue at law existed, the question then is whether chapter 41, Laws 1933, in providing that "the court shall have the power *only* to decree and compel the delivery of the possessession of the premises to the purchaser thereof," did not deprive the court of the power to authorize the institution of an action at law for a foreclosure deficiency, while at the same time leaving in effect, as against the mortgagee, the statutory ban of section 20-2142, Comp. St. 1929, that "no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." It seems to me that it did, and when looked at in this manner, chapter 41, Laws 1933, can soundly be made to effectuate the intent of the legislature. Such a construction is impossible, however, under the rule adopted by the majority, but the majority, as I have pointed out, have departed from our former decisions, in laying down the rule that "after exhausting the remedy by foreclosure, the equity proceeding is no longer pending and there is no further purpose or right of the court to control the beginning of an action at law. If remedies at law exist, an action at law may be had without the requirement of securing permission of the equity court." The point which the majority opinion misses or ignores is that, under

the statute, no remedy has ever existed at law in such a situation, without authorization of the equity court, soundly exercised.

I should perhaps add that I have examined the title to chapter 41, Laws 1933, to see that there is no constitutional violation in the interpretation which I have made of the act. The only constitutional provisions bearing upon the question are contained in section 14, art. III, where it is provided: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed."

I find nothing in the title that conflicts with these requirements. The title reads: "An Act to amend Sections 20-2141 and 20-2143, Compiled Statutes of Nebraska, 1929, relating to civil procedure, district courts; to divest courts of the power to enter a deficiency judgment in actions for the foreclosure of real estate mortgages; and to repeal said original sections." The act clearly does not contain more than one subject—matters "relating to civil procedure, district courts"—and this general subject is sufficiently clearly expressed in the title. The day when it was necessary for a legislative title to be a catalog or index of the purpose and contents of the act is past. So, too, the recitation in the title as to divesting courts of the power to enter a deficiency judgment in the foreclosure proceedings will not, because of its incompleteness, be permitted to defeat the obvious and admitted purpose which the legislature was seeking to accomplish, in view of the fact that such a recitation constitutes in reality a mere title surplusage, and is wholly unnecessary to the validity of the act. *City of Beatrice v. Masslich,* 108 Fed. 743, 47 C. C. A. 657. The act to my mind also fully meets the requirement that the new act must "contain the section or sections as amended and the section or sections so amended shall be repealed."

If it be suggested that the limitation upon the power of the court to authorize the institution of a suit at law is not

germane to the powers originally covered by section 20-2141, Comp. St. 1929, the answer seems to me to lie in giving to the word "amended," as used in the Constitution, the broad connotation to which it is entitled. The element of germaneness is a judicial limitation and not a constitutional one, and germaneness is in any event wholly a matter of relative viewpoint. The addition to or denial of powers exercisable by a court of equity in a foreclosure proceeding seems to me germane to and amendatory of any previous specification of correlative powers in that field. The fact that the act here involved incidentally restricts or affects the operation of section 20-2142, upon which the right to institute an action at law depends, does not, of course, make it invalid. *Pierson v. Faulkner,* 134 Neb. 865, 279 N. W. 813.

I am reminded how easy it is for the judicial mind to become impatient with legislative imperfection. Where, however, no constitutional rights have been invaded, where the legislative intent is known, and where the aim sought to be accomplished is admittedly salutary and necessitous, the courts should lend themselves to the accomplishment of the legislative purpose to the fullest extent possible. Here, as in all other processes with which the law deals, substance is more important than form. There run through my mind the words of the late Justice Holmes, in *Johnson v. United States,* 163 Fed. 30, while sitting as a Circuit Justice, when speaking with respect to legislative acts, he said that "It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and we shall go on as before."

CARL SCHULZ, APPELLEE, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

293 N. W. 409

FILED JULY 26, 1940. No. 30840.

1. **Eminent Domain.** When it becomes necessary to take private property for a public improvement, and all of the strict require-

ments of the law have been met, then the only question is: What is the loss to the owner?

2. ———. The just compensation, required by the clause in the Constitution to be made to the landowner, is to be measured by the loss occasioned to him by the appropriation.
3. ———. "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N. W. 593.
4. ———. While the compensation for land taken by right of eminent domain is measured by its market value at the time taken, no evidence is admissible of its peculiar value for special reasons to its owner.
5. **Appeal.** When a verdict is so large as to raise a presumption that it was based on prejudice rather than on sober judgment on the evidence submitted, it will be set aside and a new trial ordered.

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

R. O. Canaday and *Beatty, Maupin, Murphy & Davis*, for appellant.

J. C. Hollman, E. H. Evans and *Urban Simon, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an appeal by the defendant district from a judgment of the district court, entered upon the verdict of the jury, for $11,534.25 with interest for some 374.17 acres of land taken by condemnation proceedings.

The defendant, Central Nebraska Public Power and Irrigation District, is a public corporation, commonly referred to as the Tri-County District, and is engaged in the construction of an on-river dam, known as the Kingsley dam, on the North Platte river north of Ogallala, designed to store about two million acre-feet of water, from which supply canals will transport the water to land to be irrigated,

and also to serve power houses and many transmission lines. In the construction of one of these power houses on a supply canal, the plans call for a regulating reservoir just above the power house, to standardize the flow of the waters through the turbines in the power house. Such reservoir will be constructed just east of the land taken from the plaintiff's ranch, and the raising of the water level will cause the water to back up in a canyon upon the plaintiff's land, and in draws, or fingers, leading back from said canyon.

The defendant district brought a statutory condemnation proceeding in the county court for Lincoln county to appropriate the necessary land from the south edge of plaintiff's ranch. The county judge appointed five disinterested freeholders as appraisers, to which appointment the plaintiff filed objections on the ground that the district and landowner had not failed to agree upon a price, and that the said district did not need the land, and in no event needed more than 150 acres, and that the balance was being sought condemned for reasons of expediency and caprice, and in excess and usurpation of the power of eminent domain.

On October 11, 1938, the appraisers filed a report that they had carefully inspected and viewed the real estate, and given hearing to all persons interested, and assessed the damages of the plaintiff and his wife for the appropriation of said real estate at the sum of $12,000, to which report the district filed exceptions, but paid the amount of the award to the county judge of Lincoln county, as required by law, to enable it to enter upon such land and erect and construct its contemplated works of internal improvement, and notified the court to withhold the disbursement of said award, or any part thereof, until the final determination of the appeal.

The Federal Land Bank of Omaha and the Federal Farm Mortgage Corporation filed in the proceedings in the county court notice of the fact that said corporations held first and second mortgages upon the real estate, and were entitled to have applied upon their mortgages all moneys paid in by

reason of said condemnation proceedings, and said corporations also filed answer and cross-petition in the district court, showing that the original mortgage was $8,000, bearing 5 per cent. interest, and the second mortgage given the land bank commissioner was in the sum of $4,000, with certain payments made thereon.

The verdict returned by the jury on June 10, 1939, consisted of five items, which made up the total verdict, as follows:

"For the 347.47 acres of pasture land taken.....$6,949.40

"For the 26.7 acres of cultivated land taken.....$1,068.00

"As damages to the pasture land in section 5 that consists of about 223.37 acres and that was not taken.....$1,116.85

"As damages to the pasture land in the East half of Sec. 32 and Southeast quarter of Sec. 29 that consists of about 270.1 acres and that was not taken.....$1,350.50

"As damages to the 209.9 acres of cultivated land and building and feed lot in the southeast quarter of Section 29 and east half of Section 32 .....$1,049.50"

The motion for new trial set out 26 errors, and the brief presents these errors under four propositions of law. The question of fact as to the actual amount of damage suffered by the plaintiff appears to be determinative of the case.

The plaintiff's ranch reaches for three miles north and south. The land at the north end of the ranch is the east half of section 29, in which half-section are located all of the farm buildings, consisting of a barn, sheds, cribs, windmill, and a house, such buildings occupying some three acres of land adjoining 206.90 acres of cultivated land. Immediately to the south lies the east half of section 32, consisting of high, rough grazing land, or grass land. No part of the land in sections 29 or 32 is taken by the condemnation proceedings. To the south of the land lying in the east half of section 32 lies section 5, making the south end of the ranch

of the plaintiff. In this section there are 26.70 acres of cultivated land up in the northwest corner, and the rest of this entire section consists of canyons and rough, hilly grazing land, being hard clay, rather than sandy.

The land taken in the condemnation proceedings consists of the southern extremity of the three-mile strip belonging to this ranch. It is irregular in outline on the north side, and has some six fingers, or draws, extending to the north from the deep canyon, with steep sides, which will make up part of the reservoir when the work is completed. Of the 233.60 acres of the cultivated land in this ranch, only the small detached area of 26.70 acres will be taken, which lies two miles from the farm buildings, from which all the machinery to farm it must be taken.

Of the 840.94 acres of grazing land, 347.47 acres will be taken, leaving 493.47 acres remaining in the ranch, and if we include the three acres where the farm buildings are in section 29, the total land in the ranch was 1,077.54 acres, from which the district will take 374.17 acres, leaving 703.37 acres remaining of the ranch, all connected together the same as before, for all of the land taken by the district is off the south end of the ranch.

The plaintiff testified that he has owned this land since 1904, but has never lived on the place himself. At first it was rented out, but since 1917 the plaintiff has operated the place with hired help. The floor of the canyon taken is somewhat level, so that plaintiff was able to cut hay there some years, the last hay cut there being in 1935.

Plaintiff testified that during the winter time the canyon afforded some shelter and protection, and so he fed cattle there. He has one windmill and tank and cistern on the land which is taken. Plaintiff testified that his total damages for the taking of this were in the neighborhood of $28,000.

Jess Highberger, a farmer and stock raiser, living 17 miles southeast of North Platte, testified that the total damages of the plaintiff were from $30,000 to $33,000; that the remaining pasture land left with the ranch in section 5

was worth $25 an acre before the land at the south end of the section was taken, and is worth only $10 an acre now; that the 120 acres of valley land at the north end of the ranch which are not broken out was worth $70 before and is now worth only $30 an acre, and that the inconvenience of fencing the irregular borders of the canyon would cost ten times as much to fence as it would to build a straight fence. He testified that he saw the plaintiff's pasture land for the first time the day before he testified, and has only seen the farm land from the road; that he knows of no sales of farm land, and the opinions he gave were not based upon any sales. He valued the windmill and tank and cistern taken by the district as $1,200, but admitted on cross-examination that he did not know how deep it was to water, and that a windmill tower would cost around $40 and the tank $30 to $40 to build.

L. C. Craig testified that he lived 12 miles south of Brady; that he runs about 150 to 200 head of cattle, and cultivates 70 acres of land, his land being canyon land, located ten miles south and east of the plaintiff's land. He fixed the plaintiff's damages at over $32,000, but did not base his opinion on sales of land, for he said no land was being sold.

John Litchenberg owns a place 12 miles south and east of the plaintiff's place, and went over the land in question about a month ago; he said it was too rough to drive over all of it. He places the value of the 151 acres of canyon bottoms at $90 an acre, and said the farm land in section 29 was worth $95 an acre, but would only be worth $75 an acre after the district took off the pasture land at the south end of the ranch, and placed the total damages at over $33,000. He knew of no sales of land in that vicinity.

Louis F. Schulz, the brother of the plaintiff, testified that the total damages were $23,440. His land joins that of the plaintiff. He placed the bottom land in the canyon at $60 an acre, but does not recall of any such land ever selling for that price. R. E. Stenger testified the total damages would be over $24,000.

After the testimony of these witnesses the plaintiff rested,

and the defendant called Clarence Wilson, engineer in charge of construction of the supply canal, who had prepared exhibit No. 1, and testified to the situation of the canal reservoir, and that the water at the outlet end will be about 19 feet deep, but that there will be no construction work of any kind on the land taken.

H. C. Loutzenheiser testified that he had been handling real estate at Gothenburg for 30 years; that the pasture land taken by the district was worth $12.50 an acre; that the pasture land remaining in plaintiff's ranch north of that taken is worth $3.75 an acre less since the taking, and that the cultivated land at the north of the ranch would not be depreciated in value at all by the taking of the pasture land, and that the total damages of the plaintiff were $6,500. He testified on cross-examination that the land taken by the district does not remove all of the desirable protection for cattle feeding, or all the hay ground, but that taking the south end off the pasture may tend to unbalance the ranch for any one looking for a combination place.

A. D. Middleton testified in detail as to the value of all this land, and that the plaintiff's damages were over $7,000. William W. Findlay also placed the damages over $7,000. C. E. Pollard, engaged in the real estate business at Farnam, Nebraska, since 1911, placed the damages of the plaintiff at $8,169.50. John Ginapp placed the damages at between $6,500 and $7,500. G. W. Pollard, of Farnam, placed the damages at over $7,000, and Harry A. Johnson made the total damages $7,506.68.

If we examine the highest values estimated by plaintiff's witnesses, we find their average is about $29,500 for the plaintiff's damages, while the average of the lowest estimates by the district's witnesses is about $7,000. This court cannot ignore the evidence of any of these witnesses, although we may seriously question certain estimates.

This great discrepancy arises from several causes. The jury allowed $6,949.40, or over $20 an acre, for the canyons and rough, hilly land taken by the district, when many reliable witnesses testified that such land was worth not over

$12 an acre. Under no process of reasoning can this court find that the 207 acres of farming land at the north end has been reduced over a thousand dollars in market value by detaching some rough, hilly canyon land located some two miles to the south of it, when every one knows that the fertility and productiveness of this farm land are in no wise affected, and it will produce just as much wheat or other grain as it did before. It is also true that detaching 347.47 acres of rough, hilly pasture land from the extreme south end of a tract of 840.94 acres of similar land cannot, in the very nature of things, reduce the market value of the remainder nearly $2,500, even though the canyon taken afforded some shelter for feeding cattle in the winter.

The vast project being carried out by the defendant district with the assistance of federal funds is in the nature of a public project, which of necessity changes the plans of individuals whose lands are taken by right of eminent domain for the construction of canals and reservoirs required to complete this improvement, but each citizen holds his property subject to the paramount claims of the state, and our Constitution guarantees only that his property will not be taken without just compensation.

When it becomes necessary to take property for a public improvement, and all of the strict requirements of the law have been met, then the only question before the courts is: What is the loss to the owner?

This court has said: "The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking." *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593.

"The just compensation, required by the clause in the Constitutions, to be made to the landowner, is to be measured by the loss occasioned to him by the appropriation." 2 Kinney, Irrigation and Water Rights (2d ed.) 1941, sec. 1081.

"The jury in fixing the damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property." *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521. See, also, *Sternberger v. Sanitary District No. 1,* 100 Neb. 449, 160 N. W. 740; *In the Matter of Furman Street,* 17 Wend. (N. Y.) 649; *Sandy Valley & E. R. Co. v. Bentley,* 161 Ky. 555, 171 S. W. 178.

But this court has also stated that the owner is not entitled to damages to the remainder of a large tract of land not taken under eminent domain, when damages to such land are of the same character as those suffered by all owners of land in that vicinity; also that, while the compensation for land taken by right of eminent domain is measured by its market value at the time taken, no evidence is admissible of its peculiar value for special reasons to its owner. *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918.

It is true that five appraisers and the jury of twelve men went upon and inspected this land, and practically agree upon the amount of plaintiff's damages. Plaintiff urges us to consider this fact in connection with the refusal of the trial court to sustain a motion for a new trial, and insists that, as this judgment is founded upon a fair, reasonable, and impartial verdict, it should not be disturbed by this court.

However, this court, after a careful examination of the entire record, believe that the jury were somewhat prejudiced in favor of the plaintiff, and reached a verdict which to this court appears to be unjustified by the facts shown by the evidence. In our opinion, the sober judgment of another jury would be based upon better reasoning, and the verdict and judgment are hereby set aside and reversed.

REVERSED.

BUSHMAN CONSTRUCTION COMPANY, APPELLANT, V. SANITARY DISTRICT NO. 1 OF LANCASTER COUNTY, APPELLEE.
293 N. W. 380

FILED JULY 26, 1940. NO. 30775.

Contracts. It is not the province of the court to make a new contract for the parties by construction; its duties are limited to the interpretation of the contract which they have made for themselves, viewed in the light of all the facts and circumstances existing at the time it was entered into.

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

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg,* for appellant.

Peterson & Devoe and *Chauncey E. Barney, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and BLACKLEDGE, District Judge.

CARTER, J.

This is an action to recover the amount claimed to be due the plaintiff, Bushman Construction Company, from the defendant, Sanitary District No. 1, on a contract for the construction of a bridge across Salt creek in Lancaster county, Nebraska. Plaintiff appeals from the action of the trial court in directing a verdict for the defendant on the second and third causes of action set forth in its petition.

The record discloses that on May 28, 1935, defendant accepted plaintiff's bid of $21,175 for the construction of a bridge according to plans and specifications, including channel excavation and the removal of the existing structure. A written contract was thereupon executed by the contracting parties. The two causes of action involved herein arise as the result of a dispute over the rate of payment to be made for 167.08 cubic yards of excavation for the piers supporting the bridge.

The contract defines "channel excavation" as follows:

"Channel excavation shall consist of all material, wet or dry, above the grade of the channel section."

"Wet excavation" is defined by the contract to be: "Wet excavation shall be defined as consisting of all materials below the normal ground water elevation at the time construction is started, and below the established grades for the new channel section of Salt creek."

It is the contention of plaintiff that the 167.08 cubic yards of excavation in question is wet excavation within the terms of the contract, for which plaintiff is entitled to $10 a cubic yard. The defendant insists that it is channel excavation only, for which plaintiff is entitled to 15 cents a cubic yard.

The controversy arises out of a change in the plans and specifications regarding the amount of channel excavating to be done. The plans and specifications provided for channel excavation to a level 7.66 feet lower than the level agreed upon in the change of plans at the points where the two bridge piers were to be constructed. In view of the fact that the changed plans provided for the channel excavation to the level of the normal ground water elevation at the time construction was started, it is contended by plaintiff that the cubic yards of wet excavation were increased from 191.2 to 358.28, a difference of 167.08 cubic yards, the basis for the present litigation.

The claimed wet excavation involved herein is the material which laid below the normal ground water elevation and below the channel grade established by the supplemental oral agreement, but above the channel grade fixed by the original contract, which was necessary to be removed in the construction of two concrete piers to sustain the bridge. All of this excavation being below the normal ground water level, it was necessary to construct cofferdams to keep the water out while the concrete piers were being constructed. The cofferdams were each 32 feet 9 inches long and 9 feet wide and, due to the change in the channel excavation level, they each had 7.66 feet of additional excavation below the normal ground water level, resulting in the 167.08 cubic

yards of claimed wet excavation which, except for the change in plans, would have been classified without question as channel excavation. No mention of any change in the classification of materials to be excavated as estimated and fixed by the original contract was made at the time the supplemental oral agreement was entered into.

It must be remembered that the contract provides for the construction of a bridge and the excavating necessary to permit its construction. There is no agreement to make any excavations, except adjacent to the bridge. This being true, the ground water level would remain the same, whether or not the channel excavation was as provided by the written contract or as changed by the subsequent oral agreement. If the excavations had been made in accordance with the original written contract, it would have resulted in a deepening of the river channel in the proximity of the bridge, but not in a lowering of the ground water level. It is evident therefore that there was no change in the physical condition of the excavated materials resulting from the subsequent change in the written contract. We fail to see how a change in the channel grade, which did not affect the ground water level or the physical condition of the materials to be excavated, could operate to change the classification of the various types of excavation provided for in the written contract, in the absence of a supplemental agreement with respect thereto. It certainly was not within the mutual contemplation of the parties that defendant should pay $1,645.74 additional on its contract by adopting defendant's suggestion that the removal of 2,317 cubic yards of channel excavation was unnecessary and useless under the conditions existing at the site of the bridge. To so hold without any direct evidence to sustain it would amount to the making of a new contract between the parties, and this, of course, is not within the province of the court. Any changes in the contract were by its terms required to be in writing. We think this provision was inserted as a protection against such a situation as exists in the present case. Since the written contract had been modified by oral

agreement to change the grade of the river channel, it is urged that a change with respect to the classification of materials to be excavated could likewise be made. The first oral modification, however, has been fully carried out and the contract fully completed and approved in accordance therewith. Under such circumstances, neither party is in a position to rely upon the provision of the contract that all changes must be in writing. But in the situation before the court, such condition does not exist and defendant has in no way deprived itself of the benefit of this provision.

The fact that it was mutually agreed that 2,317 cubic yards of the estimated 3,500 cubic yards of channel excavation were not to be removed does not relieve the plaintiff from its contract to remove the balance, including the 167.08 cubic yards in question, at the specified contract price. We think the physical facts surrounding the existing situation at the time the contract was entered into indicate a clear intention on the part of the contracting parties to treat the disputed excavations as channel excavations within the purview of the contract, and that there was no mutual understanding that this was to be changed by the subsequent oral agreement. The oral agreement was intended as a modification of the original contract only as to the amount of channel excavating to be done. It did not purport to change, nor did the parties at the time intend to modify, any other provision in the contract. The trial court properly gave effect to the mutual intention of the parties and directed a verdict for the defendant.

AFFIRMED.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. EDWARD L. HYDE, RESPONDENT.

293 N. W. 408

FILED JULY 26, 1940. No. 30790.

1. **Attorney and Client.** Disbarment of attorney required, where he misappropriated part of assets of an estate of which he was administrator; made other withdrawals of funds from his account

as administrator, for personal use; converted proceeds of a judgment collected for a client; unjustifiably and for undue period withheld remittance of other funds collected; released a judgment without having received full satisfaction and without client's authorization; converted to his own use the proceeds received from such judgment settlement, and refused for a number of years to give client requested information as to the judgment's status.

2. ———. Mere restitution of funds wilfully converted by an attorney is not a professional exoneration.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, to disbar the respondent. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for complainant.

C. S. Radcliffe, for respondent.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The State on relation of the Nebraska State Bar Association instituted disciplinary proceedings against respondent as an attorney. Robert O. Reddish was appointed by the court as referee, and the record of the hearing had before him and his report have been duly filed. Respondent has filed no exceptions to the referee's report, and the state now moves that the report be approved and confirmed, and that an appropriate disciplinary order be entered.

It is unnecessary to set out all the charges or to make a detailed review of the evidence. The referee has found, and the record amply supports his findings, that respondent has misappropriated part of the assets of an estate which came into his hands as administrator; that he has made repeated and numerous petty withdrawals from his bank account as administrator, for his personal use; that he has converted the funds of a client which, as attorney, he collected on a judgment, and has made restitution only after the commencement of a prosecution for embezzlement

against him; that, on other funds collected by him as attorney, he has unjustifiably withheld remittance for almost two and a half years; and that he has settled, without authority from or notice to his client, a judgment in the amount of $143.52 for the sum of $40 in cash and a bill of sale to a two-thirds interest in a stand of wheat in Colorado,—which proved to be worthless,—converted the $40, and refused to give any information as to the status of the judgment to the forwarding attorney, until he learned of the investigation that was being made of his conduct by the district complaint committee, prior to the institution of this proceeding.

The events involved have extended over a period of several years. They evidence such a lack of appreciation of, or concern for, the obligations and proprieties of the legal profession, that the court cannot justify his being held out to the public as possessed of the honor, rectitude, responsibility and diligence which the high office of attorney at law demands, and as meriting the confidence which clients necessarily repose in such a relationship. *State v. Marconnit,* 134 Neb. 898, 280 N. W. 216; *State v. Sowards,* 134 Neb. 159, 278 N. W. 148; *State v. Hatteroth,* 134 Neb. 451, 279 N. W. 153; *State v. Goldman,* 127 Neb. 340, 255 N. W. 32. We cannot condone respondent's conduct simply because he attempted to make restitution after he was faced with the issue of legal accountability. *State v. Priest,* 123 Neb. 241, 242 N. W. 433. Mere restitution of funds wilfully converted by an attorney is not a professional exoneration.

An order of disbarment must be entered. Respondent will accordingly be disbarred from the practice of law in Nebraska; his license will be revoked and canceled; and his name will be stricken from the roll of the attorneys of the state.

ORDER OF DISBARMENT.

IN RE ESTATE OF LARS A. LARSON.
LA VON ROBERTSON ET AL., APPELLEES, V. ROY O. LARSON, ADMINISTRATOR, APPELLANT.

293 N. W. 430

FILED JULY 26, 1940. No. 30864.

1. **Executors and Administrators.** An unmatured but absolute obligation, such as a promissory note, may be filed and allowed as a claim against a decedent's estate, with the right of immediate enforcement limited, so that the estate may have the opportunity to make payment according to the contract terms. Comp. St. 1929, sec. 30-608.
2. ———. If a decedent's estate desires to pay a claim upon an unmatured but absolute obligation, such as a promissory note, before it becomes due, it may at any time, after the claim has been filed, make application to have the present value of the obligation determined by the county court. Comp. St. 1929, sec. 30-607.

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

John L. Barber, Jr., and *Chatt & Ellenberger*, for appellant.

Sidner, Lee & Gunderson, contra.

Heard before ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The question presented is whether a promissory note, which is not yet due, is entitled to allowance as a claim against the estate of a decedent.

Claims were filed on two notes, totaling $12,500, against the estate of the maker, although the notes were not in default and would not mature until March 1, 1941. The administrator filed objections to their allowance, on the ground that, since they could not have been enforced by suit against the decedent in his lifetime, they were not provable claims against his estate. The county court duly allowed the claims, and the administrator appealed to the district court. A similar order of allowance was made there, with a provision

that "said estate and the defendant herein (administrator) be, and hereby is, granted the privilege of paying said claims and each of them, according to the terms and at the time specified in the notes which form the basis of said claims, and nothing herein contained shall be construed to prevent said administrator from paying said claims in such manner." The administrator has appealed to this court.

In support of his contention, the administrator relies principally upon some expressions in *Colson v. Estate of Johnson,* 111 Neb. 773, 197 N. W. 674. The opinion there says that "such claims are provable as decedent would be liable upon if suit were brought during his lifetime," and that "claimant is attempting * * * to secure a judgment against the estate for a sum not due." What the court actually decided in that case, however, was that the vendor in an executory contract for the sale of land, where the agreements to convey and to pay the purchase money are dependent, is not entitled to file a claim against the estate of the deceased vendee for the purchase money, "for the reason that the county court has no jurisdiction in cases involving the title to lands, nor of cases for specific performance, and is therefore in no position to afford the defendant any protection regarding the conveyance." The complications which such dependent agreements may present in the administration of an estate are not involved in the case of a simple promissory note. Such expressions in the court's opinion as go beyond the facts and the situation actually there involved must be ignored, for otherwise it would appear that the court overlooked and failed to give consideration to sections 30-607 and 30-608, Comp. St. 1929, by which the present situation is controlled.

Section 30-607 provides: "The court shall have power to examine and allow at their present value all demands which will mature against any such estate at a future date including demands payable in specific articles and may set off such demands as in other cases."

Section 30-608 provides: "Nothing in the preceding sec-

tion shall be construed to prevent any executor or administrator from paying any debt which shall be payable at a future day according to the terms and at the time specified in the contract."

These statutory provisions clearly recognize the right to file an unmatured but absolute obligation, such as a promissory note, as a claim against a decedent's estate, and to have it allowed, with the right of immediate enforcement limited, so that the estate may have the opportunity to make payment according to the contract terms. The order of allowance is, of course, in the nature of a judgment (*In re Estate of Kothe,* 131 Neb. 785, 270 N. W. 120), but the purpose of the statute is to prevent the judgment from being enforced except in accordance with the terms of the contract. In order that the closing of an estate may not be unnecessarily delayed, the legislature has given the executor or administrator the right, where it is expedient and assets are available for this purpose, to have the court at any time determine the present value of the obligation and to make immediate payment thereof.

The public has a sound interest in the liquidation and closing of decedents' estates, and such a statutory provision is a proper exercise of legislative authority. It is not an invalid impairment of contract rights for the state to say, as a matter of public policy, that, if an unmatured obligation is filed as a claim against a decedent's estate, the claimant may be required at any time to accept the actual present value of his debt, and cannot be permitted to delay the closing of the estate, the payment of claims to other creditors, the distribution to heirs and beneficiaries, and the final fixing of individual and social rights in the property, by a refusal to accept his money until the maturity date specified in the obligation has expired. The parties will be held to have contracted with reference to the regulatory provisions of the statute, and to have agreed that, if the obligation ever should be filed as a claim against the maker's or obligor's estate, it would be governed, as to its payment, by the provisions of the statute.

The estate insists that claims upon unmatured obligations should be governed by section 30-701, Comp. St. 1929, and section 30-704, Comp. St. Supp. 1939. These sections have application only to contingent claims, and we have already held that a note and any liability against the maker arising out of it are not a contingent claim. *In re Estate of Golden,* 120 Neb. 233, 233 N. W. 893; *In re Estate of Ayres,* 123 Neb. 453, 243 N. W. 274. The fact that the note is secured by a mortgage does not change the character of the liability on the note.

The order of allowance made in this case was proper under section 30-608, Comp. St. 1929, and, as indicated above, if the estate desires at any time to make payment of the claim before it matures, the way is left open to it, under section 30-607, Comp. St. 1929, to make application to have the present value of the obligation or judgment determined by the county court.

AFFIRMED.

ROSE, J., dissenting.

I do not concur in the opinion. If the statute authorizing the county court to require the administrator of an estate to pay, and the payee of a note to accept, payment of decedent's interest-bearing note, before it is due according to its terms, is a part of the note by construction, the enactment of the statute is an unconstitutional interference with the right of private citizens to make private contracts between themselves according to their own mutual and harmless terms, and such legislation, in my opinion, violates a valid obligation of the contract and conflicts with the state Constitution.

GEORGE R. WHEELOCK, APPELLANT, V. HARRY H. HANEY, APPELLEE.

293 N. W. 418

FILED AUGUST 2, 1940. No. 30858.

1. **Elections.** In absence of corruption or fraud on the part of voters or election officers in a voting precinct, election returns in due

form in the hands of the county clerk will not invalidate the entire vote of the precinct, merely because the election officers failed to sign such returns and failed to string the ballots on a strong thread and failed to seal such returns in the manner provided by statute.

2. ———. Mail ballots are void if they are not transmitted to the county clerk by the United States mail in compliance with a mandatory provision of statute making that method of transmission a condition of the right to vote by mail.

APPEAL from the district court for Grant county: ERNEST G. KROGER, JUDGE. *Reversed.*

Elmer Gudmundsen and *Cleary, Suhr & Davis,* for appellant.

S. L. O'Brien, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This is an election contest for the office of county clerk of Grant county. George R. Wheelock is plaintiff and Harry H. Haney is defendant. Each claims to have been elected at the general election November 8, 1938. Their names were on the official ballots at that election as rival candidates. There are three voting precincts in Grant county—Ashby, Hyannis and Whitman. After the election, a canvass of the votes cast by voters for county clerk at the polling places in the three precincts resulted as follows: For Haney, defendant: Ashby, 62; Hyannis, 129; Whitman, 123; total, 314. For Wheelock, plaintiff: Ashby, 76; Hyannis, 199; Whitman, 46; total, 321, giving Wheelock a majority of 7. Of 19 mail ballots, 5 were counted for plaintiff and 14 for defendant, giving the latter a majority of 2. On the vote as thus canvassed, defendant, Haney, county clerk at the time of the election and present incumbent, issued to himself a certificate of election.

Plaintiff based his contest and his claim that he was elected on the allegation and the undisputed evidence that 10 of the mail ballots counted for defendant were void.

Upon a trial of the contest the district court found the issues in favor of defendant and adjudged him to be the duly elected county clerk of Grant county. Plaintiff appealed.

On appeal the position of plaintiff is that the 10 mail ballots counted for defendant were void because they were not sent to the county clerk by mail in compliance with provisions of the statute. Comp. St. 1929, sec. 32-806. On the contrary defendant argues that the statute directing transmission of mail ballots to the county clerk by mail is directory merely and does not invalidate them, but that, even if rejected, they would not change the result of the election, because, as contended, the entire vote of Hyannis precinct should be rejected for the reason that the election officers did not comply with the statute directing them to sign the returns, to string the ballots on a strong thread and to seal them before delivering them to the county clerk. Comp. St. 1929, secs. 32-905, 32-906, 32-915. The rejection of the entire vote in Hyannis precinct, where 199 ballots were in favor of plaintiff, would give defendant a clear majority without regard to the mail ballots. The district court held they were valid. Was there error in this respect? The record contains no evidence of fraud or corruption in the election at Hyannis. The conduct of the electors and of the election officers at the polls in that precinct is unchallenged. The records of the election as returned to the county clerk were in proper form and showed the results of the balloting. Tampering with the poll books, tally sheets, ballots and other election documents at any time or place is not shown in any manner. Did the failure of the election officers to sign their names on the blank lines, to string the ballots and to seal them in compliance with statute disfranchise all the voters in Hyannis precinct? The voters appeared before the election officers, were identified as electors and cast their secret ballots in the manner provided by law. The tally list and summary of the votes cast showed the results of the election. The county clerk received the returns without requiring the election officers to comply with the statute in the respects already indicated. The general rule of law is

that such provisions are directory unless made otherwise by legislation. In an early case this court ruled:

"It is doubtless the duty of the judges of the election to seal up the returns, and among other things to direct them to the county clerk; but a failure to discharge this duty by the judges of election in the manner provided by law, will by no means excuse the county clerk for failing to canvass such returns as in point of fact are delivered to him within the time limited by law." *Long v. State,* 17 Neb. 60, 22 N. W. 120.

This is in harmony with the law generally. A text reads as follows:

"Unless it is expressly declared by statute that the particular act is essential to the validity of the election, or that its omission will render it void, an election which appears to have been fairly and honestly conducted will not be vitiated by mere irregularities which are not shown to have affected the result. In the absence of fraud, the misconduct of election officers or irregularities on their part will not justify rejecting the whole vote of a precinct where it does not appear that the result was affected thereby, even though the circumstances may be such as to subject the officers to punishment. Voters who have done all in their power to cast their ballots honestly and intelligently are not to be disfranchised because of an irregularity, mistake, error, or even wrongful act, of the officers charged with the duty of conducting the election, which does not prevent a fair election and in some way affect the result." 20 C. J. 180.

The district court, therefore, did not err in finding that the ballots cast at the polling place in Hyannis precinct were valid and did not err in counting them.

The 10 mail ballots in controversy, however, are in a different situation. The privilege of voting, though the voter is absent from the voting precinct at the time of the election, requires a departure from the usual method of exercising the elective franchise and is a grant of legislative authority. The exceptional privilege was granted only on the conditions imposed by statute. In authorizing mail votes,

it was a legislative purpose to preserve the purity and secrecy of the ballot in harmony with the safeguards thrown around voting at polling places. Substantial compliance with the conditions on which the privilege is granted is a necessary part of the legislative grant. The very nature of the privilege makes the conditions imposed by statute necessary to an exercise of the right. The act of the legislature provides that any qualified elector of this state who is about to be absent from the county of his residence on the day of any primary or other election "may vote at such election upon compliance with the provisions of this act and in manner hereinafter set out." Comp. St. 1929, sec. 32-801. It is thereinafter set out that a ballot of an absent voter, when prepared for a mail vote, must be addressed and mailed to the county clerk as registered mail. Comp. St. 1929, sec. 32-806. Such a vote must reach the county clerk through the United States mail. That is a condition of the right to vote by mail and a substantial compliance therewith is essential to an exercise of the privilege. *Rasp v. McHugh,* 121 Neb. 380, 237 N. W. 394; *Wichelmann v. City of Glencoe,* 200 Minn. 62, 273 N. W. 638; *Sartwelle v. Dunn,* 120 S. W. (2d) (Tex. Civ. App.) 130; *In re Baker,* 126 Misc. 49, 213 N. Y. Supp. 524; *Guice v. McGehee,* 155 Miss. 858, 124 So. 643; *Bullington v. Grabow,* 88 Colo. 561, 298 Pac. 1059.

Ten of the mail ballots in issue were never in the United States mail. They reached the county clerk by other means. It follows that they were erroneously counted for defendant. When they are eliminated, as they must be, the returns show the election of plaintiff. The judgment below is therefore reversed, with directions to the district court to enter a judgment in favor of plaintiff and against defendant in conformity with views herein expressed.

REVERSED.

ETTA CARPENTER, APPELLEE, V. SUN INDEMNITY COMPANY, APPELLANT.

293 N. W. 400

FILED AUGUST 2, 1940. No. 30826.

1. **Insurance.** Untrue representations made by the assured in his application, where the questions eliciting such statement call for matters of opinion, judgment, or belief, will not avoid a policy issued thereon, unless it is shown that the misrepresentations were knowingly made with intent to deceive.
2. **Appeal.** Competent evidence in the record examined, and *held* to sustain the verdict of the jury and the judgment of the trial court entered thereon.
3. ———. A verdict against an insurance company on the issue of false representations will not be set aside if there is competent evidence to sustain it.
4. **Trial.** Refusal of the trial court to approve and give instruction requested by defendant to the effect that the failure of plaintiff to call Dr. Harry Everett as a witness was, under the facts in this case, "to be considered by the jury and to be given such weight as the jury might see fit," approved.
5. **Insurance.** In order to defeat recovery in this case, the company must prove that the representations were untrue and were made by the assured knowingly with the fraudulent intent to mislead and deceive; that they were material to the risk, and were relied upon by the defendant.
6. ———. As applied to assured's negative answer to the question, "Have you ever had or ever been advised to have an operation?" the controlling rule is: In order for alleged misrepresentations in an application for insurance to constitute a defense to an action on the insurance contract evidenced by the policy in writing, it is incumbent upon the insurance company to plead and prove: (1) That the statements and answers were made as written in the application; (2) that they were false; (3) that they were false in some particular material to the insurance risk; (4) that they were made knowingly by the insured with the intent to deceive; (5) that the insurance company relied and acted upon such statements or representations and was deceived by them to its injury; (6) that the false statements so relied upon constitute a part of the completed application indorsed upon or annexed to the insurance policy in suit as delivered to the assured.
7. ———. Record examined, and *held* to establish that the notice of receipt of injury was timely given in behalf of the beneficiary.

8. **New Trial.** No affidavit, deposition or other sworn statement of a juror will be received to impeach or explain a verdict or on what grounds it was rendered, or to show a mistake in it, or that the jurors misunderstood the charge of the court or that they mistook the law, or the result of the finding, on the ground that such matters inhere in the verdict. Affidavits or testimony of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to matters inhering in the verdict itself. At all events, the misconduct complained of must relate to a matter in dispute in the case, and must influence the jurors in arriving at the verdict.
9. **Appeal.** "Alleged error in allowance of attorney's fees in an action on an insurance policy will not be reviewed by this court unless such question has been first presented to the trial court for correction." *From v. General American Life Ins. Co.*, 132 Neb. 731, 273 N. W. 36.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Stewart, Stewart & Whitworth and *Rosewater, Mecham, Shackelford & Stoehr,* for appellant.

Brown, Fitch & West and *John J. Wilson, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action at law upon a policy of accident insurance by Etta Carpenter, the beneficiary named therein. The amended petition sets forth the making and delivery of the policy of insurance by the defendant "on or about the 28th day of March, 1932," in which defendant agreed to pay plaintiff $10,000 in the event of the death of Harry Lyman Carpenter (the husband) "provided said death was caused solely and exclusively by bodily injury sustained solely through accidental means." A copy of the policy is attached to and forms a part of the petition. The occurrence of an accident is alleged to have taken place on July 22, 1937, and as a result of the injury then received, "and by reason thereof, the said Harry Lyman Carpenter died on or about the 16th day of April, 1938." The substantial compliance

with the terms and conditions of the policy is alleged, followed by the usual prayer for judgment.

The defendant's answer, in addition to a general denial, sets forth as a defense that the application for insurance signed by Harry Lyman Carpenter, in addition to numerous questions answered by him to the effect that he had no disqualifying illness or physical defects, contained the following questions and answers thereto made by said applicant, viz.: "28. 'Are you otherwise in sound physical condition?' To which the insured answered 'Yes.' 29. 'Have you within the past five years had medical or surgical advice or treatment or any departures from good health? If so state when and what and duration.' To which the insured answered 'None' in the first application, and answered 'No' in the second application. 30. 'Have you ever had or ever been advised to have an operation?' To which the insured answered 'No.' That said answers and each of them were untrue as the insured in the year 1910 had had a serious attack of osteomyelitis in the right leg, at and below the knee; that said disease was so severe that it required medical and surgical attention; that the insured was operated upon at said time and a large part of the bone removed; that said disease and operation left said leg in a weakened condition; that said disease became latent and rendered said leg extremely susceptible to injury and a recurrence of said disease, and that the insured at all times had to protect said leg with an extra covering, pad or bandage, and at intervals consulted a physician and surgeon with reference thereto. * * * That the answers so made by the insured in answer to said questions in each of said applications materially affected the acceptance of the risk and the risk to be assumed by the company; that the said policy was issued by reason of said statements and in reliance thereon and not otherwise; that the answers were untrue and were made by the insured, Harry Lyman Carpenter, with intent to deceive defendant; that defendant relied upon and believed the truthfulness of such answers and information and was deceived to its injury." Defendant further alleged that plaintiff's recovery

was negatived under the facts in the case by the policy provision excluding "loss caused or contributed to directly or indirectly by disease or infirmity" and also by the provision of the policy that, "C. Reimbursement will not be made for any disability or operation which is necessitated by a bodily condition contracted or existing prior to the issuance of this policy." Defendant also alleged, at length, that no written notice of injury was given as required by the terms of the policy; and also that the amount of the premiums received by defendant, to wit, $417.45, was tendered into court for the use of plaintiff.

To this answer plaintiff replied setting forth a general denial; that the application for insurance and the answers of the insured upon which defendant's defense is predicated are not a part of the contract sued upon; and further alleged that the injuries which were received on account of said accident of July 22, 1937, were apparently trivial in their nature, and remained in that condition until said insured was taken to the hospital on or about November 29, 1937, when he became incompetent to give notice, and his daughter thereafter in due time gave notice; and that defendant's agent, R. M. Kirk, who took the application from Harry Lyman Carpenter, on which the policy in suit was issued, had actual notice of said accident and the condition of said Harry Lyman Carpenter resulting therefrom.

On these issues there was a trial on the merits to a jury, who, after hearing the evidence, returned a verdict for plaintiff as prayed. The defendant's motion for a new trial was presented and overruled, from which order it presents this appeal.

The contractual provisions contained in the insurance policy here in suit, as well as the statements, representations and warranties contained in the application therefor, are to be construed to comply with the terms of, and in harmony with, the following statutory provision, viz.: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat

or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Comp. St. 1929, sec. 44-322. See, *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.

So far as the alleged false statements of the assured quoted in its answer are concerned, the defendant by its pleading interprets them as representations and not as warranties. This construction is accepted as the law of this case. *Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129. The present proceeding is not a trial *de novo* but is in the nature of a proceeding in error. If, therefore, the record here presented discloses that the litigable issues involved were submitted to the jury by proper instructions, the verdict against the insurance company will not be set aside if there is competent evidence to sustain it. The burden of proof on questions of falseness and materiality of the "answers" contained in the alleged application for insurance upon which defendant relies is imposed upon the defendant in view of the form of the issues tendered by it.

The sole basis for defendant's contention as to the falsity of the answers quoted rests upon the claim that Mr. Carpenter suffered from an attack of osteomyelitis in 1910, which fact, it is in substance alleged, he, in effect, fraudulently concealed by his replies to the questions quoted in the application of March 28, 1932. However, while the assured was specifically inquired of in that application, as to whether he "had any of the following: Epilepsy, syphilis, vertigo or dizziness, diabetes, tuberculosis, mental disorder, disease of brain or nervous system, pyorrhea, disease of heart or blood vessels," etc., this application, which is on a form provided by the insurer, contains no direct reference to osteomyelitis, and there is no connection between the

questions answered by the assured and that particular disease, unless it is to be found in the alleged "operation" claimed to have been undergone by the assured in 1910. But we find no competent controlling evidence in the record that discloses with any degree of particularity what happened to Mr. Carpenter in 1910. Mrs. Carpenter testifies that in 1910 her husband was struck on the leg by a gate at the stockyards and he was taken to the hospital for treatment. Dr. Harry Everett was the attending physician. In due time Carpenter recovered and the injured leg was fully healed. He had been engaged in the live stock business at the public yards and this required him to make frequent trips by automobile through Nebraska, Colorado, Kansas, etc. Commencing immediately after he got over the accident of 1910, and continuing down to July 22, 1937, Mr. Carpenter enjoyed splendid health, resumed his active duties, and never laid off a day on account of sickness or for any other reason. He made no complaints of his leg (which had been injured in 1910) troubling him in any way. He played golf, and during vacations indulged in mountain climbing, and appeared to be in all respects a hearty, rugged man.

Witness Dr. George H. Walker, a physician and surgeon of over twenty years' experience, and medical director of the Lincoln Liberty Life Insurance Company, testifies that he was a personal friend of Harry Lyman Carpenter, lived adjoining him, and had known him since about 1919 and 1920; that he made professional periodical check-ups or examinations of Mr. Carpenter for his health during the latter years of his life. These were the usual health examinations. In addition, in 1924 and in 1931 he examined Mr. Carpenter for life insurance. He examined the leg in 1924 and again in 1931, and found it to be in first class condition and free from infection. While he did not examine him between 1927 and 1931, nor after 1931 until in November, 1936, and April, 1937, Mr. Carpenter appeared to be in excellent physical condition at all examinations, and he at no time made any complaint about the leg which

was injured in 1910. As part of the cross-examination of Dr. Walker, defendant introduced in evidence a letter written by Dr. Walker, as medical director of the Lincoln Liberty Life Insurance Company, on July 15, 1931, in behalf of that company and directed to the North American Reassurance Company. The Lincoln Liberty Life Insurance Company was then seeking to secure reassurance on a policy of life insurance which it had issued upon the life of Mr. Carpenter. It will be remembered in this connection that Dr. Walker first met Carpenter, the deceased, in 1919, was not his attending physician in 1910, and, so far as disclosed by the record, this letter was written wholly without the knowledge of the deceased or in any way authorized by him. Paragraph two of the letter was offered by the defendant as part of the cross-examination of this witness, and over plaintiff's objection it was received by the district court. The plaintiff then immediately offered the letter as an entirety, and it was, in turn, received in evidence. The following constitutes quotations from this letter:

"We are submitting for your consideration papers on the life of Harry L. Carpenter.

"This man had an Osteomyelitis of the right tibia in 1910. His condition was serious at that time. The bone was opened and curetted, with good results. At times since then there has been a slight irritation of the skin, or rather the old scar over the bone. These have merely been a breaking down of the scar tissue.

"I have seen this leg off and on for over a period of ten years, and it does not change any. There is no discharge of any kind and the bone has apparently healed. This is substantiated by Dr. Harry Everett, who was and is now his attending physician and surgeon. I have seen Mr. Carpenter at various times for health examinations and the findings are about the same as shown on the medical examination presented, with the exception that the urine on the average shows only a few hyaline casts per field, slightly more than the ordinary man of 59 years.

"I feel that this man is entitled to insurance—although

possibly not standard, a slight rate up would be necessary on account of the kind of policy he is applying for."

It will be noted that this letter does not purport to be the statement of Harry Lyman Carpenter, or authorized by him. There is no evidence in the record that these statements were based upon things said by Mr. Carpenter. As to him and his representative, the plaintiff in this case, the statements in this letter are mere hearsay and of no binding force and effect. Offered by the defendant for the purpose of impeachment of witness Dr. Walker, the letter was properly received for what it was worth, but limited to the question of impeachment. The statements did not constitute primary evidence as against the plaintiff in this case for any purpose whatever, nor did they tend to establish, as against the assured, the conditions as to the injury to his leg as they existed in 1910.

We are not overlooking the medical history and hospital records which purport to have been taken and made on "11-29-1937," which appear in this record as exhibits 16 and 17. They were each received in evidence over due objections offered by the plaintiff. As was stated in *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N. W. 532, with reference to an identical class of evidence: "It is to be noted that statements contained in exhibit 13 do not come to us under sanction of the customary oath." Strictly speaking, the results therein contained are hearsay, and, having been received over proper objections, cannot be held to establish the facts therein recited. In addition, the competency of the assured to make admissions, in view of all the evidence in the record, at the time the statements purport to have been made, is a matter of doubt.

There is no question in the evidence but what the accident of July 22, 1937, was the primary cause of the death of the assured. The continued course of more than twenty-two years of excellent health was in effect interrupted by this accident. The effects of this accident, gradually increased by developments thereof, with no intervening agency disclosed by the evidence, culminated in the death of the as-

sured on April 16, 1938, at which time the policy in suit was in full force and effect. On this point we do not overlook the contention of the defendant that if the assured, at the time the injury was received, was suffering from a disease or defect which, acting with the injury as a contributing factor, causes death, or when such disease or defect aggravates the effect of the injury, or the injury aggravates the effect of the disease, and both acting together cause death, the claimed injury and death are not within the terms of such policy. Conceding *arguendo* this contention, it must also be conceded that osteomyelitis is curable, and the existence of instances of that fact are admitted even by defendant's experts. It must also be admitted that we have no controlling competent evidence of what treatment was actually administered to assured's leg in 1910. Twenty-two years of excellent health with no untoward development at the seat of the injury suffered in 1910, together with other facts presented in the record, tend to establish as a fact that a cure of the conditions that obtained in the injured member had been effected in 1910. It will be remembered, however, that the insurance company's defense is not predicated necessarily upon the existence of osteomyelitis when the application was signed, but upon assured's alleged false answers to the questions propounded to him in the formal application for his insurance. However, it is quite obvious that twenty-two years of uninterrupted good health experienced by him, in connection with other facts established, justified the assured's statements made to numerous questions answered by him in 1932, to the effect that he then had no disqualifying illness or physical defects. This conclusion is confirmed by the continued good health of the assured down to July 22, 1937. This situation, if proved to the satisfaction of the trial jury, certainly establishes the good faith of assured in making the representations last above referred to. Even if, as to these facts, the assured should have been honestly mistaken when the application here presented was signed by him, still the controlling rule would be, "Untrue representation made by the assured in his application, where

the question eliciting such statement calls for matters of opinion, judgment, or belief, will not avoid a policy issued thereon, unless it is shown that the misrepresentation was knowingly made with intent to deceive." *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787. See, also, *Royal Neighbors of America v. Wallace,* 73 Neb. 409, 102 N. W. 1020.

As we have already seen, the evidence fails to disclose with any degree of particularity what happened to Mr. Carpenter in 1910, other than that Mrs. Carpenter testifies that he was struck on the leg by a gate at the stockyards, and that he was taken to the hospital for treatment. This treatment was the scraping of the bone, as she understood it, but she was not present at the hospital and did not see what was done, and therefore has no personal knowledge of what was done. When we take the testimony on this subject as an entirety, and in the light of all the other facts shown in the record by competent testimony, we have, at most, a question for the jury to determine as to whether the deceased was actually subjected to an "operation" in 1910, as that term "operation" is commonly understood; and ample evidence appears in the record to support a conclusion that the representations actually made on that subject were made under circumstances and conditions evidencing good faith and negativing knowledge of falsity or any intent to deceive on the part of the assured. See *Beile v. Travelers Protective Ass'n,* 155 Mo. App. 629, 135 S. W. 497; *Rogers v. Atlantic Life Ins. Co.,* 135 S. Car. 89, 133 S. E. 215; *Caruthers v. Kansas Mutual Life Ins. Co.,* 108 Fed. 487.

The rule applicable in the instant case, on the subject under discussion, is: "In order to defeat a recovery in such a case the company must prove that the representations are untrue, and were made by the assured knowingly with the fraudulent intent to mislead and deceive; that they were material to the risk, and were relied on by the defendant." *Aetna Life Ins. Co. v. Rehlaender,* 68 Neb. 284, 94 N. W. 129.

It appears from the entire record in this case that there is ample evidence, in view of the burden of proof as imposed upon the defendant by the form of the issues upon which the case was tried, to sustain the verdict returned by the jury and the judgment entered thereon.

A verdict against an insurance company on the issue of false representations will not be set aside if there is competent evidence to sustain it. *Aetna Life Ins. Co. v. Rehlaender, supra.*

The defendant challenges the refusal of the trial court to give the instruction requested by the defendant to the effect that, under the circumstances established by the record, the failure of the plaintiff to call Dr. Harry Everett as her witness was "to be considered by the jury and to be given such weight as the jury might see fit." The defendant cites in support of its request *Vergin v. City of Saginaw,* 125 Mich. 499, 84 N. W. 1075. In the *Vergin* case the Michigan court merely cites *Cooley v. Foltz,* 85 Mich. 47, as controlling authority without further discussion of the reason therefor. An examination of *Cooley v. Foltz, supra,* and the authorities therein cited discloses that this rule announced by the Michigan court arises in the application of the statute relating to privileged communications to physicians, etc. Our statute relating to this subject is, as an entirety, wholly different from the Michigan act, and makes the physician in the instant case a competent witness, and alike subject to the call of both plaintiff and defendant. The reason which underlies *Vergin v. City of Saginaw, supra,* has no application under the Nebraska statute, hence our courts have never announced the rule for which defendant contends. The action of the trial court in refusing to give the instruction requested is approved. See *Westing v. Chicago, B. & Q. R. Co.,* 87 Neb. 655, 127 N. W. 1076.

The further contention is made by the defendant that by his answer to the question, "Have you ever had or ever been advised to have *an operation*?" made more than twenty-two years after 1910, after he had been apparently completely cured, and after enjoying more than twenty-two years of

excellent health, assured made such a known and fraudulent representation as to avoid the policy.

In order for alleged misrepresentations in an application for insurance to constitute a defense to an action on the insurance contract evidenced by the policy in writing, it is incumbent upon the insurance company to plead and prove: (1) That the statements and answers were made as written in the application; (2) that they were false; (3) that they were false in some particular material to the insurance risk; (4) that they were made knowingly by the insured with the intent to deceive; (5) that the insurance company relied and acted upon such statements or representations, and was deceived by them to its injury; (6) that the false statements so relied upon constitute a part of the completed application indorsed upon or annexed to the insurance policy in suit as delivered to the assured. See *Kettenbach v. Omaha Life Ass'n,* 49 Neb. 842, 69 N. W. 135; *Aetna Life Ins. Co. v. Rehlaender,* 68 Neb. 284, 94 N. W. 129; *Royal Neighbors of America v. Wallace,* 73 Neb. 409, 102 N. W. 1020; *Bankers Union of the World v. Mixon,* 74 Neb. 36, 103 N. W. 1049; *Beeler v. Supreme Tribe of Ben Hur,* 106 Neb. 853, 184 N. W. 917; *Pollard v. Royal Highlanders,* 128 Neb. 790, 260 N. W. 399; *Muhlbach v. Illinois Bankers Life Ass'n,* 108 Neb. 146, 187 N. W. 787; *McClure v. World Ins. Co.,* 126 Neb. 676; 254 N. W. 393; *Scott v. New England Mutual Life Ins. Co.,* 128 Neb. 867, 260 N. W. 377.

We take it, in view of all the surrounding circumstances, that, without doubt, on July 22, 1937, Harry Lyman Carpenter met with an accident that bruised his right leg between the knee and ankle; that in the evening of the day of the accident the discoloration occasioned by the accidental bruise clearly appeared, and that the leg at the point of injury then presented no other involvement; that it was an ordinary bruise, painful but not immediately disabling in its effects; that it was not such an injury as would impose liability under the terms of the policy; that these characteristics continued for a time, and while sufficient to cause the application of home remedies, they brought no notice

of the seriousness thereof until osteomyelitis developed, which seems to have become evident to the assured shortly before November 29, 1937. Until that time the assured's failure to give notice thereof was clearly excused. Under the terms of defendant's insurance contract, the time within which a policyholder must give notice of an accident does not begin to run until such time as he has reason to believe that the injury received will constitute a claim under his certificate. *Kaneft v. Mutual Benefit Health & Accident Ass'n,* 102 Neb. 87, 166 N. W. 121; *Ross v. First American Ins. Co.,* 125 Neb. 329, 250 N. W. 75; *McCleneghan v. London Guarantee & Accident Co.,* 132 Neb. 131, 271 N. W. 276. On this factual basis, the notice stipulated for in the policy of insurance was timely served.

The defendant attacks the verdict for misconduct of the jury in their deliberations. It seeks to support its challenge by affidavits of the jurors as to what occurred in the jury room during their deliberations. This court has long been committed to the principles which have been summarized in *Schindler v. Mulhair,* 132 Neb. 809, 273 N. W. 217, as follows:

"No affidavit, deposition or other sworn statement of a juror will be received to impeach or explain a verdict or on what grounds it was rendered, or to show a mistake in it, or that the jurors misunderstood the charge of the court or that they mistook the law, or the result of the finding, on the ground that such matters inhere in the verdict.

"Affidavits or testimony of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to matters inhering in the verdict itself."

If we assume that the facts upon which the defendant relies to sustain this challenge are not covered by the rule above quoted, and are for consideration of this court, then the further principles, long established in this jurisdiction, would, under the facts as established by the preponderance of the evidence, control: (1) That the misconduct complained of influenced the jurors in arriving at a verdict. *Lambert v. State,* 91 Neb. 520, 136 N. W. 720; *Aten v. Quan-*

tock, 112 Neb. 288, 199 N. W. 551; *Harris v. State,* 24 Neb. 803, 40 N. W. 317; *Glick v. Poska,* 122 Neb. 102, 239 N. W. 626. (2) That the alleged misconduct related to a matter in dispute. *Harris v. State,* 24 Neb. 803, 40 N. W. 317; *Douglas v. Smith,* 75 Neb. 169, 106 N. W. 173; *Wessel v. Bishop,* 76 Neb. 74, 107 N. W. 220.

A careful reading of the affidavits attached to the bill of exceptions affirmatively discloses that the statements challenged in no manner affected the result, and were, in fact, in accord with the statements of defendant's witness. It follows that the action of the trial court in denying defendant's motion based on this ground was in all respects correct.

We have carefully considered the instructions given and refused by the trial court and find no substantial error therein; and further find the conduct of plaintiff's attorney in the argument of the case to the jury not properly subject to the criticism made.

The last matter submitted to this court is the reasonableness of the attorney fee allowed by the trial court. However, the transcript discloses that this matter was not called to the attention of the trial court by motion to retax costs or motion for a new trial. We are committed to the view that "Alleged error in allowance of attorney's fees in an action on an insurance policy will not be reviewed by this court unless such question has been first presented to the trial court for correction." *From v. General American Life Ins. Co.,* 132 Neb. 731, 273 N. W. 36. However, the court deems the allowance made by the trial court ample for services in both district and supreme court and therefore no additional allowance is made on appeal.

It follows that the judgment of the district court is correct in all respects and is, therefore,

AFFIRMED.

LOUIS BEHLE, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

293 N. W. 413

FILED AUGUST 2, 1940. No. 30799.

Eminent Domain. Where a certain theory as to the measure of damages is relied upon by the parties to a trial and adopted by the trial court in submitting the case to the jury, it will be adhered to on appeal whether such theory is correct or not.

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

C. N. McElfresh and *August Wagner*, for appellant.

Walter, Flory & Schmid, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a proceeding to condemn an easement for a ditch to drain seepage waters. The verdict and judgment were for the plaintiff in the amount of $1,990.08. Defendant appeals.

The record discloses that the defendant is a corporation organized under sections 70-701 to 70-715, Comp. St. Supp. 1933, for the purpose of constructing and operating a hydroelectric system. As a part of its works, defendant constructed a reservoir close by the plaintiff's farm, on land approximately 100 feet higher in elevation. As a result of seepage from this reservoir, most of the south 31 acres of plaintiff's 116-acre farm was inundated with seepage water. To alleviate this situation by draining the water and reclaiming the ruined lands, defendant condemned a right of way for a drainage ditch. The right of way taken runs diagonally across the 31-acre tract, taking 2.91 acres thereof, and leaving 10 acres to the north and 18.3 acres to the south of it.

Defendant contends that the trial court erred in the giving of instructions Nos. 7, 7½ and 10, wherein the jury

were instructed that in fixing the damages to the farm they must consider it as it was before there was any seepage on it, and not as it was in its seeped and flooded condition. It has long been the rule in this state that the measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593. That the instructions given are not in accord with this rule has been determined by this court in the case of *In re Platte Valley Public Power and Irrigation District,* 137 Neb. 313, 289 N. W. 383, wherein we said: "It necessarily follows that the evidence as to the value of the land taken and damaged by the condemnation proceedings must be based upon its value in the condition in which it was at the time of the condemnation. The damage caused to this same land by seepage from defendant's reservoir gives rise to a cause of action for which damages may be presently recovered in a proper action." It is clear therefore that the trial court submitted the case to the jury on an incorrect measure of damages.

Plaintiff contends that the parties to the case tried it on a common theory—that as defendant was liable for the seepage damage as well as for the land appropriated and the severance damages resulting therefrom, the farm should be treated for the purpose of this suit as if no seepage damage had occurred. We think there is merit to this contention. All the evidence of value was based on this assumption without objection on the part of defendant. Defendant, in examining its expert witness as to the value of the lands before the taking, made the same assumptions. There is also evidence in the record that defendant advised the appraisers appointed by the county judge to treat the lands as if no seepage existed. From a consideration of the whole record we come to the conclusion that it fairly shows that the case was presented to the court and jury on the theory that the lands involved were to be considered as if free

from seepage damage. While it is true that the court's instructions on the measure of damage were incorrect, yet they fairly reflect the theory adopted by both litigants in the submission of evidence, and under such circumstances they do not constitute reversible error. We think the correct rule is: Where a certain theory as to the measure of damages is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Parker v. Knights Templars & Masons Life Indemnity Co.*, 70 Neb. 268, 97 N. W. 281; *Bothell v. Miller*, 87 Neb. 835, 128 N. W. 628; *Nebraska State Bank v. May*, 117 Neb. 262, 220 N. W. 276; *Warne v. Finseth*, 50 N. Dak. 347, 195 N. W. 573.

Defendant complains of the rulings of the trial court on objections to certain questions specifically described in defendant's assignment of errors. We have examined these rulings and find that they are free from prejudicial error.

There is evidence in the record to sustain the verdict of the jury on the theory upon which it was tried. In view of the fact that the amount of the judgment is not assigned as excessive in the brief of appellant, there is nothing for us to consider in that respect in any event. We find no prejudicial error in the record.

AFFIRMED.

IN RE ESTATE OF FREDERICK W. SCHUETTE. M. D. CARROLL, EXECUTOR, V. HENRY SCHUETTE ET AL., APPELLEES: FRANCES ASH ET AL., APPELLANTS.

293 N. W. 421

FILED AUGUST 2, 1940. No. 30845.

1. Wills: CONSTRUCTION. "Where a provision in a will is couched in correct grammatical language, it will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended." *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11.
2. ———: ———. "Under familiar rules of construction, the

court is required to consider all of the relevant circumstances which surround the testator at the time his will was made and to give effect to his meaning." *Elliott v. Quinn*, 109 Neb. 5, 189 N. W. 173.

3. ———: ———. Provision in a will, "One-fourth to the children of my deceased brother," construed; *held*, the word "children" to include only the children living at the time of the execution of the will, and not to include grandchildren of the deceased.

4. **Judgment.** A party relying upon a former adjudication to sustain his position must aver in his pleadings in what court the judgment was rendered and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res judicata* is made, and that the judgment is in full force.

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

Stevens & Stevens and *E. E. Wakeman*, for appellants.

Butler, James & McCarl, Emmett Thurmon and *C. D. Ritchie, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and BLACKLEDGE, District Judge.

MESSMORE, J.

This appeal involves the construction of the last will and testament of Frederick W. Schuette, deceased. The sole controversy is over the meaning of the following bequest and devise contained in the will: "One-fourth to the children of my deceased brother, John Schuette."

The record discloses that the will of Frederick W. Schuette, dated April 16, 1938, was admitted to probate in the county court of Furnas county June 14, 1938. Frederick W. Schuette departed this life during the year 1938. A brother, John Schuette, died several years prior to the date of the will of Frederick W. Schuette. John Schuette had three children at the time of his death, Henry Schuette, a son, Sophie Hoxie, a daughter, and Gustav Schuette, a son. Gustav died about two years prior to the death of the

testator, Frederick W. Schuette, leaving surviving him seven children, four of whom are minors, appearing by a guardian *ad litem,* the adults by their own counsel. John Schuette, therefore, had two living children on the date the will of Frederick W. Schuette was made and on the date it was admitted to probate, and had seven grandchildren; that is, the children of his deceased son Gustav.

The question presented for determination is: Who are entitled to share in the assets of the said estate, devised and bequeathed by the provision of the will heretofore set out. Henry Schuette and Sophie Hoxie each claim an undivided one-half interest in one-fourth of the estate of Frederick W. Schuette. The grandchildren of John Schuette, deceased, respondents (appellants), claim each an undivided one-seventh of one-third of the estate of Frederick W. Schuette; or, in other words, that the share of their father, Gustav Schuette, would go to them by right of representation.

Before the respondents are entitled to share in the distribution of one-fourth of the estate, the term "children," as used in the provision of the will, reading, "One-fourth to the children of my deceased brother, John Schuette," must be construed to mean the grandchildren of John Schuette, deceased. The designation made in the provision of the will referred to is to children as a class, no individual being named.

The authorities on the question involved in this case are not in harmony; but we believe that the word "children," as used in the will of Frederick W. Schuette, under the circumstances, means the children of John Schuette living at the time of the testator's death and at the time his will was admitted to probate, as reflected by the case of *Brown v. Brown,* 71 Neb. 200, 98 N. W. 718, as follows:

"It is argued, at some length, that the court erred in overruling the demurrer to the petition of intervention. As such petition stood when the demurrer was overruled, it was based on the theory that the interveners, who it will be remembered are grandchildren of the testator, were included within the term 'children' in the residuary clause of the

will. That theory, to our minds, is untenable. It is a familiar rule of construction that, ordinarily, words should be taken in the sense in which they are commonly used. It is a matter of common knowledge that, in ordinary conversation and the affairs of life, the word 'child' is commonly used to designate a son or daughter, a male or female descendant of the first degree. Such is Webster's definition of the term, and such is its primary signification according to all standard lexicons. It is safe to say that, standing alone, it is never understood to mean grandchildren. Bouvier says: 'The term children does not, ordinarily and properly speaking, include grandchildren or issue generally; yet sometimes that meaning is affixed to it in cases of necessity.' "

The definition of the term "children," and its use in connection with its meaning, as referring to grandchildren, is disclosed by 69 C. J. 180, as follows: "The general rule that 'children' does not in its natural and proper signification include grandchildren, together with its exception where it is apparent that it was intended to give the term a more extended signification, applies in determining the meaning of 'children' as used in a will in designating the beneficiaries. Thus, as a general rule 'children,' as used in such connection, does not include grandchildren, unless it clearly appears that the testator meant to include grandchildren."

Our attention is directed to section 30-229, Comp. St. 1929, which provides: "When a devise or any legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

In *Lincoln Nat. Bank & Trust Co. v. Grainger,* 129 Neb. 451, 262 N. W. 11, in considering the above section of the statute, the court said (p. 459): "By the terms of this section, the issue of any of the children living at the date of the

execution of the will, and who might die before the termination of the trust period, would take the share that would have gone to the parent of such issue;" the writer of the opinion obviously recognizing that the statute referred to applied only where the child or children, through whom claim was made, were living at the date of the execution of the will.

We conclude that section 30-229, Comp. St. 1929, is not applicable to the facts in the instant case. This holding is required if the words of the statute are to be given their plain, ordinary and grammatical meaning, and is in harmony with the views expressed by Judge Good in *Lincoln Nat. Bank & Trust Co. v. Grainger, supra.*

"Where a provision in a will is couched in correct grammatical language, it will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended." *Lincoln Nat. Bank & Trust Co. v. Grainger, supra.*

"Under familiar rules of construction, the court is required to consider all of the relevant circumstances which surround the testator at the time his will was made and to give effect to his meaning." *Elliott v. Quinn,* 109 Neb. 5, 189 N. W. 173.

Considering the will in the light of the foregoing authorities, to determine the intention of the testator and to give that intention effect, we come to no other conclusion than that the above definition of the word "children" is applicable to the will of Frederick W. Schuette. Otherwise, the will would be ambiguous and uncertain. The district court entered such judgment and decree in favor of Henry Schuette and Sophie Hoxie, appellees. We affirm the judgment and decree of the district court in such respect.

The respondents assign as error that they are entitled to have the doctrine of *res judicata* applied to the instant case. This contention is based on an order of the county court, ordering partial distribution of the assets of the estate of Frederick W. Schuette, wherein the grandchildren were in-

cluded in the distribution, to which ruling Henry Schuette and Sophie Hoxie subsequently objected. The executor of the estate of Frederick W. Schuette then filed a petition in the county court, disclosing the controversy and asking for an adjudication of the rights of inheritance of the respective parties, children and grandchildren of John Schuette, deceased. From the order of partial distribution no appeal was taken, and it is respondents' contention that the only remedy of the aggrieved party was by appeal.

The record discloses that the doctrine of *res judicata* was not argued to the district court or contained in any of the pleadings filed by the respondents in joining the issues; nor is the subject-matter sufficiently covered in the petition of the executor to warrant the court in passing upon the question of *res judicata.*

In order for respondents to avail themselves of the doctrine of *res judicata,* they are bound by the following rule of law announced in *Thomas v. Thomas,* 33 Neb. 373, 50 N. W. 170, and quoted in *Burke v. Munger, ante,* p. 74, 292 N. W. 53, as follows: "The party relying upon a former adjudication as a defense must aver in his answer in what court the judgment was rendered, and plead facts showing that the recovery was upon the same subject-matter and between the same parties, or their privies, as the suit in which the defense of *res adjudicata* is made, and that the judgment is in full force."

In the instant case, the respondents raise the doctrine of *res judicata* for the first time on their motion for a new trial. The record discloses an order of the trial court to such effect in overruling the motion for a new trial.

We conclude that the contention of respondents in such respect is not merited, and that the trial court was right in denying the application of the doctrine of *res judicata.*

AFFIRMED.

STATE, EX REL. WESTERN REFERENCE & BOND ASSOCIATION, INC., RELATOR, V. V. B. KINNEY, RESPONDENT: MILLS TEACHERS AGENCY ET AL., INTERVENERS.

293 N. W. 393

FILED AUGUST 2, 1940. No. 31021.

1. **Pleading.** A motion for judgment on the pleadings admits only facts well pleaded in an answer and does not admit a conclusion of law.
2. **Constitutional Law.** Section 9, art. XV of the Nebraska Constitution, provides: The legislature may enact laws "for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare." In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that the factual situation favors the legislature in enacting such law, and that it is not in contravention of section 3, art. I of the Constitution of Nebraska, the due process clause.
3. ———. That part of section 48-508, Comp. St. 1929, objected to, wherein the maximum amount that may be charged by a private employment agency for services rendered is fixed, is unconstitutional in that it contravenes section 1 of the Fourteenth Amendment to the Constitution of the United States.
4. **Licenses.** The power to require a license for and to regulate the conduct of private employment agencies is distinct from the power to fix prices. *Ribnik v. McBride*, 277 U. S. 350, 48 S. Ct. 545.

Original proceeding in mandamus by the state, on the relation of Western Reference & Bond Association, Inc., against V. B. Kinney. *Writ allowed.*

Tunison & Joyner, for relator and interveners.

Walter R. Johnson, Attorney General, and *Don Kelley,* for respondent.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an original action in mandamus. The relator is a private employment agency and seeks to compel the secretary of labor of Nebraska to issue it a license to do busi-

ness as such. The respondent refused to issue a license because relator refused to comply with section 48-508, Comp. St. 1929, fixing the maximum compensation which an employment agency may collect. The respondent's answer seeks to justify the refusal to issue the license for the reason as above stated, and specifically alleges that the business of a private employment agency is vitally affected with a public interest, and the legislature, in the exercise of its police power, can lawfully regulate the maximum fee. A petition in intervention was filed by eight additional agencies, which allege that they operate on the same basis as the relator. By stipulation, the respondent's answer stands to the petitions in intervention. The relator filed a motion for judgment on the pleadings.

By stipulation, the only issue for determination in the cause is the constitutionality of section 48-508, Comp. St. 1929, in so far as the same fixes or limits the fees or compensation for private employment agencies.

The respondent contends that the motion of relator for judgment on the pleadings has the effect of admitting all material facts in the answer.

A motion for judgment on the pleadings admits, either directly or impliedly, the truth of all well pleaded facts in the pleading of the opposing party. Such a motion is in the nature of a demurrer and raises an issue of law only. *Van Etten v. Kosters,* 48 Neb. 152, 66 N. W. 1106; *Webster v. City of Hastings,* 56 Neb. 669, 77 N. W. 127; *Abrahams v. Studebaker Corporation,* 113 Neb. 721, 204 N. W. 786. A motion for judgment on the pleadings does not admit conclusions of the pleader. The allegation in respondent's answer,—that the business of a private employment agency in Nebraska is vitally affected with a public interest,—is a conclusion of law. *State v. Wurdeman,* 311 Mo. 64, 277 S. W. 571; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* 303 U. S. 54, 58 S. Ct. 466.

The pertinent part of the statute here involved is as follows: "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant,

require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent. of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.'" Comp. St. 1929, sec. 48-508.

Relator concedes that a private employment agency is subject to regulation by the state and may be compelled to pay a license fee for the privilege of conducting such business. *Brazee v. Michigan,* 241 U. S. 340, 36 S. Ct. 561; *Ribnik v. McBride,* 277 U. S. 350, 48 S. Ct. 545. Relator's claim is that the part of the statute above set out, fixing the fees and compensation of an employment agency, is in contravention of section 3, art. I of the Constitution of Nebraska, which reads: "No person shall be deprived of life, liberty, or property, without due process of law."

The respondent cites section 9, art. XV of the Constitution of Nebraska, as follows: "Laws may be enacted providing for the investigation, submission and determination of controversies between employers and employees in any business or vocation affected with a public interest, and *for the prevention of unfair business practices and unconscionable gains in any business or vocation affecting the public welfare.* An industrial commission may be created for the purpose of administering such laws, and appeals shall lie to the supreme court from the final orders and judgments of such commission." (Italics ours.)

The respondent's contention is that the language in italics disposes of the relator's challenge, so far as the Nebraska Constitution is concerned; that such provision of the Constitution gives to the legislature authority to enact laws to prevent unfair business practices and unconscionable gains affecting the public welfare.

The language of section 9, art. XV, as above quoted, is clear and comprehensive. In the absence of evidence disclosing that the statute is confiscatory, thereby depriving a person of property without due process of law, the presumption is that on the factual situation the legislature, in enacting section 48-508, Comp. St. 1929, contemplated that such act was in accord with section 9, art. XV of the Constitution. Under the circumstances, we conclude: That part of section 48-508, Comp. St. 1929, objected to, does not contravene section 3, art. I of the Constitution.

Relator further contends that the issue, as stated, contravenes that part of section 1 of the Fourteenth Amendment to the Constitution of the United States, reading in part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Our attention is specifically called to the case of *Ribnik v. McBride,* 277 U. S. 350, 48 S. Ct. 545, decided May 28, 1928. The New Jersey statute empowered the commissioner of labor to provide a schedule of fees for services to employers seeking employees and persons seeking employment. Discretion with reference to the fees and granting of the license was left to the labor commissioner. All conditions of the statute were conformed to and complied with except the part with reference to the fees as fixed in the schedule and charged therein. The *Ribnik* case is analogous to the instant case, except that the statute in Nebraska fixes the maximum charge. The court in *Ribnik v. McBride, supra,* held: "The business of an employment agent is not one 'affected with a public interest,' " so as to enable the state to fix charges to be made for the service rendered.

"The power to require a license for, and to regulate the conduct of, a business, is distinct from the power to fix prices." In the opinion it was said (p. 355): "But the question here presented is whether the due process of law clause (of the federal Constitution) is contravened by the legislation attempting to confer upon the commissioner of labor power to fix the prices which the employment agent shall charge for his services." And at page 356, quoting from the

opinion in *Wolff Co. v. Industrial Court,* 262 U. S. 522, 537, 43 S. Ct. 630, 27 A. L. R. 1280, it was said: "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation * * * one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

The respondent has cited and analyzed many subsequent decisions to *Ribnik v. McBride, supra,* in an attempt to disclose that the supreme court of the United States has deviated from such decision, to show a general trend therefrom, emphasizing, among other cases, *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 57 S. Ct. 578, 108 A. L. R. 1330, wherein the case of *Adkins v. Children's Hospital,* 261 U. S. 525, 43 S. Ct. 394, was overruled. The language of the court in *Adkins v. Children's Hospital,* relied on in *Ribnik v. McBride, supra,* appearing on page 356 of that opinion, is as follows:

"In *Adkins v. Children's Hospital,* 261 U. S. 525, this court had under consideration an act of congress fixing minimum wages for women and children in the District of Columbia. The legislation, so far as it affected women, was held invalid as contravening the due process of law clause of the Fifth Amendment, because it was an arbitrary interference with the right to contract in respect of terms of private employment. It was said (p. 546) that while there was no such thing as absolute freedom of contract, nevertheless, freedom of contract was the general rule and restraint the exception; and that 'the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.' "

The case of *West Coast Hotel Co. v. Parrish, supra,* upheld the statute of the state of Washington in fixing minimum wages for women and minors, and expressly overruled

Adkins v. Children's Hospital, supra. Therefore, it is the respondent's contention, a death-blow was delivered to the *Ribnik* case. In any event, that case was not expressly overruled in *West Coast Hotel Co. v. Parrish, supra.*

The respondent also cites *Tagg Bros. v. United States,* 280 U. S. 420, 50 S. Ct. 220. That case involved the enforcement of regulations prescribed by the secretary of agriculture in fixing the fees which commissionmen could charge the seller for handling stock. We believe this situation to be entirely different. The court pointed out the distinction between *Tagg Bros. v. United States,* and the *Ribnik* case, stating, in substance, that in the latter the court did not hold that the charge for personal services cannot be regulated. The question decided by the court was whether the services then attempted to be regulated were vested with a public interest to such extent as to require regulation of the fees an employment agency could charge for services rendered. The *Ribnik* case held that such business was not affected with a public interest to the extent of requiring the fixing of charges. *Tagg Bros. v. United States, supra,* does not overrule *Ribnik v. McBride.*

The respondent also contends that certain language by Mr. Justice Brandeis in *Tagg Bros. v. United States,* in fact, nullifies *Tyson & Brother v. Banton,* 273 U. S. 418, 47 S. Ct. 426, 58 A. L. R. 1236, in so far as such decision is relied upon and cited in *Ribnik v. McBride;* this on the theory that Mr. Justice Sanford, in concurring in the *Ribnik* case, did so on the sole authority of *Tyson & Brother v. Banton,* in that he was unable to distinguish between a labor broker and a theater broker. Respondent implies that the court states: Fixing charges for personal services of brokers is no longer good reason for declaring price-fixing regulations unconstitutional, and respondent reasons that *Tagg Bros. v. United States, supra,* overruled *Ribnik v. McBride* by implication.

The holding in *Tyson & Brother v. Banton, supra,* is set forth in substance in *Ribnik v. McBride,* as follows (p. 358): "And we since have held definitely that the power to require

a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulations of the manner in which a business shall be carried on.' *Tyson & Brother v. Banton, supra*, p. 431." The opinion in *Ribnik v. McBride* also states (p. 355): "And again (p. 438) after reviewing former decisions, it was said that 'each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use.' "

The foregoing language is clear on the issue of price-fixing. *Tyson & Brother v. Banton, supra,* has not been overruled by the supreme court of the United States and still constitutes a cardinal part of the law relied upon in the *Ribnik* case.

The respondent relies to a great extent on *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, which involved the constitutionality of a New York statute, creating a control board to fix minimum and maximum retail prices to be charged by stores to consumers off the premises where sold. The question presented was whether the federal Constitution prohibited the fixing of the price of milk (held to be food by federal decisions and by the Nebraska supreme court). The court upheld the statute.

The respondent asserts that *Ribnik v. McBride, supra,* premised the decision on the following: That the fixing of prices for food and clothing, for house rentals or wages to be paid, whether minimum or maximum, is beyond the legislative power. Referring again to *Nebbia v. New York, supra,* the respondent contends that that case approved the fixing of prices for food, thus dispensing with such reason-

ing in the *Ribnik* case. In the *Nebbia* case the court held: "There is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (In the instant case there is no contention on the part of the relator that that part of section 48-508, Comp. St. 1929, here objected to, is arbitrary or discriminatory.) In support of its contention in distinguishing the *Nebbia* case, the relator calls attention to the foregoing language.

To clarify relator's distinction between *Ribnik v. McBride* and *Nebbia v. New York,* in the former case, the attempted regulation of the price to be charged by private employment agencies was squarely before the court and held not to be subject to state regulation in such respect. Attention is further called by respondent to the far-reaching effect of the case of *Nebbia v. New York,* in that the court gave a new meaning to the phrase, "affected with a public interest," and concluded such formula was without value in determining the power of the state to regulate a business, thus definitely removing the taboo against price-fixing. Establishing the principle of the character of the business does not prevent the state from regulating prices. The limitation of the test set up by the court is that the legislation must not be arbitrary, discriminatory or demonstrably irrelevant to the policy that the legislature is free to adopt. In the instant case it is true that the relator made no claim that the legislation here objected to on the point at issue was arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt. While the force of this decision is apparent on the issue therein involved, it obviously draws a distinction between a case involving the milk industry and that of a private employment agency. Otherwise, we firmly believe, the supreme court would have overruled *Ribnik v. McBride, supra.*

Respondent cites the case of *Abbye Employment Agency*

v. Robinson, 166 Misc. 820, 2 N. Y. Supp. (2d) 947, with reference to a legislative act which fixed the gross fees chargeable to applicants for employment in certain enumerated occupations and common labor of the necessitous class, which, in effect, repudiated the holding in *Ribnik v. McBride,* and possibly cited for the purpose of disclosing the thought of a New York court on the subject. Nevertheless, the decision is not one by a court of last resort of the state of New York, and not the final word on the subject, so far as that state is concerned, and would, therefore, be of no material value in its effect on *Ribnik v. McBride,* which has not been overruled by the court that rendered the decision.

The respondent cites *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 60 S. Ct. 907, decided May 20, 1940, in which the supreme court of the United States had before it an act providing for the sale and distribution of bituminous coal. The aim of the act was to stabilize the industry primarily through price-fixing and the elimination of unfair competition. The court upheld the act. The effect was to regulate the business of such coal industry in so far as it affected the mining operator, and fixed and regulated the price of the product and the miner's wages. The regulatory provisions were held to be within the power of congress under the commerce clause of the Constitution. The powers of congress under the commerce clause are restricted by the Fifth Amendment in the same manner as the powers of state legislatures are restricted by the Fourteenth Amendment, so what the court has to say as to the one is generally applicable to both.

Respondent cites the foregoing case and specifically calls our attention to the language cited in the *Ribnik* case from *Wolff Co. v. Industrial Court, supra,* as follows: "It has never been supposed, since the adoption of the Constitution, that the business of * * * the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation." *Sunshine Anthracite Coal Co. v. Adkins* refers directly to mining operators and miners. The distinction between the

federal act in the reported cases and the statute under consideration in the instant case is a palpable one and clearly manifested by the provisions of the bituminous coal act, appearing in the opinion, which, if set out, would unnecessarily lengthen this opinion.

We are cognizant of the distinction contended for by respondent in the cases cited and analyzed. The mere fact that certain cases, upon which a decision has been predicated, are either subsequently overruled or the reasoning therein changed or given a new meaning, does not, in fact, overrule such decision. In order to ascertain the full effect and reasoning of a decision, all the language appearing in the opinion to sustain it must be taken into consideration and given equal credence. Cases may be similar and yet not alike. The industries affected by subsequent decisions of the supreme court to *Ribnik v. McBride* are industries distinctively different from the one affected by the *Ribnik* decision. Suffice it to say that no decision from a court of last resort, expressing a view contra to that determined in *Ribnik v. McBride,* has been cited by the respondent.

There is no doubt that the supreme court of the United States has, on account of economic conditions that have supervened, recognized that further exercise of the protective power of the state was required and acted accordingly, taking judicial notice of the existence of unemployment and demand for relief, occasioned by an economic depression. That the country has been faced with a distressing economic depression, in which millions of our fellow citizens have been out of employment and unable to secure it, and in many instances only by the grace of the United States government, is too well known to admit of argument or discussion. While for many years employment agencies have been created by many states, civic and labor organizations, to which those unemployed might resort without charge to them, this field has been vitally enlarged upon by both the federal government and the states, and such other organizations as previously mentioned, to such extent that it is apparent that the business of an employment agency is dis-

tinctively one of a highly competitive nature. An attempt to establish a uniform fee for a valuable service and less valuable service, without the expense of overhead, would seem to be hopelessly impracticable, within the limits of constitutional rights.

The relator is engaged in a beneficial business. Constituting part of its property are services rendered in obtaining employment. One is not obligated, nor is it compulsory, to employ relator, and the person seeking to avail himself of such services is at liberty to reject them, if the terms of the contract for compensation are not satisfactory. This right of contract, common to all followers of legitimate vocations, constitutes an asset of the relator and is a part of the property, in the enjoyment of which relator is guaranteed protection by the Constitution. By that part of section 48-508, Comp. St. 1929, objected to, relator is stripped of the right of contract, deprived of property, circumscribed and hampered in the vocation followed and in the pursuit of livelihood by a provision in an act not applicable in many other occupations.

Speaking of the regulation of the business of relator with reference to fixing prices for services rendered, the relator meets severe competition, and surely such competition is effective in the regulation of fees charged. If the fee be exorbitant or unreasonable, an adequate remedy is provided by law as against the relator and, under the terms of the act, might be very properly exercised.

In view of all argument, the pertinent legal conception is that the supreme court of the United States has not expressly overrruled the case of *Ribnik v. McBride, supra,* and our research confirms this fact. The respondent desires that we march on past the decision in the *Ribnik* case and do the thing that the United States supreme court has not seen fit to do. We cannot logically indulge in speculation, however much we may be impressed with masterly dissenting opinions. We conclude that we are bound by the decisions of the supreme court of the United States in its interpretation of the federal Constitution.

We make reference to *First Trust Co. v. Smith,* 134 Neb. 84, 277 N. W. 762, in which this court held: " 'The United States supreme court and the supreme court of this state are peers. The decisions of the former upon the federal Constitution and laws are binding on the latter; the decisions of the latter upon the Constitution and laws of Nebraska are binding on the former.' *Franklin v. Kelley,* 2 Neb. 79."

Giving effect to *Ribnik v. McBride, supra,* that part of section 48-508, Comp. St. 1929, constituting the issue is unconstitutional, in that it contravenes the due process clause of the Constitution of the United States.

The relator's motion for judgment on the pleadings in such respect is sustained.

It is hereby ordered and adjudged that a peremptory writ should issue, commanding the respondent to issue to the relator a license to operate an employment agency for the year commencing May 1, 1940.

JUDGMENT ACCORDINGLY.

JOHNSEN, J., dissenting.

I am unable to agree with the majority that *Ribnik v. McBride,* 277 U. S. 350, 48 S. Ct. 545, 72 L. Ed. 913, is decisive of the present case.

First of all, the statement of Mr. Justice Brandeis, in the unanimous opinion in *Tagg Bros. v. United States,* 280 U. S. 420, 439, 50 S. Ct. 220, 74 L. Ed. 524, should be noted: "This court did not hold in * * * *Ribnik v. McBride* that charges for personal services cannot be regulated. The question upon which this court divided * * * was whether the services there sought to be regulated were *then* affected with a public interest." (Italics mine.)

The question to be determined here is not whether in 1928, when the *Ribnik* case was decided, the employment agency business was sufficiently affected with a public interest to permit the legislature to limit its charges for services, but whether it is so affected at the present time. "It is clear," says Mr. Justice Roberts, speaking for the majority in *Nebbia v. New York,* 291 U. S. 502, 536, 54 S. Ct. 505, 78

L. Ed. 940, "that there is no closed class or category of businesses affected with a public interest * * *." Or, as Mr. Justice Holmes expressed it in the majority opinion in *Block v. Hirsh,* 256 U. S. 135, 41 S. Ct. 458, 65 L. Ed. 865, "Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern." Mr. Chief Justice Taft gave recognition to the same view, in *Wolff Co. v. Industrial Court,* 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103, when he classified, as clothed or affected with a public interest, "Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

With me, the conviction is clear that, if the employment agency business did not hold such a peculiar relation to the public as to permit the legislature to limit its charges for services in the prosperous era of a decade and a half ago, the staggering unemployment problem of the past few years has now placed it in that category. This economic condition is, of course, a proper matter for judicial notice. *West Coast Hotel Co. v. Parrish,* 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703. Today, if not in 1928, the declarations of Mr. Justice Stone, in his dissenting opinion in the *Ribnik* case, are peculiarly applicable and controlling: "We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects (*Brazee v. Michigan,* 241 U. S. 340), and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under

exceptional economic compulsion to accept such terms as the agencies offer. * * * There is a public interest at such times in bringing about a prompt readjustment of the labor supply to industry's need for labor. The additional barrier to a quick readjustment created by the agencies' raising of their rates affects that interest adversely. The establishment of a reasonable maximum rate is well calculated to obviate the abuse."

To what extent, in the field of price regulation, the supreme court of the United States has in fact broadened the principle of the *Ribnik* case, in the subsequent decisions of *Tagg Bros. v. United States, supra* (commissionmen's fees), *Nebbia v. New York, supra* (milk prices), *West Coast Hotel Co. v. Parrish, supra* (female minimum wage), and *Sunshine Anthracite Coal Co. v. Adkins,* 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 825 (bituminous coal prices), I deem it unnecessary to discuss. These decisions at least have not moved in the direction toward which the *Ribnik* case pointed. For present purposes, it is sufficient to say that the vast economic changes that have occurred since the *Ribnik* case was decided, and the close relationship that employment agencies now bear to the unemployment problem, present such differences in conditions that that decision can no longer be regarded as controlling, and we are entitled to make a new examination of the question. In the necessitous and unequal bargaining position in which the unemployed have come to be placed, it is not unconstitutional to close the doors to any possibility of overreaching or "job selling."

The majority opinion is content to rest upon the ground that the *Ribnik* case has never been expressly overruled. This seems to me too narrow a view of real judicial responsibility. It is not *les majesty* to question the continued existence of the circumstances and conditions upon which a decision of the supreme court of the United States has been predicated, and in such a situation to reexamine the problem that is involved. In some instances this may be the only way in which that court will ever be afforded the oppor-

tunity to review its former decision. It was such a reexamination by the supreme court of Washington of *Adkins v. Children's Hospital,* 261 U. S. 525, 43 S. Ct. 394, 67 L. Ed. 785, and a refusal to recognize it as controlling, that resulted in a review and overruling of it in the subsequent case of *West Coast Hotel Co. v. Parrish, supra.* Judicial decisions must not become mere copybooks, but they should always be present admeasurements of the principles and the spirit of the law. Except as to definite and invariable prescriptions and prohibitions of the Constitution, and such limited rules of property as, in the interest of society as a whole, require a permanent crystallization, past decisions do not establish the finalities of the law, and no sound judicial body will ever deal with them as such. Such decisions necessarily should be employed to measure and test the soundness of judicial thinking, and to safeguard it against transient instability, or the whims of changing personnel, but they obviously can never mark the boundaries to which the thought of the law can extend or its spirit can move.

The majority have properly refused to be guided by the reasoning in the *Ribnik* case in testing the validity of the statute involved under our state Constitution. They have properly held under that instrument that the employment agency business is one "affecting the public welfare." They have inconsistently refused, however, to recognize it as one "affected with a public interest" under the federal Constitution, because they are unwilling to allow their thoughts in that field to move beyond the boundaries of the *Ribnik* case. I am unable to stop there. The statute in my opinion is violative of neither the state nor the federal Constitution, and the application for a writ of mandamus ought accordingly to be denied.

The reasonableness of the charge fixed by the legislature in the statute is not raised in this proceeding and so is not involved.

BEN HANSEN, APPELLANT, V. PAXTON & VIERLING IRON WORKS, APPELLEE.

293 N. W. 415

FILED AUGUST 2, 1940. No. 30847.

1. **Workmen's Compensation.** Plaintiff *held* entitled to compensation for temporary total disability from a nerve pressure in the region of the fourth and fifth lumbar vertebræ, occasioned by a traumatic injury to and subsequent thickening of the ligamentum flavum.
2. ———. An employee will not be deprived of compensation because he has violated a rule which has fallen into disuse, with the knowledge of the employer, or which has been so treated by the employer as not to be controlling on the employee's actions.
3. ———. There is nothing in the workmen's compensation law to prevent an employee from receiving compensation for temporary total disability to perform the duties in which he is engaged at the time of an accident, merely because he is then receiving an unrelated allowance for a permanent partial disability from a previous accident.

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

McKenzie & Dugan, Edward J. Peterson and *Fred S. Wolfe*, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a workmen's compensation case. It has been before us previously on a procedural question, reported in 135 Neb. 867, 284 N. W. 352. After it was reversed and remanded, the case was tried in the district court on its merits, and plaintiff was denied a recovery. He has again appealed to this court.

Plaintiff claimed that, while he was engaged in greasing a plate shearing machine, he fell to the floor, a distance of six feet, and lit on his buttocks. He alleged that he severely strained his sacro-lumbar joint and injured his left sciatic nerve, and that as a result thereof he had been totally dis-

abled since the date of the accident. It was his contention that, among other injuries, he had suffered a partial loss of sensation in his left leg, with a resulting nerve and muscular insecurity that impaired motion and required him to shuffle or drag his leg in walking.

Two medical experts diagnosed his difficulties as due to a herniated intervertebral disc between the fourth and fifth lumbar vertebræ, produced by the fall. Another expert, with special training and experience in injuries of this character, declared that the disability was due either to a rupture of the intervertebral disc or to a thickening of the ligament between the vertebræ, known as the ligamentum flavum, and that the only way to determine the exact cause was by an exploratory operation. He stated further that either condition would produce pressure on the nerve roots in the spinal canal, which was the principal cause of plaintiff's disability, and that, in his opinion, it was a result of the accident. All three doctors agreed that plaintiff was totally disabled.

After the evidence had been concluded, plaintiff expressed a desire to submit to an operation, to have the exact cause of the disability determined and, if possible, to have it corrected, and he requested the court to hold the matter under advisement until this had been done. The operation was performed by Dr. J. J. Keegan, a neurological surgeon, who had previously examined plaintiff, but who was not called as a witness on the trial. Following the operation, the hearing was reopened. Dr. Keegan then testified that he had removed the spines and laminæ of the fourth and fifth lumbar vertebræ and had found a thickening of the ligamentum flavum which he removed; that "this thickened ligament had produced a compression of the spinal nerve roots at this level, which could be seen by a depression as the ligament was removed;" that "that condition causes a narrowing of the canal, particularly in the outer canal on that side where the nerve root passes out to go to the leg, and it is recognized that it causes symptoms of sciatic pain and low back pain which cannot be distinguished either by

symptoms or X-ray from herniated intervertebral disc;" that "with that definite history of an injury and disability immediately following it, and continued symptoms from that time, and later finding by operation of this thickened ligament, and relief thus far from serious pain following the operation, it would be my opinion that this injury definitely was related to his subsequent symptoms or caused his subsequent symptoms;" and that it would probably be a matter of two months from the time of the operation before plaintiff would have recovered from his disability and be able to return to heavy manual labor.

On defendant's side, the case was strenuously contested on every issue. It was contended that plaintiff had never had an accident; that, if he did, he had not been hurt; that, if he was hurt, he had fully recovered and was simply a malingerer; and that, in any event, his activity in greasing the machine was such a departure from the work that plaintiff was directed to do that the accident could not be said to have arisen out of his employment.

Defendant's evidence and argument would have us go the length of holding, in effect, that plaintiff did not fall off the machine, but that he simply lay down beside it and pretended to be hurt; that, notwithstanding he had a satisfactory record as a workman for defendant, with fifteen months of service and two increases in wages, he allowed himself to be carried off to the hospital on a stretcher and remained there for thirteen days, for the sole purpose of laying a foundation for a compensation claim; that he deliberately cultivated a leg drag and a limp for the same reason; that there is and has been absolutely nothing wrong with plaintiff, but that he is a pure malingerer; that the operation performed by Dr. Keegan did not and could not serve any useful purpose, because no abnormal ligament thickening and nerve pressure existed; and that the reason plaintiff suggested and was willing to submit to such a major operation, notwithstanding its attendant risk of life, was that it gave him an opportunity for vindication, by claiming recovery from a disability that never actually existed.

We are not willing to go this length, under the credible facts in the record. It can serve no useful purpose to detail the evidence in support of the several contentions of the parties. The thing that seems to us most persuasive and corroborative, on the various aspects of the case, is the operation performed by Dr. Keegan, with the findings and conclusions resulting therefrom. We are convinced from these that, as a result of the accident and the injury which it occasioned, plaintiff developed a thickening of the ligamentum flavum which produced a disabling nerve pressure, and that the pain disappeared when the pressure was removed. The disputes between plaintiff's and defendant's medical experts rest largely upon differences in their conclusional premises. Defendant's doctors adopted a literal viewpoint of all the facts upon which their opinions were predicated. They assumed that, when plaintiff said he fell on his buttocks, this meant that his back was straight and that he in no way jackknifed his spine, and they therefore asserted that there could have been no injuring strain on his ligamentum flavum. They took the position also that it would require some time for the ligamentum flavum to thicken as the result of an injury, and that plaintiff therefore could not have been continuously disabled from the date of the accident. They stated further that a pressure in the spinal canal was bound to produce a partial paralysis and atrophy of the nerves, and that a regeneration could not possibly have occurred as rapidly as in plaintiff's alleged recovery, following the operation.

On the issue of whether there actually was a thickening of the ligament, we feel bound to accept Dr. Keegan's findings, over the observations and opinions of the other medical witnesses. He certainly had a better opportunity than any one else to ascertain that fact from the operation. He is corroborated by two of plaintiff's doctors who watched the operation, although defendant's experts, who also were present, asserted that they saw no evidence of any abormal ligament thickening. If an abnormal thickening existed, sufficient to produce a disabling nerve pressure, it must be

attributed to the accident, for the record does not indicate that plaintiff had ever previously suffered from such an incapacity. The ligamentum flavum could not, of course, have thickened momentarily, but, as plaintiff's doctors pointed out, the immediate pain was due to the straining of the ligament and the bruising of the nerves, and this turned into a continuing pain as the ligament healed and thickened and produced a permanent nerve pressure. On the question of nerve regeneration, the viewpoint of plaintiff's doctors was that the pressure, while sufficient to produce a continuing pain, was not such as had caused a marked atrophy of the nerves and muscles, and that the elimination of the nerve pressure, by a removal of part of the ligament, would and did immediately relieve the pain and the disability which had resulted from it. They estimated that an eight weeks' healing period would enable plaintiff to recover his nerve and muscular strength and permit him to return to his previous occupation.

A number of propositions of law are discussed in the brief of each party, but most of these are principles that have been declared in our past decisions, and, in their application to the facts of the present case, call for no reiteration here. There is one proposition, however, which defendant is entitled to have discussed in connection with its contention that, in attempting to grease the machine, plaintiff had departed from the work which he had been directed to do, and that the accident therefor could not be said to have arisen out of his employment.

Defendant cites and relies upon *Hibberd v. Hughey,* 110 Neb. 744, 194 N. W. 859. In that case, compensation was denied for injuries sustained in an uncompleted elevator whose use had been expressly prohibited to plaintiff. Here, plaintiff was not prohibited from climbing onto the plate shearing machine, because it was his job to operate it. Defendant attempted to prove that, while plaintiff was the operator of the machine, the task of greasing it, as well as all other machines in the shop, was entrusted to one man, in order to insure that the greasing was properly done, and

that plaintiff had been so advised. There was proof, however, by other workmen that in practice each operator in fact greased his own machine; that plaintiff had repeatedly done the greasing work on the plate shearing machine; and that defendant's superintendent knew of that fact, because he had been seen talking with plaintiff on various occasions while he was thus engaged in greasing. An employee will not be deprived of compensation because he has violated a rule which has fallen into disuse, with the knowledge of the employer, or which has been so treated by the employer as not to be controlling on the employee's actions. *Morris & Co. v. Cushing*, 103 Neb. 481, 172 N. W. 691; *McCrary v. Wolff*, 109 Neb. 796, 192 N. W. 237; *M. P. Gustafson Co. v. Industrial Commission*, 348 Ill. 11, 180 N. E. 567. The fact that, after he had finished working with the machine, plaintiff had been directed to help paint angle irons during the afternoon, did not operate to prevent him from first putting his machine in shape for future operation, in accordance with his practice.

One other contention, perhaps, also requires consideration. Defendant insists that, if plaintiff is allowed compensation in this case, he will be receiving two allowances under the workmen's compensation law at the same time. It appears that, approximately three and a half years before this accident occurred, plaintiff sustained a heatstroke while working for another employer, and that he made a lump sum settlement for this injury on the basis of 50 per cent. permanent partial disability. The 300-week period covered by this settlement had not yet expired. The extent to which plaintiff's right might be affected, to recover additional permanent partial disability benefits by reason of another accident, during the unexpired period of his previous lump sum settlement allowance, is not here involved. The allowance which we are making is for temporary total disability or healing period during the time that plaintiff has been unable to perform the duties in which he was gainfully employed when the accident here involved occurred. His previous disability is not claimed in any way to be a contributing

factor to the temporary loss thus sustained. There is nothing in the workmen's compensation law to prevent an employee from receiving compensation for temporary total disability to perform the duties in which he is engaged at the time of an accident, merely because he is then receiving an unrelated allowance for a permanent partial disability from a previous accident. Comp. St. 1929, sec. 48-121, as amended. Whatever the employee's physical condition may be, the employer is bound to compensate him for any impairment of his existing ability to perform the duties in which he is engaged, by accident arising out of and in the course of his employment. Comp. St. 1929, sec. 48-101.

The evidence in the record indicates that plaintiff should have completely recovered from his disability within two months from the date of Dr. Keegan's operation. The judgment of the district court will accordingly be reversed, and the cause remanded, with directions to allow plaintiff compensation, at the rate of $15 a week, from the date of the accident to and including October 16, 1939, and to allow the expenses of Dr. Keegan's operation in the sum of $250. No other medical expense can be allowed, because they were not proved on the trial.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1940

STATE, EX REL. EVERETT T. WINTER ET AL., APPELLANTS, V. HARRY R. SWANSON, SECRETARY OF STATE, APPELLEE.

294 N. W. 200

FILED OCTOBER 8, 1940. No. 31067.

1. **Constitutional Law.** The provisions of section 4, art. III of the Constitution, empowering the legislature to enact laws to facilitate the operation of the initiative power, authorize it to enact laws to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment.
2. ———. Any legislative act which tends to insure a fair, intelligent and impartial result on the part of the electorate tends to facilitate the initiative power.
3. **Statutes.** Requirements in a statute that a form of initiative petition must be filed with the secretary of state before petitions are circulated, together with a statement of the names of persons sponsoring the petitions or contributing or pledging contributions to defray the expense of preparation, printing and circulation, tend to prevent fraud and to render intelligible the purpose of the proposal to be submitted, and by so doing they facilitate the initiative power within the purview of the Constitution.
4. ———. Requirements of a statute enacted to facilitate the initiative power reserved to the people by providing safeguards against fraud and deception will ordinarily be construed to be mandatory and not directory.

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

Baylor, Tou Velle & Healey and *Carlisle P. Myers,* for appellants.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is an appeal from a judgment of the district court for Lancaster county denying relators a peremptory writ of mandamus against respondent, the secretary of state, to require him to accept and file certain initiative petitions by which it was sought to submit to the voters of Nebraska at the general election a certain constitutional amendment limiting the tax levy on farm and city property.

It is conceded that the petitions and accompanying affidavits were in proper form and that the proceedings were in all respects regular, except a failure to comply with the following provisions of chapter 34, Laws 1939:

"Prior to obtaining any signatures to said petition, a copy of the form to be used shall be filed with the secretary of state together with a sworn statement containing the name or names of every person, corporation or association sponsoring said petition or contributing or pledging contribution of money or other things of value for the purpose of defraying the cost of the preparation, printing or circulation thereof."

Relators admit that the foregoing provisions of the statute were not complied with and allege that the cited statutory provisions are unconstitutional and void, and that, in any event, they are directory and not mandatory.

The power to enact laws and adopt constitutional amendments independently of the legislature was reserved by the people in the Constitution. Const., art. III, sec. 2. The Constitution also provides in part: "The provisions with respect to the initiative and referendum shall be self-executing, but legislation may be enacted to facilitate their operation." Const., art. III, sec. 4. Relators contend that the provisions in question do not "facilitate their operation" and that they, therefore, are unconstitutional.

We think the constitutional provision authorizing the legislature to enact laws to facilitate the operation of the initiative power means that it may enact reasonable legislation to prevent fraud or to render intelligible the purpose of the proposed law or constitutional amendment. See *State v. Amsberry*, 104 Neb. 273, 177 N. W. 179. Any legislative act which tends to insure a fair, intelligent, and impartial result on the part of the electorate may be said to facilitate the exercise of the initiative power. We believe the provisions of the act before us meet these requirements.

The requirement that the form of the petition be filed with the secretary of state before the petitions were circulated is calculated to advise the electorate in advance as to the exact provisions of the proposal through publicity resulting from its filing. By this means the proposal is rendered intelligible and the possibilities of fraud greatly reduced. The requirement that the name of every person, corporation or association sponsoring the petition or contributing or pledging contributions to defray the cost of preparation, printing and circulation of petitions be filed is likewise a safeguard against fraud and deception. We think the legislature was authorized to enact the mentioned requirements under its granted authority to facilitate the exercise of the initiative power.

Relators contend that the questioned provisions of the statute are directory and not mandatory. It seems to us that none of the features of a directory statute is present in this case. It would seem to us that an anomalous situation would be created if statutory safeguards against the perpetration of frauds and deceptions were held to be directory. Such requirements must by their very nature be mandatory, or the purposes of the legislature will be completely defeated. We hold that the provisions of the statute herein discussed are mandatory and that the failure of relators to comply therewith justifies the action of the secretary of state in refusing to file the same.

Relators further contend that the provision requiring the filing of "a sworn statement containing the name or names

of every person, corporation or association sponsoring said petition or contributing or pledging contribution of money or other things of value for the purpose of defraying the cost of the preparation, printing or circulation thereof" is unconstitutional in that contributors and those pledging contributions to defray expenses could not be determined at the time of the filing, and that such an impossible requirement would not facilitate the exercise of the initiative power by the people. It is clearly the duty of this court to give a statute an interpretation which meets constitutional requirements if it can be reasonably done. *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388. It was undoubtedly the intent of the legislature that the contributors, and those pledging contributions known to relators at the time the form of petition was filed, were alone contemplated. To give it this interpretation removes any question of invalidity and gives it the effect which the legislature intended.

We are of the opinion that the questioned provisions of chapter 34, Laws 1939, are constitutional and mandatory. Under such holding the trial court properly denied a peremptory writ of mandamus.

AFFIRMED.

W. BRUCE SHURTLEFF, APPELLANT, V. LAURA D. FORNEY ET AL., APPELLEES.

294 N. W. 394

FILED OCTOBER 18, 1940. No. 30885.

Affirmance. Judgment of the trial court holding that plaintiff had waived a deficiency judgment against the defendant is affirmed.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

Donald O. Shurtleff, for appellant.

Field, Ricketts & Ricketts, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This case presents the question of whether or not the plaintiff Shurtleff had waived a deficiency judgment against the defendant Forney. The trial court found that a waiver had been made. We concur.

Plaintiff and wife executed a mortgage to the Lincoln Trust Company on some apartment properties as security for a loan. Subsequently plaintiff conveyed the properties to the defendant and wife, and, as a part consideration, the defendant assumed and agreed to pay the trust company mortgage, and also executed a second mortgage thereon to the plaintiff. The loans became in default. Plaintiff foreclosed his second mortgage, and eventually had confirmation of sale to him under his foreclosure. He filed a motion for a deficiency judgment in May, 1937. In the meantime, the First Trust Company, as successor trustee, began a foreclosure of the first mortgage. Separate litigation also arose as to the ownership of the furniture in the properties, with plaintiff taking a position antagonistic to defendant. A determination was had that defendant owned the furniture. An appeal was threatened.

Over a period of time, effort was made to settle all this litigation. Many letters and other papers are in evidence, making proposals and counter proposals. These indicate a desire on plaintiff's part to be relieved of the possibility of a deficiency judgment against himself and wife on the first mortgage and to secure possession of the property, rents, and furniture for the bondholders, and likewise a willingness, if certain conditions were met, to waive a deficiency judgment against defendant. The defendant likewise desired to be relieved from the possibility of a deficiency judgment on both mortgages and to be paid for the furniture, and to that end was willing to surrender certain rents and possession of the property. The bondholders wanted possession of the property and the rents.

In late August, 1937, an agreement was reached between defendant and the bondholders, by which the trust company, acting for the bondholders, purchased the furniture from defendant, received an accounting of rentals, and secured possession of the real estate. The trust company had previously received an assignment of his bid from the plaintiff, so that it could and did take title to the property. The trust company waived deficiency judgment against the plaintiff and defendant on the first mortgage. The defendant demanded as a condition of this settlement that the plaintiff waive deficiency judgment against him. Mr. Schlaebitz, an officer of the trust company, testified in substance that plaintiff was insisting that the trust company secure possession of the property and prevent the defendant from collecting additional rentals, and that plaintiff agreed to waive deficiency judgment against the defendant if deficiency judgment were likewise waived against plaintiff, the possession and rents of the property secured for the bondholders, and the entire litigation settled. Schlaebitz so advised the attorney for the defendant. (Plaintiff admits a conversation with Schlaebitz about the matter, and declares that he refused to waive his right to a deficiency judgment against defendant.) The entire matter seems to have been closed on that basis in August or September, 1937, with the exception that the motion of plaintiff for a deficiency judgment remained pending of record. Two years later plaintiff called up said motion, and hearing was had thereon. The finding of the trial court that plaintiff had waived deficiency judgment against defendant is amply sustained by direct testimony and the circumstances revealed by the negotiations. We find no controlling reason for reaching a different conclusion.

Plaintiff next contends, assuming that the waiver was established, that such agreement was without consideration. This contention is based upon the proposition that several weeks prior to the August settlement he had assigned his rights as purchaser of the property at the foreclosure sale on the consideration that the trust company waive deficiency

judgment against him, and that the trust company in August merely performed an agreement to which it was previously bound.

It appears that in June, 1937, plaintiff submitted an assignment of his bid to the trust company, conditioned upon the trust company's waiving a deficiency against plaintiff and wife. Some of the bondholders objected to plaintiff's being released. The assignment is shown to have been filed July 27. On that same date, the trust company secured an order from the district court authorizing it to waive the deficiency upon receipt of the assignment. That, however, does not complete the story. The following facts also must be considered:

The evidence indicates that the filing of the assignment and the securing of the court order in July, 1937, was a step toward final settlement of the litigation. This is shown by a number of matters, including the fact that the trust company did not direct its attorney to waive the deficiency until September 3. The defendant, in August, refused to surrender possession of the property, account for rents (both of which acts plaintiff desired he do), or sell the furniture unless he was released from a claim for a deficiency judgment by both the trust company and plaintiff. The trust company did not receive authority to release plaintiff until a meeting of the bondholders on August 23, when authority, conditioned upon a settlement, was voted by a majority of the bondholders. Although plaintiff now claims that he had assigned his bid and been released by the trust company in July, 1937, yet he (for himself and a bondholder) thereafter continued an active participation in the negotiations for a settlement of this litigation, and protested the purchase of the furniture.

"There are two kinds of consideration,—that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Either is a valid consideration which will support a contract." *United States Fidelity & Guaranty Co. v. Curry,* 126 Neb. 705, 254 N. W. 430.

Although negotiations were in progress for some time

prior to August, 1937, it is apparent that the benefits conferred and the detriments caused by this settlement were considerations which moved to and against the several parties at the time the litigation was terminated, and that ample consideration is shown.

AFFIRMED.

GLEN AYRES V. STATE OF NEBRASKA.
294 N. W. 392

FILED OCTOBER 18, 1940. No. 30958.

Criminal Law. It is the function of the jury in a criminal case to determine the question of the guilt or innocence of the defendant. Where the court, without the aid of the jury, is required to fix the punishment in the event of a verdict of guilt, it is not error for the court to fail or refuse to instruct the jury as to the penalty which may be imposed.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Affirmed.*

Thomas E. Dunbar, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

The defendant was convicted of the crime of burglary and sentenced to serve a term of not less than one or more than two years in the reformatory for men.

On appeal he first presents the proposition that the verdict of the jury is not sustained by sufficient evidence. The record discloses that defendant was an habitue of a beer parlor operated on the main street in Nebraska City by Heinke and Beason. Defendant's home was on the second floor of a business building located in the same block and but a few feet from the beer parlor. On the night in question defend-

ant and others had been drinking and playing cards in the beer parlor. Beason, one Hoffman, and defendant were the last to leave the place, closing the building, turning out the lights, and locking the door about 1:30 a. m. The three walked together a short distance up the street and then separated, defendant proceeding alone, Beason and Hoffman turning into a side street. There appears to have been previous difficulty with the lock. Beason decided to return to make certain that the door was securely fastened. He and Hoffman returned, found that it could be opened without a key, again shut the door, and the two men went to Heinke's home, some two blocks away, aroused him, and the three returned to the parlor for the purpose of securely fastening the door.

They came to the parlor about 2:30 a. m. and found the door closed and the lights out. They opened the door, entered and found the defendant standing some distance inside the room, facing the door. Some cigarettes had been taken from the counter behind the bar, and several brands placed in two cartons which were on the bar. Beason had placed some coins in a sack and left them beneath a counter when he closed the place. This change was found in another location, removed from an outer sack.

The defendant testified that after he left Beason and Hoffman he had taken a short walk, gone to his apartment, prepared a sandwich and coffee; that, while eating, he had heard a car on the street, went down to investigate, found the door of the beer parlor open, walked in, and was there when Heinke, Beason, and Hoffman returned. He denied touching the cigarettes or the money and denied any unlawful breaking and intent. When asked that night to explain his presence, his only answer was, "What are you going to do about it?" When placed under arrest, he advised the officer, "I haven't done anything." Defendant gave no other reason or explanation to the jury upon his trial. The dispute in the evidence is as to the unlawful breaking and as to the felonious intent. These elements may be shown by direct or circumstantial evidence. *Young v. State,* 133 Neb.

644, 276 N. W. 387. The evidence is clearly sufficient to sustain the finding of guilt.

Defendant next complains of the admission of certain photographs of the interior of the beer parlor taken some days after the night in question. These pictures show Heinke standing behind the bar. Defendant contends that "this was like admitting the prosecuting witness into the jury room" and was "liable to arouse the sympathies or prejudices of the jury." Clearly the purpose of the pictures was to show the jury the physical features of the interior of the building. Heinke testified for the state. The jury obviously had a better view of him on the witness-stand than they did in the picture. Prejudicial error in the admission of the photographs is not found.

Defendant complains of alleged prejudicial remarks of the court and county attorney. Defendant had by cross-examination disclosed that Heinke had spent the night before the trial "in the courthouse" and that "state liquor agents" had brought him there. Upon examination by the county attorney Heinke testified that a warrant had not been served upon him. The county attorney then asked, "If a complaint is filed against you and a warrant is issued against you for the violation of any infringment of the liquor law, and that complaint charges you with a crime of which you are guilty, you will plead guilty, won't you?" Defendant objected that it did not go to "his credibility." The court remarked, "That would be hard on the legal profession, wouldn't it?" The county attorney said, "Most of the guilty do plead guilty, I will grant you that." The question was not answered. The defendant made no objection to the remarks and asked for no cautionary instruction to the jury. Conceding for this purpose that the question should not have been asked, nor the remarks made, prejudicial error is not apparent.

Defendant complains that the court unduly limited his right of cross-examination of a witness, and made improper remarks in so doing. Defendant was cross-examining the witness Beason with reference to the calling of the police as

to how and where it was done, how long they were in coming, how they were dressed, whether armed, if they were in the courtroom, etc. The court on its own motion said, "I don't see the materiality of these questions." The defendant's counsel said: "It is cross-examination. I am just trying to make a record." The court said, "We are spending an awful lot of time. Let's go along." Defendant made no request for a cautionary instruction. The court's remarks seem to have been well timed. No prejudicial error is shown.

Defendant complains that the court should have instructed the jury not only as to the elements of the crime of burglary, but also should have instructed them as to the statutory penalty, and that he thereby denied to the jury the right to know that the defendant could receive a jail sentence. "There is * * * no merit to this contention. It was the business of the jury to determine from the evidence whether the defendant was guilty or innocent; they had no other duty or function to perform and they could not have been aided in reaching a right conclusion by knowing what penalty the law annexed to the crime. 'Where the jury are not required to fix the punishment in a criminal prosecution, it is not error to refuse to instruct them as to the penalty.' *Ford v. State,* 46 Neb. 390." *Edwards v. State,* 69 Neb. 386, 95 N. W. 1038.

The jury voluntarily attached to their verdict a separate sheet upon which appeared the following language: "The jury recommends a light sentence." Defendant contends that the sentence of the court was excessive in view of the recommended leniency. The penalty was for the trial court and not the jury to determine. The statute places no duty upon the jury in that regard. Section 29-2308, Comp. St. 1929, provides: "In all criminal cases that now are, or may hereafter be pending in the supreme court on error, the said court may reduce the sentence rendered by the district court against the accused, when in their opinion the sentence is excessive, and it shall be the duty of said supreme court to render such sentence against the accused as in their opinion may be warranted by the evidence."

It is our opinion that the sentence rendered by the trial court is not excessive and that prejudicial error is not shown to have occurred.

AFFIRMED.

CITY OF OMAHA, APPELLANT, V. JOHN J. CASAUBON, APPELLEE.

294 N. W. 389

FILED OCTOBER 18, 1940. No. 30966.

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

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

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Alfred A. Raneri,* for appellant.

Cranny & Moore, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

This is an action under the workmen's compensation law. The district court, after trial and upon evidence adduced before it, found generally for the employee, John J. Casaubon, and against the employer, the city of Omaha; and further found specially that on or about the 10th day of March, 1939, John J. Casaubon was employed by the city of Omaha as a janitor and utility man at the City Emergency Hospital, and at that time, while so employed and engaged in the performance of his duties as such employee, he sustained and received an injury, when a ladder on which he was then standing, some nine feet from the floor painting a wall of the hospital, fell away and out from under him, precipitating him head first over and down against this wall on which he was working and down to and upon a metal trash can situated in the vicinity of the bottom of the ladder; that

in this fall his back in the area of the ninth and tenth thoracic vertebræ was severely bruised and wrenched, causing a compression fracture to the seventh, ninth, tenth and eleventh thoracic vertebræ and lighting up a preexisting arthritic condition in his spine; that as a result of said accident and the injury occasioned thereby the employee Casaubon was temporarily totally disabled from and after the 1st day of July, 1939, up to and including the present time, and will continue to be temporarily totally disabled in the future to a date not as yet ascertainable by the court at this time. The district court awarded compensation at the rate of $15 a week, required the city of Omaha to furnish the injured employee further medical care and attention, as provided by law, and allowed and directed the payment of certain bills for professional services furnished the employee. The appellant, on appeal, substantially presents the contention that the evidence is insufficient to establish the happening of the accident as asserted, or to sustain the claim of the employee that it arose out of and in the course of his employment; that the proof does not establish that the alleged fall caused the compression fracture of the vertebræ or lighted up a preexisting arthritic condition in claimant's spine; and that the award of $15 a week as compensation was excessive in amount.

We are unable to accept this contention. In consideration of the evidence in the record, it will be remembered that it is sufficient to show that the injury and preexisting disease combined to produce disability, and not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement that the accident arose out of the employment. *Gilcrest Lumber Co. v. Rengler,* 109 Neb. 246, 190 N. W. 578.

In the instant case, however, the evidence is uncontradicted that, while an arthritic condition of complainant's spinal column existed prior to the occurrence of the accident, it caused no pain or suffering whatever and created no noticeable impairment of the strength or use of that organ. But that after the injury claimant's suffering and

impairment immediately commenced and that the injuries received, the compression fracture, were ample cause of the same irrespective of the preexisting arthritic condition. In so far as conflicting evidence in the record may tend to negative or qualify the conclusion thus stated, it is to be remembered that, where evidence in workmen's compensation cases is conflicting, the supreme court, on trial *de novo*, may consider the fact that the district court gave credence to some witnesses rather than to others. *Hudson v. City of Lincoln*, 128 Neb. 202, 258 N. W. 398. Besides, the testimony of all parties is that the existence of a compression fracture to certain vertebræ of the spinal column is clearly established. Complainant's evidence as to the occurrence of the fall during the first days of March, 1939, is clear, direct, positive, and supported by circumstances. The employer's counter evidence on this subject, on the other hand, is negative, circumstantial and not convincing. The physical effects of the fractures and the natural disabilities arising therefrom, the existence of which is conceded, are really not controverted by the expert witnesses testifying. Assuming the view of the evidence most favorable to the appellant, the disability of claimant at least amounts to traumatic arthritis which, under the facts in this case, must be deemed to have arisen out of and in the course of the employment of the claimant and therefore compensable. *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N. W. 532; *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N. W. 860.

Appellant further contends that the amount of the allowance is excessive, for the reason that, by the terms of his employment, this employee was to receive but $60 and board, lodging and washing; that the money value of the board, lodging and washing received not having been fixed by the parties at the time of hiring, it can afford no basis for the allowance of compensation. This contention involves two contentions, one of fact and one of law. The record, without contradiction, discloses the following testimony by Casaubon, viz.:

"Q. And what were your wages? A. Sixty dollars a month,

board, and room, and washing. Q. And you may tell the court if the mayor fixed any value of the board and room, and washing? * * * A. I went and saw Mr. Butler one day, and I asked him for a raise, and he told me just this, he says: 'Now, you are getting,' he says, 'at the rate of one hundred dollars a month right now, and we can't afford to pay any more.' He said: 'You are getting sixty dollars a month, and forty dollars for board, room and washing, which makes it one hundred dollars.' "

Now, there is no evidence in the record that claimant was employed by the city of Omaha for a definite term. So far as advised, Casaubon could terminate his services at his own option. But it does fairly appear from the above and the attendant circumstances that claimant accepted and relied upon the terms and conditions of his employment and the value thereof, as stated by the mayor, and continued his services on the basis thus communicated. In view of the entire situation, it may be properly inferred that claimant's job was originally set up and created by the municipal authorities on the basis of $40 a month as the money value of the board, lodging and washing to be received by the incumbent thereof. This fact had been properly communicated to claimant prior to his injury, and by his continuance in the work he had necessarily assented to the same.

The provisions of the governing statute are as follows: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and shall not include gratuities received from the employer or others, nor shall it include board, lodging or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring: Provided, that if the insurance carrier shall have collected a premium based upon the value of such board and lodging and similar advantages then the value thereof shall become a part of the basis of determining compensation benefits." Comp. St. Supp. 1937, sec. 48-126.

Good, J., in interpreting this legislative provision, in *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797, says:

"Were it not for the statutory limitation above quoted, there would be no doubt that the meals and lodging furnished by the employer would constitute a part of the employee's weekly wage. It has been so held by many courts in states where no such statute existed. Among the authorities so holding are *Fowler v. Zellerbach-Levison Co.,* 1 Cal. I. A. C. Dec. 609; *Haas v. Globe Indemnity Co.,* 16 La. App. 180; *Baur v. Common Pleas of Essex,* 88 N. J. Law, 128; *Ciarla v. Solvay Process Co.,* 184 App. Div. 629, affirmed in 226 N. Y. 566. See, also, Honnold, Workmen's Compensation, p. 574.

"It has long been the policy of this state to give a liberal construction of the workmen's compensation law, so that its beneficent purposes might not be thwarted by technical refinement of interpretation. *McGuire v. Phelan-Shirley Co.,* 111 Neb. 609; *Baade v. Omaha Flour Mills Co.,* 118 Neb. 445; *Speas v. Boone County,* 119 Neb. 58."

Construing the statute under consideration with liberality, in accord with the principles announced in the *Geary* case, we are inclined to the view, in the light of the entire situation, that the evidence as an entirety sustains the conclusion that the money value of the board, lodging and washing that claimant was receiving at the time of the infliction of his injuries had been legally fixed by the parties at $40 a month, and was to be considered in determining the amount of his compensation, and that the judgment of the trial court on this point is not subject to attack.

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

AFFIRMED.

C. J. ADAMS V. STATE OF NEBRASKA.

294 N. W. 396

FILED OCTOBER 18, 1940. No. 30985.

1. **Statutes.** "A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute." *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210.
2. ———. "The offense of larceny by bailee is defined in section 28-547, Comp. St. 1929. The sentence is fixed by the general statute on larceny, section 28-511, Comp. St. 1929." *Frades v. State,* 131 Neb. 811, 270 N. W. 314.
3. **Embezzlement.** "The gist of the offense in such a prosecution (for larceny as bailee) is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same." *Frades v. State,* 131 Neb. 811, 270 N. W. 314.
4. ———. Evidence in the record examined, and *held* ample to sustain conviction.
5. **Criminal Law.** "The general rule is that evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him. But the rule has its exceptions which are as well established as the rule itself, and may be applied in a given case, not to establish the other crime but as confirmatory of the evidence tending to show the commission by defendant of the crime for which he is being tried." *Smith v. State,* 114 Neb. 445, 208 N. W. 126.
6. ———. Whether the proof of unlawful conversion of the moneys by the defendant, for which he was not informed against, tended to prove unlawful conversion of the moneys, which he was charged with having converted, is a question of fact for the trial jury.
7. ———. The language employed by the county attorney in his opening statement to the trial jury, viz.: "And the evidence will further show that in county court he (the defendant) pleaded guilty to the charge and later changed his plea in this court," *held,* under the facts in this case, not objectionable.

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

J. E. Willits, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

EBERLY, J.

Plaintiff in error, C. J. Adams, hereinafter referred to as defendant, prosecutes error from his conviction and sentence under the provisions of section 28-547, Comp. St. 1929. This section was originally enacted as independent legislation, was approved February 25, 1875, and is as follows:

"If any bailee of any money, bank bill or note, goods or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny in the same manner as if the original taking had been felonious; and on conviction thereof shall be punished accordingly."

Defendant challenges the sufficiency of this act to sustain the conviction for the reasons, that it is in fact, though not in form, an "attempted" amendment of the larceny statute therein referred to (citing *Sovereign v. State*, 7 Neb. 409, and *Smails v. White*, 4 Neb. 353); that there has been no compliance with the Constitution relative to enactment of amendatory legislation; that the same is without force and effect; and that the penalty affixed to another section of the statute in defining an offense cannot be affixed to such section 28-547 except by amendment of the other section, 28-511. This contention cannot be accepted. The effect of the language employed, as above quoted, is not to amend the larceny statute (section 28-511), or to incorporate therein section 28-547, but rather to incorporate in section 28-547, by reference, the penalty provisions of section 28-511 only.

This conclusion is based upon the well-established principle that "A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. Where, however, the adopted statute is referred to merely by words describing its general character, only those parts of it which

are of a general nature, or particularly relate to the subject of the adopting statute, will be considered as incorporated into the later." 59 C. J. 1059.

The part of section 28-511 which particularly relates to the subject of the adopting statute is its penalty provisions, and these are, by reference, incorporated in section 28-547 as effectually and completely as if they "had been written into the adopting statute."

Our own decisions are in harmony with the conclusion thus announced. In the case of *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210, we held:

"A statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute."

See, also, *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *State v. Ure,* 91 Neb. 31, 135 N. W. 224.

It would seem that the contentions under consideration are wholly foreclosed by the doctrine announced in *Frades v. State,* 131 Neb. 811, 270 N. W. 314, wherein we held:

"The offense of larceny by bailee is defined in section 28-547, Comp. St. 1929. The sentence is fixed by the general statute on larceny, section 28-511, Comp. St. 1929.

" 'The gist of the offense in such a prosecution (for larceny as bailee) is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same.' *Ford v. State,* 46 Neb. 390, 64 N. W. 1082."

The evidence in this case, if believed by the triers of fact, discloses beyond a reasonable doubt that Rufus A. Porter, then a railway employee, indorsed a check of $79.96, received for wages, and delivered the same to defendant Adams for the latter to cash and return the proceeds thereof to Porter, who was to take up his cash on the same evening; that Adams cashed the check and not only failed to deliver the proceeds to Porter, the owner thereof, but absconded and converted the same to his own use. Under these facts,

one entrusted with a check to cash and to return the proceeds to the owner, having cashed the check and received the proceeds in cash, is a bailee of such proceeds, within the meaning of section 28-547, Comp. St. 1929, and if these proceeds are converted by this bailee to his own use with intent to steal the same, the bailee is guilty of a violation of the section referred to.

See *State v. Dohn,* 216 Wis. 367, 257 N. W. 21; *State v. Carr,* 118 N. J. Law, 233, 192 Atl. 36; *Commonwealth v. Weddle,* 176 Ky. 780, 197 S. W. 446; *State v. Fraley,* 71 W. Va. 100, 76 S. E. 134; *Ford v. State,* 46 Neb. 390, 64 N. W. 1082; *Larson v. State,* 107 Neb. 800, 186 N. W. 981; *Frades v. State,* 131 Neb. 811, 270 N. W. 314.

The defendant challenges as erroneous the action of the trial court in admitting over objections evidence that, on the same day that the Porter check was received by defendant, other checks from other employees of the railway were likewise received by the defendant for the purpose of cashing them and returning the funds so received to the owners of the checks cashed, and that these funds were likewise unlawfully converted by defendant to his own use. In a case involving similar principles this court employed the following language, viz.:

" 'The general rule is that evidence of the participation by an accused person in the commission of a crime, other than that for which he is placed on trial, cannot ordinarily be admitted in evidence against him. But the rule has its exceptions which are as well established as the rule itself, and may be applied in a given case, not to establish the other crime but as confirmatory of the evidence tending to show the commission by defendant of the crime for which he is being tried.' *Welter v. State,* 112 Neb. 22.

"Whether proof of the unlawful conversion of goods by defendant, for which he was not informed against, tended to prove the unlawful conversion of goods, which he was charged with having converted, is a question of fact for the jury. *Welter v. State,* 112 Neb. 22." *Smith v. State,* 114 Neb. 445, 208 N. W. 126. See, also, *Davis v. State,* 58 Neb.

465, 78 N. W. 930; *State v. Routzahn,* 81 Neb. 133, 115 N. W. 759; *Bode v. State,* 80 Neb. 74, 113 N. W. 996; *Buckley v. State,* 131 Neb. 752, 269 N. W. 892.

It follows that the introduction of the evidence objected to was proper and the instructions of the trial court relating thereto, challenged by the defendant, are approved.

The defendant insists that reversible error was committed when the county attorney who prosecuted the case, in his opening statement to the trial jury, employed the following language: "And the evidence will further show that in county court he (the defendant) pleaded guilty to the charge and later changed his plea in this court." The proceeding in the county court referred to by the county attorney was not a trial of the defendant but a preliminary examination accorded him in the county court on the charges then before the district court.. The record further discloses that the state sought to establish how defendant pleaded at his preliminary examination but on objections of defendant this evidence was excluded. Later the defendant was called as a witness in his own behalf and testified on his examination in chief, without objection, as follows: "A. Then they took me down before Judge Bohkle right after I left that room there and I plead guilty to the charges that was preferred against me that morning before Judge Bohkle in County Court; but I still said I didn't want to plead guilty to embezzlement because I didn't think it should be the right charge to prefer against me. I also told them I was willing to come up and plead guilty to the charge of breach of trust. Q. Following that you were arraigned in this court here? A. Yes, sir. Q. What did you plead up here? A. Not guilty to both counts." It would seem when the defendant voluntarily testified before the trial court to the truthfulness of the statement made by the county attorney in his opening statement to the jury, any claim of error based upon the making of the statement must be deemed to have been waived.

Still, counsel for defendant insists that the county attorney should not make statements in the presence of the jury

in relation to prejudicial facts which are incompetent to be proved; and that the so-called plea of guilty entered by the defendant at the time of his preliminary examination in the county court was incompetent evidence and therefore its recital by the county attorney in the instant case resulted in a miscarriage of justice. *People v. Bigge,* 288 Mich. 417, 285 N. W. 5, is cited in support of this contention. But the facts in the *Bigge* case did not in any way involve a change by a defendant of a plea of guilty to one of not guilty, and therefore as an authority the case is not in point. The statement in the opinion in the *Bigge* case, on which defendant relies, made arguendo, and found not in the opinion of the supreme court of Michigan but in a concurring opinion by Justice Potter, is as follows: "If defendant, on arraignment upon the information filed against him, *had pleaded guilty in the circuit court and subsequently changed his plea* and gone to trial, his plea of guilty would have had greater evidentiary value than his alleged admission by silence. Had he pleaded guilty and then changed his plea, the people could not upon the trial of the case have introduced in evidence, as an admission binding on him, his former plea of guilty." (Italics ours.) In support of this statement as an entirety is cited every authority on which the defendant relies, which, in addition to texts, include *People v. Ryan,* 82 Cal. 617, 23 Pac. 121, and *Kercheval v. United States,* 274 U. S. 220, 47 S. Ct. 582, 71 L. Ed. 1009. In each of the cases cited we find the record discloses, first, the due entry with the consent of the trial court of a plea of guilty; second, the withdrawal of the plea of guilty with the consent of the trial court and defendant's pleading not guilty in lieu thereof. The cases last referred to support the rule that a plea of guilty withdrawn by leave of court is not admissible on the trial of the issue arising on the substituted plea of not guilty. But this rule is far from uniform. Well-reasoned cases support the opposing doctrine. 4 Wigmore, Evidence (3d ed.) sec. 1067; *People v. Steinmetz,* 240 N. Y. 411, 148 N. E. 597; *State v. Carta,* 90 Conn. 79, 96 Atl. 411; *United States v. Alonso,* 8 P. I. 78; *State v. Bringgold,* 40 Wash. 12,

82 Pac. 132. But which of the two well-established rules is for adoption in this jurisdiction is not now for determination by us, for the facts in the instant case do not in any manner invoke the application of the rule now under consideration. In the case at bar defendant Adams was accorded the privilege, the right, of a preliminary examination. Upon inquiry as to whether he was guilty of the crime with which he was charged in the complaint, he voluntarily stated to the magistrate that he was guilty, and by so doing, to the extent of the admission made, he waived the swearing and examination of witnesses, waived the right given him by statute to have the county judge make a judicial inquiry as to whether the crime of larceny by bailee had been committed, and as to whether the accused probably committed it. What he said and did, did not amount to technically entering a plea of guilty, but it was the admission of facts supporting the charge embraced in the complaint. The preliminary examination provided for by the Criminal Code is in no sense a trial of the person accused. When one is charged with having committed a crime, is arrested, and brought before a magistrate, it is not essential that he should be asked to plead, or plead to the complaint. *Latimer v. State,* 55 Neb. 609, 76 N. W. 207. It cannot be said that a technical plea of guilty was entered in the instant case in the county court, for the reason that such a course was not contemplated by the statute, and the magistrate had no jurisdiction to consent thereto or enter the same. Therefore, the rule of exclusion, on which the defendant relies in the instant case, would have no application whatever, but any statement or recital of facts made at the time of the preliminary examination would, as a confession or admission against interest, be competent evidence at a subsequent trial of the defendant in a court of competent jurisdiction.

In consideration of the authorities on which defendant relies, it is to be noted that they are concerned only with formal pleas of guilty made and entered with consent of trial courts of competent jurisdiction. They are in no manner concerned with other forms of confession made to com-

mitting magistrates or other persons in authority. A rule of law must be deemed limited to the subject-matter in which it originates. Besides, "The general rule is that a plea of guilty to a criminal offense on arraignment before a committing magistrate is admissible against accused as a confession, on the trial of the indictment for the offense." See note under *State v. Carta,* L. R. A. 1916E, 641. See, also, in support of this statement, the following: *Territory v. Charman,* 18 Haw. 46; *Rector v. Commonwealth,* 80 Ky. 468; *Commonwealth v. Brown,* 150 Mass. 330, 23 N. E. 49; *People v. Gould,* 70 Mich. 240, 38 N. W. 232, 14 Am. St. Rep. 493; *Green v. State,* 40 Fla. 474, 24 So. 537; *State v. Briggs,* 68 Ia. 416, 27 N. W. 358; *State v. Blay,* 77 Vt. 56, 58 Atl. 794; *Rice v. State,* 22 Tex. App. 654, 3 S. W. 791; *Commonwealth v. Ervine,* 8 Dana (Ky.) 30; *People v. Jacobs,* 165 App. Div. 721, 151 N. Y. Supp. 522; *State v. Bringgold,* 40 Wash. 12, 82 Pac. 132.

It follows that in the instant case the so-called plea of guilty to the complaint in the county court was, when properly presented as a confession or declaration against interest, competent evidence and admissible against the defendant on the trial of the information filed against him in the district court; and that no error was committed by the county attorney in referring to the same in his opening remarks to the trial jury.

The evidence contained in the record before us is ample to sustain the verdict rendered, and the sentence imposed, in the light of the record as an entirety, we do not find excessive.

The judgment of the district court is, therefore,

AFFIRMED.

CLARA SINN, APPELLEE, V. GEORGE SINN, APPELLANT.
294 N. W. 381

FILED OCTOBER 18, 1940. No. 30848.

1. **Husband and Wife.** A wife living apart from her husband generally becomes entitled to alimony or separate maintenance when she offers in good faith to return to him and he refuses to accept the offer and receive the wife.
2. ———. The term "alimony" is not used in any technical sense, but rather as an equivalent of an allowance by the husband to a wife for her separate maintenance and support.
3. ———. Without seeking a divorce, a wife, who has not violated any duty growing out of the marriage relation, may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her.

APPEAL from the district court for Thayer county: CLOYDE B. ELLIS, JUDGE. *Affirmed as modified.*

Harvey W. Hess, for appellant.

Jack & Vette and *Baldwin & Pike, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

PAINE, J.

In an action for separate maintenance, the district court found that the wife was entitled to separate maintenance, with payments in the sum of $40 a month to be made her by the defendant.

The amended petition alleged, in brief, that the plaintiff, Clara Sinn, married the defendant at Fairbury, December 29, 1930, and conducted herself as a faithful wife, but that the defendant had used vile, vulgar, profane, and insulting language, and avoided the marital society of the plaintiff, and that defendant had, by these and other acts of cruelty, made plaintiff nervous and sick in body and mind, so that she felt obliged to leave the home of the defendant in March, 1936. Defendant gave notice that he would not pay for the necessities of life which she bought on his credit. Plaintiff had no source of income, and had been for months without support. On August 18, 1936, she sought to return to the

home of the defendant, and requested him to permit her to do so, but he paid no attention to such request. She alleged that he owned 780 acres of land, of the value of $40,000, and notes, mortgages, and other personal property in addition thereto. Her prayer was for separate maintenance at the expense of the defendant, together with attorney's fees and costs.

The answer admitted the marriage; denied allegations of extreme cruelty; alleged that she left his home without provocation on his part, and since said date has voluntarily absented herself therefrom; alleged that he is the owner of but 560 acres of land, worth not to exceed $14,000; denied that the value of his personal property is $30,000, and alleged that its value does not exceed $500.

It was further alleged in the answer that on March 26, 1936, plaintiff had filed a former petition for separate maintenance, and the defendant had filed an answer and cross-petition, asking for an absolute divorce, to which plaintiff had filed a reply and answer. The trial on the issues made by such former pleadings took place on the 22d, 23d and 24th days of June, 1936, and a decree was entered on June 24, 1936, by the resident district judge Robert M. Proudfit, finding that the plaintiff had failed to establish her cause of action, and dismissing her petition, and the court further found that the defendant had failed to establish the allegations of his cross-petition for an absolute divorce, and dismissed the same, and taxed the costs to each party. Pleadings from the former trial are attached as exhibits to the answer.

Trial was had in the case at bar before Cloyde B. Ellis, district judge, and on August 9, 1939, he entered a decree, finding that the plaintiff's offer to return was a sufficient offer under the circumstances, and that the defendant's complete disregard thereof entitled plaintiff to relief, and granted plaintiff maintenance while living separate and apart in the sum of $40 a month, beginning August, 1939, and her attorney's fee of $100 and costs.

The bill of exceptions at the second trial between these

parties disclosed that the plaintiff, Clara Sinn, was 59 years of age, and married the defendant, George Sinn, December 29, 1930, and moved out to his farm home located seven miles southeast of Belvidere, where they lived together for five years and three months. During such time they had continual marital differences, beginning about a year after they were married. The evidence disclosed that he continually used vile and profane language, which was very distressing to the plaintiff; that she could not put up with his cruelty and left his home; that after the first trial between the parties she wrote him a letter, introduced as plaintiff's exhibit No. 1, and reading as follows:

"Belvidere Nebr Aug 18—1936

"Mr. George Sinn, Alexandria Nebr.

"George—Please come to Belvidere and get me and my baggage and take me back home.

"I am ready to return but have no way to get out to the place. And no money to hire some one to take me. After the things you said about me in court. I dont know weather or not you would recive me if I did find a way to get out to the place. So I am writing this letter for you to come after me. We are still married and you will have to support me. Eather away from home or at home. I have no money and no property.

"Sincerally,

"Clara Sinn"

Plaintiff testified that she owned only the home that she lived in, for which she had paid $300, but testified that it is not worth very much at the present time; that since the first trial the defendant has made lewd and vulgar comments about the plaintiff in public places, and six men were called to the witness-stand to bring out the facts of such conversations by the defendant, which distressed and humiliated the plaintiff.

Evidence as to the value of the defendant's real estate indicated that a tract of land of 240 acres owned by the defendant, located south and west of Alexandria, Nebraska,

was worth $7,200 under present conditions; that a tract of 160 acres owned by the defendant in section 17, township 3, range 1, with a good house and barn and other improvements, was worth $45 an acre under present conditions, or $7,200; that the northeast quarter of section 34, township 4, range 1, was worth $6,400; that another piece of land, of three 40-acre tracts, was worth about $3,000; that 80 acres in section 31, township 3, range 1, was worth $40 an acre; making a total of approximately $27,000 worth of unencumbered real estate. The publisher of the Hebron Register testified that the defendant published a notice five times in his paper, reading as follows: "Will not stand responsible for any debts made only by myself. Geo. Sinn."

At the conclusion of the plaintiff's evidence, the defendant rested without introducing any evidence.

We are cited to the provision reading, "A divorce from the bonds of matrimony or from bed and board may be decreed for the cause of extreme cruelty," found in section 42-302, Comp. St. 1929. This section has been found in the laws of Nebraska since the earliest times, for it was first set out in section 7, ch. 16, Laws 1866.

Chief Justice Reese, in his opinion in *Earle v. Earle*, 27 Neb. 277, 43 N. W. 118, had the question squarely before him of whether an action for maintenance and support can be maintained in this state when not coupled with a petition for divorce, either from the bonds of matrimony or from bed and board, and said that it was a well-established rule that it was the duty of the husband to provide his family with support such as would fit his means, position, and station in life, and the wife generally has the right to use the husband's credit for the purchase of necessaries. Cases from many other states were reviewed, and it was held that courts of equity have the jurisdiction to grant the relief prayed for, even though there was no prayer for a divorce.

We are faced with the question whether the wife is living separate from her husband without her fault. It would add little to this opinion to recount all of the specific acts of cruelty which the wife suffered at the hands of her husband.

In our opinion such acts would tend to justify her in leaving him at the time she did. The letter which she wrote him on August 18, 1936, shows a willingness on her part to again take up her duties as wife in his home. Defendant argues that this letter was simply an effort to manufacture evidence on her part, and lacked all signs of affection. With this contention we do not agree. The contents of this letter and the evidence of the plaintiff appear to the court to prove an honest, sincere effort on her part to again take up her duties as wife in his home. It was not necessary for her to take her belongings to the door of his home unless she knew that he would be willing to receive her, and as he paid no attention to her offer, made in good faith, to return, he cannot now be heard to complain that she is living apart from him.

A wife living apart from her husband generally becomes entitled to alimony or separate maintenance when she offers in good faith to return to him and he refuses to accept the offer and receive the wife. The term "alimony" is not used in any technical sense, but rather as the equivalent of an allowance by a husband to a wife for her separate maintenance and support.

"Without seeking a divorce, a wife who has not violated any duty growing out of the marriage relation may maintain a suit in equity against her husband for separate maintenance, where he has violated his legal duty to support her and their children." *Keup v. Keup,* 98 Neb. 321, 152 N. W. 555. See, also, *Forburger v. Forburger,* 122 Neb. 705, 241 N. W. 279.

It is contended that the plaintiff has a little home of her own, worth about $300, and that she is not in need of support. The petition shows clearly that she is the wife of the defendant, and that he owns considerable real estate as well as other property. When these facts are shown, the plaintiff need not go farther and show that she is absolutely destitute and in starving circumstances. *Cochran v. Cochran,* 42 Neb. 612, 60 N. W. 942; *Sutherland v. Sutherland,* 132 Neb. 558, 272 N. W. 549; *McKnight v. McKnight,* 5 Neb. (Unof.) 260, 98 N. W. 62.

In this action the wife alleges sufficient grounds, and furnishes proof in support thereof, which would probably have justified the trial court in granting her a divorce, but we are faced with the situation that she did not ask for an absolute divorce; and we believe the evidence is sufficient to grant a separate maintenance, as prayed. *Pick v. Pick,* 99 Neb. 433, 156 N. W. 769; 27 Am. Jur. 23, sec. 415; *Rhoades v. Rhoades,* 78 Neb. 495, 111 N. W. 122.

After a careful examination of the pleadings and the bill of exceptions, we find that, contrary to the contention of the defendant, plaintiff's suit was well founded; that while she repudiated the marital relationship, and left the home of the defendant, she was not only free from fault, but had ample justification for her act. We find that her *bona fide* offer to return to defendant's home was not made as a cover to base a demand for alimony, but was made in good faith, and free from any improper conditions. 76 A. L. R. 1025, Ann.

In regard to the allowance, while it appears from the evidence that the defendant has real estate of the value of $27,000, yet we are left in some doubt as to the income which it produces. The court is inclined to the view that the $40 a month is too high an allowance, and the decree of the trial court is affirmed, excepting that the payments are reduced to $25 instead of $40 a month, with an allowance of $100 attorney's fees in this court, taxed to the defendant.

AFFIRMED AS MODIFIED.

MARTIN CHADEK V. STATE OF NEBRASKA.

294 N. W. 384

FILED OCTOBER 18, 1940. No. 30907.

1. **Indictment and Information.** "When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient." *McKenzie v. State,* 113 Neb. 576, 204 N. W. 60.
2. **Homicide.** The exact location of a wound need not be alleged in an information. 13 R. C. L. 900, sec. 206.

3. **Courts.** The sufficiency of an information charging an offense under the law of a state is not a federal question.
4. **Constitutional Law.** An information drawn in accordance with the rule laid down in *Nichols v. State*, 109 Neb. 335, 191 N. W. 333, does not violate the due process clause of the state or federal Constitution.
5. **Homicide.** In a prosecution for murder in the second degree, the court, in instructing the jury, is required only to state the law applicable to the facts proved and those which the evidence tends to prove. Where there is no evidence tending to prove a killing on a sudden quarrel, the court is not required to charge the jury with reference to the law applicable to such a nonexisting situation.
6. ———. In a prosecution for murder in the second degree, when the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand or any justification on the other, the law presumes malice. There is an inference that the killing was intentionally done. The crime of murder in the second degree is established, and the evidence requires the submission of the case to the jury.
7. ———. Evidence examined, and *held* sufficient to constitute murder in the second degree.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

O'Sullivan & Southard, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

In a prosecution by the state in the district court for Douglas county, Martin Chadek was convicted of murder in the second degree, and, after motion for a new trial was overruled, sentenced to serve a term of 25 years at hard labor in the state penitentiary. As plaintiff in error he brings to this court for review the record of his conviction.

Plaintiff in error (hereinafter referred to as defendant) attacks the supplemental and amended information in that it does not charge the crime of second degree murder, con-

tending that such information contains no sufficient allegation of intent to commit murder in the second degree, and fails to inform defendant of the nature and cause of the accusation, thus amounting to a deprivation of liberty without due process of law, in violation of section 3, art. I of the Constitution, and in violation of the Fourteenth Amendment to the Constitution of the United States, which provide that no person shall be deprived of liberty without due process of law.

The supplemental information in substance alleges that on June 25, 1939, the defendant unlawfully, maliciously, feloniously and purposely, but without premeditation and deliberation, shot Emma Chadek with a shotgun, and as a result thereof she died on the 25th day of June, 1939. Defendant thus committed murder in the second degree.

Section 28-402, Comp. St. 1929, provides in part: "Whoever shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Plaintiff in error contends that nowhere in the supplemental and amended information is it charged that the defendant shot Emma Chadek with intent to kill, or with intent to murder, citing as authority the case of *Schaffer v. State,* 22 Neb. 557, 35 N. W. 384, dealing with an indictment; that is, that the plain and obvious meaning of the statute required an intent or purpose to kill at the time of the commission of the act, and the indictment containing no allegation of intent or purpose to kill constituted error, the court holding that the intent or purpose to kill is essential to constitute the crime of murder in the second degree, and that this intent must be specifically and directly averred as part of the description of the offense in every indictment.

The information in the instant case is, in all probability, taken from the case of *Bordeau v. State,* 125 Neb. 133, 249 N. W. 291, wherein a short form of an information is set out in substantially the same language. The court concluded that the charge contained the essential elements of murder in the second degree, citing section 28-402, Comp. St. 1929,

although the question of the information was not an issue in the case. The information in the instant case, as well as that in *Bordeau v. State, supra,* is an adaptation of the form of an information for first degree murder, promulgated as a rule of practice and procedure in *Nichols v. State,* 109 Neb. 335, 191 N. W. 333. Defendant takes further exception to the information, contending that neither the form prescribed in *Nichols v. State, supra,* nor in decisions upholding informations conforming to this form, meets the requirements as set forth in the *Nichols* case, wherein the court said that the information should contain facts constituting every element in first degree murder, as defined by the statute. The court further said (p. 342): "Tested by these standards the following brief form (of the information, which was set out) meets all requirements of the law in a prosecution like the present." Thus the court in the *Nichols* case settled the proposition, "with intent to kill," by indorsing the form of the information.

"When an information alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished, it is sufficient." *McKenzie v. State,* 113 Neb. 576, 204 N. W. 60.

With reference to the information being in violation of the state and federal Constitutions, the consensus of authority is that the sufficiency of the indictment, or, in this case, the information, is not a federal question. See *Caldwell v. Texas,* 137 U. S. 692, 11 S. Ct. 224; *In re Robertson,* 156 U. S. 183, 15 S. Ct. 324; *Bergemann v. Backer,* 157 U. S. 655, 15 S. Ct. 727.

While the defendant makes no serious contention that the information was insufficient in that it did not specifically allege the location of the wound, "the trend of modern authority is in favor of dispensing with any allegation whatsoever respecting the location of the wound or bruise." See 13 R. C. L. 900, sec. 206, and cases cited under note 15. We deem it unnecessary to discuss the many decisions of like holding subsequent to *Nichols v. State, supra,* and conclude that any change with reference to the form of the informa-

tion, as stated in *Schaffer v. State, supra,* has been expressly overruled in the *Nichols* case and several subsequent decisions. The criticism of the information is highly technical. The defendant was not misled by it; nor did he misunderstand the charge made against him. The technical rules of the common law are relaxed in this state. *Nichols v. State, supra.* To hold this information insufficient would be to recede from our advanced position, as set forth in the *Nichols* case, and restore the old, cumbersome and involved form of information which served no useful purpose in the administration of justice. This we are not willing to do.

The foregoing analysis disposes of defendant's objections to instructions 5 and 6, given by the trial court on its own motion.

Defendant predicates error on instructions 7 and 8, given by the court on its own motion, with reference to the crime of manslaughter, in that the instructions omitted the language, "either upon a sudden quarrel," as provided in section 28-403, Comp. St. 1929, defining manslaughter. Defendant's contention is founded upon the evidence that he and his wife were engaged in a sudden quarrel at the time of the shooting and not in the commission of an unlawful act. Instruction No. 8 omitted the word "unintentional." Defendant contends that this word was of importance because he testified that he did not intend to shoot his wife. The record shows the defendant contended that he shot and killed his wife because, if he had not done so, she would have killed him or would have inflicted great bodily injury upon him; that he was in fear of his life and was defending himself. There was some evidence upon which the jury might have conceivably found that defendant committed homicide unintentionally while in the commission of an unlawful act. There is evidence that when he came home he and his wife did have some quarrelsome words, and the argument proceeded far enough that they scuffled, and in the process of scuffling she tore his shirt and he her dress, but there is nothing in the evidence which amounts to a sudden quarrel. After the argument, she went to the oppo-

site side of the basement, supposedly to secure a knife. From this time on, the case was one of self-defense. Under the circumstances and evidence in this case, the two instructions given adequately cover the offense of manslaughter. The defendant tendered no instruction on the theory that he might have killed his wife in a sudden quarrel, which would constitute manslaughter. The court is required to state in an instruction only the law under the facts proved or which the evidence tends to prove. This principle of law has been announced by this court so many times that citation of authority is unnecessary.

Defendant contends that the evidence is insufficient to sustain a conviction of murder in the second degree. We are, therefore, required to set forth the pertinent facts shown by the record.

Martin and Emma Chadek were married at Papillion, Nebraska, September 26, 1912, and lived together until the day of the tragedy, which occurred shortly after 5 o'clock p. m., Sunday, June 25, 1939. At the time, Martin was 49 years of age, five feet, seven inches tall, and weighed about 150 pounds. He was employed as a steam fitter at a packing plant. Emma Chadek, the deceased, was 50 years old, approximately five feet, one inch in height, and weighed 105 pounds. By their joint efforts they had accumulated some property during their married life. On the morning of the tragedy Martin and his brother John went to dig out an excavation at a property which Martin had purchased for rental purposes. They had remained all day at the property, and shortly before 5 o'clock left, going to a tavern where they had two pint bottles of beer, after which John went to his home, and Martin returned home.

The physical facts play an important part in this case. The tragedy occurred in the basement of the Chadek home, and the following physical facts are disclosed by the record: The stairway into the basement consists of nine steps, each two feet, eight inches wide, and seven feet in length from the basement wall to the bottom of the steps. The basement proper is 24 feet, 8 inches from east to west, and 27 feet

from north to south. Along the south wall of the basement and to the center thereof is an old-fashioned kitchen cabinet, with drawers containing knives and other kitchen utensils. To the east of the cabinet, along the south wall, are a gas plate, chair and an inclosed toilet; to the west an electric refrigerator and a bench. Three feet from the east wall are a table and four chairs, which are approximately four feet northwest of the kitchen cabinet. This table is two feet south of a cold-air duct that extends southwest from the furnace, the furnace being located approximately in the center of the basement floor. Two feet directly south of the cold-air duct is a storage room which is along the east wall and extends approximately four feet therefrom, leaving a space of two feet between the storage room and the cold-air duct. In the northwest corner is a storage room, with a door facing south. This room extends approximately four feet from the west wall. There is a chest located against the east wall of this room; north of the chest is a Victrola; east of the Victrola is a couch. The south side of the steps is about 15 feet from the south wall of the basement; the north side of the steps nearly 10 feet from the north wall of the basement. The distance from the north lower step to the couch is approximately 12 feet, to the Victrola 14 feet, and to the storage room approximately 16 feet. The map, exhibit No. 1, is drawn to the scale of one inch to two feet. A shotgun wad was found by the east wall, north of the stairway. There is also evidence of an ironing board located in this part of the basement.

Martin Chadek testified, in substance: When he returned home, he entered the back door, which was unlatched, and, for the purpose of changing his clothes, went to the north part of the basement, about six or eight feet from the steps. His wife was in the south part of the basement, and she commenced to scold him for taking off his clothes in the basement instead of in the garage, to which he replied that it was his place and he would take off his overalls in the basement if he wanted to. She went to the kitchen cabinet, opened the drawer, obtained a butcher knife, said she was

going to kill him and proceeded toward him and threatened him, going through the two-foot space between the cold-air duct and the storage room on the west side of the basement. Martin ran around the furnace, passed the steps, but did not go up the steps. He stated that he was afraid his wife would stab him in the back and he could not get away. She continued to pursue him at a distance of three to four feet, he going to the west side of the basement and through the two-foot space between the air-duct and the storage room; thence to the storage room in the northwest corner; he reached into the storage room, picked up a 12-gauge repeating shotgun, then proceeded to the Victrola and, from the third compartment of a box standing thereon, took four shells and loaded one of the shells into the gun. They proceeded until the wife was on the north side near the bottom of the steps. Defendant claimed to be at a distance of two or three feet from her, when she lunged toward him, and he pointed the gun in her direction, shooting from the hip. She fell dead immediately. He then laid the gun beside the couch, went upstairs and called his brother John, who, with his son Leonard, came over to the house.

The coroner's physician found a gun-shot wound which made its entrance into the right upper arm. The wound entrance measured two and one-fourth inches in its longitudinal or vertical direction and an inch and a half in its transverse direction, the gun-shot going completely through the humerus, the upper arm, and then from the chest wall into the chest, and some of the shot was lodged in the heart itself. There were no powder burns. The course of the shot was from right to left. The fact that no powder burns were found on the body would at least indicate that the shot was fired from a distance of more than five feet, possibly from a distance of eight or ten feet. The marks placed on the map as to the location of the body and from where Martin said the shot was fired clearly indicate a distance of possibly eight feet or more. The story told by defendant varied in some degree as to what occurred between himself and his wife; that is, whether the argument arose over the

changing of his clothes, he having at times changed his clothes in the garage, or whether she was displeased because he had purchased other real estate. He told two different stories as to the cause of the argument and the shooting. The deceased was high-strung and evidently possessed a violent temper. She was an immaculate housekeeper, requiring those living in the house to remove their shoes and put on slippers when they arrived home from work. Blood was spattered along the floor of the basement east of the point where the deceased had been standing; that is, along the north side of the stairway, and some blood spots were found on the east wall. The record is replete with evidence of difficulties and disagreements between the defendant and his wife, even to the state of hurling missiles at each other, through the course of their married life. There is evidence of character witnesses for defendant, that he was a peaceful and law-abiding citizen.

From an analysis of the evidence, the jury found defendant guilty of murder in the second degree. It seems, from a careful reading of the record, that this analysis is correct. There is no reason why defendant could not have averted this shooting; he could have escaped by the stairway on at least one occasion and possibly two. He could have struck his wife with the gun. The obtaining by him of the gun and loading it would indicate that, under the circumstances, the wife lost some considerable time, if she had desired to assault defendant and kill him with a knife. The knife was found within a distance of five or six inches from the wife's body. An explanation of its position is difficult. There were no fingerprints on it. Obviously, she had not grasped it with a degree of firmness. The description of the wound and its progress indicate clearly that the wife was shot from the side, and also that her arm was not upraised, and that she was not facing the defendant. Evidently, therefore, she was not pursuing or attempting to assault him. The state's theory, based on the physical facts, is that the defendant did shoot his wife from a point near the couch; that his wife was not attacking him, but was attempting to

escape from the basement by the stairway, and she had in her hand, not a knife but clothing which she had ironed. This is borne out by the exhibits. The witness Benak heard a scream, which he described as "like a fire siren," immediately before the shot. There were no eyewitnesses to the uxoricide. The story told by defendant to Captain McGuire is significant, wherein he stated he fired at a point between the storage room and the couch. At this time, he told the officer, his wife was standing at the stairway (where the body was found), a distance of eight or ten feet from where he fired the shot. This would place the wife with her right side toward the defendant. He then shot her as she reached the steps. The foregoing constitutes the evidence upon which the jury rendered their verdict. Under similar circumstances, the following rule has been adopted in this state:

In a prosecution for murder in the second degree, when the fact of unlawful killing is proved and no evidence tends to show express malice on the one hand or any justification on the other, the law presumes malice. There is an inference that the killing was intentionally done. The crime of murder in the second degree is established, and the evidence requires submission of the case to the jury. See *Preuit v. People,* 5 Neb. 377; *Davis v. State,* 51 Neb. 301, 70 N. W. 984; *Kastner v. State,* 58 Neb. 767, 79 N. W. 713; *Kennison v. State,* 80 Neb. 688, 115 N. W. 289.

For the reasons given herein, the verdict of the jury and the sentence of the court are

AFFIRMED.

STATE, EX REL. C. B. WOOLSEY ET AL., RELATORS, V. J. B. MORGAN, COUNTY CLERK, RESPONDENT.

294 N. W. 436

FILED OCTOBER 19, 1940. No. 31106.

1. **Justices of the Peace.** Under the provisions of section 1, art. V of the Constitution of Nebraska, the legislature has the power to abolish justice of the peace courts only as an incident to the

exercise of the power to substitute "other courts" for the justice of the peace courts.

2. ———. The substituted court must be one which, as minimum requirements, has the jurisdiction, fully and completely performs the functions, and takes the place of the justice of the peace courts for which it is substituted.
3. **Courts.** The municipal court of the city of Lincoln is essentially a court of the city and not of the justice of the peace district comprising Lancaster county.
4. **Justices of the Peace.** Within the meaning of section 1, art. V of the Constitution, the municipal court of the city of Lincoln, limited as it is to a city tribunal in its creation, structure, purpose, and functions, is not such a court as may be substituted for justices of the peace in precincts in Lancaster county, without the city of Lincoln.
5. **Constitutional Law.** The use of constitutional language does not validate an act where the purpose and effect is not within a constitutional power.
6. **Justices of the Peace.** The use in the act of the words from the Constitution, "substituted by law," does not bring the act within the constitutional power when the purpose and effect of the act in question is simply to abolish justice of the peace courts.
7. **Constitutional Law.** The entire act in question is beyond the constitutional power of the legislature and therefore void.

Original proceeding in mandamus by the state, on the relation of C. B. Woolsey *et al.*, against J. B. Morgan, county clerk. *Writ allowed.*

Harry A. Spencer, J. A. Brown, G. E. Price and *William O. Brown,* for relators.

Max G. Towle and *Farley Young,* for respondent.

Bruce Fullerton, J. Jay Marx, J. Victor Eithel, Dwight Dahlman, Joseph Ginsburg, Charles H. Flansburg and *Charles Ledwith, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This case presents the question: Is Legislative Bill No. 350, being chapter 46, Laws of Nebraska 1937, page 191, unconstitutional and void?

The question is presented in an application, original in this court, for a writ of mandamus commanding the respondent to place the names of the relators as candidates for the office of justice of the peace in precincts outside the city of Lincoln on the official ballot. The application alleges that relators have been and now are justices of the peace, and are the duly nominated candidates for the office of justice of the peace in their precincts; that the respondent has the duty of compiling and printing the official ballots for the general election to be held November 5, 1940; that it is his duty to place the names of relators on said ballots, and that he unlawfully refuses to do so.

The respondent for answer sets up the passage by the legislature of L. B. 350, that all offices of justice of the peace in Lancaster county have been abolished, and that there can be no candidates for offices that no longer exist.

Relators by reply allege that for 14 specific reasons L. B. 350 is unconstitutional and void.

A previous act of the legislature attempting to accomplish the same result as L. B. 350 was held unconstitutional and void in *State v. Brown,* 131 Neb. 239, 267 N. W. 466. The decision there rested upon the proposition that the act in question did not give the electors of Lancaster county, residing outside the city of Lincoln, the right to vote for the judge of the court.

"The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law." Const. art. V, sec. 1.

The questions to be determined here are: What is the meaning of the clause, "but other courts may be substituted by law for justices of the peace within such districts?" Has the legislature acted within the power conferred upon it by the Constitution?

This language was placed in the Constitution as a result

of the recommendation of the Constitutional Convention of 1920. An examination of the journal of the convention reveals that it had before it a proposal (No. 143) to give the legislature power to "*alter or abolish* any such courts inferior to the district courts as now exist and confer their powers and jurisdiction upon other courts." This proposal was rejected, and, in lieu thereof, the committee on Judicial Department recommended the adoption of substantially the present provision. 1 Proceedings of Constitutional Convention, 1919-1920, p. 676. Mr. Heasty, chairman of the committee, in making his report addressed the convention in part as follows:

"The committee, in the course of its deliberations, reached the conclusion that the courts of justices of the peace should not be abolished. There were proposals before us, and some members of the committee favored abolishment of the justice of the peace courts and others said they were a 'poor man's' court. We concluded further, that an institution which had existed in this country since the beginning, more than 140 years in constant use, should not be abolished, and we therefore concluded to retain in that section courts of justices of the peace, but we decided that in certain of the larger towns and counties it might be advisable to substitute for the justice of the peace other courts of more extended jurisdiction, and we therefore, by that section, authorized the legislature to provide for courts as substitutes for courts of justice of the peace, and authorized the legislature to give to those courts additional jurisdiction if they saw fit to do so." 1 Proceedings of Constitutional Convention 1919-1920, p. 994.

It therefore appears that the framers of the constitutional provision contemplated that the legislature should not have an unqualified power to abolish the justice of the peace courts, but that, if justice of the peace courts were to be abolished, "other courts" in the justice of the peace "districts" must be put in their place. This is in accord with Webster's definition of "substitute" which is, "to put in the place of another person or thing; to exchange."

The legislature then has the power to abolish justice of the peace courts only as an incident to the exercise of the power to substitute "other courts" for the justice of the peace courts. The substituted court must be one which, as minimum requirements, has the jurisdiction, fully and completely performs the functions, and takes the place of the justice of the peace courts for which it is substituted. If the act does not perform such a substitution, then it must fail because of a lack of constitutional power in the legislature.

Section 5 of L. B. 350 amends section 32-217, Comp. St. 1929, and states that "municipal courts * * * are hereby substituted by law for justices of the peace and police judge within such justice of the peace districts." Obviously, the legislative declaration that the one is being "substituted" for the other is not conclusive. The question is, what is the effect of the legislative act taken as a whole? Has it merely abolished justice of the peace courts in Lancaster county, or has it abolished them only as an incident to the substitution of another court within the district in their stead?

To answer these questions, we must determine first the structure, jurisdiction, functions, and nature of the municipal court which the legislature declares that it is substituting for the justice of the peace courts in Lancaster county. Is it a court that may, within the constitutional authority, be "substituted" for the justice of the peace courts, without the city of Lincoln and *within* Lancaster county?

The municipal court is a court "established and created *in each city*" held "*within such city*." The *city* must provide courtrooms, equipment, and necessary help. Comp. St. 1929, sec. 22-101.

"*In cities*" (of the class of Lincoln) "there shall be elected one judge of the municipal court," and as provided by the act in question, "in all justice of the peace districts wherein municipal courts shall be substituted by law for justices of the peace within such districts, the judges of such municipal court shall be elected by all the electors within such justice of the peace district." Comp. St. Supp. 1937, sec. 22-102.

(This and other like amendments to sections 32-213, 32-216, 32-217, 15-110, 16-105, 32-215, Comp. St. 1929, appear to have been passed in view of the decision of this court in *State v. Brown, supra.*) "No person shall be eligible to the office of judge of the municipal court unless he be * * * *a resident of* the city for at least five (5) years next preceding his election or appointment * * *." Comp. St. 1929, sec. 22-103. The salary of the clerk "shall be fixed by the *city council*" and all salaries shall be paid "out of the general fund of such *cities.*" Comp. St. 1929, sec. 22-106. The "clerk shall be *a resident of the city,*" he shall execute a bond "*in favor of the city,*" he shall pay all fees and costs earned by the court "*into the city treasury;*" all unclaimed witness fees are "*forfeited to the city*" and required to be paid to the *city* treasurer. Comp. St. 1929, sec. 22-108. The *city clerk* or comptroller shall audit the books of the clerk of the municipal court "in the same manner as * * * with *other* city officials." Comp. St. 1929, sec. 22-112. All fees paid by the clerk to the treasurer shall be placed to the credit of the general fund of the city. Comp. St. 1929, sec. 22-113. Its jurors in civil actions must be "citizens of the municipality." Comp. St. 1929, sec. 22-904. (A jury before a justice of the peace is drawn from "citizens of the county." Comp. St. 1929, sec. 21-904.)

Section 22-201, Comp. St. 1929, provided that the jurisdiction of the municipal court of Lincoln is "coextensive with the county." The act under question amends this clause so as to provide that the municipal court shall have jurisdiction "over territory coextensive with the boundaries of the justice of the peace districts in which such courts are located" (which in this instance are the same, for by section 5-106, Comp. St. 1929, justice of the peace district No. 10 "shall consist of the territory within the county of Lancaster"). "*The judges* of the municipal court shall also exercise the ordinary powers and jurisdiction of justices of the peace." Comp. St. 1929, sec. 22-203.

The analysis of the act heretofore given establishes the fact that the municipal court is a city court, its officials are

residents of the city, it is operated and controlled by the city, its expenses are paid by and its revenues inure to the benefit of the city, and it exists primarily for the use and benefit of the city and to serve its governmental functions. It is a court of the city and not of the justice of the peace district comprising Lancaster county. This conclusion is recognized by this court in *State v. Hunter*, 99 Neb. 520, 156 N. W. 975, *State v. Brown, supra,* and *State v. Kubat,* 110 Neb. 362, 193 N. W. 754.

"In this country it is usual to provide in the charter or organic act of a municipal corporation for a local or special tribunal * * * which is invested with jurisdiction over complaints and prosecutions for the violation of the ordinances of the corporation, and often, for public convenience, with special civil and limited criminal jurisdiction under the laws of the state." 2 Dillon, Municipal Corporations (5th ed.) sec. 744.

Although the legislature has extended the territorial jurisdiction of the court beyond the city and to and inclusive of the county, the municipal court here discussed remains essentially a tribunal of the city of Lincoln.

Other changes made in the law by the act should be noted. Section 32-217, Comp. St. 1929, provided for the substitution of municipal courts for "the justice of the peace and police judge *within such cities.* Provided, this act shall not be construed to substitute municipal courts for justices of the peace *outside* said cities in said justice of the peace district." In the act under question "such cities" is stricken out, and "such justice of the peace districts" inserted. The balance of the clauses above quoted is omitted. The above amendment proposes a substantial change from the original act limiting the municipal courts to the cities where created, a change which is not made effective in the structure of the court organization as a city court heretofore quoted.

It is not here presented, but as written in the act in question, section 32-217 provides for the substitution of the municipal court, not only for justices of the peace, but also for the "police judge within such justice of the peace dis-

tricts." The query comes, did the legislature thereby abolish the police courts of the villages of Lancaster county and require those municipalities to look to the municipal court of Lincoln to perform the duties now performed by the police judge of their municipality?

To sections 32-216, 15-110, 16-105, 32-215, Comp. St. 1929, is the added provision that in all justice of the peace districts wherein municipal courts shall have been substituted by law for justices of the peace within such districts, that part of the section relating to justices of the peace shall not apply.

To sections 21-1805 and 21-1807, Comp. St. 1929, is added the provision that, "in justice of the peace districts wherein municipal courts shall have been substituted by law for justices of the peace within such districts, the municipal court shall be deemed the successor in office of all justices of the peace within such districts for all purposes."

From a study of the entire act under question, it appears clear that (1) the proposed substitution of the municipal court for the justice of the peace courts is contained in the amendment to section 32-217 in the language that "municipal courts as heretofore or hereafter established are hereby substituted by law for justices of the peace and police judge;" (2) that the only material change in the municipal court code is the provision that the judge is to be elected by all the electors of the county; (3) that, within the meaning of the constitutional provision quoted, the municipal court of the city of Lincoln, limited as it is to a city tribunal in its creation, structure, purpose and functions, in all respects save territorial jurisdiction and the right of the electors of the county to vote for its judge, is not such a court "within such district" as may be substituted for justices of the peace in precincts in Lancaster county without the city of Lincoln; (4) that, if the act is valid, the justice of the peace courts heretofore existing for the service of the people of Lancaster county are abolished; (5) that no additional court facilities are created for those abolished; (6) that, instead of saying that municipal courts were substituted by law

for justices of the peace, if the legislature had said that in counties such as Lancaster, containing cities with municipal courts, such as Lincoln, justice of the peace courts were abolished, the act would have had the same effect, for the obvious purpose and the result of the act is to abolish justice of the peace courts in Lancaster county. The use of constitutional language does not validate an act where the purpose and effect is not within a constitutional power. We look beyond the language used to the thing desired, and, if valid, accomplished. The use in the act of the words from the Constitution, "substituted by law," does not bring the act within the constitutional power when the purpose and effect of the act is simply to abolish justice of the peace courts. The legislature does not possess that power.

The necessary conclusion is that the entire act, having but the one purpose and the one effect, is beyond the constitutional power of the legislature and therefore void.

Respondent urges that *State v. Kubat, supra,* is definite authority for the substitution of an existing municipal court for justices of the peace, and for his position that the act here in question is a substitution and not an abolishment of the justices of the peace.

There are vital distinctions in the two situations. By the provisions of Laws of Nebraska 1915, ch. 249 (now Comp. St. 1929, sec. 5-106) justice of the peace district No. 15 consisted of the territory within the county of Douglas, *exclusive* of the cities of Omaha and South Omaha, and district No. 16 consisted of the territory within the cities of Omaha and South Omaha. The relator was a justice of the peace within district No. 16 (being the city district). This court there recognized that the legislature had "in view the distinction between the administration of justice in a metropolitan city and in outside districts;" that the legislature, after creating one justice of the peace district within, and one without, the city, substituted for the justice of the peace court *within the city* a *city* court whose territorial jurisdiction was coextensive with the city and with the justice of the peace district, for which it was substituted.

There the territorial jurisdiction of the city, the court, and the justice of the peace district was the same. This court there said: "By substituting the municipal court for the justice of the peace court *in Omaha*, the legislature was merely carrying out the purpose of the constitutional amendments by adopting a scheme of local government *for the city of Omaha*, whereby the ordinances of the city and laws of the state might be enforced through one court, thereby abolishing the offices of justice of the peace and public magistrate within the city * * *."

Here the attempt is to substitute a court created within a city for courts not within, but without, the city. The situations are not the same, and the *Kubat* case is not controlling in the case at bar.

WRIT ALLOWED.

STATE, EX REL. ALDA S. KING, RELATOR, V. VICTOR N. HANSON, COUNTY CLERK, RESPONDENT: JOSEPH E. MARSH, INTERVENER.

294 N. W. 453

FILED OCTOBER 19, 1940. No. 31079.

Elections. Section 32-1203, Comp. St. Supp. 1939, providing that, "If a vacancy shall occur as to any person duly nominated on a non-political county ticket, the same may be filled by petition filed with the county clerk," does not authorize a county clerk to accept only the first petition presented to him in such a situation and to refuse to file any others, but requires him to accept and file all such petitions presented to him in proper form and within the necessary time, and to place the names of all such persons upon the ballot as candidates at the general election.

Original proceeding in mandamus by the state, on the relation of Alda S. King, against Victor N. Hanson, county clerk. *Writ allowed.*

Kingsbury & Kingsbury and *John E. Newton*, for relator.

Malcolm R. Smith, for respondent.

W. V. Steuteville and *George W. Leamer*, for intervener.

S. W. McKinley, Jr., amicus curiæ.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

The question presented is whether the provision in section 32-1203, Comp. St. Supp. 1939, that, "If a vacancy shall occur as to any person duly nominated on a non-political county ticket, the same may be filled by petition filed with the county clerk," authorizes a county clerk to accept only the first petition presented to him in such a situation and to refuse to file any others.

The issue arises in a mandamus action, instituted by our leave, to compel the county clerk of Dakota county to accept relator's petition for filing, and to place his name on the ballot at the general election on November 5, 1940, as a candidate for the office of county judge. At the primary election on April 9, 1940, Sherman W. McKinley, who had been county judge of Dakota county for many years, was the sole candidate and only nominee for that office. On June 9, 1940, he died. On June 17, 1940, John L. Pucelik presented a petition, in proper form, to have his name placed on the ballot at the November election, to fill the ballot vacancy thus created. The county clerk accepted and filed this petition. On June 25, 1940, Joseph E. Marsh presented a similar petition in his own behalf, and on July 5, 1940, one was presented by relator. The county clerk refused to accept these petitions, on the ground that Pucelik's petition had filled the vacancy.

Relator then instituted this action. Marsh was given leave to intervene, and he has asked that a writ of mandamus issue as to his petition of intervention also. In response to an alternative writ, the county clerk, as respondent, has filed a demurrer. He has waived the right to file further pleadings, so that our ruling on the demurrer, by agreement, is to be treated as a final adjudication of relator's and intervener's rights.

It is the contention of relator and intervener that section 32-1203, Comp. St. Supp. 1939, does not limit the number of petitions that may be filed to fill such a ballot vacancy, nor does it prescribe a method of selection and elimination among the candidates, and that respondent therefore had no right to refuse to accept any petitions that might be presented to him, in proper form and within the necessary time, but was required to file all such petitions and to place the names of all these candidates on the ballot at the general election.

The material portions of section 32-1203, Comp. St. Supp. 1939, are as follows: "After said primary election * * * the county clerk * * * shall place the names of all non-political candidates upon the * * * ballot * * *; and said county clerk * * * shall place on said official ballot, on each office division, twice as many names as there are places to be filled at the said general election. Said names shall be the names of the persons who received the highest number of votes for the office for which they were candidates in the primary. If more than one person was candidate for the same position in the primary, the county clerk * * * in preparing the official ballot for the general election, shall place therein the names of the two persons who received the highest number of votes in said primary for the position for which they were candidates; but in no event shall the names on the official ballot in each office division be more than twice the number of offices to be filled at the said general election. When at least two persons shall not file an affidavit to have their names placed on the primary ballot for the nomination for each position to be filled and the name of a person is written in and voted for as a candidate for any of such positions, who did not file as aforesaid as a candidate for such nomination, such person shall not be entitled to a certificate of nomination at such primary election nor have his name placed on the general election ballot unless he shall have received at least the second highest number of votes cast for such nomination and unless such a number of votes received shall be at least ten per cent. of the total vote cast for

Governor in said county at the preceding general election. If a vacancy shall occur as to any person duly nominated on a non-political county ticket, the same may be filled by petition filed with the county clerk for at least ten per cent. of the number of voters who voted for Governor at the preceding general election, if such vacancy be as to a nominee for either County Judge or County Superintendent."

This statute, as will be noted from its language, permits one to become a candidate for the office of county judge, by petition, only "If a vacancy shall occur as to any person duly nominated." It differs in this respect from the statute applicable to non-political offices in districts comprising more than one county (Comp. St. 1929, sec. 32-1204) and from that applicable to members of the legislature (Comp. St. Supp. 1939, sec. 32-1208) both of which provide for petition filings, "If, after a primary election, there shall, through any cause whatsoever, be a vacancy upon the ballot." It differs further from these statutes in that it does not expressly prescribe a method for selection and elimination among the candidates, where more than one petition is presented to fill a ballot vacancy. Section 32-1204, Comp. St. 1929, provides, as to offices on the non-political ballot in districts comprising more than one county, that, "If there shall be more than one candidate for a vacancy it shall be the duty of the Governor of the State, thirty (30) days prior to the general election, to choose from among the candidates the one whose name shall appear on the ballot." Section 32-1208, Comp. St. Supp. 1939, provides, as to members of the legislature, that, "If more file than there are places vacant then the candidates shall be chosen by drawing for place."

These imperfections in section 32-1203, Comp. St. Supp. 1939, are the result of a legislative looseness in dealing with the situation pointed out in *State v. Penrod,* 102 Neb. 734, 169 N. W. 266. In that case, decided in 1918, one of two successful candidates for the nomination for county judge of Gage county had withdrawn his name from the ballot after the primary election, because he had entered the military

service of his country. Two candidates filed petitions to fill the vacancy on the ballot. In an opinion written by Justice Dean, denying a writ of mandamus, it was held that no right existed to fill this vacancy on the ballot by petition, because, as the statute then stood—to use the court's language—"The candidates whose names appear on the nonpartisan ballot at the general election must be restricted to such candidates as have been nominated under that act at the primary." In a concurring opinion, Justice Sedgwick pointed out that, "If the possibility of the contingency that has arisen in this case had been suggested to the attention of the legislature, a provision would have been inserted remedying the apparent defect in the present law."

The legislature at its next session amended the statute, to authorize a filing by petition, "If a vacancy shall occur as to any person duly nominated on a nonpartisan county ticket." Laws 1919, ch. 89. No provision was made, as we have previously indicated, for filling a ballot vacancy by petition, occasioned by the fact that no candidates, or only one, might have filed at the primary election. There is some contrary dictum in *State v. Minor*, 105 Neb. 228, 232, 180 N. W. 84, 85, but the language of the statute is clear in this respect. The statute failed also to provide for the contingency pointed out in Justice Sedgwick's concurring opinion, that, "If, as in this case, more than one candidate is presented by petition to fill this vacancy, there is no method provided, or even indicated, in the statute by which it could be determined which one of these candidates should have a place upon the general ticket."

It is respondent's position that the failure of the legislature to prescribe a method for selection and elimination among petition candidates in such a situation must be held to be an intention that the first petition presented should fill the vacancy. The statute does not say, however, that the county clerk shall have either the power or the duty to refuse to file any petition presented to him. It merely provides that a vacancy "may be filled by petition filed with the county clerk." To hold that this means that such a va-

cancy shall be filled by the first petition filed with the county clerk is to insert language in the statute. It substitutes judicial improvisation for necessary legislative expression, as a method of candidate selection and elimination. As has previously been pointed out, the legislature has, in sections 32-1204, Comp. St. 1929, and 32-1208, Comp. St. Supp. 1939, undertaken to prescribe the methods for selection and elimination among petition candidates as to all non-political offices, except those on a county ticket. Its failure to make some corresponding provision in section 32-1203, Comp. St. Supp. 1939, as to petition candidates to fill a ballot vacancy on a non-political county ticket, is obviously an oversight. The field, however, is one in which the legislature alone may speak, either by specific prescription in the statute, or by express delegation of the right to improvise a method as an administrative regulation; but, in the absence of either form of legislative utterance, "the court is without authority to supply that which the legislature did not see fit to supply." *State v. Minor, supra.*

The legislature might, of course, if it chose, have made such a provision for selection and elimination, as respondent seeks to have read into the statute. The method suggested would hardly be regarded as a satisfactory solution, however, if the field were one that depended upon and was legitimately open to administrative or judicial improvisation. It leaves the race to fill a ballot vacancy to the swift alone, which is hardly a commendable exercise of democratic process. But, more than this, it would leave the situation stalemated, if two or more persons should undertake to present petitions to the county clerk at the same time.

Without further discussion, it seems clear to us that, under the circumstances, as the statute stands, if we were to hold that the first petition presented in this case filled the ballot vacancy, we should be improvising for the legislature. Since there are no words of limitation in the statute itself and no method for selection and elimination is provided, it must necessarily follow that the field is left open to as many candidates to file by petition as desire to do so.

No more confusion is occasioned by this situation than by the usual primary ballot. Nor is any difficulty presented by the provisions of section 32-1203, Comp. St. Supp. 1939, that "Said county clerk * * * shall place on said official ballot, on each office division, twice as many names as there are places to be filled at the said general election," and that "In no event shall the names on the official ballot in each office division be more than twice the number of offices to be filled at the said general election," in view of the further qualifying provision that "Said names shall be the names of the persons who received the highest number of votes for the office for which they were candidates in the primary." This language has application only to nominations made at a primary election. It was contained in the statute before the legislature added the provision for petition filing to fill a ballot vacancy, and was in no way changed by chapter 89, Laws 1919. In the absence of a statutory provision for selection and elimination among petition candidates, it can have no significance except in its original context. It refers only to "persons who received the highest number of votes in said primary."

We accordingly hold that the demurrer of respondent must be overruled, and that relator and intervener are entitled to the issuance of a peremptory writ of mandamus, directing the placing of their names upon the ballot at the general election as candidates for the office of county judge. Following the argument of this cause and a consultation thereon, we directed the issuance of the writ before preparation of a written opinion, in order that the county clerk might be advised of our decision at least thirty days prior to the general election. This opinion is confirmatory of our previous order.

The statutory defect here involved is perhaps one to which the legislature may wish to give attention at its next session.

WRIT ALLOWED.

ARNOLD STRASHEIM V. STATE OF NEBRASKA.
294 N. W. 433

FILED OCTOBER 25, 1940. No. 30972.

Criminal Law. In a criminal case where a felony is charged, under the circumstances recited in the opinion, it is prejudicial error, requiring a reversal of a judgment of guilt, for the trial court, without notice to and in the absence of the defendant, and his counsel, to instruct the jury orally while that body is deliberating upon their verdict.

ERROR to the district court for Lancaster county: FREDERICK E. SHEPHERD, JUDGE. *Reversed.*

Max Kier, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

This case presents the question: In a criminal case where a felony is charged, is it prejudicial error, requiring a reversal of a judgment of guilt, for the trial court, without notice to and in the absence of the defendant and his counsel, to make an oral statement to the jury while that body is deliberating upon their verdict. We conclude that a reversal is required.

Defendant was convicted of the crime of manslaughter. At 8:45 a. m., some thirty-six hours after the cause had been submitted to them, and while they were deliberating, the jury reported in the courtroom. The regular hour for convening of court is 9 a. m. Neither defendant nor his counsel were present, nor were they notified to be present. Apparently, the county attorney was not present. The court addressed the jury orally, and the following discussion was had, the official reporter making the customary stenographic notes. The court asked the foreman if they had arrived at a verdict. Being told that they had not, the court commented upon the length of time that they had been deliberat-

ing, and stated that commonly juries were not discharged until they had deliberated for at least forty-eight, and sometimes fifty-six hours; that he supposed that they had had an "arduous time with it * * * deliberating, no doubt balloting a good deal." He asked the foreman how many ballots had been taken, and being told, replied, "Six ballots only?" The foreman stated, "But we have had an awful lot of discussion." The court asked, "And there is still a considerable difference, is there?" The foreman answered, "Yes; there is." The court then expressed regret that he could not release them, because they "ought to be able to decide this case;" that he could not tell them how; that his function was to wait until they had found "the fact * * * whether the defendant is guilty or not guilty;" that, after that, his function began; that, if further instructions would help, and if proper, he would be glad to give them, "but the case is an extremely simple one—the issue is clearly defined;" that as good a jury as they were "ought to be able to determine it;" that it had to be determined by a jury; that there had been "great expense, great cost of time and labor, great cost to the county already, and if it is possible for you to agree, you certainly ought to agree;" that he would not "constrain any jury," but that he wanted them "to go out and to further take up this case and try to lay aside your differences in any little rough edges that may have arisen," and "to lay those aside and ballot, not talk too long before you go into the balloting stage;" that he had known juries to take fifty ballots in the length of time this jury had been out; that he wanted them to "deliberate further" because they "ought to arrive at a decision;" that if they would "deliberate in the spirit of harmony and with a great desire to arrive at a determination of the facts * * * —the evidence is all pretty straightforward on one side or the other;" that "you don't have anything to do with fixing the punishment. That is reserved to the court under the law. * * * You are to find the fact. * * * That no person, not the highest in the land, can have a word to say to you in directing how you shall find because you are supreme. * * * Our President with

all his disposition to answer questions and direct the way couldn't say 'boo' to you * * * the Supreme Court of the United States, the Supreme Court of Nebraska can't say 'boo' to you. You are in the supreme place * * * in the function in which you perform." The court then asked if he could assist them in any way, if the instructions were plain to all, and said that he judged they were. He asked that any juror speak in regard to anything that the court could do. There was no reply from the jury. They were then (at 8:53 a. m.) told to retire, and "see what you can do for us." The journal entry shows that the same morning at 10:30 the jury returned a verdict of guilty, "recommending leniency."

Defendant, in his motion for a new trial and before this court, assigns this discourse as an error.

The defendant urges that the above statement to and with the jury was an invasion of his undoubted right to be present personally at all steps of the trial; that it constituted a comment to the jury as to the nature of the evidence; that it suggested the manner of their deliberations; that it found fault with the manner of their procedure; that it constituted an instruction to the jury not in writing; that it constituted an oral explanation of the instructions; that it tended to coerce the jury to reach a verdict; that the second reference to the penalty indicated that the court expected the jury to render a verdict of guilty; and that it told the jury their verdict would be immune from criticism.

This discourse on the part of the trial court violated the constitutional and statutory right that inheres fundamentally in the defendant's right to a jury trial, i. e., the right of a defendant when charged with the commission of a felony to be present personally at all times during his trial.

"The right of trial by jury shall remain inviolate." Const. art. I, sec. 6.

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel." Const. art. I, sec. 11.

"No person indicted for a felony shall be tried unless

personally present during the trial." Comp. St. 1929, sec. 29-2001.

Under section 29-2001, "Defendant has a right to be present at all times when any proceeding is taken during the trial, from the impaneling of the jury to the rendition of the verdict, inclusive, unless he has waived such right; and, it being a personal right to the defendant, the waiver thereof, if permitted, must be by him personally, and not by his attorneys." *Scott v. State,* 113 Neb. 657, 204 N. W. 381.

The defendant and his counsel are not obligated to remain constantly in the courtroom throughout the days and nights of the jury's deliberations in order that the accused may protect his rights. The defendant had the right to be present in the courtroom when this action was taken and to have his counsel there in order that he might have the advantage at every stage of the trial of the legal knowledge, training, and skill which his attorney possesses, and which presumptively he himself does not possess. It was the duty of the court not to resume the proceedings of the trial unless the defendant and his counsel were present.

"When the legislature has provided specific rules of court procedure intended for the protection of litigants, the courts should not countenance a flagrant departure therefrom." *Dow v. Legg,* 120 Neb. 271, 231 N. W. 747.

The state takes the position that defendant's counsel learned at 8:55 a. m. that the court had orally addressed the jury, and elected to do nothing about it; that no objection was made prior to the verdict; that corrective instructions were not requested nor a motion for a mistrial made; and contends that, having taken a chance on a favorable verdict, the defendant is now foreclosed from securing a new trial. Citing *Long v. Crystal Refrigerator Co.,* 134 Neb. 44, 277 N. W. 830; *Janesovsky v. Rathman,* 107 Neb. 165, 185 N. W. 411; *Bunting v. Oak Creek Drainage District,* 99 Neb. 843, 157 N. W. 1028; *Ford v. State,* 46 Neb. 390, 64 N. W. 1082.

There is no showing that the defendant knew anything

about what transpired. True, defendant's counsel knew at 8:55 a. m. that the court had addressed the jury that morning, but it is not shown that defendant's counsel knew the details of the discussion. There is no showing that he had an opportunity to question it at that time. Had he examined the court's journal, it would have shown the following entry: "Now on this day comes the jury * * * at nine o'clock a. m., into the jury box, and the court asks the jury if they require further instructions and upon learning they did not, asks them to retire to jury room for further deliberation and make a further effort to agree, and said jury retires." Certainly that entry did not reveal to the defendant what had transpired. It is not required that a defendant cross-examine bystanders, comb the corridors, or rely upon a court reporter's notes for information as to what transpires during his trial. He has the right to be in the courtroom with his counsel during the trial where they may know what happens. Whether or not a defendant may waive the errors here assigned is not presented. It is obvious that they have not been waived and that proper objection has seasonably been made.

The state cites the following provisions of the statute: "No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308. The state argues that it is our duty to examine the "entire cause" and determine whether or not a "substantial miscarriage of justice has actually occurred" and that, "if from an examination of the competent evidence it clearly appears that the defendant is guilty, then the errors should be disregarded."

A sufficient answer to this argument is found in *Scott v. State,* 121 Neb. 232, 236 N. W. 608.

To do as the state suggests would be for this court to

usurp the function of the jury. It is not our task to determine the guilt or innocence of the accused. That is the function of the jury. It is not for us to attempt to determine what the jury's verdict might have been had no error been committed. Our task is to determine whether or not a fair trial has been had and whether or not prejudicial error has been committed. It being manifest that a substantial invasion of defendant's rights has occurred, and that prejudicial error was committed by the trial court, the examination of further assignments of error becomes unnecessary, and the cause is

REVERSED AND REMANDED.

HERBERT W. WEISEL, APPELLANT, V. BERDINE EDITH HOBBS ET AL., APPELLEES.

294 N. W. 448

FILED OCTOBER 25, 1940. No. 30876.

1. **Adjoining Landowners.** The ownership of a tree, the trunk of which stands wholly on the land of one owner, although its roots and branches extend into or over the land of another, is vested in the person on whose land the tree stands.
2. ———. A tree standing directly upon the boundary line between adjoining owners, so that the line passes through it, is the common property of both parties.
3. **Injunction.** An injunction may be issued to restrain the destruction of a tree on a boundary line, where no sufficient reason for the commission of the act appears. The question whether such destruction is reasonable or not is a matter of discretion with the court.
4. **Adjoining Landowners.** When a tree, growing on the boundary line, has been braced and protected against the ravages of time and disease by the joint work of the adjoining lot owners, who have shared the expenses thereof equally, this fact indicates joint ownership thereof.
5. ———. A landowner is entitled to have parts of adjoining building encroaching upon his land removed, where encroachment was due to no fault of his.
6. **Estoppel.** It is a well-settled rule that admissions of a party against interest, made with reference to, and pertinent to, the

issues being tried, are admissible in evidence against such party, and proof thereof will work an estoppel *in pais.*

7. **Adverse Possession.** An occupant's disclaimer of title prior to the running of the statute of limitations precludes his acquisition of title by adverse possession.
8. ———. Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to the adverse party.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed in part and reversed in part.*

T. R. P. Stocker and *Ralph W. Ford,* for appellant.

Roland Max Anderson, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

PAINE, J.

Plaintiff and appellant sought by injunction to restrain defendants and appellees from cutting down a large ornamental shade tree. Defendants by cross-petition asked that plaintiff's garage be moved back to lot line. Trial court found for defendants, and dissolved the temporary restraining order, finding that said tree was entirely upon the real estate of defendants. The court also required plaintiff to remove the garage, which encroached upon the lot of defendants.

The petition alleged that defendants Hobbs are the record owners of lots 37 and 38, block 2, Arlington Heights addition, being on the north side of Franklin street, in the block east of Twenty-seventh street, in Lincoln; that upon the boundary line between lots 38 and 39 there is located a large, valuable, ornamental shade tree, which the defendants threaten to cut down and destroy, and, if this is done, plaintiff will suffer irreparable injury. Plaintiff secured a temporary order of injunction, which restrained the defendants from removing said tree.

The defendants filed a general denial to the allegations of the petition, and added a cross-petition, alleging that

they had been the record owners of said lots 37 and 38, in block 2, Arlington Heights addition, continually since December 1, 1926; that such lots cover an area of 50 feet on Franklin street and 132 feet north and south, and that the plaintiff's garage extends approximately two feet over their east lot line. Defendants allege that, because of an oral agreement, said garage building has been subject to removal from the property of these answering defendants, and they do now request that plaintiff forthwith remove said garage building off lot 38, as the location of the garage constitutes a cloud upon the title of their property.

To this answer and cross-petition, plaintiff filed a reply, which was a general denial, and alleged that the garage building was built by the predecessor of the plaintiff in the chain of title; that plaintiff purchased the premises now occupied by him, and long prior to the time that defendants had any connection whatsoever with the property now claimed to be owned by them; that said garage was built in the open, and with full knowledge and consent, and without objection of the then owner of the adjoining property, who suffered the predecessor of the plaintiff to expend the money necessary for the erection of said garage, making no objections thereto; that said garage was erected upon a permanent concrete foundation, and that plaintiff's predecessor and the plaintiff each asserted claim to said property for more than ten years last past, and have at all times been in actual, open, notorious, continuous, exclusive, undisturbed, hostile, and adverse possession, and claiming ownership and entire title to the real estate located beneath said garage, and have paid all of the taxes assessed against the same, and have exercised all the ordinary, customary, and usual rights of ownership with respect to said real estate. Plaintiff further denies that there was ever any agreement, oral or otherwise, entered into between the parties, by which plaintiff agreed, upon request, to remove or change the location of the garage, and prays that the title to the real estate be quieted in him.

The defendants, for a reply to the answer of plaintiff to

the defendants' cross-petition, allege that, prior to the time defendants purchased lots 37 and 38, and as inducement for them to do so, plaintiff orally stated to defendants that the garage on his lot extended over on lot 38, and that if at any time the owner of lot 38 wanted it moved the plaintiff would do so, and relying on such statement defendants purchased the lot.

The various issues involved in these pleadings were tried to the court without a jury. The evidence was taken, written briefs were filed, and a decree was entered finding for the defendants on their answer and also on the cross-petition. The restraining order was dissolved. The court found that the large shade tree, and all parts thereof which determine ownership, is entirely upon the real estate of the defendants, and their sole and separate property; that the location of the garage on a part of lot 38 was a permissive use thereof by the owners of said lot, and not at any time hostile or adverse to the title of the defendants, and the plaintiff was required to remove said garage at his own expense on or before October 2, 1939, and all costs of the case were taxed to the plaintiff.

Having briefly reviewed the pleadings and the decree of the lower court, we will now consider evidence relating to the points at issue. Plaintiff testified that his house is a small bungalow, with a low roof; that the branches from this tree are the only shade that he has from the west sun, and that the sunshine has been terrific for the last years, and without the tree it would be almost unbearable; that the tree is thrifty and healthy at the present time.

Plaintiff further testified that the first he knew of the defendants' attempt to destroy or cut down the tree was when they telephoned to him that some one was on the garage and had started to cut the limbs down; that he then telephoned to have the man doing the cutting brought into his house so he could talk to him, and he insisted that the work should stop, and the man said he did not see any sense in cutting down the tree anyway, and stopped, and that evening he talked two hours with defendant Hobbs; that

as he left Hobbs' home that night plaintiff asked if Hobbs would not leave the tree alone, and he said he could not do that, and plaintiff asked him to telephone him if he changed his mind about cutting the tree down, and as he did not hear from him there was nothing left to do the next morning but employ an attorney and get an injunction to keep the defendants from cutting down the tree. The defendants deny the correctness of this report of their conference.

The exact location of this shade tree at the date of the trial is the point most sharply in dispute in the evidence. The defendants employed a deputy in the county engineer's office, who made his latest survey about a year and eight months before the trial, to wit, on February 3, 1937, and testified that the face of the tree was .17 west of the east line of lot 38, which would place the trunk entirely upon the land of defendants.

The plaintiff introduced a picture, exhibit No. 22, which was taken about 5:00 p. m. on the same day, and after this survey was made, and which shows that the driveway and the base of the tree were covered with ice and snow, and that the snow had not been cleared away from the bottom of the tree. The deputy who made the survey was asked on cross-examination: "Q. It was all covered with ice and snow, was it not? A. No; not that I recall. Q. Isn't it a fact there were several inches of snow on most of that land when you made that survey? A. I don't recall that. Q. Do your field notes disclose what the condition was? A. No. Q. Do you have any independent recollection what the condition was? A. No; I don't."

The law, according to the latest holdings, is determined by the exact location of the trunk of the tree at the point it emerges from the ground, and this cross-examination leaves some doubt on the important point in issue.

On the other hand, the plaintiff produced as his witness Wardner J. Scott, a registered professional engineer, who has been in business in Lincoln for himself since 1920, and who testified that on Thursday before the trial started on October 17, 1938, he was employed to survey lots 38 and 39,

Arlington Heights addition, especially with regard to the west lot line of lot 39, and show the location of a large cottonwood tree thereon. He testified that he was able to observe the base of the tree where it entered the ground at the edge of the concrete drive along the lot line; that he used a copy of the original plat, using the monuments at Twenty-seventh and Franklin, and also at Twenty-seventh and Sumner. He testified that the west edge of the cement driveway on lot 39 is the west line of the lot, and that the driveway at the point where the tree is located was exactly on the lot line.

To add to the uncertainty of the two surveys, it was brought out that, between the fixed monuments used to survey this line, there is an excess, which must be apportioned relatively between the various lots.

The plaintiff testified that the tree had grown until it had upheaved the block of cement of the driveway. Several years ago, when no dispute had arisen between these parties, they decided it was necessary to fasten the large branches of this tree together, so there would never be any danger of breakage, and they installed separate cables between the branches, and the plaintiff and the defendant not only did the work together, but shared the expense, each paying one-half, for the necessary turnbuckles and cables. Several years after the tree was thus braced in its upper branches, the plaintiff and defendant together made an examination and found that the braces were cutting in on the tree. They thereupon loosened up the turnbuckles and cables and put in boards and pieces of automobile tires underneath to protect the tree. As dirt was accumulating in the crotch, they dug the dirt out and put in asphalt to protect the tree. Plaintiff testified that there was no decay there at the time, but there was a possibility of disease starting there, with which defendant does not agree, and claims it had split. Plaintiff testified that there are two main branches and two minor branches coming over the flat roof of his house, and only one minor branch goes over the defendant's house.

The growth of the law exhibits several changes during the years, for it was held in 1789 that a tree belongs to the person in whose land the roots grow, and Chief Justice Holt said: "If A. plants a tree upon the extremest limits of his land, and the tree growing extend its root into the land of B. next adjoining, A. and B. are tenants in common of this tree." *Waterman v. Soper,* 1 Ld. Raym. 737. But, in a much earlier case, *Masters v. Pollie* (1620) 2 Rolle, 141, 81 Eng. Reprint, 712, it was held (the opinion being in Latin, French and English) that, where a tree grows in A's close, though the roots grow in B's, yet, the body of the tree being in A's soil, the tree belongs to him. 18 A. L. R. 655, Ann. See, also, *Lyman v. Hale,* 11 Conn. 177, 27 Am. Dec. 728.

"The ownership of a tree standing wholly on the land of one owner, although its roots or branches extend into or over the land of another, is vested in the person on whose land the tree stands, and the adjoining owner has no property in it." 2 C. J. S. 33, sec. 37, citing *Wideman v. Faivre,* 100 Kan. 102, 163 Pac. 619; *Cobb v. Western Union Telegraph Co.,* 90 Vt. 342, 98 Atl. 758, Ann. Cas. 1918B, 1156; 1 C. J. 1232, note 23.

In *Griffin v. Bixby,* 12 N. H. 454, it was said: "A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other." See, also, *Phillips v. Brittingham,* 2 Boyce (Del.) 173, 77 Atl. 964; *Dubois v. Beaver,* 25 N. Y. 123, 82 Am. Dec. 326.

"An injunction will be granted to prevent one adjoining owner from injuring or destroying trees that are growing on the boundary line, even though the owner suing for the injunction had previously destroyed a part of the trees." 1 Am. Jur. 540, sec. 59. This statement appears to be founded upon the case of *Musch v. Burkhart,* 83 Ia. 301, 48 N. W. 1025, in which case it was held that, where trees grow on the boundary line between tracts of land, and serve to shelter and protect the building of one of such owners, the

other owner may be enjoined from cutting them down, even though their presence is a damage to his land.

"An injunction may be issued to restrain a threatened removal or destruction of a tree on a boundary line where no sufficient reason for the commission of the act appears; and whether such destruction is reasonable or otherwise is a matter of discretion with the trial court." 2 C. J. S. 36, sec. 40.

In the case at bar, where the trunk of the tree impinges upon the lot line, and when the respective owners have for years jointly cared for the tree, and divided the expenses of protecting it from the ravages of time and the elements, then each has an interest in the tree sufficient to demand that the owner of the other portion shall not destroy the tree. *Lennon v. Terrall,* 260 Mich. 100, 244 N. W. 245; *Robinson v. Clapp,* 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582; 1 Washburn, Real Property (6th ed.) 13, sec. 14.

"Every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another." *Bush v. Mockett,* 95 Neb. 552, 145 N. W. 1001. In this opinion is quoted the following: " 'No one ought to have the legal right to make a malicious use of his property for no benefit to himself, but merely to injure his fellow man. To hold otherwise makes the law an engine of oppression with which to destroy the peace and comfort of a neighbor, as well as to damage his property for no useful purpose, * * *.' *Barger v. Barringer,* 151 N. Car. 433." See, also, 25 L. R. A. n. s. 831.

In our opinion, each of the parties has an interest in this shade tree. The evidence of the defendants is that it is a nuisance, that the leaves clutter up their lawn and require many rakings, and that, because of its propensity to split and fall, it is dangerous, and should be removed. The evidence of the plaintiff, as to the great value of this tree to him in shading his flat roof in the summer, must be weighed, but under the present state of the case the evidence warrants a permanent injunction against its arbitrary destruc-

tion by the defendants, and the trial court is reversed as to this feature of the case.

We will now consider the encroachment of plaintiff's garage for two feet upon the defendants' land.

It was stipulated that Dorothy Maude Weisel received the title to lots 39 and 40 by deed dated May 31, 1924, at which time a house and garage were already there, and that she died June 12, 1933, and that the property descended by will to Dr. Weisel. It is stipulated that the defendants Hobbs received title to lots 37 and 38 by warranty deed dated April 19, 1926.

The testimony of both of the defendants is that in April, 1926, before they had purchased the property, they drove out to look it over, and the plaintiff came over to their car in the street, and urged them to buy the property and build upon it; that, at that time and place, Dr. Weisel, the plaintiff, said in substance: I want to tell you that the garage back there is over this line a few inches, but any time the owner of this property demands, I will move it; it will be some inconvenience, but I will move it. He also said, I have an agreement with the former owner of this property he will pay me for the moving of this garage if the owner of this property demands it be moved.

The plaintiff denies that he made this promise, but the defendants testified positively that he did, and said they bought this property relying on this agreement.

While the plaintiff's wife was the owner of the property at the time of this conversation which the weight of the evidence supports, yet upon her death the property passed by will to the plaintiff, and he is estopped by his promise so made from availing himself of the defense of adverse possession for ten years.

It is a well-settled rule that admissions of a party against interest, made with reference to, and pertinent to, the issues being tried, are admissible in evidence against such party, and proof thereof will work an estoppel *in pais*. *Gentry v. Burge*, 129 Neb. 493, 261 N. W. 854; *Resnick v. Kazakes*, 123 Neb. 654, 243 N. W. 861.

"Disclaimer of Title. An occupant's disclaimer of title prior to the running of limitations precludes his acquisition of title by adverse possession unless he thereafter claims and holds for the statutory period." 2 C. J. S. 575, sec. 57.

The leaving of the garage on defendants' land was but a permissive use of the land. Possession by permission of the owner can never ripen into title by adverse possession until after such change of position has been brought home to adverse party.

From an examination of the evidence and the law, the trial court's order that the garage be moved was correct, and plaintiff is given 60 days from the issuance of the mandate herein to move the garage, as directed in the decree of the district court.

AFFIRMED IN PART AND REVERSED IN PART.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. JAMES W. MCGAN, RESPONDENT.

294 N. W. 430

FILED OCTOBER 25, 1940. No. 30789.

1. **Attorney and Client.** Failure of an attorney to account for, or the misappropriation of, money of his clients collected or received in his professional capacity constitutes a violation of his duty as an attorney to maintain the respect due the courts and the legal profession, and is ground for disbarment.
2. ———. The disbarment of an attorney is not punishment for crime, nor for the purpose of enforcing remedies between the parties, but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts, the legal profession and the public.
3. ———. Ordinarily, a settlement with clients does not preclude an inquiry into the moral and professional quality of an attorney's acts in connection with the complaint.

Original disciplinary proceeding by the state, on the relation of the Nebraska State Bar Association, against James W. McGan. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *Edwin Vail,* for complainant.

James W. McGan, pro se.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a proceeding for the discipline of the respondent, an attorney duly admitted to the bar and licensed to practice law in this state. Preliminary proceedings have been held before the committee on inquiry of the fourth judicial district in accordance with the rules of this court. The matter is now before us on the record and findings of the referee appointed by this court.

The complaint filed sets forth three transactions alleged to constitute professional misconduct and violations of the standards of ethics prescribed for lawyers in the practice of their profession in this state.

The record discloses that about two years prior to December 31, 1938, the respondent, through the recommendation of one L. J. Cowen, was employed by Mary Duckworth Field, Iris Leeper and C. J. Coates, all of Redfield, Iowa, to handle a personal injury action against the James Way Motor Freight Company. A contract of employment was entered into whereby respondent was to receive 45 *per centum* of any amount recovered, whether by suit or settlement. On December 31, 1938, during the pendency of the action, respondent negotiated a settlement and received $1,350 as full payment of his clients' claims. It is not disputed that the sum of $742.50 belonged to and was immediately due respondent's clients. It appears that respondent's clients did not find out about the settlement until Cowen discovered it through other attorneys interested in the case. The clients then commenced their efforts to obtain the amount due them. On February 9, 1939, respondent paid $250 of the amount due. After innumerable letters and calls, the balance was collected and receipted for on May 17, 1939, the day before the committee on inquiry formally heard the complaint. It is apparent that the committee on inquiry had no knowledge of the settlement with the clients until after its decision had been reached.

Respondent contends that he held up the funds in an attempt to collect fees and expenses in other cases in which Cowen was interested. We are unimpressed with this story for many reasons apparent from the record. In the first place, Cowen was not a party to the contract of employment and had no interest in the case. Respondent's clients had informed him that Cowen had no claim against the fund and respondent had confirmed the information by letter on February 9, 1939. There is no evidence in the record that Cowen ever claimed anything due him except respondent's statement to that effect. Even if respondent's clients were indebted to Cowen, there was no obligation on the part of respondent to act other than in accordance with the contract made with his clients. The evidence shows that the $742.50 was placed in respondent's savings account in the bank of which he was a customer. The fact that he could only pay $250 on February 9, 1939, and was compelled to borrow the $492.50 he paid on May 17, 1939, is conclusive evidence that he had applied the money to his personal use. That such conduct violates the standards of legal ethics prescribed for lawyers practicing in this state is beyond question. This court has long been committed to the rule that failure of an attorney to account for, or the misappropriation of, money of his clients collected or received in his professional capacity is in violation of his duty as an attorney to maintain the respect due to the courts and the profession, and is ground for disbarment. *State v. Priest,* 123 Neb. 241, 242 N. W. 433, and *State v. Ireland,* 125 Neb. 570, 251 N. W. 119.

The record further discloses that respondent obtained a settlement on the personal injury claims of one L. L. Fiedler and his minor son, residents of Los Angeles, California, growing out of an accident which occurred at Valley, Nebraska, on or about July 1, 1938. Respondent entered into a contract of employment whereby he was to receive for his services 50 *per centum* of the recovery after deducting all expenses, including medical expense. A settlement of the claims of respondent's clients and others interested there-

in was made by respondent in the amount of $1,724. This amount was delivered to respondent, and all parties were paid the amounts due them except Fiedler and his minor son. The record shows that drafts for the amounts due Fiedler and his son were sent on December 6, 1938, to respondent, who in turn forwarded them to Fiedler for indorsement, with the promise that the net proceeds due Fiedler would be remitted by respondent immediately upon the return of the indorsed drafts. The drafts were subsequently returned to respondent, properly indorsed, but payment was not made. The record is replete with letters demanding payment, most of which were not answered by the respondent. The amount due Fiedler and his son was $211.55. Respondent contends that only $151.46 was due. The larger item of the difference was brought about by the application of a California statute limiting the attorney fee in a case of this character to 33 1/3 *per centum* of the recovery where a minor's rights are involved. The order of the court was communicated to respondent. Many letters over a period of several months were ignored. The clients communicated with respondent's associate in the hope that settlement could be obtained. It appears that respondent settled the dispute with Fiedler in August, 1939, or thereabouts, by paying the sum of $179.98, after the matter was out of the hands of the committee on inquiry. We think the facts in this case reflect a course of conduct on the part of respondent that is not commensurate with the standards of ethics required of one engaged in the practice of the law. While we realize that there was basis for disagreement as to the amount of the fee to which respondent was entitled, yet his failure to diligently attempt to adjust the differences, his refusal to answer the many letters directed to him concerning it, his refusal to appear before the committee on inquiry and disclose the facts as he saw them, and his apparent willingness to make a settlement only after the report of the committee on inquiry had recommended disciplinary action, leads us to the conclusion that his conduct was other than is expected of an ethical lawyer in dealing with his client.

The record further shows that on or about October 23, 1937, respondent was representing one Anna Anderson in a claim against the Metropolitan Utilities District of Omaha, for damages for injuries sustained when Anna Anderson fainted and, in falling, pulled a tub of boiling water over and upon herself. It was contended that she fainted as a result of escaping gas from the mains or pipes of the utilities company. Settlement was made on a basis of $750, with the additional stipulation that the company would pay Anna Anderson $100 to cover the expenses of trips made by her from her home in western Nebraska to Omaha.

Respondent had entered into a contract of employment whereby he was to receive 50 *per centum* of the amount recovered after first deducting hospital and doctor bills. At the time settlement was made, hospital and medical bills in excess of $1,300 were filed. An order was procured from the district court allocating $375 to the payment of hospital and medical bills, and the balance was released to Anna Anderson. It is evident under the terms of the contract of employment that respondent was entitled to $187.50 and that Anna Anderson was entitled to $187.50 plus the $100 expense money paid to her by the Metropolitan Utilities District direct. In making settlement with his client respondent took $275 and gave Anna Anderson $100 in addition to the $100 expense check for which she gave a receipt. Later, she discovered that the settlement was not in accordance with the contract and demanded an additional $87.50, which respondent refused to pay. Complaint was made to the committee on inquiry which, after hearing, suggested that respondent pay Anna Anderson the sum of $87.50. This he refused to do and the matter was then included in the disciplinary proceeding being filed in this court. The record shows that respondent paid the $87.50 to Anna Anderson after a recommendation by the committee on inquiry that a disciplinary action be brought against the respondent.

Respondent contends that the $100 given to Anna Anderson by the Metropolitan Utilities District to cover expenses was a part of the recovery and that he was entitled to share

in it. The evidence will not sustain any such conclusion, but if it did, respondent did not settle with Anna Anderson even on that basis. Assuming that the $100 was a part of the recovery, Anna Anderson should have received $237.50 instead of the $200 paid to her. The claim that the $100 was to be included in the recovery appears to be an afterthought without any basis in fact. We feel that the conduct of respondent in this matter was anything but exemplary and tends to show that respondent does not have the moral fitness required of one engaging in the practice of law in this state.

The record discloses that respondent settled with his clients during the pendency of the disciplinary proceedings. Payment of such claims under the pressure of pending disciplinary action does not have much weight in showing moral fitness to engage in the practice of law. Ordinarily, a settlement with clients does not preclude an inquiry into the moral and professional quality of an attorney's acts in connection with the complaint. It must be borne in mind that the disbarment of an attorney is not punishment for crime, nor for the purpose of enforcing remedies between the parties, but to remove a person shown to be unfit for the discharge of the duties of the office and to protect the courts, the legal profession and the public.

We have not overlooked the fact that the referee appointed by this court has arrived at a conclusion contrary to what we have herein said. A careful and painstaking examination of the evidence, however, convinces us that the first charge discussed in this opinion is amply sustained by the evidence that respondent abused and took advantage of the confidence and trust reposed in him by his clients, collected money belonging to his clients and failed to account therefor, caused said money to be commingled with his own personal funds and used by him for his own personal use. The very least that can be said of the two subsequent charges is that they show an utter disregard of the rights of his clients and of the ethical standards of the profession. Such irresponsible conduct requires this court to exercise its dis-

ciplinary powers for the protection of the public. We are obliged, therefore, under the record, to enter a judgment of disbarment.

JUDGMENT OF DISBARMENT.

IN RE ESTATE OF CALVIN B. EDWARDS.
E. H. LUIKART, RECEIVER, APPELLANT, V. RAY F. QUINN, ADMINISTRATOR, APPELLEE.
294 N. W. 422

FILED OCTOBER 25, 1940. No. 30863.

1. **Statutes.** "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed,* 3 Neb. 17.
2. **Executors and Administrators.** The word "claim" includes every species of liability which an executor or an administrator of an estate can be called upon to pay, or provide for payment of, out of the general fund of the estate.
3. ———. The verb "exhibit," as used in section 30-704, Comp. St. Supp. 1939, interpreted, means to present in legal form as a charge against an estate, to be filed of record.
4. ———. A claim for stockholders' liability is a contingent claim against a stockholder's estate until it is judicially determined.
5. ———. Section 30-704, Comp. St. Supp. 1939, deals with contingent claims against an estate, and with reference thereto must be read in connection with section 30-609, Comp. St. Supp. 1939. When a claim against an estate is capable of being exhibited, it must be presented to the county court within the time limited for creditors to file their claims, and, if not so presented and filed, such claim is barred.
6. ———. The contingent claim of the receiver in the instant case is a claim capable of being exhibited within the time limited for creditors to present their claims, and the failure of the receiver to so file such claim bars it.

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

F. C. Radke and *Leon L. Hines,* for appellant.

Victor Westermark, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

This is an appeal from the district court for Dundy county from a finding in favor of the defendant, appellee, in disallowing an amended claim filed in the estate of Calvin B. Edwards, deceased, by plaintiff, appellant, and sustaining appellee's objections thereto. Plaintiff appealed from such order. The pertinent facts, not in dispute, are as follows:

Calvin B. Edwards, affiliated with the Citizens State Bank of Benkelman during his lifetime, was the owner of 20 shares of the capital stock of said bank, evidenced by four stock certificates, the first dated May 12, 1909, and the last April 15, 1924. On June 11, 1929, the bank was found and adjudged to be insolvent, and plaintiff was appointed receiver. On May 28, 1935, it was judicially determined that the bank was liquidated, and there remained a deficiency of $236,956.51. Calvin B. Edwards died intestate March 31, 1937, still the owner of the 20 shares of stock. August 26, 1937, Ray F. Quinn was appointed administrator of his estate upon the petition of the plaintiff and qualified as such. On the same day the county court of Dundy county made and entered its order, directing notice to creditors of the estate to be given by publication, and fixed a period of five months from August 26, 1937, as the time in which to file claims. The notice was given as ordered. No decree barring claims is shown by the record.

May 13, 1938, the receiver sued the stockholders of the bank in the district court, making the administrator of the estate a party to the action. He was duly served with process and filed an answer therein. On December 16, 1938, judgment was entered by the district court against the administrator in the sum of $2,000, based on the 20 shares of capital

stock. January 4, 1939, plaintiff filed an amended claim in the county court for $2,000, based on the 20 shares of capital stock, stating that the claim had become absolute, having been converted into a judgment on December 16, 1938, as evidenced by a certified copy of the judgment attached. This amended claim also related that a contingent claim had been filed. The record does not disclose that there was a contingent claim filed. The heirs objected to the amended claim for the following reasons: That plaintiff failed to file a contingent claim for stockholders' liability within the time fixed by the court for filing claims; that more than three months have elapsed since January 28, 1938, the time set for filing claims; that said claim was capable of being exhibited within the time allowed, it was not filed, and the court has no jurisdiction thereof; that plaintiff's claim was a contingent claim up to January 27, 1938, capable of being exhibited to the court, and is now forever barred. The county court sustained the objections; the plaintiff appealed to the district court, and a transcript of the entire record of the proceedings in the county court was filed therein, trial had, and the district court affirmed the judgment of the county court.

Plaintiff contends that the district court erred in finding that the receiver's claim was capable of being exhibited within the time limited for creditors to present their claims; that the judgment is, therefore, contrary to the law and the evidence.

The following sections of the probate code are necessary for consideration in determining this case:

Section 30-609, Comp. St. 1929, under article 6, entitled "Allowance and Payment of Claims," provides as follows: "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 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 setting off the same in any action whatever."

We deem the further provisions of this section not pertinent to the issues. In 1933 the above section of the statute was amended (Laws 1933, ch. 49, sec. 1), the amendment eliminating the words, "whether due or to become due, whether absolute or contingent."

Section 30-701, Comp. St. 1929, under "Contingent Claims," provides in substance: If any person shall have any other contingent claim against an estate which cannot be proved as a debt, the same may be presented with proper proof to the county court, which, if satisfied such claim is a legal demand against said estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim when the same shall become absolute.

Section 30-704, Comp. St. 1929, provides: "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present their claims, the person having such claim may present it to the court, and prove the same at any time within one year after it shall accrue or become absolute; and if established in the manner provided in this chapter, the executor or administrator shall be required to pay it, if he shall have sufficient assets for that purpose, and shall be required to pay such part as he shall have assets to pay, and if real or personal estate shall afterwards come to his possession, he shall be required to pay such claim or such part as he may have assets sufficient to pay, not exceeding the proportion of the other creditors, in such time as the court may prescribe." In 1933 section 30-704, *supra,* was amended to read: "If the claim of any person not capable of being exhibited within the time limited for creditors to present their claims, shall become absolute at any time thereafter, the person having such claim may present it to the court, and prove the same at any time within one year after it shall become absolute; * * * ." Laws 1933, ch. 49, sec. 2.

A contingent claim against an estate is one where the liability depends upon some future event which may or may not happen and which, therefore, makes it wholly uncertain whether there will ever be a liability. A claim for stock-

holders' liability is a contingent claim. See *Parker v. Luehrmann,* 126 Neb. 1, 252 N. W. 402.

By section 30-609, Comp. St. 1929, all contingent claims should be filed within the time fixed by the county court for creditors to present their claims. By section 30-704, Comp. St. 1929, a creditor having a contingent claim did not have to present the claim until within one year after it became absolute. Section 30-609, as amended by section 1, ch. 49, Laws 1933, Comp. St. Supp. 1939, sec. 30-609, eliminates the element of a contingent claim from said section of the statute, while section 30-704, Comp. St. Supp. 1939, containing the amendment made in 1933, reads differently: "If the claim of any person not capable of being exhibited within the time limited for creditors," etc. Section 30-704, as amended in 1933, has not been heretofore determined.

Plaintiff contends that a contingent claim, such as the claim involved in this case, does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate (see *Hazlett v. Estate of Blakely,* 70 Neb. 613, 97 N. W. 808) ; therefore, it could not become a claim proper to be allowed by the court until it has passed to judgment in this action (a stockholder's liability suit). Plaintiff cites *Parker v. Luehrmann, supra,* and also relies on *In re Kleinschmidt's Estate,* 167 Wis. 450, 167 N. W. 827, wherein the supreme court of Wisconsin construed a similar section of the statutes. The section of the Wisconsin statute contained the phrase, "*proper to be allowed by the court.*" The contention is that this phrase has the same meaning as the language appearing in section 30-704, Comp. St. Supp. 1939, viz., "not capable of being exhibited," meaning not capable of being maintained in any judicial proceedings, a claim not properly allowed by the court, or one not presented to the court.

With the foregoing contention we are unable to agree for the following reasons: The word "claim" must, by necessity, have a uniform sense throughout the probate statutes and be held to include every species of liability which the

executor or administrator can be called upon to pay, or provide for payment of, out of the general fund of the estate. See annotation, 41 A. L. R. 183.

The verb "exhibit" is defined as: "To submit, as a document, to a court or officer in course of proceedings; also, to present or offer officially or in legal form; to bring, as a charge; to file of record." Webster's New International Dictionary (2d ed.).

Section 7, art. XII of the Constitution determined the individual responsibility and liability of owners of bank stock to the bank's creditors. The Citizens State Bank of Benkelman was adjudged insolvent June 11, 1929. May 28, 1935, it was judicially determined that the bank was liquidated and there remained a deficiency of $236,956.51. The liability was then existent as provided by section 7, art. XII of the Constitution. The receiver brought an action in the district court May 13, 1938, against the stockholders, to obtain a judgment for stockholders' liability. In so doing, he alleged in his petition the ownership of Calvin B. Edwards in 20 shares of stock of the par value of $100 a share; that the assets of the bank had been exhausted; the amount of the deficiency judicially determined, and that, by reason of the constitutional liability imposed upon the stockholders of the bank, there was due from Calvin B. Edwards the sum of $2,000. At all times, from and after the appointment of the administrator, during the period for filing claims against the estate, the contingent claim of the receiver could, without question, have been filed. It was capable of presentation and of being exhibited and was a claim which might have been settled by Calvin B. Edwards during his lifetime, or been settled by the administrator of his estate under proper order of the court. In this type of claims it is not required that one must wait for the routine of court procedure. The amount of the liability was known, and the receiver could have accepted settlement, had an offer of settlement been made. By requiring all claims capable of being exhibited, either general or contingent, to be filed, the court would be advised of the actual or probable in-

debtedness of the estate at the time of making the order allowing claims. Such interpretation of this section of the statute would expedite the handling of estates and enable provision to be made to either pay the claim, or, if the estate were insolvent, to prorate the assets of the estate. This, obviously, was the reason for the amendment.

The case of *In re Estate of Montgomery,* 133 Neb. 153, 274 N. W. 487, which plaintiff claims is decisive of the instant case, was governed by sections 30-701 to 30-704, Comp. St. 1929, as section 30-704 existed before the amendment of 1933, while the question in the instant case is whether or not the receiver's contingent claim was capable of being exhibited within the time limited for creditors to present their claims. As heretofore explained, we deem the receiver's claim one capable of being exhibited within the time limited.

"In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed,* 3 Neb. 17.

Section 30-704, Comp. St. Supp. 1939, deals with contingent claims against an estate, and with reference thereto must be read in connection with section 30-609, Comp. St. Supp. 1939. When a claim against an estate is capable of being exhibited, it must be presented to the county court within the time limited for creditors to file their claims, and, if not so presented and filed, such claim is barred. It is clear that the sections of the statute here involved required the contingent claim of the receiver to be filed within the time limited for creditors to file claims.

AFFIRMED.

LENA AUGUSTA MARTENS, APPELLANT, V. EMIL SACHS ET AL., APPELLEES: VIRGIL L. BROWN, ADMINISTRATOR, APPELLANT.
294 N. W. 426

FILED OCTOBER 25, 1940. No. 30874.

1. Wills: CONSTRUCTION. "Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain." *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11.
2. ———. "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law." *Lehman v. Wagner*, 136 Neb. 131, 285 N. W. 124.
3. ———. The refusal of a devisee to accept the devise on condition of payment of certain amounts to his brother and sisters will not affect the charge of the legacies upon the real estate so devised.
4. ———. Where real estate is devised by will upon condition that devisee pay his brother and sisters specific amounts, such realty is charged with the payment of the legacies.

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

McKenzie & Dugan, Virgil L. Brown and *Fred S. Wolfe*, for appellants.

W. H. Justin and *Murphy & Murphy, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

Plaintiff brought this action in the district court for Douglas county, to have the court adjudge and decree that the bequest, in the sum of $2,500, made in the last will of Edward Sachs, deceased, is, under the terms of the will, a charge upon an 80-acre tract of land owned by the testator in his lifetime. The trial court found that paragraph 2 of the will was not operative and ordered that the assets of the estate, including the real estate, should pass to the four

children, share and share alike, as provided in the residuary clause of the will, paragraph 3, hereinafter set out. From this judgment plaintiff appeals, and Virgil L. Brown, administrator of the estate of Emma Gabernovitz, deceased, appeals in behalf of her estate.

Paragraphs 2 and 3 of the last will and testament of Edward Sachs, made August 10, 1921, read as follows:

"Second, I give, devise and bequeath to my son Emil Sachs the West half of the south east quarter, of Section Thirty-two (32) Township sixteen (16) Range Eleven (11) in Douglas County Nebraska under these conditions that he my son Emil Sachs shall pay to my son Gustave Sachs, the sum of Two thousand five hundred dollars ($2,500.00), He shall pay to my Daughter now Emma Gabernovitz the sum of two thousand five hundred dollars ($2,500.00), He shall pay to my daughter now Lena Martens the sum of Two thousand five hundred dollars ($2,500.00) and with no other charge whatsoever.

"Third, All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to my son Emil Sachs, and my son Gustave Sachs, and to my daughter Emma Gabernovitz, and to my daughter Lena Martens, and to them and their heirs and assigns forever, share and share alike, as tenants in common."

Edward Sachs departed this life January 5, 1936, and on April 16, 1936, his will was admitted to probate. On October 3, 1936, Emil Sachs filed in the probate proceedings a declination to accept the conditional devise, in which he refused to accept the 80 acres of land under the conditions in said will set out. Lena Augusta Martens, a daughter of the testator, brings this action as plaintiff, to enforce the sale of the 80 acres of land to pay the bequest to her of $2,500, which, she alleges, the testator made a lien against said land.

The hour of will-writing is a solemn one. Into his will the testator puts his most serious reflections, and from it we get a correct insight into his character, because it genuinely reveals his heart and his conscience. It is the

testator himself who speaks, although he is gone. "The moving finger writes; and, having writ, moves on; nor all your piety nor wit shall lure it back to cancel half a line, nor all your tears wash out a word of it." Our temporal possessions are but life-holdings, and the manner in which we part with them at the end of the journey reveals not only our fortunes but our spirits in their least disguised forms, our motives, our principles and our affections.

There is evidence of Emil Sachs that a year or so before his father's death his father told him that he, Emil, was to have the land and pay the rest of them, and that, "if I didn't want it that way, it was equally divided;" that his father had made such a statement "dozens of times." This is oral evidence that the testator expressed an intention with reference to the will and intended to change it. It is significant that the will was not changed. Emil did not see the will or know where it was. The apparent reason for his declination is the difference in the value of the real estate at the time the will was made and at the time of his father's death, some 15 years later.

"Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain." *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11.

In the instant case, the language of the will, and especially in paragraph 2, is plain, explicit and unambiguous, and, under the circumstances, the testimony heretofore related is inadmissible. The question as to whether or not Emil Sachs rejected or accepted the 80 acres of land has nothing to do with the construction placed upon the words used in the will and chosen by the testator at the time the will was made. Whatever the meaning of the words was, then that meaning still obtains and is not influenced or changed by refusal to act, or any action taken by Emil Sachs some 15 years after the testator drew his will.

In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be

collected from the whole instrument, if such intent is consistent with the rules of law, and, in this connection, circumstances relating to the last will may be considered. Comp. St. 1929, sec. 76-109; *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644; *In re Estate of Hunter,* 132 Neb. 454, 272 N. W. 318; *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124.

"Without much regard to canons of construction, the court will place itself in the position of the testator, ascertain his intent from the provisions of the will and enforce it, if lawful. *Weller v. Noffsinger,* 57 Neb. 455; *Krause v. Krause,* 113 Neb. 22; *Elliott v. Quinn,* 109 Neb. 5; *Heywood v. Heywood,* 92 Neb. 72." *Lincoln Nat. Bank & Trust Co. v. Grainger, supra*; *Lehman v. Wagner, supra.*

The language of the will in the case at bar indicates clearly that the testator did intend the payment of the legacy of $2,500 to each of the two daughters when he devised the land. What he did was to devise the 80-acre tract of land to Emil Sachs, and in the same paragraph and in the same sentence imposed upon the devise the following condition: "Under these conditions that he my son Emil Sachs shall pay * * * to my Daughter now Emma Gabernovitz the sum of" $2,500, etc. Payment was required under the condition upon which the devise was made. The testator did not require Emil Sachs to pay the $2,500 without giving him something out of which to pay it, to wit, the 80 acres of land.

In *Lehman v. Wagner, supra,* this court held: "The refusal of the devisee to accept the devise will not affect the charge of the legacy or the charge of the payment of a designated sum to the personal representative of the deceased person. In equity, the land is charged, whether or not the devisee accepts the devise." See, also, 69 C. J. 1205; *Mahaney v. Mahaney,* 91 N. J. Eq. 473, 110 Atl. 15.

As was stated in 69 C. J. 1183: "In the absence of anything indicating a contrary intention, land specifically devised will be charged with the payment of legacies where the will expressly directs the devisee to pay the legacies; or

where the land is specifically devised 'subject to,' 'charged with,' or 'on condition that' the devisee pay the legacies." To like effect is *Schrader v. Schrader*, 158 Ia. 85, 139 N. W. 160.

We conclude that the bequest evidenced by paragraph 2 of the will is, under the terms of the will, a charge upon the 80-acre tract of land bequeathed to Emil Sachs.

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

REVERSED.

ROSE, J., dissents.

PAINE, J., dissenting.

I respectfully dissent from the opinion adopted by the majority of the court.

The district court held that, because Emil Sachs declined to accept said 80 acres under the conditions of the will, it would not pass, and Gustave, Emma and Lena would have no lien on said 80 acres for $2,500 each, as set out in the second paragraph of the will, but that said 80 acres would be distributed under the residuary clause to Emil, Gustave, Emma and Lena, share and share alike, free of any liens, for the payment of the three bequests of $2,500 each. In other words, the trial court held that, when real estate is devised to a legatee, coupled with a direction requiring the legatee to pay a designated legacy to another, the latter legacy is not an equitable charge upon the real estate so devised.

The testimony disclosed that the will was made in 1921, when the land was worth $250 an acre; that now the land is only worth $80 to $90 an acre. Evidence was offered as to certain declarations of the testator as to what the real and true meaning of the will was, and three or four different witnesses testified that the testator said he did not want it to go the way the will had it go, and that he said he was only going to give his daughters $10 apiece, but although there is testimony that he said these things, unfortunately he did not change the will to carry out his expressed wishes.

Emil Sachs testified that the testator said that he could reject the 80 acres of land, and then the land could be divided equally between the heirs.

The opinion adopted holds, in effect, that a charge imposed by a testator to pay legacies does not become the personal obligation of the devisee unless he chooses to accept the devise, and if he actually refuses to accept the devise and pay the legacies, the land will descend to the testator's heirs, chargeable in equity, however, with payment of the legacies.

Plaintiff contended that paragraph 2 of the will presented a condition subsequent, and that the title vested, and that these special bequests directed to be paid out of this land by the testator are liens against the land, and that Emil did not have to take the land, but that, whoever takes it, there is a lien placed upon it by the testator.

The majority opinion refers to a somewhat similar case of *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124, but in an examination of that will we find a provision which reads that testator gives to his son Joseph certain described real estate: "The above devise of real estate to my said son, Joseph Wagner, is based upon, subject to and burdened with the express requirement and condition, that he make payment of the sum of Five Thousand Dollars," etc. It is clear in this case, from an examination of the entire will, that the *real estate* itself was intended by the testator to be burdened with the express requirement to pay the bequests, which provisions are entirely lacking in the case at bar, which simply says that "he my son Emil Sachs shall pay."

"The debt of a devisee to the testator is not a charge on lands devised to him by the testator in the absence of language in the will making such debt a charge." 40 Cyc. 1892-c.

In the annotation found in 62 A. L. R. 589, cases from many states are gathered in which such provisions have been construed as conditions precedent, and the headnote reads as follows: "Where a devise directs the devisee to pay a sum of money to a third person * * * and it is to be

gathered from the provisions of the will, taken together, that the expectation of such payment served the purpose of a consideration in the mind of the testator to induce the devise, and but for that expectation it would not have been made, and that the testator never intended that the devisee should receive or retain the property so devised until he made the payment as directed by the will, then the requirement is held to be a condition precedent."

Among the cases cited in support of the rule is *Gotchall v. Gotchall,* 98 Neb. 730, 154 N. W. 243, in which this court held: "Whether a devise is upon a condition precedent or subsequent is not to be determined alone from the use of technical words in a will. The question is one of the intention of the testator. If the language of the whole will shows that it was the intention of the testator that the act upon which the right depends was to be performed before the interest vested, the condition is precedent, and in such case, unless the act is performed as directed and required by the will, no interest in the property passes."

In another Nebraska case, a father bequeathed a tract of land to his son, Henry, Jr., and added: "He is to pay Ten (10) Dollars each year To Mary, Tena, Anna, John, Will, and Frank, Luenenburg, as long as they are alive." Our court held that this provision created no charge against the land bequeathed, under the rule of law that lands specifically devised are not liable for the payment of annuities, unless they are charged thereon by will. *Luenenborg v. Luenenborg,* 128 Neb. 624, 259 N. W. 649.

To summarize, we might ask the question: Is it not the duty of this court to carry out the intention and wishes of the testator? At the date this will was made, the testator gave to his favorite son, Emil, a very valuable 80 acres of land, and instructed Emil to pay $2,500 apiece to three others, leaving Emil with property which then would have a net value far in excess of these payments. Now, by the decision of this court, we take from Emil all of his interest in this 80 acres of land and give it all to the other three, a thing which was farthest from the wishes and intention of

the testator. Emil refused to accept the land when the testator died, for the land had then depreciated in value to an amount less than the three payments required to be made.

It is my opinion that this court should affirm the trial court in the case at bar, and establish the law to be:

1. A paragraph in a will requiring a devisee of land to pay certain sums to a brother and two sisters, held to charge the devisee personally with such payments if he accepts the land, but not to create a charge against the land itself.

2. Whether a devise is upon a condition precedent or subsequent is not to be determined alone from the use of technical words in the will. The question is one of the intention of the testator, and if the language of the whole will shows that it was his intention that the act upon which the right depends was to be performed before the interest vested, it is a condition precedent.

3. A residuary clause in a will carries everything not otherwise disposed of, including any legacies which have lapsed, or are void, or have for any reason failed.

JOHN WIESE V. STATE OF NEBRASKA.

294 N. W. 482

FILED NOVEMBER 8, 1940. No. 30877.

1. **Criminal Law**: PENALTY. Upon conviction of accused for the second offense of chicken stealing under the Nebraska statute, an increase in the penalty therefor may be imposed for a previous conviction for chicken stealing in Iowa. Comp. St. 1929, sec. 28-524.
2. **Indictment and Information.** To authorize an increase in the penalty for the second offense of chicken stealing, conviction for the first offense must be charged in the information.
3. **Criminal Law.** "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." *Burnham v. State*, 127 Neb. 370, 255 N. W. 48.
4. ———. "A motion to quash may be made in all cases, when

there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Comp. St. 1929, sec. 29-1807.

5. ———. "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." Comp. St. 1929, sec. 29-1811.
6. ———. A statutory rule of the criminal law provides that no indictment shall be deemed invalid "for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged." Comp. St. 1929, sec. 29-1501.
7. **Larceny.** Evidence outlined in opinion *held* sufficient to sustain the conviction of defendant for chicken stealing.
8. **Criminal Law.** In a criminal prosecution, defendant cannot be convicted on circumstantial evidence alone, unless the circumstances established exclude every reasonable hypothesis except his guilt, and an instruction in substantial compliance with this rule, though in different language, is not erroneous.

ERROR to the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

Grenville P. North, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

ROSE, J.

In a prosecution by the state of Nebraska in the district court for Cass county, John Wiese, defendant, was prosecuted for violating the statute which provides that, whoever steals any chickens or other poultry of any value "shall for the first offense be imprisoned in the county jail not less than ten days nor more than six months or in the state penitentiary for not more than one year; and for a second or subsequent offense, such person or persons so offending shall be deemed guilty of felony, and, upon conviction thereof, shall be imprisoned in the state penitentiary for not more than five (5) years nor less than one (1) year." Comp. St. 1929, sec. 28-524.

The first count of the information charged that defendant, in Cass county, Nebraska, on or about April 29, 1939, "unlawfully and feloniously did steal, take and carry away about 36 chickens of value, the personal property of John Blotzer, without the consent of the said John Blotzer, the owner thereof, and against his will, and that the said defendant, John Wiese, was arrested and convicted of chicken stealing on or about October 16th, 1935, in the county of Cass, state of Iowa, and committed to the state penitentiary at Fort Madison, Iowa, for five years, and that the charge herein alleged is for the second or subsequent offense of chicken stealing."

In similar form the information contained a second count in which defendant was charged with stealing in Cass county, Nebraska, May 1, 1939, about 37 chickens belonging to Arthur Rough. The former conviction for chicken stealing in Cass county, Iowa, was also charged in the second count in the form alleged in the first count.

Defendant, by general demurrer, challenged the sufficiency of the information to charge him with an offense punishable under the laws of Nebraska. The demurrer was overruled and afterward defendant presented a formal motion to quash the information, which was also overruled. A plea of not guilty followed and upon a trial the jury found defendant guilty on each count for the first offense of chicken stealing in Nebraska. On that verdict defendant was sentenced to serve one year in the penitentiary for each offense, the sentences to run concurrently. As plaintiff in error defendant presents for review the record of his conviction.

In the trial court it was urged by general demurrer that the facts stated in the first and second counts of the information did not constitute an offense punishable under the laws of Nebraska and the overruling of the demurrer is assigned as error. In this connection it is urged further that the Nebraska statute does not authorize punishment for an offense committed in another state. The information charged in direct terms every element of chicken stealing

defined by the Nebraska statute as shown by the language already quoted therefrom. The information was not invalidated by the additional allegation that defendant had been convicted of chicken stealing in Iowa in 1935 and committed to the penitentiary in that state. The sole purpose of that allegation was to increase the penalty for the "second or subsequent offense." Convictions in Nebraska for both offenses are not required by statute as conditions of an increase in penalty. The former conviction must be charged in the information for a second offense, if the penalty therefor is increased. *Osborne v. State,* 115 Neb. 65, 211 N. W. 179. The law has been stated thus:

"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." *Burnham v. State,* 127 Neb. 370, 255 N. W. 48.

It follows that the information charging chicken stealing was sufficient as against the general demurrer.

The information was attacked by motion to quash after the demurrer was overruled. This point seems to be without merit. The criminal law provides:

"A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Comp. St. 1929, sec. 29-1807.

What defendant regarded as defects in the information were such as appeared on the face of the record before he filed his demurrer or procured the ruling thereon. His remedy for such, if any, was available to him in the first instance by motion to quash but defects were waived by his demurrer. The Criminal Code provides:

"The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." Comp. St. 1929, sec. 29-1811.

There is also a statutory rule that no indictment shall be deemed invalid "for any surplusage or repugnant allega-

tion when there is sufficient matter alleged to indicate the crime or person charged." Comp. St. 1929, sec. 29-1501. According to statute and established rules of court, therefore, the overruling of the motion to quash was free from error. The defenses and legal rights of accused were available to him under his plea of not guilty. Moreover, the jury did not find that he had been convicted of a former offense in Iowa. An increase in the penalty for the first offense was not imposed. There was no error prejudicial to defendant in the preliminary proceedings.

The principal question for review arises on the sufficiency of the evidence to prove defendant guilty of chicken stealing beyond a reasonable doubt as charged in the information. No witnesss saw him at or near the scene of either offense at the time and place charged or in possession of the chickens. The state relies on circumstantial evidence to establish the conviction.

The testimony of the owners of the chickens, of the sheriff and his deputy and of other witnesses for the state may be summarized in part as follows: During the morning of April 30, 1939, the chickens owned by John Blotzer were counted as they were let out of the coop and 36 of them, "White Rocks," were missing. The sheriff was notified of the loss, went to the Blotzer place with his deputy the same day and examined the chicken coop and the surroundings. The officers and others observed tracks or shoe prints of two different sizes at the door of the coop. Some of the prints had been made by small shoes and others by large, wide shoes. A rubber heel on a large shoe distinctly showed the brand "U. S." These heel prints were further identified by a ridge around nail holes and by cross bars. They left distinct impressions in dry dust at the chicken coop. The tracks were observed and traced in soft plowed ground and in bare spots in an alfalfa field and across fences to a public highway where impressions of four different kinds of automobile tires on a single car showed in soft earth by the roadside. The heel prints, prints of burlap, tire prints and the condition of the ground on which the

impressions were made were minutely described by witnesses. White feathers were found where the car had stood.

May 2, 1939, chickens owned by Arthur Rough were counted as they came out of the coop on his farm west of Murray, in Cass county, Nebraska, and 37 of them were missing. The sheriff and his deputy came to the premises later the same day and discovered, near the coop, heel prints like those observed and traced on the Blotzer farm. The trail from Rough's coop was followed to a hay meadow and lost where tire prints like those observed at the roadside April 30, 1939, were found.

At night, May 2, 1939, the sheriff and his deputy, while in a car without lights, followed, at some distance, another car about two miles until the lights on it were turned off. It left the highway, went into a wheat field, and stopped beside a strawstack. The officers followed, surprised the two occupants of the first car and found them with sacks in their hands. One of the men ran toward the car and the deputy fired a shot through the car door without hitting him. The other man ran around the stack, refused to halt when ordered to do so and was shot in the leg, falling to the ground. Both suspects were arrested. The wounded man was taken to a hospital in Weeping Water and afterward to a hospital in Omaha. He is the defendant herein. From his foot a large wide shoe with a rubber heel was removed, preserved and introduced in evidence at the trial. This shoe bore on the heel the brand "U. S.," the ridge around the nail holes and the cross bar. Charley Wheeler was owner of the car and the companion of defendant at the time of the arrests. The tires were removed from the wheels, preserved and introduced in evidence. The distinguishing features of the tire treads corresponded to the four tire prints at the ends of the trails leading from the chicken coops. The evidence of the thefts and the chain of circumstances outlined were sufficient to prove the guilt of defendant beyond a reasonable doubt.

Defendant called his sister as a witness to prove he was

in Omaha, where he roomed and boarded, when the chickens were stolen, but her testimony on the defense of alibi is not convincing, when the heel tracks at the chicken coops and his arrest at the strawstack are considered. In his own behalf defendant testified that he went to the haystack to respond to a call of nature and that he did not steal the chickens. The jury, however, were judges of the facts and found otherwise on sufficient evidence.

It was argued by counsel for defendant that the trial court gave erroneous instructions to the jury and refused to give necessary instructions requested. An examination of the entire charge to the jury shows that the substance of requested instructions properly stating the law was inserted in those given by the trial court. An instruction that defendant could not be convicted on circumstantial evidence, unless the circumstances established were such as to exclude every reasonable hypothesis except his guilt, was not given in the usual form, but the rule of law thus stated was distinctly given in different language. Every right of defendant was carefully guarded in the instructions as a whole. Prejudicial error in the proceedings and the judgment below has not been found in the record.

AFFIRMED.

HARRY I. HYLTON, ADMINISTRATOR, APPELLANT, V. EMMA KRUEGER ET AL., APPELLEES.
294 N. W. 485

FILED NOVEMBER 8, 1940. No. 30882.

Annuities. A parol modification of an annuity agreement constituting a charge on real estate, which changes the obligation into one to furnish such farm products and provisions as the annuitant may need and request, is valid, and complete performance or execution of the modified agreement will discharge the real estate lien.

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

Benton Perry, for appellant.

Phil B. Campbell and *Mills & Mills, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This is a suit by the administrator with will annexed of the estate of Eva Krueger, deceased, to foreclose an equitable lien, under a reservation in a deed, for some annuity payments of $300 each, claimed to have accrued in favor of plaintiff's decedent from January 1, 1926, until her death in August, 1935. The trial court, after a hearing on the merits, dismissed plaintiff's action, on the ground that the annuity obligation had been validly modified by parol, and, as modified, had been fully performed and the lien thereby discharged, and that the suit was accordingly without equity. Plaintiff has appealed.

The case has been before us previously in *Hylton v. Krueger,* 134 Neb. 66, 277 N. W. 792, on the sufficiency of the petition as against a demurrer, and reference can easily be made to that opinion for a statement of its allegations.

It appears that in 1904 Fred Krueger, who was the husband of defendant Emma Krueger and the father of the other defendants, entered into an oral agreement with his parents, August and Eva Krueger, to pay them or the survivor, for life, an annuity of $100 and to supply them with farm provisions, in consideration of which they agreed to convey to him a 320-acre farm. Fred Krueger made the annuity payments and furnished the provisions pursuant to the agreement until his death in 1917, but without ever receiving a conveyance of the property. Upon his death, August and Eva Krueger entered into a lease agreement for the land with his widow, Emma Krueger, and executed a conveyance of the title thereto to Fred and Emma Krueger's children. These instruments, which were executed together and were recorded, provided that Emma Krueger should have the right to occupy the land during

her lifetime, but should have no other interest in the property; that she should pay August and Eva Krueger, and the survivor of them until the latter's death, the sum of $300 per year; that, if Emma Krueger died before the annuity obligation had been discharged, her children, to whom the title had been conveyed, should continue the payments until August and Eva Krueger both were dead; and that the annuities to be paid were to constitute a specific reservation from the title conveyed.

According to defendants' contention, a few days after the lease agreement became operative in 1917, and before any breach had occurred, it was agreed orally between August and Eva Krueger and Emma Krueger that the obligation should be modified to require Emma Krueger to pay, instead of an annuity of $300, the sum of $100 annually, and to furnish August and Eva Krueger and the survivor of them with such provisions from the farm as she was able to supply and as they might require. It was contended further that this modified agreement continued in effect and was duly complied with by Emma Krueger until August Krueger's death, and that at that time another oral modification was agreed upon between Eva Krueger and Emma Krueger, by which no more cash payments were to be made, but Emma Krueger was simply to furnish Eva Krueger with such farm provisions as she might request. The contract as thus modified was claimed to have been duly recognized by both Eva Krueger and Emma Krueger and to have been faithfully performed down to the time of Eva Krueger's death.

The evidence leaves us with the clear conviction, as it did the trial judge, that the parol modifications were made, as defendants contended, and that Emma Krueger thereafter performed all the obligations of the modified agreement. Since August and Eva Krueger were deceased, Emma Krueger could not, of course, testify to the conversations or the circumstances by which the modifications were created. There was disinterested testimony, however, to the effect that, at the time the first modification is claimed to

have been made, August and Eva Krueger declared that they wanted Emma Krueger to occupy the land on the same basis as her deceased husband—by making payments of $100 annually and furnishing them with farm provisions. This declaration was repeated on several occasions, and the record sufficiently indicates that the parties proceeded on this basis until August Krueger's death. While any annuity payments that might otherwise have accrued under the original agreement prior to 1926 are not here involved, under plaintiff's petition, the oral modification made in 1917 serves in some degree to explain the situation and the action of the parties in connection with the second modification.

There is testimony on the part of disinterested witnesses that, after August's death, Eva Krueger declared that she did not want any more cash payments, as she did not need the money, and that all that she desired in the future was such farm products and provisions as she might need and request. It sufficiently appears that, until the time Eva Krueger went to live with one of her daughters at Gresham in 1927, Emma Krueger continuously brought all kinds of supplies and provisions to her home in Columbus,—meat, lard, butter, eggs, honey, wood, cobs, chicken feed, etc.,—and that after 1927, Eva Krueger, instead of asking to have provisions delivered to her, used to come to the farm and stay as long as she desired, on occasion from six to eight weeks at a time.

We are satisfied from this evidence, as well as from other circumstances in the record, that Eva Krueger agreed that Emma Krueger's obligation was to be performed and discharged in the manner in which defendants claimed; that Emma Krueger fully performed her obligations under the modified agreement; and that the parties intended that this performance should operate to release the lien reserved in the deed and should not leave Eva Krueger's estate with any claim such as is sought to be enforced here.

But, plaintiff contends that it was incompetent to permit defendants to allege and prove the oral modification upon

which they relied, and the performance thereof, because such modification was without consideration and was within the statute of frauds. Defendants answer this contention with the rules announced in *Bowman v. Wright,* 65 Neb. 661, 91 N. W. 580, where, in an opinion by Commissioner Pound, it was held:

"There is a clear distinction between parol modification of an executory written agreement before breach and before the time for performance has arrived, and an attempt to satisfy a liquidated and accrued indebtedness by payment and acceptance of a less sum.

"While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.

"Where, however, the contract is one required to be in writing by the statute of frauds, there must be consideration for a modification by waiving some of its requirements, or else such new agreement must be executed.

"In such case, if the terms of the new agreement have been fully carried out, the original obligation is discharged, though there was no additional consideration.

"Hence, a parol agreement, reducing for the future the rent stipulated in a written lease, is binding after the amount provided for in the new agreement has been paid and accepted in full during the whole term."

This decision has been the subject of text criticism in its application to a unilateral contract for the payment of a liquidated sum of money, though unmatured, where the parol modification makes no other change in the contract terms except to provide for the payment of a lesser sum than the original obligation. 1 Williston, Contracts (Rev. ed.) sec. 120. It is unnecessary, however, to deal with that criticism here, for the modification upon which defendants rely in this case changed the form and nature of the original obligation, and thus clearly rested upon an adequate consideration. Under the modified agreement, Emma Krueger, instead of being required to pay money, became obligated

to supply farm provisions without pecuniary admeasurement.

Nor is it of importance here whether the modification involved was or was not within the statute of frauds. Its complete performance made the statute in any event inapplicable. *Lucas v. County Recorder of Cass County*, 75 Neb. 351, 106 N. W. 217. Certainly, where, as in this case, there has been both a valuable consideration for the parol modification and complete performance or execution of the ensuing agreement, the statute of frauds can present no difficulty. *Northern Wyoming Land Co. v. Butler*, 252 Fed. 971, 164 C. C. A. 479.

The relationship of the first and second modifications does not call for any discussion in the situation before us. Plaintiff denies the validity and enforceability of both of them. While, as we have already stated, there could be no prejudice to plaintiff in showing the conduct of the parties under the first modification, to indicate the status with which they were recognizedly dealing, it may be treated as having been rescinded and nullified, and as having left Emma Krueger's obligation to supply farm provisions as a direct modification of the annuity obligation.

A further discussion of plaintiff's contentions is unnecessary under the views here taken. We agree that the trial court properly dismissed plaintiff's action.

AFFIRMED.

THURSTON COUNTY, TO USE OF FRANK VESELY ET AL., APPELLANTS, V. JAMES CHMELKA ET AL., APPELLEES.
294 N. W. 857

FILED NOVEMBER 29, 1940. No. 30880.

1. **Officers.** When an officer, charged with the custody of public funds, serves successive terms, the sureties upon the bond for the second term become *prima facie* responsible for such balance of the previous account as is chargeable to their principal, the presumption being that the officer has received in his new official capacity that which it was his duty to pay in his old, and that he

has on hand all the funds with which he is chargeable. The burden of proving the contrary is upon the sureties on the second bond.

2. **Schools and School Districts.** It is the duty of a treasurer to require that payments be made to him in money, or its equivalent evidenced by some medium that is immediately convertible into money. However, the fact that he does not require payments to be so made does not *ipso facto* relieve him or his surety from liability.

3. ———. A transfer of the funds from a treasurer to himself has been made where a treasurer of public funds succeeds himself in office, furnishes the required bond with new sureties, has funds of his office on deposit in a bank, which, although insolvent, continues to do business, receiving deposits and honoring withdrawals, and the treasurer deals with such deposit as funds of his office for the second term, and the bank recognizes his continued authority and control over such funds. If a loss results, the treasurer and his surety for the second term are liable, unless it be shown that the loss was complete during the first term. To avoid this liability, it is necessary to show that the *particular deposit* could not and would not have been paid in money upon demand by the treasurer at the beginning of his second term. It is not sufficient for the surety on the bond for the second term to show that the bank was insolvent at the beginning of the second term and that its liabilities were in excess of its assets.

4. ———. A treasurer is bound to pay over to his successor the money remaining in his hands at the conclusion of his term. The succeeding treasurer is bound to require that he be paid in money.

5. ———. The guaranty of the "faithful discharge" of the duties of a treasurer, contained in a bond, is a guaranty not only of personal honesty, but also of competency, skill, and diligence in the discharge of the treasurer's duties.

6. **Officers.** "When a public officer gives a bond for the faithful discharge of his duties, the word 'faithful' is held to imply that he has assumed that measure of responsibility laid on him by law, had no bond been given; that the object of a bond so conditioned is to get sureties for the performance of the duties of the office according to law, and that everything is unfaithfulness which the law does not excuse." *London & Lancashire Indemnity Co. v. Community Savings & Loan Ass'n*, 102 Ind. App. 665, 4 N. E. (2d) 688.

7. **Schools and School Districts.** Except as relieved by statute, if a treasurer receives money or its equivalent, he and his surety are

accountable therefor as insurers of such funds. If, in lieu of money, he accepts something else, he has failed to discharge faithfully the duties of his office, and he and his surety are responsible for any resulting loss.

8. ———. The obligee of the bond for the second term is not denied a right of recovery for a breach of duty during that term merely because there might have been a different breach of duty by the treasurer during the first term, arising out of the handling of the funds in such a manner that the surety of that term might be liable.

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

Zacek & Nicholson, for appellants.

Ginsburg & Ginsburg, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

SIMMONS, C. J.

A school district treasurer deposited funds of the district in a state bank operated by the Guaranty Fund Commission; the bank honored all withdrawals during the first term, and a balance remained on hand payable to the treasurer at the end of his first term. At that time the bank was probably insolvent, but had sufficient cash reserves to pay the treasurer's deposit had it been demanded. The treasurer succeeded himself in office, furnished the required bond, with different sureties, entered upon the duties of his office for the second term, did not require the payment to himself of the moneys on deposit, treated the deposit as money at the beginning of and during his second term, added deposits thereto, issued checks against the same, and generally exercised dominion and control over the deposit. The bank during the period of the second term was adjudged insolvent and was closed, and money was lost to the treasurer and the district. The question is presented: Are the treasurer and his surety for the second term liable for the loss? The conclusion is that they are liable.

This action was before this court in *Thurston County v.*

Chmelka, 135 Neb. 342, 281 N. W. 628. The issues remain the same. Upon the second trial evidence was presented which materially changes the factual situation. The issues material here are that Chmelka, as treasurer of the school district, succeeded himself in that office in July, 1927, and that on July 16, 1927, he, with the defendant Jasa as one of his sureties, delivered his bond, which was duly approved. The bond was filed July 27, 1927, with the county clerk. The condition of the bond is that Chmelka "shall faithfully discharge the duties of his office * * * and shall well and truly pay over to the person or persons entitled thereto, upon the proper order therefor, all sums of money which shall come into his hands as treasurer of said district, and shall, at the expiration of his term of office, pay over to his successor in office all moneys remaining in his hands as treasurer." Plaintiff alleges that during said term Chmelka "deposited or permitted to remain on deposit in the Liberty State Bank of Thurston, Nebraska," certain of the funds of the district; that on March 10, 1928, the bank was adjudged insolvent; that at that time Chmelka had on deposit in said bank funds of the district in the sum of $1,500; that the said amount could not be withdrawn or obtained; that Chmelka is in default "as to the funds with which he was chargeable," and liable therefor. Defendants admit the official status of Chmelka, the execution and delivery of the bond, and deny generally other allegations. The cause was tried to the court, a jury being waived. At the conclusion of the trial, the court made findings of fact and law and dismissed the action.

Plaintiff contends that the defense offered is one of confession and avoidance and is not available under the general denial. We pass that contention and decide the principle question involved: Are the defendants Chmelka and Jasa, his surety, liable on the bond here in suit for the loss to the district? That the district lost its funds is not denied.

There is little dispute as to the material facts. The dispute arises as to the conclusions to be drawn from the evi-

dence and as to the liability of the defendants. The Liberty State Bank (hereinafter called the bank) was taken over by the Guaranty Fund Commission of the state on September 30, 1925, and thereafter operated by the commission as a "going concern." The expectation was "that the guaranty fund would eventually pay off the depositors." For cases dealing with this general situation, see *Svoboda v. Snyder State Bank,* 117 Neb. 431, 220 N. W. 566, and *Morrill County v. Bliss,* 125 Neb. 97, 249 N. W. 98. The situation did not develop as was hoped. Beginning some time during June or July, 1927, the commission, *as to all banks* under its control, required that withdrawals of deposits be regulated "in accordance with their reserve," and, where necessary, individuals be favored over public bodies in withdrawals. The bank involved here continued to take deposits until August, 1927. Just when it stopped withdrawals generally is not clear. It was adjudged insolvent, and a receiver placed in charge March 10, 1928.

The defendant Chmelka was elected treasurer of the school district in July, 1926. He furnished the required bond and entered upon his duties. He deposited the funds of the district in the bank, and all checks thereon during his first term were honored and paid by the bank without question. During the month of June, 1927, fourteen checks, totaling $429.95, were drawn against the account and paid by the bank. During the months of January to April, 1927, the district borrowed from the bank the sum of $3,200, and on June 7, 1927, the district paid the bank the sum of $3,255.70. At the end of the defendant's first term, $1,588.09 remained on deposit in the bank. The first term ended about the middle of July, 1927 (exact date not shown). The bond in question was entered into and delivered July 16, 1927. By stipulation it is agreed that exhibit "A" is one of the records kept by Chmelka "during his term of office commencing July, 1927." This exhibit shows an entry dated July 16, 1927. It may, therefore, be determined that Chmelka's second term of office began on or before the 16th day of July, 1927. His treasurer's record (exhibit "A")

shows that on July 16, 1927, he received from the bank "balance from last year $1,588.09." Actually on that date he did not receive any transfer of funds, and did not take any specific action as to this deposit. He testified that that amount was "chargeable" to him when he entered upon his second term, as a "balance on hand;" that he "just left it in the bank;" that it was in the bank at the beginning of his second term. The officials of the district did not examine his records because they "knew what he had" and that "the money was in the bank." Also, on July 16, 1927, Chmelka deposited a county warrant for $24 in the bank which was credited to this fund. In August, 1927, Chmelka attempted to make a deposit of $700 in the bank, and the bank refused the deposit. An additional deposit of 11 cents was made October 21, 1927 (which will be explained later).

Also, on July 16, 1927, Chmelka issued a check on the bank for school supplies in the sum of $12.20. This check was paid by the bank. October 13, 1927, Chmelka issued a check against the bank for a debt of the district in the sum of $100. This the bank refused to pay in money, but did issue to the payee a certificate of deposit therefor and charged the same to the account of Chmelka as treasurer, leaving a balance of $1,499.89. So far as the record discloses, this was the first refusal of the bank to pay in money checks drawn against this deposit. However, as defendants state in their brief, "So far as the account of the school district was concerned, the bank honored its check."

October 21, 1927, Chmelka asked the agent in charge of the bank "if there was a possibility of withdrawing this money." Withdrawal was refused because the agent "didn't have any funds to pay with." No previous effort to withdraw the money is shown. Chmelka then at the suggestion of the agent drew a check signed "James Chmelka, Treas." payable to "Time Certificate" for the balance of $1,499.89, which Chmelka had in the account at that time and gave it to the agent together with 11 cents in cash (of his own money), and the agent issued to "James Chmelka Treas. of School Dist. No. 6" an interest-bearing certificate of de-

posit for $1,500. Chmelka testified that these three checks were drawn during his second term, and "They were paid, the last one by the C. D." This certificate was subsequently turned over to Chmelka's successor. Chmelka was asked to examine his records, and to tell "how much money" he had on hand at the end of his second term. He answered $3,811.79, and that that included the $1,500 which was on deposit in the bank. Chmelka as treasurer on April 5, 1928, filed a claim in the receivership action for $1,500 due to "James Chmelka, Treas." on the certificate of deposit. Two dividends in the sum of $195.18 were subsequently paid to the school district thereon. The cash reserve of the bank on July 16 is not shown. As of July 27, 1927, the cash reserve was $5,493.35. At that time the balance in Chmelka's account as treasurer was $1,599.89. The cash reserve of the bank on October 25 (probably the same on October 21) was $652.87.

The defendant Chmelka was an insurer of the funds that came into his hands. When he was reelected to, and assumed the duties of, his office for the second term, he changed his official personality and became another officer. *Thurston County v. Chmelka, supra.*

He was bound by statute (Comp. St. 1929, secs. 79-404 and 79-406) and his bond to "faithfully discharge" the duties of his office and to pay over to his successor the money remaining in his hands as treasurer which had not been otherwise legally disbursed. See *Thurston County v. Chmelka, supra.*

Did Chmelka, as a matter of law, pay to himself as treasurer for the second term the money remaining in his hands as treasurer at the end of the first term? The trial court found that he did not. In this the court erred.

When an officer, charged with the custody of public funds, serves successive terms, the sureties upon the bond for the second term become *prima facie* responsible for such balance of the previous account as is chargeable to their principal, the presumption being that the officer has received in his new official capacity that which it was his duty to

pay in his old, and that he has on hand all the funds with which he is chargeable. The burden of proving the contrary is upon the sureties on the second bond. 46 C. J. 1073-1082; *District Township of Fox v. McCord,* 54 Ia. 346, 6 N. W. 536 (citing *Bruce v. United States,* 17 How. (U. S.) 437; *Kelly v. State,* 25 Ohio St. 567; *Kagay v. Trustees of Schools,* 68 Ill. 75); Murfree, Official Bonds, 144; Throop, Public Officers, 233; *Snuggs v. Stone,* 7 Jones (N. Car.) 382; *Stoner v. Keith County,* 48 Neb. 279, 67 N. W. 311; *Clark v. Douglas,* 58 Neb. 571, 79 N. W. 158; *Paxton v. State,* 59 Neb. 460, 81 N. W. 383; *Board of Education v. Robinson,* 81 Minn. 305, 84 N. W. 105; *State v. Bobleter,* 83 Minn. 479, 86 N. W. 461.

To meet this burden, defendants contend that the bank was insolvent at the beginning of the second term, that it could not and would not have paid this deposit in money, had a demand for it been made, that Chmelka did not pay the amount due to himself as treasurer for the second time, that the money never came into his hands during his second term, that, therefore, the money was lost during the first term, and that the surety for the second term is not liable.

It is the duty of a treasurer to require that payments be made to him in money, or its equivalent evidenced by some medium that is immediately convertible into money. *State v. Hill,* 47 Neb. 456, 66 N. W. 541; *Bush v. Johnson County,* 48 Neb. 1, 66 N. W. 1023; *Paxton v. State, supra.* However, the fact that he does not require payments to be so made does not *ipso facto* relieve him or his surety from liability.

A transfer of the funds from a treasurer to himself has been made where a treasurer of public funds succeeds himself in office, furnishes the required bond with new sureties, has funds of his office on deposit in a bank, which, although insolvent, continues to do business, receiving deposits and honoring withdrawals, and the treasurer deals with such deposit as funds of his office for the second term, and the bank recognizes his continued authority and control over such funds. If a loss results, the treasurer and his surety for the second term are liable, unless it be shown that the

loss was complete during the first term. To avoid this liability, it is necessary to show that the *particular deposit* could not and would not have been paid in money upon demand by the treasurer at the beginning of his second term. It is not sufficient for the surety on the bond for the second term to show that the bank was insolvent at the beginning of the second term and that its liabilities were in excess of its assets. *Village of Hampton v. Gausman,* 136 Neb. 550, 286 N. W. 757; *Oeltjen v. People,* 160 Ill. 409, 43 N. E. 610; *Independent School District v. Hackman,* 178 Minn. 199, 226 N. W. 514; *Board of Education v. Robinson, supra*; *Yawger v. American Surety Co.,* 212 N. Y. 292, 106 N. E. 64; *Board of Commissioners v. Massachusetts Bonding & Ins. Co.,* 175 Ga. 584, 165 S. E. 828. The factual situations in the cases just cited are essentially identical with the case at bar. In lieu of extending this opinion unduly, the reader is referred to them for the facts and reasoning of the courts.

The bank was probably insolvent on July 16 and subsequent thereto. The cash reserves as of July 16 are not shown, but as of July 27 the cash reserves were $5,493.35 and Chmelka's account was $1,599.89.

The amount due Chmelka could have been paid at that time, had demand for payment been made. We are mindful of the fact that the secretary of the Guaranty Fund Commission testified that, because of the position taken by the commission as to all banks of which it had charge, he "would say" that the deposit in question could not have been withdrawn after July 1, 1927. He, however, was testifying from memory, ten years after the event, and without particular knowledge of the conditions of this bank. Likewise, the agent in charge of the bank after July 27, 1927, testified that, because of depleted reserves and the rules of the commission, Chmelka could not have withdrawn the deposit after July 27, 1927 (11 days after the beginning of the term and the delivery of the bond). The testimony of these two guaranty fund officials, in the nature of conclusions made ten years after the event, must be considered in the

light of the facts that demand for payment was not made or payment refused until sometime after the bond in suit was in force, at which time there had been a material depletion in the cash reserves; that a withdrawal against this account was paid during the second term; and that the depletion of the bank's reserves in the period between July 27 and October 25 would indicate that the bank had, during that period, been honoring checks of others drawn against deposits with it.

The decision here need not rest upon the above reasoning alone. A treasurer is bound to pay over to his successor the money remaining in his hands at the conclusion of his term. The succeeding treasurer is bound to require that he be paid in money. In the instant case, Chmelka was bound both by statute and his bond to the "faithful discharge" of his duties. This is a guaranty not only of his personal honesty, but also a guaranty of his competency, skill, and diligence in the discharge of his duties. *Fiala v. Ainsworth,* 63 Neb. 1, 88 N. W. 135. "The rule for the interpretation of bonds seems to be that, when a public officer gives a bond for the faithful discharge of his duties, the word 'faithful' is held to imply that he has assumed that measure of responsibility laid on him by law, had no bond been given; that the object of a bond so conditioned is to get sureties for the performance of the duties of the office according to law, *and that everything is unfaithfulness which the law does not excuse.*" (Italics ours.) *National Surety Co. v. State,* 90 Ind. App. 524, 161 N. E. 832; *London & Lancashire Indemnity Co. v. Community Savings & Loan Ass'n,* 102 Ind. App. 665, 4 N. E. (2d) 688.

Except as relieved by statute, if a treasurer receives money or its equivalent, he and his surety are accountable therefor as insurers of such funds. If, in lieu of money, he accepts something else, he has failed to discharge faithfully the duties of his office and he and his surety are responsible for any resulting loss.

At the beginning of his second term Chmelka was not required to accept anything other than money for the bal-

ance due to him as successor treasurer. He was not required to accept this deposit as money. It was his duty to refuse to accept it if it was not money. He did not require that the balance due be paid in money. He accepted this deposit as money of the district, assumed jurisdiction over it, and acted with it as moneys of the district in his possession and control during his second term.

"The retention of the deposits in the bank, and the adoption of the entries upon his books, made during his second term, were, in law, official acts, performed during * * * and binding upon the sureties for that term." *State v. Bobleter, supra.*

True, this court said in *Village of Hampton v. Gausman, supra,* that "The transfer from his one hand to the other of a check book to a worthless bank account would not constitute a legal accounting." Here, as has been pointed out, the evidence does not support a finding that the account was worthless.

In the *Gausman* case, upon the facts there disclosed, it was held that the bank could not and would not have permitted a withdrawal of the funds at the close of the treasurer's term, and that accordingly the treasurer (the managing officer of the bank) could not have accounted to his successor or to the village for the funds. In the case at bar, a different conclusion is reached. However, that decision did not rest upon that conclusion alone. It rested upon the further proposition that Gausman, as managing officer of the bank, knew of its precarious condition and that it was a breach of duty for him to fail to communicate the facts to the village, and if the funds could have been withdrawn on or before the expiration of his term it was a breach of duty for him to fail to make the withdrawal.

We are mindful of the fact that Chmelka occasionally worked in the bank both before and after July 27, 1927, as assistant on the "book work," from which it is argued that he must have known the condition of the bank beginning with his second term. However, he was not the managing officer of the bank as was Gausman. Neither does it appear

that he considered the deposit unsafe for he made an added deposit of $24 thereto during his second term and attempted to make a substantial deposit of funds therein in August, 1927.

The obligee of the bond for the second term is not denied a right of recovery for a breach of duty during that term merely because there might have been a different breach of duty by the treasurer during the first term, arising out of the handling of the funds in such a manner that the surety of that term might be liable. The findings of facts of the trial court not in accord with this decision are clearly wrong and are set aside. The conclusions of law of the trial court that there was no default on the part of defendant Chmelka, under the bond in suit, and that said bond has not been breached, and that defendants Chmelka and Jasa are not indebted to the school district are erroneous.

It necessarily follows that the defendants Chmelka and his surety, Jasa, are liable to the district for the loss it has incurred.

REVERSED AND REMANDED.

PAINE, J., dissents.

GEORGE L. WOODARD, ADMINISTRATOR, APPELLEE, V. HILDA F. BILLINGSLEY ET AL., APPELLANTS.

294 N. W. 793

FILED NOVEMBER 29, 1940. No. 30888.

Mortgages. "An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck, ante*, p. 203, 292 N. W. 605.

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

A. H. Gutberlet and *Beeler, Crosby & Baskins*, for appellants.

E. H. Evans and *Urban Simon, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ.

SIMMONS, C. J.

This case presents the question: Did the trial court err in confirming a sale under a decree of foreclosure? The foreclosure was started in 1933, decree was entered in 1934, statutory stay was taken, sale was had in April, 1935, the bid was $2,283.09, two moratoriums were granted, the sale of 1935 was set aside, resale had in 1939, and $2,500 bid. This appeal is taken from an order confirming the second sale. As of the date of the last sale, the total due on the decree, including costs and taxes, was $3,657.24. The plaintiff waived a deficiency judgment. Witnesses with varying qualifications testified as to values from $2,560 (by the plaintiff and his witness) to $6,400 (by the defendant). There is no assurance that a subsequent sale would result in a higher bid. Under similar circumstances, this court has on many occasions declined to set aside an order of confirmation.

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck, ante,* p. 203, 292 N. W. 605.

AFFIRMED.

HOWARD CORNELL V. STATE OF NEBRASKA.
294 N. W. 851

FILED NOVEMBER 29, 1940. No. 30851.

1. **Criminal Law.** While it is the better practice for a trial court to give a cautionary instruction on an accomplice's testimony in a criminal case, the failure to do so, where no such instruction is requested, will not ordinarily constitute reversible error.

2. **Witnesses.** "Where a witness, previous to the trial, has made a written statement, duly signed, favorable to the contention of the party calling him, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement to refresh his memory, or to probe his conscience, as well as to show to the court and the jury the reasons which induced him to call such a witness to the stand." *Mason v. Reynolds*, 135 Neb. 773, 284 N. W. 257.
3. **Criminal Law.** A criminal case will not be reversed for the refusal of the trial court to grant a continuance, unless this court is convinced from the record that the defendant was prejudiced thereby.
4. **Receiving Stolen Goods:** SENTENCE. The sentence on a conviction for receiving stolen goods of the value of $41.75 is, under the facts in the record in this case, reduced from four years to two years confinement in the state penitentiary.

ERROR to the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed: sentence reduced.*

Spillman & Ptak, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

Plaintiff in error, referred to herein as the defendant, was convicted of receiving stolen property, and was sentenced to the state penitentiary for a term of four years. The information charged that he had received and purchased "1 Firestone 700-17 tire, with tube, and one 1939 Ford V-8 truck wheel attached," of the value of $41.75, the property of a third party, knowing it to have been stolen, and with intent to defraud the owner.

Defendant operated a new and second-hand goods store in the city of Norfolk. The state's evidence showed that on January 21, 1939, about 6:30 p. m., a 22-year-old youth named Fischer and a 17-year-old lad named Luikens drove out to a sales barn near the edge of the city and removed a spare tire and wheel from the side of a parked truck. They

then drove to defendant's store and attempted to sell the property to him. He stated that he would be willing to buy it, if they would return later in the evening. They then hid the property in a culvert outside the city until about 8:30 p. m., when they brought it to defendant's back door. After parking their car, they came back to the store, and defendant paid them $5 for the articles. In response to an inquiry by defendant, they told him that they had stolen the property from a Ford truck.

There was evidence also that, both before and after the transaction involved, defendant had purchased other articles from Fischer and Luikens, which they told him had been stolen, including two wheels and tires, two yellow fog lamps and two pairs of ice shoe skates. Fischer further declared that defendant had suggested that he could use eight or ten tires for Model A Fords, and Luikens testified that defendant had offered to purchase any property they might steal, but that he preferred tires for Model A Fords. The wheel here involved was taken to defendant's basement, where the tire was taken off, the serial number buffed out, and the wheel repainted. The paint was still wet when the wheel came into the possession of the police.

We shall not attempt to detail the evidence further, nor to set out the testimony which was offered in defendant's behalf. It is sufficient to say that a careful reading of the record shows that it abundantly supports the conviction.

Defendant complains of the failure of the trial court to give a cautionary instruction as to Fischer's and Luiken's testimony, citing *Millslagle v. State*, 137 Neb. 664, 290 N. W. 725, where we held: "In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a ma-

terial matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused."

If a thief can be considered the accomplice, within this rule, of one who afterwards knowingly receives the stolen property, defendant is confronted with the situation that he made no request for such an instruction. In *Goemann v. State,* 94 Neb. 582, 143 N. W. 800, it was held: "The failure to caution the jury as to the evidence of an accomplice in a misdemeanor case, in the absence of a special request so to do, is not reversible error." While the offense involved in that case was a misdemeanor, we see no sound distinction between a misdemeanor and a felony in the application of the principle. We have said, in *Ruzicka v. State,* 137 Neb. 473, 289 N. W. 852, quoting from *Holmgren v. United States,* 217 U. S. 509, 30 S. Ct. 588, 54 L. Ed. 861, that "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them." But this does not mean, as *Goemann v. State, supra,* indicates, that the defendant is entitled to a reversal, where he has failed to request such an instruction. We quote further from the opinion in that case: "We do not find that any instruction of this nature was requested by the defendant, and the evidence in the case is not of such a character as to create a necessity for such an instruction, so as to require a reversal on account of its omission, in the absence of any request for further instruction."

Defendant's next contention is that it was prejudicial error to admit in evidence a previous statement of the witness Stanley Allison, when he surprised the state by testifying that he had no knowledge of the transaction between defendant and Fischer and Luikens and was not present when it occurred. In a written statement taken by the chief of police before the trial, he had declared that he was in the store at the time the deal was made; that defendant had

instructed him to take the wheel to the basement of the store, remove the tire and paint the wheel; that he and another party did so and also buffed off the number from the tire with a soldering iron. The rule is well settled, both in civil and in criminal cases, that "Where a witness, previous to the trial, has made a written statement, duly signed, favorable to the contention of the party calling him, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement to refresh his memory, or to probe his conscience, as well as to show to the court and the jury the reasons which induced him to call such a witness to the stand." *Mason v. Reynolds,* 135 Neb. 773, 284 N. W. 257. See, also, *Crago v. State,* 28 Wyo. 215, 202 Pac. 1099. The previous written statement of Allison was therefore both competent and material.

The next assignment of error argued is that the trial court abused its discretion in refusing to grant defendant a continuance. The record indicates that, on a trial of the case at a previous term of court, the jury had disagreed. This was in April, 1939. The court at that time set the matter as the first case to be tried at the jury term commencing October 2, 1939. On September 25, 1939, the court formally assigned the case for trial on October 2, and the clerk sent a notice thereof through the mail to defendant's attorney. Defendant's affidavit in support of his application for a continuance shows that at that time he was represented by other counsel, who called him in the afternoon of September 29, 1939, by telephone, and advised him that the case would be for trial on October 2; that this was the first knowledge he had of this fact; that his attorney demanded a fee for the retrial which he was unable to pay; that he then spent the rest of the afternoon and the next day, which was Saturday, trying to employ another lawyer and finally succeeded in getting his present counsel; that the remaining time before trial was insufficient to permit his attorney to familiarize himself with the case, to obtain a transcript of the testimony on the former trial, or to inter-

view the witnesses. The trial court denied the application for a continuance and required defendant to proceed with the trial at one o'clock p. m., on October 2.

The trial lasted two days. The testimony of the witnesses was comparatively simple, and no particularly difficult questions of law were involved. The manner in which the examination and cross-examination of witnesses were handled by defendant's counsel shows that there could not have been any prejudice to his rights from the refusal to grant a continuance. "An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record." *Kerr v. State,* 63 Neb. 115, 88 N. W. 240.

We have already indicated that the evidence was sufficient to require the submission of the case to the jury and to support a conviction. Further discussion of defendant's contentions on the various phases of the evidence is therefore unnecessary. We may add the comment in passing, however, that the general identification of the stolen property as that which was sold to defendant was in our opinion sufficient to permit its introduction in evidence in the state's case in chief, but that we certainly would not in any event reverse a conviction on such a ground, after the defendant, as here, has himself gone on the stand and admitted that the exhibits offered were those which he had purchased from the thieves.

Defendant complains that the sentence of four years is excessive. We are of the opinion that, on the facts in the record, the sentence should be reduced to two years, and, as thus modified, the judgment of the trial court should be affirmed.

AFFIRMED: SENTENCE REDUCED.

WILLIAM H. MACUMBER, ADMINISTRATOR, ET AL., APPELLEES, V. JEROME C. GILLETT ET AL., APPELLANTS.
294 N. W. 854

FILED NOVEMBER 29, 1940. No. 30889.

1. **Appeal.** A judgment will not be reversed on appeal for the failure of the trial court to require plaintiff to state and number his causes of action separately or for a misjoinder of causes of action, where the case is of such a nature and the proceedings had on the trial are such as to indicate that no substantial right of the defendant was prejudicially affected.
2. **Limitation of Actions.** "The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100, 80 N. W. 276.
3. **Taxation.** "It is not essential to the commencement of a suit to set aside a tax deed and redeem property from tax sale that all taxes due on the property be first paid. It will be sufficient if all taxes are paid at or before the trial and entry of the decree." *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 147 N. W. 697.
4. **Appeal.** "Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions." *Nelson & Cook v. Johnson*, 44 Neb. 7, 62 N. W. 244.
5. **Landlord and Tenant.** The relation between a landlord and tenant, while the tenancy exists, does not permit the latter to obtain an independent title to the land through a tax sale.
6. **Taxation.** While the amounts paid on a tax sale cannot ordinarily be made the subject of set-off in an action to redeem, they may properly be so applied by a court of equity upon rents due from a tenant, where the latter has purchased the property without a surrender or a repudiation, and the landlord brings an action for redemption and for an accounting of the rents due during the tenant's continued occupancy.
7. **Appeal.** A judgment will not ordinarily be reversed on appeal for surprise at the trial, where no request is made for a continuance at the time and there is no showing of inability to meet the situation.

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

Charles A. Fisher and *Porter & Porter*, for appellants.

Greydon L. Nichols, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

JOHNSEN, J.

This was an action against plaintiff's tenants and some third parties, to have it decreed (1) that a tax deed, based upon some tax sale certificates, was void for irregularity in the proceedings; (2) that, if any interest or title had passed under the deed, it was being held in the name of a third party defendant for the benefit of plaintiff's tenants, who could not lawfully acquire the property through tax sale proceedings as against their landlord, and who were therefore merely trustees for plaintiff; (3) that plaintiff's title should be quieted to the real estate as against all the defendants; and (4) that an accounting should be taken of the rents due plaintiff from his tenants for occupation of the property. From a decree for plaintiff, canceling the tax deed, quieting his title, and rendering judgment against the tenants for $3,557.28 rent, after crediting the amount of taxes paid in connection with the tax title, the tenants and defendant Emma Dickerson, who was the mother-in-law of one of the tenants and who purported to hold title by conveyance from the grantee in the tax deed, have appealed. Plaintiff has since died, and the action, by stipulation, has been revived in the names of the administrator of the estate and plaintiff's heirs at law. For convenience, we shall refer to the plaintiff as if his death had not occurred.

Plaintiff had made a written lease with defendants Jerome C. Gillett and Rowland H. Gillett covering the property involved, for a five-year term, from March 1, 1926, to March 1, 1931, with a purchase option which could be exercised on or before January 1, 1931. The Gilletts never exercised the purchase option, but, on the expiration of the written lease, they continued to occupy the property, without a surrender. Plaintiff failed to pay the 1928 taxes, and, on November 4, 1929, defendant John O'Keefe purchased tax sale certificates thereon. O'Keefe thereafter purported

to assign his rights under the tax sale certificates to defendant William H. Pittam by indorsement thereof in blank, and on February 10, 1932, the county treasurer executed a tax deed in favor of Pittam. On February 25, 1932, Pittam in turn executed a conveyance in favor of Emma Dickerson, the mother-in-law of Rowland H. Gillett. This action was commenced on May 3, 1933. An amended petition was filed on February 28, 1938, which is the one on which trial was had.

During all this time, down to and including the trial, the Gilletts remained in possession of the property, without any repudiation of their tenancy and without entering into any new relationship with either Pittam or Emma Dickerson. It was plaintiff's contention, and the trial court so found, that Pittam and Emma Dickerson were merely tools of the Gilletts. Neither ever actually paid any money of their own to acquire the title. The father of the Gilletts advanced the money for the assignment of the tax sale certificates from O'Keefe and the acquiring of the tax deed, including payment of the taxes then due on the property, and there was no consideration for the conveyance from Pittam to Emma Dickerson. The record shows, as a matter of fact, that the tax sale certificates had been taken over in March, 1931, from O'Keefe by the attorney for the Gilletts, and that they were first delivered to Pittam by the Gilletts, just before proceedings were had to obtain the tax deed. In this situation, the trial court held that plaintiff was entitled to have it decreed that such title as might have passed under the tax deed was being held in trust for his benefit or with a right of redemption in his favor.

The trial court further held that the sale proceedings were in fact void because the notice of sale had failed to state "that so much of each tract of land described in the notice as may be necessary will be sold to satisfy the taxes," and that the deed itself was invalid because it was not based on a proper notice to the necessary parties before the deed was issued.

The first assignment of error argued by defendants is

the overruling of their motion to require plaintiff to separately state and number his causes of action. It may be considered together with the contention that defendants' demurrer for misjoinder of causes of action ought also to have been sustained. Without entering into a discussion of whether the petition failed properly to state and number plaintiff's causes of action, or whether there was in fact a misjoinder of causes of action, we would not in any event, from the nature of the action and the proceedings had on the trial, be justified in reversing the judgment in this case on either of these grounds. A judgment will not be reversed on appeal for the failure of the trial court to require plaintiff to state and number his causes of action separately or for a misjoinder of causes of action, where the case is of such a nature and the proceedings had on the trial are such as to indicate that no substantial right of the defendant was prejudicially affected. Comp. St. 1929, sec. 20-853; *White v. First Nat. Bank,* 104 Neb. 142, 176 N. W. 79.

The next contention is that the amended petition failed to state a cause of action because it was filed more than five years after the tax deed was recorded. The original petition, however, was filed in 1933, approximately a year after the tax deed was issued. The amended petition contains a fuller statement of the facts and the relationships between the Gilletts, Pittam and Emma Dickerson, but sufficient is set out in the original petition to show that plaintiff was asserting that the conveyances to Pittam and Emma Dickerson were subterfuges, and that the Gilletts, as his tenants, could not acquire any right in the property from which he could not redeem. "The statute of limitations does not run against an amended pleading wherein the amendment consists in setting forth a more complete statement of the original cause of action." *Norfolk Beet-Sugar Co. v. Hight,* 59 Neb. 100, 80 N. W. 276; *Kennedy v. Potts,* 128 Neb. 213, 258 N. W. 471. This contention, of course, does not involve the portion of the petition relating to the irregularities in the tax sale proceedings and in the issuance of the deed.

Defendants further claim that the amended petition is

fatally defective because it does not show that plaintiff has paid the taxes subsequently assessed against the property. Section 77-2029, Comp. St. 1929, provides: "No person shall be permitted to question the title acquired by a treasurer's deed without first showing that * * * all taxes due upon the property had been paid by such person or the persons under whom he claims title * * *." In *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 147 N. W. 697, it was held, however, that "It is not essential to the commencement of a suit to set aside a tax deed and redeem property from tax sale that all taxes due on the property be first paid. It will be sufficient if all taxes are paid at or before the trial and entry of the decree." The opinion says: "We are of the opinion that it makes no difference whether at the time of the commencement of the suit the taxes due are paid or not. The 'showing' of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough." In this case the court required plaintiff to show that the taxes due had been paid before decree was entered, and this was sufficient.

It is next contended that the court erred in overruling defendant Emma Dickerson's application for a continuance. The affidavits in support of the application are not embodied in the bill of exceptions. "Affidavits used on the hearing of a motion for a continuance cannot be considered in the appellate court unless preserved by a bill of exceptions." *Nelson & Cook v. Johnson*, 44 Neb. 7, 62 N. W. 244. This contention of defendants is therefore not open to consideration.

The next contention urged is that the court erred in offsetting the amounts paid for the tax sale certificates and in acquiring the tax deed against the rents due plaintiff from the Gilletts. While the amounts paid on a tax sale cannot ordinarily be made the subject of set-off in an action to redeem, but must be paid in full by the owner, they may properly be so applied by a court of equity upon rents due from a tenant, where the latter has purchased the property without a surrender or a repudiation, and the landlord

brings an action for redemption and for an accounting of the rents due during the tenant's continued occupancy. The general rule is: "The relation existing between a landlord and his tenant is deemed to be such as will not permit the latter to take advantage of the omission of his landlord to pay the taxes and obtain an independent title to the land through a tax sale." 61 C. J. 1203. See, also, *Lausman v. Drahos*, 10 Neb. 172, 4 N. W. 956; *Ross v. McManigal*, 61 Neb. 90, 84 N. W. 610; *Card v. Deans*, 84 Neb. 4, 120 N. W. 440. Defendants argue, however, that the money was not paid by the Gilletts but by their father, and that in any event Mrs. Dickerson would be entitled to reimbursement for it, as the holder of the title. We agree with the trial court that the entire transaction was that of the Gillett brothers, and that, after the assignment of the certificates by O'Keefe, all the other parties were merely acting as straw men.

It is contended that defendants were taken by surprise on plaintiff's evidence as to the value of the use and occupancy of the land and had no testimony to rebut it. A judgment will not ordinarily be reversed on appeal for surprise at the trial, where no request is made for a continuance at the time and there is no showing of inability to meet the situation.

The finding of the trial court upon the rental value of the property is amply supported by the evidence, and, in the absence of contrary proof upon the issue, we shall not waste time upon the contention of defendants that it is excessive. It is unnecessary also to discuss the nature of the defects in the tax sale proceedings, under the views here taken.

AFFIRMED.

ELIJAH N. PORTERFIELD, APPELLANT, V. BUFFALO COUNTY PUBLIC POWER DISTRICT ET AL., APPELLEES.

295 N. W. 379

FILED DECEMBER 10, 1940. No. 30920.

1. **Trial.** The credibility of witnesses is for the jury, not the court, to determine.
2. **Appeal.** "In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong." *Kraemer v. New York Life Ins. Co.*, 134 Neb. 445, 278 N. W. 886.
3. ———. "Where a certain theory as to the measure of damages is relied upon by the parties to a trial and adopted by the trial court in submitting the case to the jury, it will be adhered to on appeal whether such theory is correct or not." *Behle v. Loup River Public Power District, ante*, p. 566, 293 N. W. 413.

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

Nye & Nye, for appellant.

Frederick M. Deutsch and *H. L. Blackledge, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

SIMMONS, C. J.

About 1905 the plaintiff planted a row of trees, alternating cottonwood and elm, along the west, north, and east sides of his farm, the north half of a section of highly developed land. In June, 1938, the defendant power company, its agents, and contractors (all are defendants) cut down eighteen of these trees along the west line to make way for a power line. The cutting of the trees was without notice to or permission of the plaintiff. Plaintiff sues to recover his damages.

Plaintiff's evidence showed the planting, cultivation, growth of the trees, and their value as ornaments and in preventing wind erosion and moisture evaporation. Plaintiff's witnesses fixed the value of the trees at sums ranging from $40 to $80 a tree, based upon their ornamental value, value to the land, and replacement cost. They further testi-

fied that the value of the land had been depreciated as much as $10 per acre for the 320 acres. Others testified that the land east for 40 to 50 rods from the west line had been depreciated in value as much as $20 an acre, because of the loss of protection from prevailing winds.

Defendants' witnesses testified that, as a result of the grading of the highway along the west line of plaintiff's farm in 1932, a considerable part of the roots of the trees had been cut off; that there had been a prevailing drought in that area which had been detrimental to all trees; that many of the trees along the west side of plaintiff's farm had died previous to the cutting complained off; that the trees cut and remaining were either dead or not in a healthy condition; that the trees had no ornamental value; that living trees destroyed the productivity of the soil as far out from the base as the tree was high; that because of the removal of the trees, the fertility and productivity of the land were restored, and that defendants' acts improved the value of plaintiff's land to that extent; and that plaintiff's land had not been depreciated in value because of the destruction of the trees.

The jury fixed the amount of plaintiff's damage at $100.

The plaintiff presents to this court twelve assignments of error. These may be reduced to two contentions:

First, the verdict of the jury is so inadequate as to indicate that it was given under the influence of passion or prejudice.

Second, the court did not permit the jury to find the value of the trees destroyed independent of their value to the land.

As to plaintiff's first contention: The rule is: "When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict." *Dolen v. Beatrice Restaurant Co.*, 137 Neb. 247, 289 N. W. 336. It is apparent, under plaintiff's evidence, that the damages allowed by the jury are inadequate. It is likewise obvious that the jury refused to accept plaintiff's evidence as controlling and did

largely accept defendants' evidence as to damages. It is the responsibility and duty of the jury to make a determination where facts conflict. The evidence of defendants sustains the verdict. The credibility of the witnesses is for the jury, and not the court, to determine. "In a law action, a verdict of a jury based on conflicting evidence will not be disturbed unless clearly wrong." *Kraemer v. New York Life Ins. Co.*, 134 Neb. 445, 278 N. W. 886.

As to the second contention: Plaintiff in his second amended petition set out a "cause of action" against the defendants. He alleged the destruction of the trees, "that the reasonable value of said trees destroyed, as aforesaid, is the sum of $1,200, and plaintiff has been damaged by the destruction thereof, in the sum of $1,200," and that "the farm lands of plaintiff * * * have been greatly damaged" by reason of the destruction of the trees "in excess of the sum of $3,500." Plaintiff prayed for judgment "in the sum of $1,200 on account of the destruction of said trees, and in the sum of $3,500 on account of damages that plaintiff has sustained by reason of the appropriation of said trees, and of his said property."

At the beginning of the trial, as his own witness, plaintiff was asked, "What value would you place upon those trees that were cut down?" Objection was made by defendants that it was "not within the issues, and not a proper element of damages in this case." The court stated: "The measure of damages is the value of the premises with the trees standing out there, growing * * * and then what was it worth after the trees were cut down or removed, and that difference is the measure of damages. But, in order to determine what value those trees had to the land, I expect the witness could testify as to what he thought those trees were worth, standing there, to the land, and in that way we get an opinion as to what the value of the premises was before the trees were cut down. That is the theory upon which I am permitting it in. But, eventually, I shall instruct the jury, as I have stated, on the law." Plaintiff made no objection to that statement of the court and proceeded with

his proof, including proof as to the market value of the land before and after the trees were cut down.

The case proceeded throughout the trial on the theory outlined by the court. The trial court in his instructions to the jury set out plaintiff's petition in detail, including the allegations above quoted and the amounts of damages for which he prayed judgment.

As to the measure of damages, the court instructed the jury that, "In determining said damages, you must first find the fair, reasonable market value of plaintiff's premises with the trees standing in the highway (taking into consideration their value to the farm for all purposes to which they are adapted) just before they were removed, and then determine the fair, reasonable market value of defendant's (plaintiff's) premises just after the trees were removed. The difference between such values, if any, will be the damages and the amount of your verdict," and "If you believe from the evidence the plaintiff's land received a special benefit by the cutting of the trees in the restoration of the land along the trees, then you can offset said benefit, if any, against the damages, if any, you find plaintiff has sustained."

The plaintiff does not assign the giving of the above instructions as error, either in his motion for a new trial or before this court.

We do not determine whether or not the instructions were erroneous. The rule is: "Where a certain theory as to the measure of damages is relied upon by the parties to a trial and adopted by the trial court in submitting the case to the jury, it will be adhered to on appeal whether such theory is correct or not." *Behle v. Loup River Public Power District, ante,* p. 566, 293 N. W. 413.

All assignments of error by plaintiff have been examined. Prejudicial error is not found.

AFFIRMED.

JACK GUERIN V. STATE OF NEBRASKA.

295 N. W. 274

FILED DECEMBER 10, 1940. No. 31011.

1. **Indictment and Information.** Challenged information approved in form and substance.
2. **Criminal Law.** In absence of instruction requested to that end, it is not error on part of trial court to fail to instruct as to a lesser crime involved in and incident to a greater, as, for instance, assault and battery or simple assault, in connection with forcible rape.
3. ———. The record for review, consisting of a duly certified transcript and a bill of exceptions duly allowed, implies absolute verity and can in no manner be altered or added to through the medium of briefs on appeal.
4. ———. The giving of an instruction not challenged in the motion for new trial is not reviewable in a proceeding in error.
5. ———. "Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury." *Norton v. State*, 119 Neb. 588, 230 N. W. 438.
6. ———. "The credibility of witnesses is alone for the jury, and the interest of any witness is proper to be considered in weighing his testimony." *Clary v. State*, 61 Neb. 688, 85 N. W. 897.
7. **Rape.** Evidence in the record examined, and *held* sufficient to sustain the conviction.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed: sentence reduced.*

Henry R. Meissner and *Anderson & Meissner*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

EBERLY, J.

The plaintiff in error, Jack Guerin, herein referred to as defendant, aged twenty-five years, was convicted and

sentenced to be imprisoned for the period of fifteen years in the Nebraska state penitentiary, upon an information, duly presented by the county attorney for Douglas county, Nebraska, which, omitting formal parts, charged and set forth, viz.: "That on or about the 5th day of November in the year of our Lord one thousand nine hundred thirty-nine Jack Guerin late of the county of Douglas aforesaid, in the county of Douglas and state of Nebraska aforesaid, then and there being, then and there in and upon one Dorothy Beasley unlawfully, feloniously and violently did make an assault, and her, the said Dorothy Beasley, then and there unlawfully, feloniously, forcibly, violently and against her will, feloniously did ravish and carnally know, she, the said Dorothy Beasley, then and there not being the sister or daughter of him, the said Jack Guerin."

From the judgment of the district court overruling his motion for a new trial, the defendant prosecutes error to this court.

The defendant challenges the information upon which he was tried and convicted because of improper joinder therein of a charge of rape with a charge of assault with intent to commit rape.

A charge of rape necessarily includes a charge of assault to commit rape, for "the crime of rape cannot be committed without an assault with that intent. The latter is necessarily included in the greater crime." *Dawson v. State,* 96 Neb. 777, 148 N. W. 957. See, also, Comp. St. 1929, sec. 28-408.

It is therefore obvious that defendant's substantial rights have not been seriously impaired. It may be said, however, that the form of charge here employed has been approved as proper and sufficient for more than half a century in the courts of this state. Maxwell, Criminal Procedure (2d ed.) 239.

The defendant also challenges the correctness of the proceeding and insists that the court committed reversible error in failing to instruct on the subjects of assault and battery and simple assault. The record of the proceedings had in the district court in this case, however, fails to dis-

close that any request for such instructions was made by the defendant during the trial. In the absence of a request, it is not error for the court not to instruct on assault and battery and simple assault, where the defendant is on trial for rape. *Dawson v. State,* 96 Neb. 777, 148 N. W. 957; *Beer v. State,* 129 Neb. 366, 261 N. W. 824; *Williams v. State,* 113 Neb. 606, 204 N. W. 64; *McIntyre v. State,* 116 Neb. 600, 218 N. W. 401.

The defendant further asks for a new trial in his brief filed in this court because he states therein that, after the cause had been tried, argued and submitted to the trial jury, in the absence of counsel for the state and also counsel for defendant, the jury were returned to the court and further instructed by the trial judge. However, no substantiation of this charge is to be found in either the transcript or the bill of exceptions, which constitute the record for review in this case. Neither is there any reference to it in defendant's motion for a new trial. The "record for review" imports absolute verity and can in no manner be altered or added to through the medium of trial briefs. In addition, reviewing courts will not consider alleged errors in the giving of an instruction which were not assigned in the motion for a new trial. *Ball v. State,* 122 Neb. 690, 241 N. W. 273; *Barr v. City of Omaha,* 42 Neb. 341, 60 N. W. 591.

Further, defendant attacks the sufficiency of the evidence to sustain the verdict. It would accomplish no good purpose to set out the evidence in this case. An examination of it discloses that the complaining witness was amply corroborated, and the testimony as an entirety, though conflicting, sustains the verdict of the jury. In this connection it will be remembered that this court has announced the rule that, "Where the evidence in a criminal case is acutely conflicting, and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury." *Norton v. State,* 119 Neb. 588, 230 N. W. 438.

This court has also approved the doctrine that, "The

credibility of witnesses is alone for the jury, and the interest of any witness is proper to be considered in weighing his testimony." *Clary v. State*, 61 Neb. 688, 85 N. W. 897. See, also, *Burnett v. State*, 88 Neb. 638, 130 N. W. 263.

We have concluded, however, that the sentence of fifteen years imposed on the defendant is excessive. The defendant is a young man, twenty-five years of age at the time of the offense, and so far as the record shows was industrious and of fair character, the present being the only charge of a criminal nature ever brought against him. While the present charge is one of the most heinous known to statute or moral law, and admits of no excuse, still the previous character of the defendant, the extent of the actual physical injuries sustained by the prosecuting witness, and all of the surrounding circumstances are matters to be taken into consideration in determining the selection of penalty between a minimum of three years and a maximum of twenty years, as prescribed by section 28-408, Comp. St. 1929. So doing, this court concludes that a sentence of five years will meet the requirements of justice.

The judgment of the district court is, therefore, modified and the sentence reduced to five years at hard labor, and, as thus modified, is affirmed.

AFFIRMED: SENTENCE REDUCED.

MARGARET EVANS, APPELLEE, V. FIRST NATIONAL BANK OF FAIRBURY, APPELLANT.

295 N. W. 381

FILED DECEMBER 10, 1940. No. 30884.

1. **Trial.** Court's instruction No. 1 was proper, in that it gave to the jury in simple language a concise summary of the lengthy pleadings, and did not emasculate the issues, as charged.
2. **Homestead.** In a case in which the wife of an insane husband did not join with the guardian, who had been duly authorized by the court, in the execution of a mortgage upon the homestead property, it was not error for the court to instruct the jury that, as a matter of law, such mortgage was never enforceable as a lien against said homestead. Comp. St. 1929, sec. 40-104.

3. ———. The statutory homestead, as between mortgagors and mortgagees, is not limited to a value of $2,000, but covers the value of the entire 160 acres.
4. **Bills and Notes.** The assigning of a note without recourse is simply a form of a contract by which the indorser limits its responsibility at the time of sale, and is to be bound only as a qualified indorser.
5. ———. When a note is indorsed "without recourse," it does not relieve the indorser if there was proved sufficient evidence of fraud or misrepresentation to justify the submission of that issue to the jury and support the verdict thereon.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Hartigan & Skultety, for appellant.

Perry, Van Pelt & Marti and *Arthur E. Perry, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and JOHNSEN, JJ.

PAINE, J.

Plaintiff brings an action for damages against a bank and its president for having sold her a mortgage by false and fraudulent representations. The jury returned a verdict in favor of the plaintiff and against the bank for $2,041.11. Motion for new trial being overruled, the bank appealed. Case dismissed as to defendant Bonham.

Plaintiff in her amended petition charges that the First National Bank of Fairbury and the Fairbury Savings Bank had identical places of business, and that the Savings Bank was controlled, dominated and managed by the First National Bank, and Luther Bonham was president of both banks; that on December 29, 1929, the defendants, acting through said Savings Bank, and as owners thereof, sold her a note for $1,500, executed by Lee J. Cramb, guardian of George H. Cramb, an insane person, which note was represented to be secured by a first lien on the northeast quarter of section 22, township 2, range 1, in Jefferson county, Nebraska, and it was further represented by president Bonham, and those acting under and for him and the bank, that said note was a safe and sound investment, and

could be resold at any time for its full face value, together with accrued interest thereon, and that it would be impossible for the plaintiff to place her funds in a better investment; that she believed these statements and representations to be true; that she relied upon and acted thereon, and purchased said note and paid the full sum of $1,500 therefor solely in reliance upon the representations of the defendants.

Plaintiff further alleges that said $1,500 note was not secured by a first mortgage on said land, in that said land was the homestead of George H. Cramb and Elizabeth T. Cramb, his wife, and the wife did not sign, execute, or acknowledge said mortgage; that defendants, as part of said scheme to defraud, paid or caused to be paid the first seven coupons attached to said note, thereby concealing defects therein, and plaintiff did not at any time see said note, or know the form or contents thereof, or how the same was executed or indorsed.

Plaintiff further alleges that said note was not secured in any way; that it was not a good, safe investment, and that by reason thereof the plaintiff has been damaged in the sum of $1,500 and interest. Attached to the amended petition as exhibit A is a copy of said mortgage, showing the same to have been executed only by Lee J. Cramb as guardian of George H. Cramb, an insane or incompetent person, the mortgagee being the Fairbury Savings Bank.

The defendant Luther Bonham in his answer admits that he was president of the Fairbury Savings Bank, which bank owned two notes, one for $1,500 and one for $3,500, which notes were secured by a first mortgage on the land heretofore described, executed by Lee J. Cramb as guardian of George H. Cramb, an incompetent person.

Defendant Bonham further alleges that on December 29, 1929, the Fairbury Savings Bank sold the $1,500 note to the plaintiff, and the $3,500 note to Henrietta Hoopes and S. M. Bailey, trustees of the estate of Norman Cherry, and that said notes when transferred were indorsed without recourse upon the Fairbury Savings Bank; that previous to

September 1, 1929, George H. Cramb became of unsound mind, and his son, Lee J. Cramb, was duly appointed his guardian; that it was impossible to renew the $10,000 mortgage then outstanding upon certain lands belonging to George H. Cramb without leave of the district court for Jefferson county, and that regular proceedings were conducted and leave granted to the guardian by the court to mortgage all of George H. Cramb's property; that pursuant to the court order $5,000 was loaned upon one quarter of land and $5,000 was loaned upon another quarter of land in Jefferson county; that the Fairbury Savings Bank and its officers acted in good faith, and relied upon the order of the district court, and upon the advice of its legal counsel; that Elizabeth T. Cramb, the wife of George H. Cramb, participated in all of the negotiations leading up to the making of said loan. Defendant Bonham denies that he participated in the actual making of the loan, or the sale and transfer of the note and mortgage to the plaintiff, and that he made no representations in regard to the same.

The First National Bank of Fairbury files its separate answer; admits that it is a banking corporation, and that Luther Bonham is its president, and denies all other allegations in the petition, and for further answer admits that on or about December 24, 1929, the First National Bank of Fairbury purchased the assets of the Fairbury Savings Bank; and assumed certain liabilities of said savings bank, and attaches to its answer exhibit A, which is a copy of the agreement made and entered into between the Fairbury Savings Bank and the First National Bank, executed for each party by Luther Bonham, president of each bank, one of the provisions being that the First National Bank took over and assumed liabilities and obligations of the Fairbury Savings Bank at the close of business on December 23, 1929.

The plaintiff for reply denies each and every allegation in the answers of defendants not admitted; admits that there was indorsed, without plaintiff's knowledge or consent, the words "without recourse," but plaintiff, being unfamiliar with business transactions, did not examine said note, or

know of said indorsement, and charges that said pretended indorsement was vitiated by reason of the fraud set out in her petition, by which the defendants are estopped from claiming that the indorsement "without recourse" is a defense to this action.

The defendant First National Bank assigns 13 errors for the reversal of the judgment in this case. Many of these assignments of error set out rulings of the court in excluding several exhibits filed in the action in the district court for Jefferson county leading up to the issuance of the license to the guardian of George H. Cramb to mortgage the incompetent's real estate, also excluding exhibits filed in the foreclosure proceedings, and withdrawing from the jury an inventory of the estate of George H. Cramb, deceased, signed by Elizabeth T. Cramb as executrix, in which inventory she sets out the land in the case at bar, and describes it as being subject to the mortgage herein. We do not find prejudicial error in any of these rulings.

It is charged that the court erred in giving instruction No. 1, in that it does not fairly and truly state the issues set up in the pleadings, and is an effort to emasculate the issues. This court has disapproved of the former practice of copying the entire pleadings into the instructions. *First Nat. Bank v. Davis,* 123 Neb. 304, 242 N. W. 655. Nor should the court insert in the instructions allegations of the pleadings which found no support in the evidence. *Hutchinson v. Western Bridge & Construction Co.,* 97 Neb. 439, 150 N. W. 193. It is, however, proper for the trial court to present to the jury a simple and concise summary of the pleadings. *Merritt v. Ash Grove Lime & Portland Cement Co.,* 136 Neb. 52, 285 N. W. 97. This first instruction, of nearly two pages, in the case at bar, appears to the court to fairly reflect in brief summary the proved allegations of the several pleadings, which covered some 13 pages in length, and in no way did this instruction No. 1 emasculate the issues in the case.

Another error assigned is in the court giving instruction No. 2, which reads as follows:

"You are instructed that from the evidence the Court finds and instructs you that as a matter of law the mortgage instrument involved in this case, being plaintiff's exhibit 5, is not now and never was a valid lien on the real estate described in it, never was enforceable as a lien against said real estate and at no time since its execution constituted any security for the payment of the debt evidenced by the promissory note, plaintiff's exhibit 4.

"You are therefore instructed that in your deliberations you should disregard plaintiff's exhibits 7, 8 (also identified as plaintiff's exhibit 14), 10, 11, 12, 13, 15, 17, 18, 19 (also identified as defendants' exhibit R), defendants' exhibits F, G, H, I, K, L, M, N, O, P, Q, all testimony in regard thereto and all testimony in regard to other proceedings in this court or in the county court of this county in the matter of the George H. Cramb estate."

The defendant in his brief reviews all of the facts relating to the appointment of Lee J. Cramb as guardian for his father, George H. Cramb, incompetent, and all of the proceedings in the district court leading up to the order authorizing and directing the guardian to mortgage both pieces of real estate, and setting out the statute of Nebraska, section 30-1201, Comp. St. 1929, granting authority to the district judge to authorize a guardian to mortgage real estate, to redeem existing mortgages, and discusses many cases in which the constitutionality of this statute has been approved by this court. The argument of defendant is very interesting, and is well supported by abundant authorities, but does not appear to the court to cover the real question at issue. Section 40-104, Comp. St. 1929, provides definitely: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

There is no question in the case at bar but that the property was the homestead of the incompetent and his wife. She was not a party to the mortgage. All of the proceedings were taken which authorized the guardian to mortgage

the interest of the incompetent in the homestead, yet the mortgage on its very face shows that in no way was the wife of the incompetent considered in executing this instrument, for the first paragraph of the mortgage reads as follows: "This indenture, made this 25th day of October, 1929, between Lee J. Cramb, Guardian of the Estate of George H. Cramb, an insane or incompetent person, of the County of Jefferson and State of Nebraska, party of the first part and the Fairbury Savings Bank, of Fairbury, Nebraska, party of the second part:"

Many decisions of this court hold that under the homestead law of 1879 a mortgage on the homestead of a married person to be valid must be executed and acknowledged by both husband and wife. This is true even though it may deprive creditors of certain rights and work a hardship in some cases. *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209, 27 N. W. 117; *Phillips v. Bishop*, 31 Neb. 853, 48 N. W. 1106; *Whitlock v. Gosson*, 35 Neb. 829, 53 N. W. 980; *Meisner v. Hill*, 92 Neb. 435, 138 N. W. 583; *Anderson v. Schertz*, 94 Neb. 390, 143 N. W. 238; *Davis v. Merson*, 103 Neb. 397, 172 N. W. 50; *Bacon v. Western Securities Co.*, 125 Neb. 812, 252 N. W. 317.

It is the contention of the attorney for the bank that this mortgage upon the homestead, in which the wife's name did not appear, is not an absolutely void mortgage, but that it is good, save and except as to the homestead right of $2,000 in this land; but in *Storz v. Clarke*, 117 Neb. 488, 221 N. W. 101, Judge Eberly said: "The statutory homestead, as between mortgagors and mortgagee of a real estate mortgage invalid as to homestead interests of the mortgagors included therein, is unlimited as to value and is properly described as a 'quantity of land not exceeding 160 acres, not included in any incorporated town, city or village, or a quantity of land, not exceeding in amount two lots, being within an incorporated town, city or village,'" which seems to dispose of the contention of the bank.

We therefore hold that the instructions of the trial court

were correct, under the law of Nebraska, in stating to the jury that the mortgage is not now, and never was, a valid lien on the real estate, that it never was enforceable against the real estate, and that at no time did the mortgage executed alone by the guardian for the insane husband constitute any security for the payment of the mortgage sold in this case, and that at no time did it constitute any security for the payment of the debt.

There is no question but that the attorney secured from the district court a proper order to mortgage the interest of the insane husband, but nothing in that decree could or did obviate the necessity for the wife executing both the note and the mortgage.

Now, to set out the contentions of the plaintiff, she testified that she was 73 years of age, and had known Luther Bonham for 25 years, as her husband had been cashier of the bank under Mr. Bonham for over 20 years, and until the time of her husband's death. The plaintiff testified she always went to Mr. Bonham about any of her business transactions, and considered him one of her best friends; that he knew of her property holdings, and she had asked him to let out her money on a farm mortgage when something good came up. The bank telephoned her to come down, and an employee assured her this was a very good mortgage. The plaintiff then went directly to president Bonham's private office, and he assured her it was a splendid deal and a good loan on one of the most valuable pieces of property in the county, and as good as gold. This was before plaintiff bought the note and mortgage.

On behalf of the defendant bank, Luther Bonham testified positively that he had nothing whatever to do with the sale of the note and mortgage to the plaintiff, and that he was in Minnesota on the day she bought this loan. On cross-examination, he said she had talked with him many times about it after the note was in default, and he had told her that in his opinion the note could be collected. He testified that the effective date of the sale of the assets of the Fairbury Savings Bank to the defendant bank was Oc-

tober 1, 1929, but that the Savings Bank was never actually merged, but was separately liquidated, all as shown by exhibits which were signed by the Northwest Bancorporation, which about this time became interested in the affairs of the defendant bank.

In this connection, exhibit No. 3, offered by plaintiff, reads as follows:

"The Fairbury Savings Bank
Luther Bonham, President
S. M. Bailey, Vice-president
Henrietta Hoopes, Sec.-Treas.
Fairbury, Nebraska
Nov. 22, 1929.

Department of Trade & Commerce
Bureau of Banking
Nov 23 1929
Received

Department of Trade & Commerce,
Lincoln, Nebr.

Gentlemen:—

Referring to your letter of recent date asking for a report on Bank Examiners recommendations, will state that this Bank has been sold to the Northwest Bancorporation and will in a few days merge with the First National Bank of this city.

Very truly yours,
H. Hoopes,
Sec.-Treas."

Several times it is argued that this note was assigned to the plaintiff "without recourse." See Comp. St. 1929, sec. 62-309. This indorsement ordinarily relieves indorser from certain liabilities in connection therewith. *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N. W. 815. But, in the case at bar, the assigning of this note to the plaintiff "without recourse" was simply a form of the contract by which the savings bank limited its responsibility at the time of sale. "Such an indorsement indicates a purpose not to assume a liability on the paper or responsibility for its payment and is sufficient to transfer title, but, provided there is no fraud, concealment, or misrepresentation, it exempts the

transferor from all liability as indorser, except that he is still chargeable with implied warranties as a seller of the paper." 10 C. J. S. 701, sec. 214. See Brannan, Negotiable Instruments Law (6th ed.) 493, sec. 38.

Now, in the case at bar, when fraud and misrepresentation were set up and proved, the court then is justified in going behind the contract and instructing the jury generally, as the trial judge did in instruction No. 17, that if the jury find that the plaintiff was induced to purchase the note and mortgage by false representations, and find that such were made, then liability for such false representations cannot be avoided by the indorsement on said note of the words "without recourse," the court also stating the alternative proposition, and this instruction stated the law as this court has announced it in *Paul v. Cameron,* 127 Neb. 510, 256 N. W. 11: "In this state, in actions for false representations, proof of a scienter is not essential to recovery; and where a petition in this class of cases clearly and positively alleges that the representations relied on by plaintiff were false, while the further allegation in effect 'that the defendant knew it was false, or else made it without knowledge as a positive statement of known fact,' is in accord with good practice, it is not essential to recovery that either be incorporated in such pleading or covered in the instructions to the jury."

"When a note is indorsed without recourse, it does not relieve the indorser, if there was sufficient evidence of concealment, fraud, or misrepresentation to justify submission of the issue, and to sustain the verdict reached by the jury." *Farmers & Merchants Bank v. Wisdom,* 226 Ky. 179, 10 S. W. (2d) 846.

While other defenses are urged in this case, which appear to have little merit and cannot be discussed, we have reached the conclusion that the trial court was right in entering the judgment upon the verdict returned by the jury, and the same is hereby

AFFIRMED.

JOHNSEN, J., not participating.

The following opinion on motion for rehearing was filed March 12, 1941. *Motion overruled.*

PAINE, J.

In this case, appellant filed a motion and brief for a rehearing, upon which oral argument was ordered, and in which the principle announced in *Pohlenz v. Panko,* 106 Neb. 156, 182 N. W. 972, was cited for the first time as controlling in the present litigation. It is held in that case that, where the district court grants a license to sell real estate constituting a homestead for the payment of debts, after the giving of notice to all interested parties, and from which order no appeal was taken, the order cannot be collaterally attacked by one who failed to assert his homestead interest before the issuance of the license. It will be observed in that case that the claimant of the homestead interest had his day in court and failed to assert his right. In the instant case, the proceeding to secure authority for the guardian to mortgage the real estate of the incompetent ward was commenced by the filing of the application. No notice was given or required under the statutes then existing. The hearing was *ex parte* in character. The widow, the owner of the homestead interest, was not made a party, and lost no rights by the proceeding. The authority granted to the guardian was that he might lawfully act for his ward to the extent which the court prescribed. The interests of all others remained as before. The case is clearly distinguishable, and can in no way change the result heretofore arrived at.

The motion for a rehearing is therefore overruled.

MARGARET ANN BITTNER, APPELLEE, V. ROBERT S. CORBY, APPELLANT.

295 N. W. 277

FILED DECEMBER 10, 1940. No. 30895.

1. **Automobiles.** A person who is overcome by sleep while operating a motor vehicle and as a result thereof injures a guest riding with him is not guilty of reckless operation of the vehicle within the purview of the Iowa guest statute.
2. ———. Neither is it reckless operation of a motor vehicle within the meaning of the Iowa guest law for one, knowing that he is sleepy, to continue to drive his car.
3. **Appeal.** Where a case is submitted upon the theory upon which it was tried by both parties, an obvious error in the pleadings will be deemed to have been cured thereby.

APPEAL from the district court for Sarpy county: WILMER W. WILSON, JUDGE. *Reversed.*

Chambers, Holland & Locke, for appellant.

Frank L. Frost and *Frederick L. Wolff, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

CARTER, J.

This is an action at law commenced by the plaintiff, Margaret Ann Bittner, to recover damages for personal injuries from the defendant, Robert S. Corby, the owner of the truck in which plaintiff was riding as a guest at the time of the accident. Plaintiff recovered a verdict for $1,000 and defendant appeals.

The evidence shows that the truck in question was being operated by one Wayne Bricknell for the defendant on a newspaper route out of Omaha. Plaintiff requested a ride from Creston, Iowa, into Omaha and Bricknell permitted her to accompany him. A short distance out of Underwood, Iowa, plaintiff noticed a car ahead of the truck which was proceeding in the same direction. As the truck approached the car plaintiff observed that Bricknell had fallen asleep and, in order to prevent a collision, she turned the truck

out and around the other vehicle. Just as the truck passed the car Bricknell awoke suddenly and grabbed the wheel, thereby causing the truck to go off the road and injure the plaintiff.

It is the contention of the defendant that these facts are not sufficient to sustain a judgment under the guest law of the state of Iowa and that a verdict should have been directed in his favor.

That the accident happened in the state of Iowa and that the guest law of that state is applicable is not disputed. The guest law of Iowa and the interpretations placed upon it by the supreme court of that state were pleaded by the defendant.

The guest law of Iowa is as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." Code of Iowa, 1935, sec. 5026-b1.

In construing this section of the statute, the supreme court of Iowa has said, in order to establish that motorist was reckless within the automobile guest statute, injured guest must show not only negligence, but "must go further than this and show a rash, heedless, disregard of danger that would be apparent to or reasonably anticipated by a person exercising ordinary prudence and caution under existing circumstances." *Wright v. What Cheer Clay Products Co.*, 221 Ia. 1292, 267 N. W. 92.

The question is, therefore, whether the act of Bricknell in dozing off or falling asleep at the wheel is reckless operation of the truck within the purview of the Iowa guest statute. The Iowa supreme court has passed upon that question on several occasions.

In *Kaplan v. Kaplan,* 213 Ia. 646, 239 N. W. 682, the court said: "But the appellant argues that the father was reckless for going to sleep or permitting himself to be

overcome by sleep. While he may have been negligent, this does not constitute recklessness within the meaning of the statute."

In a similar case the Iowa court in denying a recovery also said: "Recklessness goes beyond mere negligence and has often been defined, and was so defined in the instructions in this case. It means proceeding without heed of or concern for consequences, and must be such as to manifest a heedless disregard for or indifference to the rights of others. In the case at bar there is no question of intoxication; and it is not seriously argued that, under our previous holdings, the mere act of falling asleep constitutes recklessness. * * * Nor does the plaintiff urge that the acts of the driver while asleep, or after being overcome by sleep, would constitute recklessness; but his claim is that the defendant driver, knowing that he was sleepy, continued to drive the car, and that, with such knowledge, in continuing to drive he was reckless." *Paulson v. Hanson,* 226 Ia. 858, 285 N. W. 189. See, also, *Duncan v. Lowe,* 221 Ia. 1278, 268 N. W. 10.

Under these decisions we are obliged to hold that the act of Bricknell in falling asleep did not constitute reckless operation of the truck within the meaning of the Iowa guest statute. Neither is it reckless operation of the truck for Bricknell, knowing that he was sleepy, to continue to drive the truck. The trial court should have directed a verdict for the defendant.

Plaintiff contends that defendant admitted liability in his answer by the use of the following language: "That thereafter on said date defendant, feeling *a* legal responsibility for the injuries sustained by the plaintiff but desiring to defray expenses for her, paid the said plaintiff the sum of $160." Defendant contends that the use of the article "a" instead of the word "no" was an obvious typographical error. With this we agree. The sentence as written is awkward and indefinite and is inconsistent with the remaining portions of the answer. In addition thereto it is not consistent with the theory of the case upon which both

parties submitted it. The obvious error in the answer was cured by its submission by both the parties on the theory that the word "no" was intended instead of the article "a". *Wheeler v. Chicago & W. I. R. Co.*, 182 Ill. App. 194; *Id.*, 267 Ill. 306, 108 N. E. 330; *Kimball v. Lincoln Theatre Corporation*, 129 Neb. 446, 261 N. W. 842.

The trial court erred in not directing a verdict for the defendant at the close of all the evidence.

REVERSED.

LINCOLN NATIONAL LIFE INSURANCE COMPANY, APPELLEE, v. ROBERT D. CURRY, APPELLANT.
295 N. W. 282

FILED DECEMBER 10, 1940. No. 30909.

Mortgages. "An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck, ante*, p. 203, 292 N. W. 605.

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

L. A. De Voe, for appellant.

Beatty, Maupin, Murphy & Derry, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

MESSMORE, J.

The land involved in this case contains 315 acres. Plaintiff's witnesses testified that 140 acres were tillable; defendant's witnesses that 160 acres may be cultivated. From 14 to 20 acres were under cultivation at the time of the decree. There are no improvements on the land except a fence. A decree of foreclosure was entered in the district

court for Keith county September 19, 1938. The court found there was due the plaintiff the sum of $3,877.98, with interest at 9 per cent. from that date, and costs in the amount of $20.50. On July 25, 1939, the plaintiff bid $3,-451.75. Upon a hearing held September 18, 1939, objections to confirmation of sale were filed. The plaintiff waived any deficiency remaining over and above its bid. The amount then owing by defendant to plaintiff was $4,269.56. The testimony with reference to the value of the land was, for plaintiff $3,150, and for defendant between $4,800 and $6,300. There is no evidence that a later sale would realize a larger bid, or that the land would sell for a greater price.

The question involved is: Did the trial court err in confirming the sale under the decree of foreclosure? Under similar circumstances, this court has, on many occasions, declined to set aside an order of confirmation.

"'An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.' *Equitable Life Assurance Society v. Buck*, 138 Neb. 203, 292 N. W. 605." *Woodard v. Billingsley, ante*, p. 707, 294 N. W. 793.

AFFIRMED.

IN RE APPLICATION OF CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT.

MARY MCKAIN ET AL., APPELLEES, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

295 N. W. 386

FILED DECEMBER 13, 1940. No. 30905.

Boundaries. Where two tributary streams meet and form one stream, the center lines of the streams of the two tributaries are extended until those lines meet and form the center line of the

main stream. In the absence of restrictions in the grants, such lines then become the boundary lines of the lands on either side of, between and immediately below the point of the confluence of the two streams.

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

R. O. Canaday, R. H. Beatty and *M. M. Maupin,* for appellant.

Hoagland, Carr & Hoagland, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

SIMMONS, C. J.

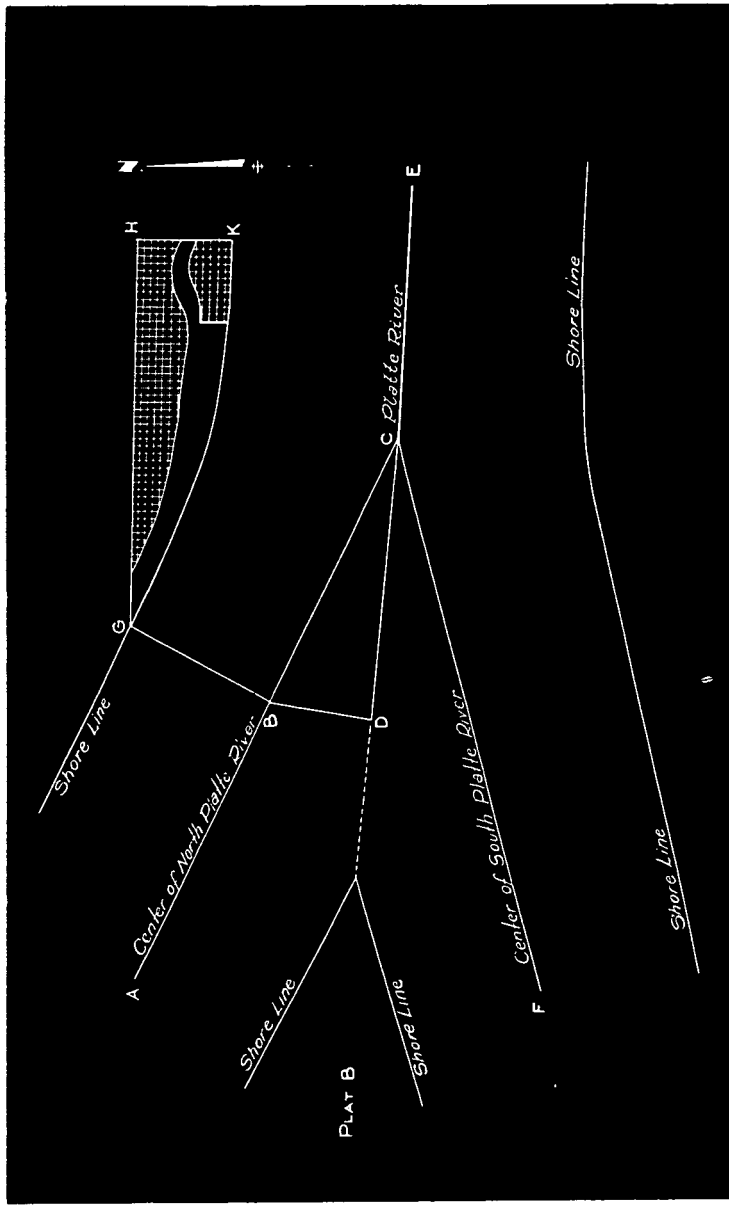
In this action plaintiffs seek to recover compensation for lands taken and consequential damages to lands not taken by the defendant in a condemnation proceeding. Defendant admits liability and tenders an issue as to the amount due the plaintiffs. Judgment was for the plaintiffs on a jury verdict.

On appeal, defendant contends:

(1) The court erred in permitting the jury to include in their verdict recovery for certain lands in the river bed, claimed by plaintiffs to be riparian to lands taken.

(2) The verdict is excessive and is the result of passion and prejudice.

The first question presented by appellant and the rule to be applied may be better explained by the use of the following illustration. The illustration is not an exact copy of the exhibits in evidence and is used only for convenience in discussing the problem presented.


H
K
G
Shore Line
A
Center of North Platte River
B
C
Platte River
D
E
Shore Line
Shore Line
Center of South Platte River
F
Shore Line
Shore Line
PLAT B

Line AC represents the center line of the North Platte river. Line FC represents the center line of the South Platte river. Line CE represents the center line of the Platte river, and line DC is an extension of CE and is equi-distant from the shores on either side. Land GHK is land owned by the plaintiffs bordering on the river. The area shown in cross-section in GHK was not appropriated by defendant.

Plaintiffs contend that, by riparian right, they own to the line DC as the center line of the Platte river. Defendant contends that the plaintiffs own only to the line BC as the center line of the North Platte river. Islands of various sizes exist in the area BCD. The trial court permitted the plaintiffs to prove and instructed the jury to include in their verdict the value of the area included in BCD. In this the trial court erred.

An owner of land on the shore of an unnavigable river, in the absences of restrictions in his grant, owns to the center line of the stream. *Haney v. Hewitt,* 105 Neb. 746, 181 N. W. 861; *McBride v. Whitaker,* 65 Neb. 137, 90 N. W. 966; *Wiggenhorn v. Kountz,* 23 Neb. 690, 37 N. W. 603.

The boundary line between riparian owners on the same side of the stream runs from the end of the shore line to, and along a line at right angles with, the center line of the stream. Clark, Surveying and Boundaries (2d ed.) 301-385; *Clark v. Campau,* 19 Mich. 325; *Bay City Gas-Light Co. v. Industrial Works,* 28 Mich. 182.

Where title to an island, bounded by the waters of a non-navigable stream is in one owner, and title to the land on the shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. *Higgins v. Adelson,* 131 Neb. 820, 270 N. W. 502.

So far as the problem here presented is concerned, the rule which controls in the case of an island, in ownership separate from the mainland, is applicable to the land designated as plat B on the illustration.

It follows that, where two tributary streams meet and form one stream, the center lines of the streams of the two

tributaries are extended until those lines meet and form the center line of the main stream. In the absence of restrictions in the grants, such lines then become the boundary lines of the lands on either side of, between and immediately below the point of the confluence of the two streams. See *Calkins v. Hart,* 64 Misc. 149, 118 N. Y. Supp. 1049.

It follows that riparian rights appurtenant to the land GHK do not extend beyond the line ABCE.

A new trial is necessary. This obviates the necessity of discussing the second question presented by the defendant.

Plaintiffs by cross-appeal ask a ruling upon another question presented at the trial and determined adversely to them. Referring to the illustration, land GHK is generally described as bottom or hay land, producing hay for winter feed and furnishing fall pasture for cattle. It contained a stream, which seldom froze during the winter, and furnished an adequate water supply. There was on the land a grove of large trees and other brush suitable for shelter to animals in the winter. By taking a part of this land, defendant concedes that it damaged the value of the land not appropriated in GHK. Beginning a mile north of this land and running north for two miles, plaintiff owned one and three-quarter sections of sand-hill pasture land on which the ranch buildings were located. The latter land was separated at its nearest point from the land GHK by an intervening section of land not owned by plaintiffs. This latter section is bisected diagonally, generally northwest to southeast, by the Union Pacific Railroad and U. S. Highway No. 30.

Plaintiffs contend that they used these two tracts of land for a common purpose and that they made up what is described as a balanced ranch, the larger or north tract being used for summer pasture and the south tract for winter care and feed. Plaintiffs contend that the taking of part of the south tract has caused consequential damages to the north tract, for which they should be permitted to recover. With one exception the situation presented is not materially different from that which existed in *McGinley v. Platte*

Valley Public Power and Irrigation District, 133 Neb. 420, 275 N. W. 593. The exception is that in the *McGinley* case the lands were all in one tract. Here, as has been pointed out, the lands are separated by an intervening tract one mile in width. This exception is not to plaintiffs' advantage.

In the *McGinley* case this court said: "Where pasture lands, forming the principal acreage of a cattle ranch partly taken for a public purpose, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken."

It cannot be assumed that the evidence upon the second trial will be the same in all particulars as that now presented. However, upon the facts of this record, it does not appear that the trial court erred in excluding evidence as to, and denying recovery for, consequential damages to the detached north tract.

REVERSED AND REMANDED.

STATE, EX REL. GEORGE B. ALLEN ET AL., APPELLANTS, V. IRA MILLER ET AL., APPELLEES.
295 N. W. 279

FILED DECEMBER 13, 1940. No. 31071.

1. **Counties.** A county board may, under the provisions of section 26-122, Comp. St. 1929, once reconsider its action on the allowance of a claim, upon due notice to interested parties.
2. ———. A reconsideration of the allowance of a claim by the county board without first fixing a time for a hearing thereon, and giving due notice thereof to interested parties, where notice has not been waived, is without jurisdiction and void.
3. ———. From the admissions in the answer of respondents and the stipulated facts in this case, *held*, that the action of the county board in reconsidering a previous allowance of claims of relators, without first fixing the time for the hearing thereon and giving due notice thereof to the interested parties, was without jurisdiction and void.
4. ———. Under the stipulated facts in this case, *held*, that the

action of the chairman of the county board in directing the county clerk to mail the copy of the notice set out in the opinion to each of the claimants, and the mailing of such notice by the county clerk as directed, was not the action of the county board or by its authorization, and was of no legal effect, and any action taken by the county board thereunder was without jurisdiction and void.

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

Max Kier, for appellants.

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

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

HASTINGS, District Judge.

This is an action in mandamus commenced in the district court for Lancaster county to compel respondents, Ira Miller, chairman of the board of county commissioners, the members of the board of county commissioners, and the county clerk of said county, to execute and deliver proper warrants for services performed by relators as assessors of property in said county pursuant to allowance of claims of relators by said county board on June 4, 1940. An alternative writ of mandamus was issued. Trial was had, and from the judgment of the trial court denying the writ relators appeal.

The answer of respondents admits that the relators are duly elected and qualified assessors in and for Lancaster county, and are entitled to compensation for services performed by them in the amount provided by law; that relators and each of them filed their separate claims for their services so performed; admits that the same were verified and approved by the county assessor of Lancaster county, Nebraska, and that at a meeting of the board of county commissioners of said county on June 4, 1940, all of said claims were allowed; admits that Ira Miller, as chairman of the board of county commissioners of Lancaster county, refused to sign said warrants.

The only defense presented by the answer of respondents is that on June 11, 1940, the county board reconsidered and rescinded their action of June 4, 1940, allowing claims of relators and deferred further action on said claims until an appeal on a similar claim in favor of Adolph Lebsack for compensation for his services as assessor had been determined in the district court for Lancaster county; that the county clerk of said county had notified all of the respondents by letter on June 13, 1940, of the action taken by said commissioners on June 11, 1940.

At the trial the parties stipulated as to the facts. The facts stipulated, so far as pertinent to a decision of questions involved herein, are: That relators claims were allowed on June 4, 1940; that warrants were drawn in payment thereof, which were signed by the county clerk and his deputy, and that Ira Miller, chairman of the board of county commissioners, refused to sign said warrants; that said warrants are now in the possession of the county clerk, complete with the exception of the signature of Ira Miller as chairman of said board and the county seal; that on June 11, 1940, the minutes of the county board show the following action was taken: "Moved by Johnson that board reconsider the allowance of all claims allowed on Tuesday, June 4, 1940, in payment of assessors with the exception of the Adolph Lebsack claim which has been appealed to the district court." The motion was carried, and then it was "Moved by Johnson that further action on assessors' claims be deferred until this board gets a decision on the Adolph Lebsack appeal." This motion was carried.

Prior to said action of the board on June 11, no notice was given relators that the county board had fixed said time to reconsider their action of June 4 in allowing their claims, or that any such action would be taken. After said action had been taken by the county board, each of the relators received a letter from the county clerk dated June 13, 1940, advising them of the action taken by the board at the meeting held June 11. On June 17, 1940, no appeal having been taken from the allowance of relators' claims,

they made written demand upon respondents to execute and deliver to each of them a warrant for the amount allowed by the board. On June 19, 1940, the respondents not having complied with said demand, this action was commenced by relators. On the same day that this action was commenced the county clerk was directed by the chairman of said board to send a notice in the following form to each of the claimants: "Dear Sir: I am directed by the board of county commissioners to notify you that at the next regular meeting of the county board to be held next Tuesday, June 25, 1940, at 9 a. m., further consideration will be given to your claim for $_____, same being Claim No. _____. Yours very truly, J. B. Morgan, county clerk."

The clerk, after filling in the amount of each claim in the blank left for that purpose, on said day mailed a copy of the same to each claimant. The county board had not at any regular, or adjourned or special session fixed June 25, 1940, to give further consideration to their claims and authorized or directed the clerk to send said notice to the various claimants, but said notices were sent by the clerk solely at the direction of Ira Miller, the chairman of said board. On June 25, 1940, the board, being in regular session, attempted to approve the sending of said notices to claimants and deferred further consideration of their claims until a decision of the district court was had on the Adolph Lebsack case.

Neither the answer of the respondents nor the stipulation of facts in this cause raises any question or issue as to the merits of relators' claims, or the amount thereof, or the propriety of their allowance.

Relators assign as error the finding and decree of the district court that the county board reconsidered its action in allowing the claims of relators, and the denial of a writ of mandamus upon that ground. The contention of relators is that the attempted reconsideration by the county board on June 11, 1940, was void because it was without notice to relators as required by section 26-122, Comp. St. 1929. Sec-

tion 26-122 provides: "The provisions of this article shall not be so construed as to prevent the county board from once reconsidering their action on any claim, upon due notice to parties interested."

Prior to the enactment of that statute, in 1877, 1878, it was held that a county board was without jurisdiction to reconsider or set aside its former action in allowing or disallowing a claim. *State v. Buffalo County,* 6 Neb. 454; *Kemerer v. State,* 7 Neb. 130.

Since the enactment of section 26-122 it is the settled law in this state that, "Upon due notice to parties interested a county board may once reconsider its action in allowing or disallowing a claim against the county." *Dean v. Saunders County,* 55 Neb. 759, 76 N. W. 450. See, also, *State v. Baushausen,* 49 Neb. 558, 68 N. W. 950. The giving of the notice provided for by the statute is mandatory, and where the giving of such notice has not been waived by the claimant, a county board has no jurisdiction to reconsider its previous action in allowing or disallowing a claim until, at some regular session, or adjourned session, or special session called for that purpose, it has set a time for a hearing for a reconsideration, and given notice to all persons interested of the time of such hearing. The purpose of giving the notice provided for by the statute is that the party or parties interested may attend at the time fixed for the reconsideration and take such steps as they may deem necessary to protect their rights.

The action of the county board on June 11, 1940, reconsidering and setting aside the allowance of the claims of relators, as made on June 4, 1940, being without notice to claimants, relators herein, was without jurisdiction and void. The notice mailed to claimants by the county clerk on June 19, 1940, after the commencement of this action, not having been authorized by the county board at any regular session, or adjourned session, or special session called for that purpose, was without legal effect, and any action taken by the county board thereunder on June 25, 1940, was without jurisdiction and void. *Morris v. Merrell,* 44 Neb. 423, 62 N. W. 865.

The action of the chairman of the county board in directing the county clerk to mail said notices to each of the claimants and of the county clerk was not the action of the board or by its authorization and was of no legal effect.

For the reasons stated, the judgment of the district court must be reversed, and it is unnecessary to consider other alleged errors assigned by relators. The judgment of the trial court is reversed, with directions to issue a peremptory writ of mandamus to respondents commanding them to execute and deliver to each of relators a warrant for the amount allowed each of them by the county commissioners on June 4, 1940.

REVERSED.

KROGER, District Judge, dissenting.

I agree with the majority opinion in all respects, with the exception of the final disposition of the case. Section 26-122, Comp. St. 1929, provides that the county board may once reconsider "their action on any claim, upon due notice to parties interested."

The majority opinion holds that no reconsideration of the claims involved in this case was had because of failure to give notice. I am of the opinion that, since no valid reconsideration has been had, the county board should be given an opportunity to reconsider their original action in allowing the claims and that the case should be remanded, with directions that a writ issue directing the board to take the necessary steps towards reconsideration within a limited time, or in the alternative that the claims be paid.

For the reason given, I respectfully dissent.

IN RE ESTATE OF ALLAN MCLEAN.
EARL DOUGLAS MCLEAN, APPELLANT, V. ANNABEL MCLEAN ET AL., APPELLEES.

295 N. W. 270

FILED DECEMBER 13, 1940. No. 30992.

1. Wills. Where an appeal bond, given in a probate proceeding, fails to conform to the conditions of the statute, but is sufficient

as a cost bond, and is approved by the probate court, such bond is defective but not void, and may be amended upon obtaining leave of the district court, if the appeal has been perfected within the required time.

2. ———. In order to obtain a modification of a judgment on the ground of fraud practiced by the successful party in obtaining the judgment, proceedings to that end must be commenced within two years from the rendition of the judgment, unless, in the exercise of reasonable diligence, the fraud was not discovered within that period.

3. ———. Where the probate of a will is contested in good faith, such a contest may be settled by a so-called "family settlement," which, in the absence of fraud or misrepresentation, is valid and binding on all the parties thereto, and as a result of which the will is not admitted to probate. The fact that the will contains an unexecuted testamentary trust does not alter the rule.

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

Perry, Van Pelt & Marti and *Arthur E. Perry,* for appellant.

Good & Simons, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

KROGER, District Judge.

Allan McLean died testate in Lancaster county, Nebraska, on May 27, 1933. He left surviving him his widow and four children. His will was offered for probate and three of the four children filed objections to the probate of the same. These objections were overruled by the county court and, on July 7, 1933, the will was admitted to probate. On the same day, an appeal undertaking was executed by the contestants, with proper surety, which undertaking was approved on the same day by the county judge, and on the 8th day of July, 1933, the transcript of the proceedings had in the county court was filed in the office of the clerk of the district court for Lancaster county, Nebraska. Issues were made up in the district court and thereafter, on November 23, 1933, proponent filed a motion to dismiss the appeal on

the ground that no good and sufficient supersedeas bond had been filed in the county court and consequently the district court was without jurisdiction of the subject-matter of the action. Contestants thereupon, and on November 27, 1933, filed a motion in the county court for leave to amend the appeal bond, which motion was granted, and an amended appeal bond was filed and approved in the county court on said date. Thereafter, and on January 5, 1934, contestants filed a motion in the district court for leave to file an amended appeal bond and, on February 5, 1934, the motion of contestants was sustained and leave granted to file an amended appeal bond. On the same day the proponent moved the court for leave to withdraw his motion for dismissal of the appeal, which motion was sustained, and on the same date the district court, a jury having been waived, proceeded to hear the appeal on its merits. Apparently sometime before February 5, 1934, the proponent and contestants had agreed upon a settlement of their differences, the basis of said settlement being that the will was to be denied probate, and when the case was called for trial, proponent elected to produce no witnesses and a decree was entered finding generally in favor of the contestants and against the proponent and the will was disallowed and denied probate as the last will and testament of said Allan McLean, deceased. Thereafter the proponent of the will was appointed administrator of the estate of Allan McLean, deceased, and was still acting as such when, on September 25, 1939, he filed a pleading in the district court which he designated as "Application of Earl Douglas McLean, Trustee and Executor under the Last Will and Testament of Allan McLean, Deceased, to avoid pretended decree," the substance of which was a challenge of the jurisdiction of the district court for Lancaster county, Nebraska, to enter the decree of February 5, 1934, and the further allegation that the decree of February 5, 1934, was obtained by fraud. To this pleading the contestants filed a demurrer which was sustained by the court on April 17, 1940, and the applicant, Earl Douglas McLean, elected to

stand on the application, and his application or petition was thereupon dismissed at his costs. From this ruling this appeal is taken.

The appeal bond given by contestants in the county court on July 7, 1933, was conditioned to pay the costs which might be assessed against the contestants, whereas the statute provides that such a bond shall be conditioned to "pay all *debts, damages and costs.*" (Italics ours.) Comp. St. 1929, sec. 30-1603. It is the contention of appellant that this defect rendered the bond void, that the district court acquired no jurisdiction on appeal and that consequently its judgment and decree of February 5, 1934, is null and void and the original order of the county court admitting the will to probate is still in full force and effect.

It is unnecessary to review all of the decisions of this court touching the question thus raised, as that has already been very ably done by Good, J., in the case of *In re Estate of Kothe,* 131 Neb. 780, 270 N. W. 117, where it was held that "This jurisdiction is committed to the rule that, where a defective appeal bond in a probate proceeding is filed within the time prescribed by statute, the proper procedure for the appellee is to move to require a proper bond to be given within a time designated by the district court, and, upon failure to comply with the order, that the appeal may be dismissed."

There, as in the instant case, the appeal bond was defective, but it was held that the bond was sufficient to give the district court jurisdiction.

As we view it, the bond in the instant case was a cost bond only and did not supersede the judgment of the county court, but it was sufficient to give the district court jurisdiction on appeal and, had a proper motion been filed, leave would have been granted to file a proper bond or the appeal would have been dismissed. A proper bond was filed as soon as attention was called to the defect in the appeal undertaking.

Counsel for appellant has cited numerous cases arising from appeals in misdemeanor actions wherein it was held

that the giving of a bond in the form and on the conditions required by statute is necessary to give the appellate court jurisdiction, but, as was pointed out in the *Kothe* opinion, such has not been the rule in civil cases and probate proceedings.

The bond in this case was filed and approved and the appeal docketed within the statutory time, and, while the bond was defective, it was not void, and we therefore hold that the district court acquired jurisdiction of the subject-matter of the action.

It is next contended by the appellant that there was fraud practiced upon the court which resulted in the decree of February 5, 1934. The application to set aside the judgment charged fraud in the following particulars: That it was represented to the court that a proper supersedeas bond had been filed, when in fact there had not been, and that it was represented to the court that all of the children and heirs of the deceased, Allan McLean, were before the court, when as a matter of fact the trustee named in the said last will and testament was not represented, and that one of the children who was a contestant had filed a dismissal of his appeal, which fact was not called to the court's attention, and that there were competent witnesses living who could have testified to facts entitling the will to probate, but that they were not called. If these facts constituted fraud, the applicant was aware of that fact on February 5, 1934, the date the decree was entered, having himself participated in all of the transactions mentioned. The application to have the decree declared void was not filed for more than five years after the decree was entered, which was long after any rights which the applicant might have had were barred by the statute of limitations. Comp. St. 1929, sec. 20-2008. See *Hoeppner v. Bruckman*, 129 Neb. 390, 261 N. W. 572.

This leaves but one contention made by appellant, and that is that the will of Allan McLean provided for a valid unexecuted testamentary trust which could not be modified or destroyed by agreement among all the beneficiaries, or

a so-called family settlement, and appellant cites the case of *In re Estate of Mowinkel,* 130 Neb. 10, 263 N. W. 488. An examination of the *Mowinkel* case immediately discloses that the situation there was entirely different. The probate of the will was not contested and, as stated by the learned justice in his opinion, "No legatee had, in the trust fund, any interest that did not come through the will." In other words, in the *Mowinkel* case, the will remained in full force and effect, except as to the attempted change in one provision therein, whereas, in the instant case, as a result of the family settlement, the entire will is set aside and none of the parties to the settlement takes any interest by virtue of the will.

While there is some authority to the contrary, the great weight of authority is to the effect that, where there is a contest in good faith of the probate of a will, such a contest may be settled by an agreement in the nature of a family settlement to have the will denied probate. See 68 C. J. 908. In the application in this case there is no claim made that the family settlement was obtained by fraud or misrepresentation, and we hold that the family settlement was valid and binding.

Finding no error in the record, the judgment of the trial court is

AFFIRMED.

IN RE ESTATE OF ALLAN MCLEAN.
JENNIE E. MCLEAN ET AL., APPELLEES, V. EARL DOUGLAS MCLEAN, APPELLANT.
295 N. W. 273

FILED DECEMBER 13, 1940. No. 31059.

1. **Executors and Administrators.** It is the duty of an administrator to administer the estate promptly and to distribute the property to those entitled thereto without unnecessary delay.
2. ———. An administrator is subject to the control of the county court to the extent that the court may remove him when it be-

comes apparent that he is unduly prolonging the administration for his own benefit.

3. ———. Under such circumstances, the administrator has become "unsuitable and incapable to discharge the trust" within the meaning of that term as used in section 30-323, Comp. St. 1929.

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

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

Perry, Van Pelt & Marti and *Arthur E. Perry,* for appellant.

Good & Simons, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

KROGER, District Judge.

This is an appeal from a judgment of the district court for Lancaster county removing appellant as administrator of the estate of his father.

The record discloses that Earl Douglas McLean, the appellant, was appointed administrator of the estate of Allan McLean, deceased, on February 6, 1934; that he qualified and took charge of said estate and, on August 22, 1935, filed what he designated as his final account and petition for settlement of said estate, but an examination of said account discloses that the estate had not been fully administered and said petition for final settlement has not been acted upon. Since that time several additional reports have been filed by the administrator. The record further discloses that the principal controversy in this case is with regard to the payment of a $25,000 claim allowed against said estate in favor of appellant's mother; that appellant, some time prior to his appointment as administrator, entered into a stipulation with his mother, by the terms of which he withdrew his objections to the allowance of said claim and agreed that the same might be satisfied by the transfer of certain real estate belonging to the estate at its

appraised value; that the other heirs have, at all times, been willing to execute deeds to carry out the terms of the stipulation, but that appellant has failed, refused and neglected to join in said deeds and has failed to take the required steps to bring about a settlement of the mother's claim. On October 28, 1938, a petition was filed in the county court of Lancaster county by the holders of a five-sixths interest in the McLean estate, asking that the appellant be removed as administrator. A hearing was had on said application and, on February 8, 1939, a decree was entered by the county court finding that the appellant was unsuitable and incapable of discharging his trust as administrator and removing him as such. From this decree an appeal was taken to the district court where a similar decree was entered.

It is the contention of appellant that the evidence is insufficient to sustain the judgment removing him as administrator on any of the grounds enumerated in section 30-323, Comp. St. 1929.

The evidence in this case is too voluminous to set out even a synopsis of the same in this opinion, but discloses that, outside of a few minor claims that have long since been disposed of, the only matter requiring settlement for the past three or four years has been the claim of appellant's mother. By appellant's own stipulation with his mother, a method of settlement of this claim was agreed upon back in 1934, yet appellant has persistently and successfully failed and neglected to bring about a settlement of this claim. His explanation that he was prevented from making such a settlement because of litigation instituted by representatives of his mother is without merit, because the litigation sought to compel the appellant to do what he had previously agreed to do, and finally resulted in a judgment of this court directing the appellant to proceed in accordance with the order of the probate court. See *In re Estate of McLean*, 136 Neb. 353, 285 N. W. 915.

It is the duty of an administrator to promptly and carefully administer the estate and distribute the property to those entitled thereto as soon as that can be done without

undue sacrifice of the assets of the estate. To that end the county court has supervision and control over the administrator to see that he performs his duty. As was stated in *In re Estate of McLean, supra*: "The appointment and discharge of an administrator is a function of the county court. We think that the county court has such control over an administrator that it may require him to perform his duty and not thwart the very objectives of the probate court."

While the record does not disclose that appellant has disregarded any order of the probate court, yet it does show that his entire conduct has been antagonistic to the other persons interested in the estate and discloses a disposition to litigate questions, at the expense of the estate, that were of no benefit to the estate or to any of the heirs, excepting possibly appellant, and, while prolonging the administration of the estate, he has absorbed the income therefrom by expenditures of which he was the chief beneficiary, at the same time permitting taxes to accumulate, all of which is against the best interests of the estate and inconsistent with his duty to administer the estate promptly and economically. The record amply sustains the finding of the county court that the appellant has become unsuitable and incapable of discharging his trust as administrator within the meaning of section 30-323, Comp. St. 1929.

The judgment appealed from is

AFFIRMED.

HILL HOTEL COMPANY, APPELLEE, V. VINCENT B. KINNEY, COMMISSIONER OF STATE DEPARTMENT OF LABOR, ET AL., APPELLEES: JOHN F. ELMORE, APPELLANT.

295 N. W. 397

FILED DECEMBER 20, 1940. No. 30878.

1. **Master and Servant.** The unemployment compensation law, providing that services performed by an individual for wages shall be deemed "employment," unless he is customarily engaged in an independently established trade, occupation, profession or

business, does not change the common-law definition of "independent contractor." Comp. St. Supp. 1939, sec. 48-702.

2. ———. "In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work." *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562.

3. ———. Under the unemployment compensation law, the claim of an employee of an independent contractor engaged for specific services at a fixed price, who hired his own employees, paid and controlled them in the performance of their duties without interference of others, is not allowable against the employer of the independent contractor.

4. ———. Evidence that a hotel manager who engaged an orchestra leader to furnish music, directed the musicians when to play, when to stop, and cautioned them not to loiter around the place or disturb guests or employees of the hotel, does not evince such control over the musicians as to disprove the otherwise established relationship of independent contractor between the leader and the hotel.

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

Lee & Bremers, Harold E. Pace and *Samuel T. Ansell*, for appellant.

Leon, White & Lipp, John E. Sidner and *R. W. McNamara, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

ROSE, J.

This is a proceeding under the unemployment compensation law. Comp. St. Supp. 1939, secs. 48-701 to 48-721.

John F. Elmore presented to the unemployment compensation division of the department of labor a claim for unemployment benefits chargeable against the account of the Hill Hotel Company. The claim contained the statement that claimant, a professional musician, with three other musicians, performing under the leadership of Bobby Bowman, had, as employee of the hotel company, furnished

music from May, 1938, until January, 1939. The claim was resisted on the grounds that claimant was not an employee of the hotel company and that the music was furnished by Bowman, an independent contractor. The appellate tribunal of the unemployment compensation division of the Nebraska department of labor allowed the claim and the hotel company appealed to the district court for Douglas county where the allowance was reversed and the claim disallowed. Elmore appealed to the supreme court.

Was claimant an employee of the hotel company within the meaning of the statute cited? This is the question presented by the appeal. Among the statutory provisions are the following:

"Services performed by an individual for wages shall be deemed to be employment subject to this Act unless shown to the satisfaction of the commissioner that—(A) Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and (B) Such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) Such individual is customarily engaged in an independently established trade, occupation, profession, or business." Laws 1937, ch. 108, sec. 2; Comp. St. Supp. 1939, sec. 48-702.

The provisions quoted from the Nebraska statute are found in the unemployment compensation law of Washington and in construing them the supreme court of that state said:

"In the Restatement of the Law of Agency, nine different items are recited as the principal elements to be considered in determining which relationship exists. In the enactment of the unemployment compensation statute, the legislature selected or picked out three elements to be considered. The legislature did not say, nor is the language

capable of that interpretation, that each of those elements must exist one hundred per cent. in order to establish the relationship of independent contractor. * * *

"The courts have never held that, in the determination of the relationship of independent contractor, there must be an absolute and complete freedom from control. The common-law test and the statutory test are the same. * * *

"In drafting the statute, the legislators attempted to codify the common law. They intended that the common-law test of employment relationship should likewise be the test under the unemployment compensation act." *Washington Recorder Publishing Co. v. Ernst,* 199 Wash. 176, 91 Pac. (2d) 718, 124 A. L. R. 667.

In that case the statute was considered at great length and many authorities cited. While there is a diversity of views among the courts on this subject and the opinions are not always unanimous, the weight of authority is that legislatures in enacting unemployment compensation statutes did not intend to depart from the common-law definition of "independent contractor." That definition was adopted by the legislature of this state in the enactment of the workmen's compensation law and by the Nebraska supreme court in construing it. One definition reads thus:

"An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." *Reeder v. Kimball Laundry,* 129 Neb. 306, 261 N. W. 562.

The following rule was adopted in the same case:

"In actual affairs an independent contractor generally pursues the business of contracting, enters into a contract with his employer to do a specified piece of work for a specific price, makes his own subcontracts, employs, controls, pays and discharges his own employees, furnishes his own material and directs and controls the execution of the work." See, also, *Prescher v. Baker Ice Machine Co.,* 132 Neb. 648, 273 N. W. 48; *Curry v. Bruns,* 136 Neb. 74,

285 N. W. 88; *Williams v. City of Wymore, ante,* p. 256, 292 N. W. 726.

In both the workmen's compensation law and the unemployment compensation law, the lawmakers legislated on labor problems and it should not be held without sound reasons that they intended to vary the status of independent contractors under the two intimately related statutes. The point in controversy was elaborately argued by counsel on each side with reference to statutes, opinions of courts and rulings of preliminary tribunals. It was earnestly insisted on behalf of claimant that the legislature had power to change the common law adopted in this state and make legislative definitions applicable to new enactments; that such power was exercised in the present instance, but that, even if the common-law tests are applied, claimant is entitled to an allowance for unemployment compensation under the facts. Though the argument is plausible, the rulings quoted from the supreme court of Washington seem to be based on better reasons and precedents and are adopted for the purpose of a decision on this appeal.

In writing, Bobby Bowman entered into a contract with the Hill Hotel Company to furnish for it in its hotel in Omaha music by four musicians, members of the Omaha Musicians' Association. The contract contains the following terms:

"Minimum of thirty hours per week; side man one dollar ($1) per hour; leader one dollar and fifty cents ($1.50) per hour; overtime at the rate of fifty cents per half hour; with two weeks' notice which may be given by either party. This contract to take effect June 24, 1938, and run until August 31, 1938, inclusive. Engagement to take place at Hill Hotel, Omaha, Nebraska.

"This contract is hereby extended to January 1st, 1939, under above conditions."

The contract was signed "Hill Hotel Co. by Sam Josephson" and by "Bobby Bowman," and approved by "Omaha Musicians' Association." Elmore was not a party to the contract. Music was furnished at the hotel by an organiza-

tion of musicians consisting of Bowman, the leader, Elmore, the claimant for unemployment compensation, and two other persons. Each played a musical instrument. The quartet was variously known as "Bobby Bowman's Band," and "Bobby Bowman's Orchestra," and "Bobby Bowman's Syncopators."

Elmore was a witness in his own behalf at the trial and testified among other things as follows, in substance: Went to work at the hotel about May 27, or 28, 1938, and worked there until the first part of January, 1939; played a guitar furnished by himself; had no written contract with any one for employment at the hotel; did not discuss employment with Josephson, hotel manager; received pay from Bowman, who paid the other musicians also; Bowman told him when to come to work; Josephson told Bowman when to play and when to quit; prior to May 28, 1938, never had a personal conversation with Josephson on the subject of playing at the hotel; Bowman furnished the music played; had authority to employ and dismiss; in common with other players Elmore bought his own uniform; was still playing with Bowman's Syncopators at the Cinema Club where he had been engaged three or four months.

Bowman testified that he entered into the contract with the hotel company in the form used by the musicians' union; that the union scale of wages was specified; that he received weekly from the hotel company pay for the four musicians and paid to each his share. He testified further: Josephson always gave him instructions, among them when to play and when to quit, manner of playing, type of music and times for intermission. Instructions to leader were passed on to other players. With the exception of a piano furnished by the hotel company, the musical instruments belonged to the players. They quit playing at the hotel when the contract for music there expired. Elmore was paid in full when he left. Later Bowman's Orchestra with some of the same players furnished music at different times and places but not continuously.

Sam Josephson testified he was manager of the Hill Hotel; employed the Bobby Bowman Band, did not at any time employ Elmore or talk to him about employment or compensation; did not talk to any member of the orchestra about what instruments to play or how to play them, or what uniforms to wear; did not criticize their work; had nothing to do with the personnel of the orchestra; told them the starting time and the quitting time; may have told Bowman to cut down the time for playing; might have cautioned them not to loiter around the place or disturb guests or employees of the hotel; paid Bowman by check for the entire cost of the music; never made any payment to any member of the band; never deducted anything for unemployment insurance; had nothing to do with rehearsals; had no oral or written contract with Elmore; never controlled any individual service of Elmore or of any other member of the band; did not discharge Bowman, the time limit under his contract having expired when he and the other musicians left.

In many material respects the evidence is not conflicting. In so far as the testimony of Elmore and Bowman conflicts with that of Josephson, credence was given to the latter by the trial judge who saw the witnesses and heard them as they testified. His ruling is adopted on appeal, since it is in harmony with the general import of circumstances and events disclosed without dispute. Josephson did not direct the technique of the musicians in the performance of their duties under the contract between Bowman and the hotel company or employ Elmore or direct him in the performance of his professional duties or discharge him. The relation of independent contractor was not disproved by evidence that Josephson instructed Bowman in regard to his duties under the contract, insisted on proper behavior in the hotel and cautioned the musicians not to loiter around the place or disturb guests or employees of the hotel. *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562.

In the better view of the entire record, considered in

connection with the unemployment compensation law and with the weight of judicial interpretation, Elmore was not an employee of the Hill Hotel Company but was an employee of Bobby Bowman, an independent contractor. It follows that the claim for unemployment compensation was properly disallowed by the district court.

AFFIRMED.

IN RE APPLICATION OF CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPLICANT, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION ET AL., APPELLEES.
295 N. W. 389

FILED DECEMBER 20, 1940. No. 31046.

1. **Railroads.** Under the Constitution and statutes of Nebraska, the Nebraska state railway commission has power to determine a properly presented issue on application of a railroad company for permission to discontinue motor passenger trains on a branch line of railroad. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201.
2. ———. On appeal to the supreme court from an order of the Nebraska state railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary.
3. ———. A final order of the Nebraska state railway commission, denying a railroad company permission to discontinue motor passenger trains operated at a loss, is unreasonable and arbitrary if based on findings without support in the evidence.
4. ———. "Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public." 3 Pond, Public Utilities (4th ed.) sec. 775; *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234.
5. ———. In determining the necessity for continued operation of motor passenger trains on a branch line of railroad, consideration should be given to the public rather than to individuals.
6. ———. The loss of railroad transportation occasioned by

operation of motor vehicles on highways constructed and improved at public expense may properly be considered on a contested application to discontinue motor passenger trains operated at a loss on a branch line of railroad.

7. ———. Motor passenger trains operated on a branch line of railroad at a loss may properly be discontinued, where adequate public transportation is otherwise furnished, though the main line is operated at a profit.
8. **Evidence.** It is a presumption of law that public officers will perform their public duties.
9. **Railroads.** An order of the Nebraska state railway commission denying permission to discontinue motor passenger trains on a branch line of railroad *held*, on appeal, to be based on findings without support in the evidence and consequently unreasonable and arbitrary.

APPEAL from the Nebraska State Railway Commission. *Reversed.*

J. W. Weingarten and *W. P. Loomis*, for appellant.

Anderson, Storms & Anderson and *L. A. Sprague, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and JOHNSEN, JJ.

ROSE, J.

This proceeding was commenced before the Nebraska state railway commission and there prosecuted to a final order. The Chicago, Burlington & Quincy Railroad Company, a common carrier of passengers and freight in Nebraska and in other states, applied for permission to discontinue motor passenger trains numbered 97 and 98 which are operated daily except Sunday on the branch line of railroad between Beatrice and Holdrege. Between those cities, the towns and stations, east and west, are Hoag, DeWitt, Swanton, Western, Tobias, Ohiowa, Strang, Shickley, Ong, Edgar, Deweese, Lawrence, Rosemont, Blue Hill, Bladen, Campbell, Upland, Hildreth, Wilcox, and Sacremento. The municipalities named appeared before the commission by counsel and remonstrated against the granting of the application. On issues raised by formal pleadings, the commission, after hearing the parties at length, made

findings of fact against applicant and in favor of remonstrants and dismissed the proceeding. Applicant appealed to the supreme court and submitted for review the sufficiency of the evidence to sustain the order.

The problem presented to the commission involved regulation of public transportation services. The commission acquired jurisdiction and had power under the Constitution and statutes to consider and determine the issue. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201. The only question on appeal therefore is the sufficiency of the evidence to prove that the order denying the applicant permission to discontinue motor passenger trains 97 and 98 was not unreasonable or arbitrary. *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N. W. 756. Where, however, a final order of the commission depriving a common carrier of substantial rights is based on findings without support in the evidence, it is unreasonable, arbitrary and reversible on appeal. *Northern P. Ry. Co. v. Department of Public Works*, 268 U. S. 39, 45 S. Ct. 412; *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234. This court in discussing the regulatory powers and duties of the commission in respect to services of common carriers unanimously adopted the following views of the law:

"'The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates. Neither the number of the individuals demanding other service nor the question of fares constitutes the entire question, but rather what the proper agency should be to furnish the best service to the public generally and continuously at the least cost. Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community

is not a convenience and necessity for the public and its introduction would be a handicap rather than a help ultimately in such a field.' 3 Pond, Public Utilities (4th ed.) sec. 775." *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234.

In the same case the court ruled that consideration should be given to the public rather than to individuals.

A ruling based on the abandonment of an unprofitable branch line of railroad, while its entire mileage is operated at a profit, is not necessary to a decision on this appeal and decisions of administrative boards and opinions of courts on such a problem are not controlling herein. The question is narrowed to the finding of the commission that applicant is not, under existing conditions as disclosed by the evidence, entitled to a regulatory order permitting it to discontinue motor passenger trains 97 and 98 on its branch line of railroad between Beatrice and Holdrege. Transportation of passengers by steam-engine trains on this line was profitable before the advent of automobiles, private trucks, common carrier trucks and public highways adapted to the use of the new motor vehicles. Much of the evidence on both sides was directed to changed conditions resulting from the new methods of transportation. Such changes were inevitable and railroad transportation must be adjusted to existing conditions if it is to survive. Long survival without earning capacity or profit is impossible.

The Chicago, Burlington & Quincy Railroad Company, applicant, operates 151 miles of railroad between Beatrice and Holdrege. Its entire mileage in Nebraska is practically 3,900 miles and it has a vast mileage of connecting lines in other states. The grounds on which applicant relies for the relief sought by it may be summarized generally as follows: The primary purpose of the motor trains was transportation of passengers. Incidental thereto the service included the carrying of mails, express, baggage, cream and other commodities transportable in a one-unit motor train. The use of private automobiles and public motor passenger buses or coaches on improved highways,

paralleling or crossing applicant's branch line, reduced the passenger service thereon almost to the vanishing point. Trains 97 and 98 are no longer needed for passenger traffic and are operated at a loss which places an unreasonable and unnecessary burden on the main railroad lines of applicant and on interstate commerce. If these trains are abandoned, all adequate transportation facilities and public services for passengers, baggage, mails, express and freight in all the towns and territory along this line will be furnished by other trains thereon, by other railroad lines of applicant, by lines of other railroad companies operating in the same territory and by common carrier trucks and motor coaches. In brief, the foregoing propositions indicate generally the position taken by applicant.

Evidence in support of the application tends to prove the following facts and inferences therefrom: The motor passenger trains operate daily except Sunday between Beatrice and Holdrege. According to the schedules, train 98 leaves Holdrege at 6:40 a. m. and arrives at Beatrice at 12:08 p. m. and 97 leaves Beatrice at 1:00 p. m. and arrives at Holdrege at 6:34 p. m. The average number of travelers on these trains per train mile did not amount to two passengers for the years 1937, 1938 and 1939 and they were not used generally by the public for transportation of passengers during those years. The expenses of operating this branch line during that period exceeded the revenues at least $500 a month and to that extent was a burden on other lines. On the line between Beatrice and Holdrege applicant operates mixed-service steam trains numbered 102 and 103. They are equipped to carry passengers, express, baggage, cream and freight and have the facilities and connections for receiving and forwarding daily shipments at or near the towns along the Beatrice-Holdrege line. Train 102 is scheduled to leave Holdrege on Tuesdays, Thursdays and Saturdays at 5:50 a. m. and arrive at Beatrice at 3:35 p. m. Train 103 is scheduled to leave Beatrice on Mondays, Wednesdays and Fridays at 9:20 a. m. and arrive at Holdrege at 7:30 p. m. This service will remain if trains 97 and 98 are

abandoned. In that event the federal government will provide for the handling of mail now carried by applicant on those trains. Freight railroad traffic with resulting revenue in this territory has been greatly reduced by motor trucks operating on improved highways. Some wholesale merchants use private trucks to deliver merchandise to their retail customers. To a great extent cream and other farm products are taken to market by farmers in their own motor cars. By these methods and other means, the revenues arising from applicant's transportation of freight on this line have been greatly reduced. The main purpose of the application is to reduce operating costs of this branch line and preserve it for public service.

The question presented by the appeal as understood by counsel for remonstrants is the same as already indicated and has been stated by them in this form:

"As the authority of the commission to grant or deny the application of the company is not challenged and cannot be challenged because of this court's previous holdings, the only substantive issue before the court is whether the order of the commission denying the application is supported by evidence showing that such order is not unreasonable or arbitrary."

In the argument on this question the evidence is discussed at length on behalf of remonstrants. Many witnesses residing in the towns or territory along the Beatrice-Holdrege branch line testified in favor of the remonstrants, but their testimony is too voluminous to recite in detail. The general import of it, however, including inferences, conclusions, opinions and forecasts of witnesses is indicated by the following summary: The record of railroad operations on this branch line covers the period since 1886 and estimates of earnings, expenses and losses in revenue for the years 1937, 1938 and 1939 are not conclusive since the business during the 10-year period ending at the close of 1939 shows a profit and the net earnings in 1939 prove an increase over 1937 and 1938. The main lines of applicant are operating at a profit. The discontinuance of trains

97 and 98 would leave the municipalities along this branch line without adequate mail, express and passenger services. The years 1937, 1938 and 1939 were not normal for this territory on account of continuous drought which destroyed crops and interfered with the live stock industry—the two principal commodities for transportation. Rainfall and snow at the time of the trial and previously indicate a more prosperous season for 1940. The live stock industry is reviving owing to the cultivation of crops adapted to the dry climate and resulting production of more feed for cattle. Chambers of commerce, city councils, municipal officers, merchants and others have assumed a friendly attitude toward applicant and have united in efforts to increase its business as a common carrier and to curb transportation by motor trucks operating in the same territory. To this end some town councils have passed ordinances imposing occupation taxes on operators of trucks. Other councils have been urged to pursue the same course. There is a general movement to turn transportation business back to the applicant and to prevent the abandonment of trains 97 and 98. Trains 102 and 103 do not run on schedule time and will not provide adequate mail and express service. Some of the county roads to and from towns along the branch line have been blocked by snow and at other times rains have made them dangerous and unfit for mail and express routes.

Testimony of the character indicated by the foregoing summary was multiplied by witnesses opposing the application, but notwithstanding such testimony and all evidential facts in the record, trains 97 and 98, operated as passenger trains, are practically obsolete. Income from passenger traffic, averaging less than two passengers per train mile, is out of all proportion to the cost of operation as shown by uncontradicted evidence. There is no public necessity for exclusive passenger trains operated as such without compensable revenue nor is there any competent probative evidence of a material increase. Witnesses generally came to the hearing before the commission in private

automobiles. They were prompted by natural impulses to do so. They preferred a convenient, speedy and comfortable way to travel on highways constructed and improved at public expense. They started from their own doors. They were not hampered by railroad time tables or limited in speed by motor trains or delayed by stops at stations. It is expecting too much of human nature, of optimism, of forecasts for moisture, and of proper attitude toward the railroad company, to find that trains 97 and 98, if continued, will be substituted for automobiles in the transportation of passengers between Beatrice and Holdrege. Conditions of railroad transportation have changed since 1886, when this branch line was constructed, and the revenues during the entire intervening period are not proper measures of earnings and expenses under present changed conditions. Earnings and expenses since 1932, a period suggested by remonstrants for computations, are not proper measures of present or future profits and losses. Applicant must reckon with conditions resulting in present losses. The slight decrease in the loss occasioned by the operation of the motor passenger trains in 1939 was due in part to dismissal of one member of a train crew. Neither the evidence nor the findings of the commission show a public necessity for trains 97 and 98 as means of transporting passengers between Beatrice and Holdrege, when the daily service, equipment and connecting links of trains 102 and 103 are considered with other available services of applicant and of other common carriers.

Do the franchises and public duties of applicant require it to operate these passenger trains for the incidental purposes of transporting United States mails, express and cream? It is not a duty of a railroad common carrier to run passenger trains at heavy monthly losses for years on a branch line of railroad after such trains have been abandoned by the public for general and ordinary passenger traffic producing only a small decimal of operating expenses, where adequate facilities and public services are provided by daily mixed-service trains carrying passengers,

mail, express and freight, and by other public utilities. Motor passenger trains operated on a branch line of railroad at a loss may properly be discontinued, where adequate public transportation is otherwise furnished, though the main line is operated at a profit. More moisture and resulting prosperity, anticipated by witnesses, are not likely to so change human nature as to turn short-trip passenger traffic, generally in rural communities, from automobiles to motor trains on railroads. Ordinances imposing occupation taxes have not yet materially lessened transportation by motor buses and motor trucks in this territory and the evidence so proves. If, in the future, there should be any unreasonable departure from the schedules of trains 102 and 103, the regulatory power of the Nebraska railway commission will be available to the public for corrective remedies. It should not be assumed or found, in absence of evidence, of which there is none, that county officers will fail to perform their duty to keep county roads in a reasonably safe condition for mail and express routes and for other public purposes; nor that the postmaster general of the United States will fail to perform his duty to furnish adequate mail services for the people residing along this branch line of railroad.

The examination and consideration of all the evidence lead to the conclusions that the operating expenses of passenger trains 97 and 98 far exceed the revenues therefrom; that those trains are not needed by the public for passenger traffic; that the continuous operation of trains 102 and 103 and of other utilities will furnish the public in this territory with adequate transportation for passengers, mail, express, cream and freight. In these views of the record, the final order denying applicant permission to discontinue trains 97 and 98 is based on findings without support in the evidence and for that reason is unreasonable and arbitrary within the meaning of the law.

REVERSED AND REMANDED.

JOHNSEN, J., not participating.

GLEN EMERY V. STATE OF NEBRASKA.

295 N. W. 417

FILED DECEMBER 20, 1940. No. 30893.

1. **Indictment and Information.** It is generally sufficient in an information to describe the crime charged in the language of the statute and it is not ordinarily necessary to negative the exceptions contained in a statute defining a crime if they are not descriptive of the offense.
2. **Criminal Law.** Statutes of limitation, as applied to criminal procedure, need not be specially pleaded and may be raised under a plea of not guilty.
3. ———. Where the state fails to produce evidence sufficient to sustain a finding by the jury that the accused was fleeing from justice during the operating period of the statute of limitations, the trial court should direct a verdict of acquittal.
4. ———. The burden of proof is upon the state under such circumstances to prove beyond a reasonable doubt that the defendant was fleeing from justice, otherwise the statute of limitations is a complete defense.

ERROR to the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed.*

H. T. White, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Don Kelley, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

The plaintiff in error was convicted in the district court for Dakota county of the crimes of chicken stealing and breaking and entering. He brings the case to this court for review.

The record shows that the alleged crimes were committed on May 18, 1936, and that the complaint upon which he was arrested was filed on September 25, 1939. Plaintiff in error demurred to the information and, after an adverse ruling thereon, moved to quash the information, which motion was also overruled. It is argued that these rulings

were erroneous for the reason that the information showed on its face that the statute of limitations had become a bar to the prosecution.

We think the correct rule is as follows: It is generally sufficient in an information to describe the crime charged in the language of the statute and it is not ordinarily necessary to negative the exceptions contained in a statute defining a crime if they are not descriptive of the offense. *Pandolfo v. State,* 120 Neb. 616, 234 N. W. 483. The statute of limitations is not descriptive of the offense and it is not necessary to plead an exception which makes it inoperative. *Boughn v. State,* 44 Neb. 889, 62 N. W. 1094. We think the better rule is that statutes of limitation, as applied to criminal procedure, need not be pleaded and may be raised under the general plea of not guilty. *Hogoboom v. State,* 120 Neb. 525, 234 N. W. 422. The trial court was not in error therefore when it overruled the demurrer and the motion to quash.

The applicable statute of limitations provides that no person or persons shall be prosecuted for any felony unless the indictment shall be found within three years next after the offense shall have been committed, provided nothing therein contained shall extend to any person fleeing from justice. Comp. St. 1929, sec. 29-110. It was proper for the state to show that plaintiff was fleeing from justice and, if the evidence was sufficient, for the court to instruct the jury with reference thereto.

It is contended by plaintiff in error that the evidence is not sufficient as a matter of law to show that he was fleeing from justice. The record shows that plaintiff in error was living with his father in Dakota City at the time the crime was committed. Immediately thereafter he left for Omaha, where he maintained his own home. The evidence shows that a warrant was forwarded to the Omaha police department on or about May 20, 1936, with instructions to pick up plaintiff in error and hold for the sheriff of Dakota county. The record shows that the police called at his home and, not finding him in, decided to wait

until they should happen to run across him. There is evidence in the record that defendant was about his home continuously during the three years immediately following the perpetration of the alleged crime.

We are of the opinion that an accused person who resides in his own home within the jurisdiction of the court, openly and notoriously, during the running of the statute of limitations is not fleeing from justice within the purview of the statute. Plaintiff in error was known to be in Omaha, otherwise the warrant for his arrest would not have been sent to that place. The fact that the officers in Omaha indifferently sought the accused and negligently permitted three years to elapse without making the arrest is not sufficient to sustain a finding that the accused was fleeing from justice. The term "fleeing from justice" necessarily contemplates that the accused has departed from his usual place of residence to a place where he cannot be found in the exercise of reasonable diligence by the officers. In the instant case, the failure to arrest the accused was due to the negligence of the officers holding the warrant, not anything that the accused did. The exception contained in the limitation statute was not intended to protect negligent law enforcement officers, but to prevent an accused from defeating justice by absconding or hiding himself so that law enforcement officers could not perform their duty even if they diligently attempted to do so.

We are obliged to hold that the trial court erred in not sustaining the motion of plaintiff in error for a directed verdict at the close of all the evidence.

REVERSED.

JOHNSEN, J., not participating.

FRANK MILLSLAGLE V. STATE OF NEBRASKA.

295 N. W. 394

FILED DECEMBER 20, 1940. No. 30761.

Criminal Law. When the trial court, in the exercise of its sound discretion, during the progress of the trial, has certain ques-

tions and objections thereto read which had been previously asked and answered over objection, and the court, in correcting the record, sustains the objections to such questions, strikes the answers from the record and admonishes the jury to disregard such questions and answers, and the ruling and action of the trial court do not constitute fundamental error, and the objecting party fails to move for a mistrial, but elects to take his chances of a favorable verdict, with power and intent to annul it as erroneous and void if the verdict should be against him, and further fails to predicate error thereon in a motion for a new trial, *held*, by such conduct, the objecting party consents to and acquiesces in the rulings and actions of the trial court and, under the circumstances, is estopped to predicate error thereon in the appellate court.

ERROR to the district court for Dawes county: EARL L. MEYER, JUDGE. Opinion on motion for rehearing of case reported in 137 Neb. 664. *Judgment of reversal vacated and judgment of district court affirmed.*

Greydon L. Nichols, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke*, *contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

MESSMORE, J.

The original opinion in this case, reported in 137 Neb. 664, 290 N. W. 725, properly disposes of the meritorious assignments of error raised, with the possible exception hereinafter discussed. The case is here on reargument. The point involved has to do with the admissibility of the following evidence, rulings thereon by the trial court, and the interpretation placed thereon in the original opinion. It develops from an alleged conversation between Ernest L. Davis, special agent for the Nebraska Stock Growers Association, and Mrs. Millslagle, wife of plaintiff in error (defendant), between 4 and 5 o'clock in the afternoon of November 22, 1938, in the sheriff's office at Chadron, Nebraska, in the presence of Roy (Bus) Shumway, an accomplice and brother of Mrs. Millslagle, and Ed Har-

rison, deputy sheriff of Dawes county, and without the presence of defendant Frank Millslagle. The evidence, admitted on rebuttal, follows, the county attorney propounding the questions, and defendant's counsel interposing objections thereto:

"Q. (1389) Did Roy Shumway make any statement to his sister Mrs. Millslagle concerning the evening of October, or the evening or night of October 11, 1938, in your presence at this time?" Objected to as asking for hearsay and incompetent. Overruled. County attorney: "Just answer yes or no. A. Yes. Q. And what did Roy Shumway say to Mrs. Millslagle?" Objected to as incompetent, immaterial, not binding on the defendant, hearsay, not impeaching as far as Mrs. Millslagle is concerned. The court: "*I understand it was said in the defendant's presence. If it was, he may answer.* (Italics ours.) A. Mrs. Millslagle and Bus were talking and Bus said, 'You remember the night I got out to your place and you came to the door and you tried to get Frank and I not to get the cattle,' and she wouldn't reply to it. She didn't make any statement in regard to that, and then she said, 'Well —'" The court: "Just a minute. Was Mrs. Millslagle asked about that?" County attorney: "She was asked about this conversation." The court: "About this conversation?" "Yes; while she and her brother—" The court: "Does she deny that?" "No; this corroborates Mrs. Millslagle's statement." The court: "It is not intended as impeaching?" "Yes; what she said immediately afterwards is contrary to what she testified. To this point it corroborates her statement." The court: "Go ahead." Counsel for defendant: "The defendant moves to strike this testimony as not rebuttal, incompetent, irrelevant and immaterial." The court: "I understand it is only preliminary. Overruled."

"Q. (1392) You have stated that Roy Shumway called to her attention the fact that on that evening she tried to get them not to go after the cattle and she refused to admit that, is that true?" Defendant's counsel objected as not proper rebuttal, incompetent, irrelevant, and im-

material. The court: "Overruled." "Q. (1393) Now, thereafter did Mrs. Millslagle make any statement? A. Yes; then was when she made that statement." Objected to as incompetent, irrelevant and immaterial, and not proper rebuttal. The court: "Overruled." "Q. (1395) Did she make any further statements to you or to Mr. Harrison in your presence and in the presence of Roy Shumway as to when and under what conditions she would tell you more about that matter? A. Yes. (No objection) Q. And what did she say in that regard?" Objected to as not proper rebuttal, incompetent, irrelevant and immaterial, and no sufficient foundation. The court: "You asked her about that on direct examination—I mean cross-examination?" County attorney: "Yes." The court: "Overruled. A. Well, she said if she could see Frank she would tell us about it but she didn't want to make Frank mad at her." Reporter's note: "The following questions herein set out are part of the direct examination of Mr. E. L. Davis in rebuttal." The court, in addressing defendant's counsel, said: "There are several objections that I possibly should sustain." At this point Q. 1500 was read by the reporter, which is in fact Q. 1389. There was no answer to the question read. The court ruled as follows: "Just show that the objection is sustained. The answer will be stricken and disregarded by the jury. Go ahead." Q. 1501 (in fact, Q. 1390) was read as was the answer, "Yes." The court: "That answer will be stricken too." Q. 1502 (in fact, Q. 1391) was read; the answer was not read. The court: "*The court was mistaken about that being in the defendant's presence and the objection should be sustained and is now sustained.* The answer will be stricken and disregarded by the jury." (Italics ours.) Defendant's counsel: "I am willing to state, your Honor, that I thought the reporter preserved at the time that you so understood that it was in the presence of Mr. Millslagle." Defendant's counsel: "The defendant moves to strike the testimony as not rebuttal, incompetent, irrelevant and immaterial." The court: "At this time that motion is

sustained and all of this is stricken and will be disregarded by the jury." Q. 1503 (in fact, Q. 1392) was read. The court: "It is now sustained (referring to the objection) and the answer will be stricken and disregarded by the jury." Q. 1504 (in fact, Q. 1393) was read, as well as the answer. The court: "Apparently the answer was in before the objection was made, but it will be sustained and the answer stricken and disregarded by the jury." Q. 1505 (in fact, Q. 1395) and Q. 1506 (in fact, Q. 1396) were read, the latter reading: "And what did she say in that regard?" Objection was made by defendant's counsel. The court: "Sustained. The answer will be stricken and disregarded by the jury." The court: "Gentlemen, those questions and answers to which objections were sustained and the answers stricken will be totally disregarded by you."

It is obvious from the record that the pertinent objections of defendant's counsel were sustained and the answers stricken without the answers being read to the jury, except as heretofore shown, when the court sought to correct the record. The court admonished the jury to disregard the evidence so stricken. Defendant's counsel did not move for a mistrial, based on the rulings of the court and its treatment of the evidence. Even the motion for a new trial contained no assignment of error with reference thereto; nor was the matter pressed in this court at any time. We believe the following Nebraska authorities properly announce the rule pertinent to this situation:

This court in *Triplett v. Lundeen,* 132 Neb. 434, 272 N. W. 307, held that defendants were not entitled to complain of misconduct of plaintiff's counsel where defendants' counsel knew of such misconduct, and did not ask for a mistrial, but elected to proceed and take the chance of a favorable verdict. It was stated in the opinion (p. 442): "There is another reason why defendants cannot complain of the misconduct of counsel for plaintiff. Counsel for defendants knew of it at the time. If they were not satisfied that the jury could give defendants a fair trial, they had the opportunity of asking for a mistrial, but elected

to proceed and take the chances of a favorable verdict. Defendants are not, therefore, in a position to complain of such misconduct." See, also, *Ellsworth v. City of Fairbury*, 41 Neb. 881, 60 N. W. 336.

Misconduct of adverse counsel may not be complained of by one failing to ask for a mistrial, although knowing of the misconduct and consenting to take chances of a favorable verdict. *Long v. Crystal Refrigerator Co.*, 134 Neb. 44, 277 N. W. 830. And in the early case of *Chamberlain v. Brown*, 25 Neb. 434, 41 N. W. 284, this court held: "Error cannot be assigned upon a ruling or action of the district court made or taken with the consent of the complaining party."

5 C. J. S. 227, sec. 1514, in substance, states: Where a party at the trial consents to and acquiesces in the making of a ruling with reference to the admission, rejection or striking out of evidence, and such ruling or action on the part of the trial court does not constitute a fundamental error, such party is estopped to predicate error thereon in the appellate court. See, also, *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Cady v. Norton*, 14 Pick. (Mass.) 236; 1 Wigmore, Evidence (3d ed.) 322.

We conclude the defendant consented to and acquiesced in the rulings of the trial court as heretofore designated, desiring to take his chances of a favorable verdict, with the power and intent to annul it as erroneous and void if the verdict should be against him. He cannot remain idly by and then profit by such conduct. To hold otherwise would be to definitely violate the right of the trial court to exercise its sound discretion in correcting errors in the admission, rejection or striking out of evidence.

Paragraph 6 of the syllabus in the original opinion and that part of the opinion adverse to the conclusion herein reached are hereby vacated. The verdict and sentence of the trial court are

AFFIRMED.

JOHNSEN, J., not participating.

H. JOE BOHMONT, APPELLEE, V. WILLIAM H. H. MOORE ET AL., APPELLANTS: MARTEL STATE BANK, APPELLANT.*

295 N. W. 419

FILED DECEMBER 20, 1940. No. 30902.

1. **Negligence.** Negligence is the "omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances." 45 C. J. 628.
2. **Warehousemen.** Where the lessee of a safe deposit box charges the lessor thereof with negligence, the burden of proof is on the lessee to prove, by a preponderance of the evidence, negligence of the lessor, and the burden of proof does not shift at any time during the trial, although the burden of producing evidence to overcome a *prima facie* case of negligence may rest on the lessor.
3. ———. The duty of a lessor renting safe deposit boxes is to exercise such care and diligence as a reasonably prudent person or corporation would exercise under like circumstances in safeguarding the contents of the safe deposit boxes, and take such measures to safeguard the property upon deposit as are customarily used in the community by ordinarily careful institutions, fairly comparable in size and other conditions with the defendant bank.
4. **Evidence.** A presumption is not evidence and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence.
5. **Appeal.** Instruction No. 4, in the instant case, *held* to be erroneous in requiring evidence of equal weight to that produced by defendants to overcome the presumption, in stating that such presumption is evidence and in instructing the jury that presumption of evidence is proof of negligence. Such instruction is not cured by a proper instruction, previously given, on the burden of proof.
6. **Trial.** "Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings*, 114 Neb. 106, 206 N. W. 19.

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*Rehearing denied. See p. 907, *post*.

7. ———. If the liability of a banking corporation, sued for tort, is necessarily dependent upon the culpability of its president and cashier, who are the immediate actors and who, in an action against them by the same plaintiff for the same act, have been adjudged not culpable, defendant banking corporation, under such circumstances, is entitled to a directed verdict.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Reversed.*

Mockett & Finkelstein and *Peterson & Devoe*, for appellants.

Lloyd E. Chapman, contra.

Amos Thomas, Hendricks & Kokjer and *Hall, Cline & Williams, amici curiæ.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

MESSMORE, J.

This is a law action wherein plaintiff charges defendants with negligence, alleging that he placed the sum of $14,000 in a safe deposit box which he rented from defendant bank, and when he later called for the box to take therefrom the money it was missing; that the defendants refused to pay or return such amount to him on his demand, denying negligence on their part. The jury, by a 10 to 2 verdict, found for the plaintiff. Defendants appeal.

The defendant bank maintains some 125 safe deposit boxes of the kind generally used in banks of the same, or larger, size, for the purpose of renting such boxes to its patrons and others, advertised such fact on its building, and made a nominal charge for the rent thereof, depending on the size of the box. The boxes were contained in steel nests of 25 boxes in each nest. Each box is manufactured so that it can be opened only by insertion in the lock of two keys, one known as the master key, kept by the bank, the other key retained by the renter. To open the box the master key is first inserted; it turns the lock partially; the renter then inserts his key in the same lock, to turn the lock completely and open the box.

Early in the year 1919, the plaintiff rented safe deposit box No. 83. He claims that one Lon Stuckey, in November, 1919, made a gift to him of $10,000, consisting of three 1,000-dollar bills, 20 100-dollar bills, and 100 50-dollar bills, which he placed in box No. 83 in November, 1919. The evidence is in dispute as to whether, when plaintiff rented the box, he was told that it was for keeping insurance papers, and other papers which he did not want to lose, but not for the safe-keeping of Liberty bonds or money. The plaintiff did purchase from the bank and leave for safe-keeping Liberty bonds.

Lon Stuckey engaged in farming in the Martell community from 1887 to 1894 with the plaintiff's father and lived in the household,—in fact, lived there when plaintiff was born November 2, 1889,—until 1894, when he moved to another farm owned by him. Throughout all of plaintiff's life he was favored by Stuckey until Stuckey died by taking his life January 15, 1920. The plaintiff in 1910 purchased a relinquishment of land in Colorado, going there to prove up on the same as a homestead. He was induced to return to the Martell vicinity in 1912, and Mr. Stuckey built a nine-room house on his farm for the plaintiff and his family. In 1911 Stuckey made a will, giving all of his estate, real and personal, to the plaintiff, the gross amount of which approximated $27,740. The plaintiff mortgaged the farm which he had inherited from Stuckey for the purpose of building a garage and entered into the Ford sales and repair business in Martell. He remained in this business until 1922. The farm was sold for $13,500, the mortgage paid, and plaintiff had left $3,000; he was indebted to the Sprague State Bank in the sum of $2,500. During the period from 1921 to 1924, he claims, he placed in safe deposit box No. 40, the box used by Mr. Stuckey and rented by him in 1918, the sum of $5,000. In 1925 the plaintiff moved to Colorado, near Julesburg, where he rented land and engaged in ranching and in the stock business. In March or April, 1928, he returned to Martell, went to the bank, had both safe deposit boxes, Nos. 40 and

83, brought to him, took from box 40 the sum of $1,000 and placed the remaining $4,000 in box 83, and surrendered box 40. This evidence is corroborated by his son Carl. There is a dispute in the evidence as to whether plaintiff was using box 40 in 1928. One Sieck claims to have rented box 40 from and after October 17, 1925, and until released by him in 1937, and a receipt issued by the bank shows box 40 was surrendered March 7, 1925, rent paid to date, and rent paid on box 83, by the plaintiff. From the time plaintiff left the bank in 1928 to return to Colorado, his wife had possession of the key to box 83 at all times. There is a dispute as to whether plaintiff was in the Martell State Bank in 1936 and had or examined the contents of box 83 at that time. The purpose was to show that plaintiff's wife did not have continuous possession of the key to box 83.

On November 2, 1938, plaintiff and his son Carl returned from Colorado to Martell, went to the bank and, after a general conversation with defendant Moore and others, the plaintiff asked for box No. 83. Mr. Moore, president of the bank, went to the vault, obtained the box, brought it out and placed it on the counter before the plaintiff. The son Carl testified: "Q. All right; then the box was brought out and set on the counter; then what happened? A. My father lifted the lid and started examining the box. Q. Then what happened? A. He looked up at Mr. Moore; Mr. Moore said, 'What is the matter, is something wrong?' And father said, 'Yes; somebody has been in my box and I have been robbed.' Q. Then what happened? A. Mr. Moore said, 'That could not be, nobody could get in the box but you.' And Mr. Moore said, 'How much money did you have in the box?' And he said, 'I had fourteen thousand dollars in the box.' And my father said he wanted his money." Plaintiff then related the transfer of the money made by him in 1928 from box 40 to box 83. His explanation of his reason for going to the bank November 2, 1938, was that Mr. Stuckey had given him the $10,000 with the admonishment that he supplement it with $5,000

and use no part of the 10,000-dollar gift until his fiftieth birthday, and November 2, 1938, was his fiftieth birth anniversary.

The record discloses that at all times when the plaintiff asked for and received his box, No. 83, the only persons who obtained it for him were defendants Moore and Sittler, the former president and the latter cashier of the bank; that one of them would go to the vault, obtain the box, and bring it to the counter, and when the plaintiff had finished examining the contents of the box it would be taken back to the vault by either Moore or Sittler. Plaintiff was never in the vault, never asked to go and never accompanied either of these persons to the vault to obtain his box at any time. There is a dispute as to whether the plaintiff's position at the counter would enable him to see box 83 in the vault and what may have occurred there on his visits to the bank. There was no evidence that the box had been tampered with in any manner. The record further discloses deposits made by plaintiff in the Martell bank from 1919 to and including 1925, aggregating $108,034.90, and deposits made in the First National Bank of Julesburg from the year 1925 to and including 1938, aggregating $118,586.91. There is a history of many chattel mortgages issued to the bank of Julesburg and releases thereof, and many items of interest paid on loans by plaintiff from the Martell State Bank, at the rate of 8 per cent. per annum, amounting to $1,400; interest to the Sprague bank in the sum of $500, and to the First National Bank of Julesburg at the rate of 10 per cent. per annum on a number of the loans and 8 per cent. on others, amounting to $2,500; interest to the Aetna Life Insurance Company, amounting to $1,880; also interest paid to individuals, interest on machinery bought, and to the Regional Agricultural Credit Corporation, all of these payments being made during the time that the $14,000 is alleged to have been kept in deposit box No. 83.

In April, 1938, plaintiff's parents made application for old-age assistance. Plaintiff was asked in writing about

his ability to contribute to their support, and he replied: "I am having a hard time of keeping the wolf from my door * * * and eat once in a while." We have here given a general statement of the pertinent evidence which will suffice for the purpose of this opinion, in view of the contentions of the defendants as to the errors committed by the trial court, requiring a reversal.

The defendants first contend that the court erred in giving instruction No. 4 on its own motion. It is agreed that negligence is the gravamen of the action.

Negligence is the "omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable, prudent man would not do; want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances." 45 C. J. 628.

The plaintiff contends that, when the renter of a box proves, first, the existence of the contract of rental, second, the deposit of money, or other valuables, under the agreement, and, third, the failure to return the money, or other valuables, on demand, if the bank renting the box then fails to explain or excuse the nondelivery, it is liable in damages, just as any other bailee for hire; that the *prima facie* case, when made, rests upon a presumption of negligence on the part of the depositary, which must be rebutted to escape liability. In support of this contention, the case of *Sulpho-Saline Bath Co. v. Allen,* 66 Neb. 295, 92 N. W. 354, is cited, in which this court held: "The burden is on a bailee for hire to show that property intrusted to his care was lost without negligence on his part."

The whole theory of the defense is that the defendants were under no obligation to return the plaintiff's property until the plaintiff had returned the key to the box wherein his property had been deposited. The receipt of some property was admitted, but there was no allegation that ordinary care and lack of negligence had been exercised by defendant bank in the preservation of such property.

It has been well said in note, 43 L. R. A. n. s. at page 1172: "The following cases, although containing language which in itself might indicate that the court regarded the bailee as having the burden of proof to establish due care by a preponderance of the evidence, must be construed, in view of other decisions in the same state, simply as authority for the proposition that, in case of injury to or loss of the property, the burden of overcoming a presumption of negligence rests upon the bailee." Citing *Sulpho-Saline Bath Co. v. Allen, supra.*

The case of *Schaefer v. Washington Safety Deposit Co.*, 281 Ill. 43, 117 N. E. 781, is cited as a case exactly like the one at bar. A certain amount of money was placed in a deposit box by the plaintiff. When she returned to obtain her money from the box it was gone. She demanded that the defendant return her money, which the defendant failed to do. The court said that, "if those facts were found from a preponderance of the evidence they would make out a *prima facie* case in favor of the plaintiff, and it then devolved upon the defendant to prove that it used ordinary care and diligence to safely keep and return the plaintiff's money." The court said that the plaintiff was "bargaining for safety which the defendant advertised as its business and for the exercise of such care as a reasonably prudent man would exercise toward the safety of like property of his own under like conditions." And further: "Under such conditions we see no reason to depart from the ordinary rule that where a bailee receives property and fails to return it the presumption arises that the loss was due to his negligence, and the law imposes on him the burden of showing that he exercised the degree of care required by the nature of the bailment * * * To call upon the plaintiff, under such circumstances, to prove some specific act of negligence by which her money was lost, and which she must necessarily prove by defendant's employees, would impose upon her a practically impossible burden." See, also, *McDonald v. Perkins & Co.*, 133 Wash. 622, 234 Pac. 456, 40 A. L. R. 859; *Lockwood v. Manhattan Storage &*

Warehouse Co., 28 App. Div. 68, 50 N. Y. Supp. 974; *Security Storage & Trust Co. v. Martin*, 144 Md. 536, 125 Atl. 449; *National Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N. E. 973; *Id.*, 232 U. S. 58, 34 S. Ct. 209.

Miles v. International Hotel Co., 289 Ill. 320, 124 N. E. 599, apparently repudiates the proposition that the bailee has the burden of proof in such manner as stated in *Schaefer v. Washington Safety Deposit Co., supra.* The following language is pertinent: "The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor has made out a case of *prima facie* negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault." It was further said in the *Miles* case that the bailee may overcome the *prima facie* case "by offering evidence to show that it was not negligent, and if it produces such evidence, the bailor, in order to make out her case, must show that the bailee was, in fact, negligent and that its negligence caused the loss or contributed thereto."

We are convinced, after a careful reading of the authorities, that the best-reasoned rule is stated in the following authorities cited by the defendants:

"Where the depositor has alleged negligence, however, the better rule appears to be that the burden of the depositor as plaintiff, and not the duty of the company to go forward with evidence to overcome the depositor's *prima facie* case, is the one which must be met, on the issue of negligence or due care, by a preponderance of evidence." 6 Am. Jur. 494, sec. 428. And in the annotation, 40 A. L. R. 883, it is said: "But that the burden of proving negligence on the part of the lessor of a safe deposit box, in an action by the lessee, who alleges failure of the lessor to exercise ordinary care safely to keep the contents of the box, rests upon the plaintiff, the lessee, and does not shift, although the burden of producing evidence to overcome a *prima facie* case of negligence may rest on the defendant,

is held in *Koczora v. Standard Safe Deposit Co.* (1921) 221 Ill. App. 43."

The recent case of *Schmidt v. Twin City State Bank,* 151 Kan. 667, 100 Pac. (2d) 652, announces what we believe to be a proper rule with reference to necessary care: "Assuming the relation of the parties was that of bailor and bailee, as contended by plaintiff, defendant's duty was to exercise ordinary care and diligence, that is, such care and diligence as a reasonably prudent person or corporation would exercise under like circumstances in safeguarding the contents of the box. Defendant was required to take such measures to safeguard the property upon deposit as are customarily used in the community by ordinarily careful institutions, fairly comparable in size and other conditions with the defendant bank. 67 C. J., Warehousemen and Safe Depositaries, sec. 300; 27 R. C. L., Warehouses, sec. 45; *Shoeman v. Temple Safety Deposit Vaults,* 189 Ill. App. 316; *Young v. First. Nat. Bank of Oneida,* 150 Tenn. 451, 265 S. W. 681, 40 A. L. R. 868; *Morgan v. Citizens Bank,* 190 N. Car. 209, 129 S. E. 585, 42 A. L. R. 1299. See, also, annotation, 40 A. L. R. 874, 878."

In this state, when a party alleges and charges negligence, the burden of proving negligence on the part of the defendant rests upon the plaintiff and never shifts to defendant in any stage of the case. *Olson v. Omaha & C. B. Street R. Co.,* 137 Neb. 216, 289 N. W. 356; *Mercer v. Omaha & C. B. Street R. Co.,* 108 Neb. 532, 188 N. W. 296; *Rapp v. Sarpy County,* 71 Neb. 382, 98 N. W. 1042; *Vertrees v. Gage County,* 75 Neb. 332, 106 N. W. 331; *Lincoln Traction Co. v. Webb,* 73 Neb. 136, 139, 102 N. W. 258. In the instant case, negligence is the gravamen of the offense. The only indication in this state of such change might be manifest by paragraph 1 of the syllabus in *Sulpho-Saline Bath Co. v. Allen, supra,* which has been explained herein. We now turn our attention to instruction No. 4.

Much confusion is evident in judicial writing on the sub-

ject of presumption of negligence and its position in jury trials, and in this confused state of the law the blame cannot always be placed on the trial court for erroneous instructions, under the circumstances. Instruction No. 3 on the burden of proof, given by the court, which we will not here set out, is a proper instruction and requires the plaintiff to prove, by a preponderance of the evidence, negligence on the part of the defendants, as alleged in the petition, before plaintiff may recover. Instruction No. 4, given by the court, is as follows:

"You are further instructed that if you find from the evidence that the plaintiff placed $14,000 in United States currency in his safe deposit box in the bank of the defendant and that the same was not subsequently removed therefrom by the plaintiff or any one in his behalf, and that said currency was not produced and delivered to the plaintiff by the defendant upon demand by the plaintiff from defendant then, in the absence of any other evidence, *the law presumes that the loss or removal of said currency was caused by the negligence of the defendant in not exercising ordinary care and diligence in the safe-keeping of the contents of the said safe deposit box.* Said presumption is rebutted, however, if there is evidence adduced at the trial of equal weight and importance to that produced by the plaintiff that the loss or removal of said currency, if any of you so find, was due to another cause or causes consistent with ordinary care and diligence on the part of the defendant, and if it is so rebutted the burden is on the plaintiff to *show by a preponderance of the evidence that the loss or removal, if any you so find, was due to the negligence of the defendant.*

"If evidence has not been produced of equal weight and importance to that introduced by the plaintiff that the loss or removal, if any you find, was due to another cause or causes consistent with ordinary care and diligence on its part, then the above presumption stands as proof of negligence on the part of the defendant." (Italics ours.)

"Ordinarily, in a civil action, a presumption is not evi-

dence, but a mere rule of law, and disappears when evidence on the subject is given." *Auld v. Auld*, 122 Neb. 576, 240 N. W. 756. See *Falkinburg v. Prudential Ins. Co.*, 132 Neb. 831, 273 N. W. 478.

"'A presumption is not evidence of anything and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until *prima facie* evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence.' *Honrath v. New York Life Ins. Co.*, 65 S. Dak. 480, 275 N. W. 258." *In re Estate of Kajewski*, 134 Neb. 485, 279 N. W. 185.

"The better reasoned authorities hold that a presumption is not evidence of a fact, but purely a conclusion, having no probative force, and designed only to sustain the burden of proof until evidence is introduced tending to overcome it. '* * * When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed.'" 1 Jones, Commentaries on Evidence (2d ed.) sec. 30. See, also, 9 Wigmore, Evidence (3d ed.) secs. 2490, 2491; *Peters v. Lohr*, 24 S. Dak. 605, 124 N. W. 853; *Ebers v. Whitmore*, 122 Neb. 653, 241 N. W. 126; *Eckman Chemical Co. v. Chicago & N. W. R. Co.*, 107 Neb. 268, 185 N. W. 444; *Wise v. Grainger Bros. Co.*, 124 Neb. 391, 246 N. W. 733; *In re Estate of Kajewski, supra.*

The effect of instruction 4, given by the court in the instant case, is to tell the jury that, if plaintiff proved he put the money in box No. 83 and did not take it out, then the burden shifts to the defendants to prove that they were not negligent. Instruction No. 4 permits weighing defendants' evidence against the evidence of plaintiff for the purpose of determining whether a presumption of negligence is rebutted. The test is not whether defendants' evidence rebuts plaintiff's evidence, but whether defendants' evidence of due care rebuts any presumption the law per-

mits from the plaintiff's evidence. See *Mercer v. Omaha & C. B. Street R. Co., supra.*

Instruction No. 4 is erroneous in requiring evidence of equal weight to that produced by defendants to overcome the presumption, in stating that such presumption is evidence, and in instructing the jury that presumption of evidence is proof of negligence. Such instruction is not cured by a proper instruction, previously given, on the burden of proof.

"Where two conflicting instructions are given on a question, one containing an incorrect, and the other a correct, statement of the law, the latter will not cure the former." *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19. See, also, *Brooks v. Thayer County,* 126 Neb. 610, 254 N. W. 413.

"An error in an instruction is not cured by the giving of other instructions, where such error consists, not of an omission of some material fact, but of an affirmative statement by the court which, when considered with the other instructions, tends to confuse the jury." *Wilch v. Western Asphalt Paving Corporation,* 124 Neb. 177, 245 N. W. 605. See, also, *Morton v. Harvey,* 57 Neb. 304, 77 N. W. 808.

We hold the giving of instruction No. 4, under the circumstances, to constitute reversible error.

It is noted from the record that the trial court sustained a motion for a directed verdict in favor of defendants Moore and Sittler. The evidence reflects that all of the transactions had by the plaintiff, with reference to safe deposit box No. 83, were with these defendants and not with any other employees of the bank, denoting that if there was negligence, as contended by the plaintiff, these two defendants would be the ones who would be guilty of such negligence and no other employees of the bank. The case was submitted to the jury as against the defendant bank. No cross-appeal was taken from the judgment of the court in favor of defendants Moore and Sittler.

"It is universally recognized that ordinary private corporations may commit almost any kind of a tort and be held liable therefor, and this liability may be enforced in the same manner as if the wrong complained of had been

committed by an individual." 13 Am. Jur. 1042, sec. 1118. Thus, the bank in the instant case is a tort-feasor, together with defendants Moore and Sittler.

"Where the liability of one party to an action is based entirely upon a wrongful act by another, a judgment necessarily based upon the finding that the first is liable and that the second is not, is inconsistent with itself unless the second party has a personal immunity or has been discharged from liability." Restatement, Torts, sec. 883.

Illustration 4. "A brings suit against B and C, alleging that B was negligent while acting in the scope of employment for C. Verdict and judgment are entered in favor of B and against C. The judgment against C should be set aside." Restatement, Torts, sec. 883. In the instant case, plaintiff instituted suit against the bank, Moore and Sittler, alleging negligence on the part of the defendants Moore and Sittler while in the scope of their employment for the bank. Motion for directed verdict in favor of defendants Moore and Sittler was sustained and unappealed from. Judgment was entered against the bank.

The same proposition is reflected by the following language in 34 C. J. 982: "If the liability of a person sued for tort is necessarily dependent upon the culpability of another, who was the immediate actor (in the instant case the immediate actors were Moore and Sittler) and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, defendant may set up such judgment as a bar." And in 15 R. C. L. 956, sec. 432, it is said: "If the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel."

Under the circumstances, the foregoing authorities are applicable, and the judgment against the bank is set aside.

For the reasons given in this opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1941

BARTON H. KUHNS, TRUSTEE, APPELLEE, V. LIVE STOCK NATIONAL BANK OF OMAHA, APPELLANT.

295 N. W. 818

FILED JANUARY 10, 1941. No. 31099.

1. **Appeal.** "When, in an error proceeding, the judgment of a trial court has been reversed, that court should retrace its steps to the point where the first material error occurred; and from that point the trial should progress anew." *Missouri, Kansas & Texas Trust Co. v. Clark*, 60 Neb. 406, 83 N. W. 202.
2. ———. "Matters expressly, or by distinct and necessary implication, adjudicated at a former hearing, will not be considered again in the same case." *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252.
3. ———. "Where a judgment of the district court has been reversed and the cause remanded 'for further proceedings in accord with this opinion,' and where the admitted facts are such as to require the entry of a specific judgment, the trial court should enter such judgment without the useless formality of a new trial." *Bliss v. Live Stock Nat. Bank*, 124 Neb. 880, 248 N. W. 645.

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

Dorsey & Baldrige, for appellant.

Young & Williams, *contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

EBERLY, J.

This is the second appearance of this cause in this court. For a complete statement of the facts reference is made to the former opinion reported in 137 Neb. 459, 289 N. W. 893. The action is one for the conversion of funds belonging to the insolvent Central Bridge & Construction Company, a Nebraska corporation, of which plaintiff is the trustee. On the first trial, after all the evidence was adduced, both parties moved for a directed verdict. The trial court discharged the jury and took a submission of the case on the evidence, the briefs, and oral arguments of counsel, and rendered judgment for the defendant bank.

The controlling questions presented on the first appeal to this court, were: (a) Whether the bank was authorized to honor the check of the Central Bridge & Construction Company, its depositor, payable to its president as an individual, and used by him to pay and satisfy his individual notes payable to this bank in the sum of $15,000, and (b) whether the bank's so doing, under the facts of the record, was wholly unauthorized, and its acts in the transaction operated as a conversion by it of the fund, thus subjecting it to liability therefor. This court, in effect, adjudged and determined the first question in the negative, and the second question in the affirmative. The opinion closes with the usual words of reversal and remand, "for further proceedings."

The record before us discloses that upon receipt of the mandate of this court, together with our opinion attached thereto, the same was duly entered upon the records of the district court for Douglas county. Thereupon the plaintiff trustee filed his motion for judgment upon the mandate and opinion for the sum of $15,000 with interest, that being the amount converted by the bank. The defendant bank then filed "Objections To Plaintiff's Motion For Judgment" which challenged the right of the trial court to enter the judgment appealed from, but which contained no request on the part of the bank for permission to amend pleadings or for permission to offer further or additional

evidence. These objections the trial court overruled and entered judgment against the defendant bank and in favor of plaintiff trustee, pursuant to, and as prayed in, the latter's motion. The defendant bank appeals.

When a judgment is reversed for error in the proceedings of the court below, and remanded to be proceeded in according to law and not inconsistent with the opinion of this court, it is always understood that the proceedings in the court below, prior to the fault or error which is ascertained by this court to exist, are in no wise reversed or vacated by the adjudication of the appellate court; but the fault or error adjudicated is the point from which the cause is to progress anew. *Missouri, Kansas & Texas Trust Co. v. Clark,* 60 Neb. 406, 83 N. W. 202; *Colby v. Foxworthy,* 78 Neb. 288, 110 N. W. 857.

In this case both parties rested after the introduction of evidence was completed. Both parties moved for instructed verdicts. No application has been made to reopen the case for submission of further evidence or for amendment of pleadings. It would seem the above principle would be applicable and controlling. Nothing which occurred in the history of this litigation prior to the first submission by both parties, and who in addition in effect joined in motions for judgment at the close of the evidence, may now be urged by either party as ground for reversal.

So, too, all matters decided expressly or by necessary implication by this court in its opinion in reversing the first judgment became the law of the case. This applies not merely to all questions actually and formally presented, but to all existing in the record and necessarily involved in the decision. Such points will not be reconsidered in this appeal. *Edney v. Baum,* 70 Neb. 159, 97 N. W. 252; *Henry v. City of Lincoln,* 97 Neb. 865, 151 N. W. 933; *Smith v. Neufeld,* 61 Neb. 699, 85 N. W. 898; *Sawyer v. Sovereign Camp, W. O. W.,* 112 Neb. 821, 201 N. W. 652; *Musser v. Musser,* 98 Neb. 398, 152 N. W. 746.

In this connection the decision of this court in the instant case on the first appeal necessarily included the de-

termination that the cause of action alleged in the trustee's petition, both as to fact and law, was clearly sustained by the record and that such trustee was therefore entitled to a judgment as prayed. This became the law of the case, and was properly, as such, interpreted by the trial court on the entry of its judgment "upon the mandate" here appealed from. As an additional reason, it may be said that a case will not be reversed for errors, where the complaining party would not be entitled to succeed in any event. *Holberg v. McDonald,* 137 Neb. 405, 289 N. W. 542; *Jensen v. Romigh,* 134 Neb. 890, 280 N. W. 223. In this connection see, also, *Burke v. Munger, ante,* p. 74, 292 N. W. 53; *Bliss v. Live Stock Nat. Bank,* 124 Neb. 880, 248 N. W. 645.

It therefore appears in the instant case that the trial court, as disclosed by the present record, properly carried into effect the mandate of this court, and its judgment is, accordingly,

AFFIRMED.

CHITWOOD PACKING COMPANY, APPELLEE, V. MABEL WARNER ET AL., APPELLANTS.
295 N. W. 882

FILED JANUARY 10, 1941. No. 30918.

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

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

Dryden, Dryden & Jensen, for appellants.

John M. Neff, Jr., and *R. E. Bannister, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and YEAGER, JJ., and ELDRED, District Judge.

PAINE, J.

Plaintiff, a wholesale packing corporation, on January 12, 1938, recovered a judgment in the district court, in the

amount of $358.54, interest and costs, against defendants, doing business as Outlaw Food Center, and operating a retail grocery store. Plaintiff assigned this judgment to one Delva Russell on January 24, 1938, for a valuable consideration. Delva Russell assigned the judgment to one R. E. Bannister for the purpose of collecting and enforcing the same, and for services rendered and to be performed by him. Execution was issued on the judgment.

Defendants moved to recall and quash the execution, for the reason that Delva Russell was acting as agent for defendants when she satisfied the judgment by using funds of the defendants and taking an assignment thereof to herself, when she had an understanding with defendants that the judgment was to be released; that Bannister, as assignee of Delva Russell, had knowledge of the facts, and is bound by all the equities in said judgment in favor of defendants.

The motion to quash the execution was overruled. From this order defendants appeal, contending that the court erred, first, in finding that no fiduciary relationship existed as between Delva Russell and the defendants; second, in finding that the judgment upon which the execution was based had not been paid.

Delva Russell lived with defendants and worked for them since 1932 in their home and store. She owned some property, and assisted with the collection of rents from real estate and apartments owned by defendants. An agreement was made to satisfy the judgment against the defendants heretofore set out. Mrs. Russell volunteered to, and did, procure a loan from a finance company, the loan being in the amount of $216, she giving as security a note and chattel mortgage on the household goods owned by defendants, and taking an assignment of the judgment to her as protection, with the acquiescence and consent of defendant Lewis Warner, who was desirous of getting rid of the matter. Considerable difficulty was experienced with this loan. The Warners left the store in charge of Delva Russell for a period of several months while they lived in Missouri, re-

turning on August 20, 1938. During that time she kept a record of the sales and transactions, collection of rents, and corresponded with the Warners on such business matters.

The evidence as to payments made on the loan is in direct conflict and not capable of being reconciled, as well as the claim made by defendants as to the amount of stock left in the store and the bills payable to the store, as against the evidence of Delva Russell, who claims to have replenished the stock at her own expense, and to have received nothing for her services but the privilege of investing money in the store, to her loss. The evidence is insufficient to show a fiduciary relationship between Delva Russell and defendants. Suffice it to say that the relationship as between the parties and the conduct of the business were most unnatural to be assumed by a stranger.

Having in mind the great conflict in the evidence in this case, as well as the state of the record, we have concluded that the following authority is applicable:

" 'Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo*, * * * will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.' *Cunningham v. Armour & Co.*, 133 Neb. 598, 276 N. W. 393." *Farmers Elevator Co. v. Peck*, 134 Neb. 305, 278 N. W. 499. See, also, *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178.

The judgment of the trial court is

AFFIRMED.

AMANDA FORSYTHE, APPELLEE, V. ANTHONY J. BERMEL: WILLIAM L. KELLER, INTERVENER, APPELLANT.

295 N. W. 693

FILED JANUARY 10, 1941. No. 30927.

Mortgages. A judicial sale, under a decree foreclosing a mortgage on realty, will not be reversed on appeal for inadequacy of

price, in the absence of a showing of fraud, or shocking discrepancy between value and sale price, or prospects of a higher bid in event of a resale.

APPEAL from the district court for Garden county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Edward P. McDermott, for appellant.

Beatty, Maupin, Murphy & Derry and *E. J. Nenstiel,* *contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

PAINE, J.

This is an appeal from the confirmation of a sale made on a decree foreclosing a second real estate mortgage.

The decree of foreclosure was entered on September 20, 1938, finding that the amount due was $1,390.54, with interest at 9 per cent., subject to a first mortgage payable to the land bank commissioner, which is handled by the Federal Land Bank. The sheriff's return shows that he sold the property on August 9, 1939, to the plaintiff, Amanda Forsythe, for $1,552.93. On September 11, 1939, motion was filed for a confirmation of said sale and issuance of a sheriff's deed.

On September 15, 1939, William L. Keller filed a petition asking for leave to intervene and be made a party defendant, which was granted October 9, 1939. In his petition for intervention he set up that he is the owner of the two sections of land in foreclosure, having received a deed from Violet E. Sallee on August 23, 1938, who had received deed from Luther Owen Hiatt on March 25, 1938. He further sets up in his petition "that he is not questioning the legality of any of the proceedings * * * except for the inadequacy of the price for which said two sections of land were sold," and that he desires to file objections to the confirmation of the sale if made a party defendant in the action.

On November 20, 1939, the objections to confirmation of sale were heard, evidence was introduced by the plaintiff

and the intervener, and the court finds that the sale was in all respects in conformity to law and confirms the same, and directs that deed be made to Amanda Forsythe, purchaser; whereupon the intervener, William L. Keller, gave notice of appeal.

The appellant, William L. Keller, for reversal relies upon two grounds: (1) That the amount for which the property was sold is grossly inadequate, unconscionable, inequitable, and unjust; (2) that the said decree is defective in that it provides that the mortgage foreclosed is a first lien, when in fact it was a second lien.

The intervener, being ill at home, according to statement of his attorney, filed an affidavit that the fair market value of the two sections of land is $6.50 an acre, or a total of $8,320, and such affidavit was all the evidence offered by the intervener at the hearing.

The plaintiff offered a large amount of evidence, given by five witnesses. J. O. Ross, the first witness called by plaintiff, has lived in Garden and Morrill counties since 1914, and has been employed for 20 years by the Federal Land Bank in handling loans in that district. He testified that section 9 consisted of rough hills, pasture land, short grass, no land is cultivated, there are no improvements upon the land. He said of section 3 that 85 acres had been broken out, but 40 acres of that was in restoration; that 80 to 90 acres were in a sand draw (this is Ash Hollow draw); that the improvements were uninhabitable. The Tri-County Power & Irrigation District had put a road through the land, and it was stipulated between Miss Derry and Edward P. McDermott, of counsel, that it had paid $1,442 for the taking of ten acres for a road, and that there was still due on the first mortgage, after applying this sum thereon, a balance of $2,877.18.

Plaintiff testified that she lived in Deuel county; that she is well acquainted with this land; that it is three miles from Lewellen on the south side of the river; that there is no longer any well on the place, as they have pulled up the pump; that the old house and barn are just skeletons, with

the doors and window-lights gone, and the house was only a two-room shack.

M. P. Clary and Louis F. Smith placed the value of the land at $3 an acre. Frank Taylor placed it at from $3 to $3.50 an acre, and testified that William L. Keller, the intervener, had offered to purchase the adjoining land belonging to Taylor at $2 an acre, which land is as good as, or better than, the two sections under foreclosure, which intervener values at $6.50 an acre.

The intervener-defendant argues that the price bid of $1,552.93 is so unconscionable for these two sections of land as to shock the conscience of the court, and that fraud may be inferred from the nature and circumstances of the transaction. He argues that, as he is a resident of Kearney, he does not have the advantage of friendly neighbors to testify in his behalf as to the value of the land in controversy, and that it would be a tragedy to affirm this sale, and that, if a new sale is ordered and he gets a full crop, he will pay off the second mortgage to plaintiff in full, but no evidence was submitted that a new sale will bring a higher bid.

This court has held repeatedly that "Mere inadequacy of price in a sale under foreclosure will not justify a court in refusing a confirmation, unless such inadequacy is so great as to shock the conscience of the court or to amount to evidence of fraud." *Lemere v. White*, 122 Neb. 676, 241 N. W. 105. See *Lindberg v. Tolle*, 121 Neb. 25, 235 N. W. 670; *Keller v. Boehmer*, 130 Neb. 763, 266 N. W. 577.

We have examined the evidence in this case and believe the action of the trial court in confirming the sale was proper under all the circumstances. The court believes that the land sold for its fair and reasonable value, and therefore the judgment of the district court is affirmed.

AFFIRMED.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LEE BASYE, RESPONDENT.

295 N. W. 816

FILED JANUARY 10, 1941. No. 30672.

1. **Attorney and Client.** A lawyer who employs another to seek out persons with claims for personal injuries in order to secure them as clients, or to pay or reward, directly or indirectly, those who bring or influence the bringing of cases to his office, is guilty of disreputable, unethical and unprofessional conduct meriting the exercise of the disciplinary powers of this court.
2. ———. The conduct of an attorney at law, who obtains a loan from a client by false representations respecting the mortgage security, constitutes such a breach of professional and ethical conduct as to require the disciplinary action of the court.
3. ———. Where the unprofessional and unethical conduct of an attorney has been continuous over a period of years, and there is no satisfactory evidence of reformation or improved conduct, a disciplinary proceeding will not be barred by lapse of time as to any of such misconduct.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, against Lee Basye. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *Rush C. Clarke,* for relator.

Lee Basye, pro se, and *Clinton Brome* and *Richard O. Johnson,* for respondent.

Heard before ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

CARTER, J.

This is a disciplinary proceeding brought by the state of Nebraska on the relation of the Nebraska State Bar Association against Lee Basye, a duly licensed attorney at law, seeking his disbarment because of unethical practices and conduct. The matter was referred to the Honorable Jean B. Cain as referee to make findings of fact and conclusions of law. The proceeding is now before us on the report of the

referee finding that respondent violated his oath of office by engaging in unprofessional and unethical conduct and practice, and the exceptions of the respondent thereto.

The complaint alleges that respondent adopted and pursued a systematic course of conduct and practice, commonly called "ambulance chasing," wherein he violated his oath of office and the ethics of the profession of the law. It is alleged that such conduct and practices were carried on directly by the respondent and through agents and runners of the respondent in securing employment as an attorney by solicitation to bring actions for personal injuries and property damage arising out of automobile collisions and other mishaps.

There is evidence in the record of many cases which were obtained by this unethical and unprofessional means and method. We will content ourselves with a detailed examination of the evidence relating to one case only.

It appears from the record that on or about June 22, 1936, one Delores Pauline Creps was fatally injured by a truck owned by S. Carveth & Son. About a week later, one George E. Hinckle called at the home of Cecil Creps, the father of the deceased, and solicited the case for this respondent. Hinckle called six or seven times, and Creps finally signed a contract authorizing respondent to handle the case on a contingent fee basis of 40 *per centum* of any amount recovered. Subsequently, respondent called at the Creps home and caused another contract to be executed, which he himself signed. Suit was brought and the case settled for $300, of which Creps received $198.

The evidence shows that George E. Hinckle was a professional "ambulance chaser" of long experience. He became acquainted with respondent about 1933 and talked with him many times about the personal injury business. Eventually, an oral agreement was made whereby Hinckle was to receive 20 *per centum* of all fees collected, plus expenses. Solicitations were commenced and many cases secured in this fashion.

Respondent contends that Hinckle was used only as an

investigator and that the charge of "ambulance chasing" is without any foundation in fact.

The evidence clearly preponderates in favor of the relator. The record is filled with evidence of cases solicited by Hinckle that unfailingly came to respondent's office. It is very evident that this was not the result of coincidence or chance. There is evidence in the record of more than ten other cases solicited in this manner, some of which are established beyond question. Without a detailed discussion of each, we conclude that the charge of "ambulance chasing" is amply supported by the record.

Such conduct, when established, constitutes unethical and unprofessional practice and subjects a lawyer, duly admitted and licensed to practice law, to the disciplinary powers of the supreme court. *State v. Goldman,* 127 Neb. 340, 255 N. W. 32; *State v. Hinckle,* 137 Neb. 735, 291 N. W. 68.

Respondent is also charged with defrauding a client in the manner hereinafter set out.

It appears that on January 11, 1918, one John J. Dean died, leaving his widow and a son, Fulton Dean, then 18 months of age. As a result of her husband's death, Alice Dean received $10,000 from the Chicago, Burlington & Quincy Railroad. One-half of the net proceeds, amounting to $4,250, belonged to the son. Alice Dean was appointed guardian, and in June, 1924, respondent prevailed upon said Alice Dean as guardian to loan to respondent the $4,250 which she held in trust for her son and ward. As security for such loan, respondent executed and delivered a mortgage upon a farm owned by himself which he then represented to be a first mortgage lien upon said farm when he well knew that a binding prior mortgage in the amount of $2,300 was of record. At the time of the hearing before the referee, a suit for the foreclosure of the first mortgage was pending. It has been called to our attention by documentary evidence not properly in the record that the $2,300 first mortgage has been in some manner adjusted and a decree entered adjudging the $4,250 to be a first lien on the mortgaged premises. It is quite evident from the record that, even if this

be true, for approximately 15 years the $4,250 mortgage stood as a second lien and that its priority over the $2,300 was established by respondent only under the pressure of the instant proceeding. That the relation of attorney and client existed is not disputed. The evidence establishes that Alice Dean reposed complete confidence in the respondent and relied upon the confidence which he had established as her legal adviser. The record fairly shows that respondent knew his conduct was unbecoming of an attorney, which is specifically evidenced by the fact that the mortgage was made to one Charles Brittan and assigned to Alice Dean without any explanation or reason shown by the record for so doing. The fact that respondent chose a circuitous method of imposing upon and taking advantage of his position as attorney does not justify such action nor relieve him from the penalties that necessarily follow such culpable conduct. The relationship of attorney and client has always been recognized as one of special trust and confidence. While the law does not prohibit business dealings between an attorney and his client, it does impose the requirement that they shall be characterized by the utmost fairness and good faith, and where it appears that this requirement has been intentionally disregarded and the client has suffered as a result thereof, the attorney subjects himself to the disciplinary powers of the court.

Respondent's misconduct has extended over a long period of time. There is no evidence in the record of any moral regeneration. In fact, the respondent attempts to justify his conduct and urges that he has done no wrong. He contends that it cannot be demonstrated that financial loss has resulted to any of his clients as a result of his conduct, and completely ignores the fact that it is his moral fitness to engage in the practice of law that is being questioned and not the degree of success he may have had in the use of unethical methods.

We cannot agree that this proceeding is barred by lapse of time. It comes squarely within the rule announced in *State v. Fisher*, 103 Neb. 736, 174 N. W. 320, wherein this

court said: "When the misconduct of an attorney has been practically continuous, and there is no evidence of reformation or change of conduct, disbarment will not be barred by lapse of time as to any of such misconduct."

We conclude that the findings of the referee are amply sustained by the record and that the duty rests upon this court to order the admission of Lee Basye to the bar of this state canceled and annulled, and his name stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

GARFIELD COUNTY, APPELLEE, V. JESSE L. PEARL ET AL., APPELLANTS.

295 N. W. 820

FILED JANUARY 10, 1941. No. 30865.

1. **Counties.** A county treasurer is an insurer of the funds that come into his hands by virtue of his office, and he and his bondsmen are liable for moneys lost by the failure of the banks in which moneys of the county are deposited, except where deposits are made in conformity with the depository act. *Thomssen v. Hall County*, 63 Neb. 777, 89 N. W. 389.
2. ———. A county treasurer must account absolutely for all funds lost in an insolvent bank, where the bank is not a validly designated depository or where the deposit is otherwise unauthorized by law.
3. ———. Where a county treasurer's bond is conditioned upon the faithful performance by him of the duties of the office, the sureties on the bond are bound in like manner, and their responsibility is the same as that of their principal.
4. ———. While county officers are presumed to have acted within their authority, statutes delegating powers to county officers must be strictly construed, and all persons dealing with public officers must inform themselves as to their authority, and acts which are within the apparent, but in excess of the actual, authority of officers will not bind the government which they represent.
5. ———. "Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity." 46 C. J. 1033.

6. ———. It is no defense for either a county treasurer or surety on his bond, in an action on the bond to recover public funds predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost without the fault or negligence of the county treasurer.

APPEAL from the district court for Garfield county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Kennedy, Holland, De Lacy & Svoboda and *B. A. Rose,* for appellants.

W. F. Manasil, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

MESSMORE, J.

This is an action by the county of Garfield against Jesse L. Pearl, its former treasurer, and his bondsman, Massachusetts Bonding and Insurance Company, to recover funds on deposit in the First State Bank and the Farmers Bank, Burwell, Nebraska, said banks having been found insolvent and taken over by, and placed under the control of, the banking department of the state of Nebraska, which funds the county alleged were deposited in said banks contrary to law.

The amended petition reflects the following: Jesse L. Pearl was elected treasurer of Garfield county November 4, 1930, for a term of four years, commencing January 8, 1931, and on January 5, 1931, Jesse L. Pearl, as principal, and defendant bonding company, as surety, executed an official bond in the sum of $20,000, which bond was delivered by Pearl to, and filed in the office of, the county clerk of Garfield county, and approved by the county commissioners of said county January 7, 1931. Subsequent to such date Pearl became the duly qualified and acting treasurer of the county. On January 7, 1931, the county commissioners met, and addressed to them appeared a request of the First State Bank and the Farmers Bank of Burwell to be designated as depositories for county funds. The

First State Bank offered as security for such deposits $25,000 in mortgage bonds, to charge $10 per thousand on such bonds, payable quarterly. The Farmers Bank made a like request, offering good bankable notes of the bank to the amount of $25,000. The county commissioners, by resolution, designated the two banks as county depositories, requiring them to comply with the law of Nebraska in securing such deposits, and, unless the banks furnished corporate surety bonds, that each was to deposit not less than $3,500 each of United States government or federal farm loan bonds, and that the balance of the security be such as provided by the laws of Nebraska, and instructed and authorized deposit in the banks of county funds equaling 80 per cent. of the bonds so deposited as security, and the full amount of corporate surety bonds if the same are furnished by the banks.

On the same day the county board reconsidered the matter of county depository banks upon the suggestion and statement of the banks that they were not in a position to secure corporate surety bonds and did not have sufficient government or federal farm loan bonds to cover the full amount of the deposit. The banks offered to secure the county deposits, over and above the amount of government and federal farm loan bonds which the banks might have, by approved customers' notes. The county board, by resolution, accepted the offer and authorized the county treasurer to accept such notes as security for the surplus deposits, to be approved by the county treasurer and county clerk, and deposited with the county clerk, and authorized and instructed the treasurer to deposit in said banks deposits to the amount of 80 per cent. of said notes, so furnished as security, and further directed that said banks be required to furnish sufficient security for all deposits necessary to be placed in said banks.

The amended petition further alleged: Prior to January 3, 1935, both banks became financially involved to such extent that the department of banking of this state took charge of them as receiver and liquidating agent. Some of

the funds deposited by treasurer Pearl had not been withdrawn from the banks. January 3, 1935, Pearl's term of office expired, and it was his duty, under the law and the bond given, to pay over to his successor all moneys in his possession as such officer. On January 3, 1935, Pearl delivered to his successor in office the sum of $13,185.96 in cash, but failed and neglected to deliver to his successor the balance of funds in his possession, to wit, $22,751.59, for which amount the plaintiff prayed judgment.

The defendants demurred to the amended petition, and the demurrer was overruled. The defendants filed separate amended answers, which were practically identical in form. The substance of the pertinent allegations thereof follows: Upon the passage of the resolution (above referred to) the county treasurer had no other option except to obey the order of the county board and comply with the resolution, and, in so doing, deposited in the First State Bank, Burwell, county funds in the sum of $20,269.91, and in the Farmers Bank, Burwell, funds in the amount of $22,767.70, and thereupon said banks furnished the security called for by the resolution. The First State Bank deposited with the county clerk and county treasurer United States government bonds in the amount of $1,600, and customers' notes amounting to $28,000. The Farmers Bank deposited with the county clerk and county treasurer United States government bonds in the sum of $3,500 and customers' notes amounting to $27,000. Said customers' notes were checked and approved by the county treasurer and the county clerk and said collateral was shown to and accepted by the county commissioners. The amended answers further alleged, in substance, that defendant bonding company was not notified with reference to the deposit of customers' notes and had no knowledge of the deposits and was never given an opportunity to check, approve or pass upon said notes or their value of acceptability as security for said deposits; that it was the sole right, duty and responsibility of the board of county commissioners to select and approve the depositories for county moneys and to approve the se-

curity offered by depositories for the safe-keeping of the deposits; that it was the duty of the county treasurer to comply with the resolution. The bonding company contends that it was not informed of the action of the board of county commissioners with respect to the securities to be furnished by the depositories designated; that, if it was the intention of the county commissioners to hold defendant bonding company liable for any shortage of the county treasurer, it was the duty of the plaintiff and the county commissioners to advise the defendant bonding company of said purpose and intention and give it the opportunity to retire from such transaction; that it was the duty of the plaintiff and county commissioners, after ordering and directing the county treasurer to take securities for deposit other than the kind of security referred to in the statute, to so advise the defendant bonding company and give it the opportunity either to be released from liability by reason thereof, or to elect to continue on the bond.

It would appear from the pleadings that, in complying with the resolution naming the depositories, the treasurer, together with the county clerk, approved the securities and knew all of the conditions of the resolutions. There is nothing in the pleadings to disclose that the county commissioners approved the customers' notes.

The plaintiff demurred to the amended answers; the demurrer was sustained; motion for a new trial was overruled; defendant bonding company elected to stand upon its amended answer. From the court's ruling on the demurrer, defendants appealed to this court. This brings us to a consideration of the statutes involved and the conditions of the bond which the defendant bonding company furnished as surety.

The bond provided: "Now, the condition of the above obligation is such that if the above bounden Jesse Leland Pearl shall faithfully and impartially perform and discharge the duties of said office according to law, and shall promptly account for and pay over all money, papers, or other property, that may come into his hands in virtue of

his said office, to his successor in office, or to the person or party entitled thereto, then this obligation to be void, otherwise to be and to remain in full force and virtue."

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

Section 77-2508, Comp. St. 1929, provides in part: "For the security of the funds so deposited under the provisions of this article the county treasurer shall require all such depositories to give bonds for the safe-keeping and payment of such deposits and the accretions thereof, which bond shall run to the people of the county, and be approved by the county board." Said section further provides for the maximum deposit and for the substitution of securities, and securities to be given in lieu of the bond, but does not provide for the giving of securities such as were offered by the banks in the instant case and approved by the treasurer and county clerk; that is, there is no provision for the acceptance of customers' notes as proper security furnished to permit a bank to be designated as a county depository.

It is therefore obvious that in this instance the banks were not legal county depositories, as provided for by law, and the county board, in so designating such banks as de-

positories, exceeded its authority and went beyond the realm of the statute in such case; in other words, its acts were illegal, as were the acts of the treasurer. Other provisions of said section 77-2508 need not be referred to here.

Section 77-2513, Comp. St. 1929, provides: "No treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond."

The legal status of a county treasurer with reference to county moneys coming into his hands and the liability attached to him with reference thereto are reflected by the following authorities:

In the case of *Bush v. Johnson County*, 48 Neb. 1, 66 N. W. 1023, this court held: "The duty imposed on a county treasurer by law, and assumed by him, of safely keeping, accounting for and turning over the public funds which come into his hands by virtue of his office, is an absolute one; and where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner and their responsibility is the same as that of their principal, and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer." The court further held: "It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are properly discharged." In *Thomssen v. Hall County*, 63 Neb. 777, 89 N. W. 389, the above holding in the *Bush* case was quoted in the opinion, the court adding (p. 785): "It may therefore be said to be the settled law in this state that a county treasurer is an insurer of the funds that come into his hands by virtue of his office, and that he and his bondsmen are liable for moneys lost by the failure of the banks in which moneys of the county are deposited, *except where deposits are made in conformity with the depository act.*" (Italics ours.)

In *Shambaugh v. City Bank of Elm Creek*, 118 Neb. 817,

226 N. W. 460, it was held: "A county treasurer's sole authority for the deposit of public moneys in banks is to be found in sections 6191-6196, Comp. St. 1922, and the directions, limitations and public policy evidenced thereby must be complied with by such officer." Sections 6191 to 6196, Comp. St. 1922, now appearing as sections 77-2506 *et seq.*, Comp. St. 1929, were referred to in the case of *Massachusetts Bonding & Ins. Co. v. Steele,* 125 Neb. 7, 248 N. W. 648, wherein the above holding was quoted and approved.

In the late case of *Village of Hampton v. Gausman,* 136 Neb. 550, 286 N. W. 757, this court said: "The liability of a public officer in this state for funds entrusted to his care by virtue of his office is that of an insurer (citing *Thomssen v. Hall County, supra*). * * * He must account absolutely for all funds lost in an insolvent bank, *where the bank is not a validly designated depository or where the deposit is otherwise unauthorized by law* (citing *Knox County v. Cook,* 126 Neb. 477, 253 N. W. 649)." (Italics ours.)

The defendants cite *Town of Lakeland v. Bekkedal,* 209 Wis. 636, 245 N. W. 682, as authority for their position. A section of the statute under consideration in the above case, permitting the town board to designate the bank, and providing that when the money is so deposited the treasurer and his bondsmen will not be liable by reason of the failure of such bank or banks, constitutes a specific exemption from liability when the depository is designated. Without repeating the statutes applicable in the instant case, the distinction is clear.

In the case of *County of Missoula v. Lochrie,* 83 Mont. 308, 271 Pac. 710, the statute provided for the deposit of public moneys in solvent bank by the treasurer, and further provided that the treasurer shall take such security as the board of county commissioners "may prescribe, approve and deem fully sufficient and necessary to insure the safety and prompt payment of all such deposits on demand," and then specifically exempted the treasurer from liability for loss of public moneys deposited in accordance with the statute. This presents a much different situation from that

involved in the instant case, as is obvious from that part of the statute herein quoted.

The defendants further contend that the general supervision of county affairs and finances, including the power to make orders respecting the property of the county, is committed to the discretion of the county boards of the several counties; that the county board has sole authority to designate in what banks deposits should be made and that the county treasurer must comply with such designation, citing *State v. Owen,* 41 Neb. 651, 59 N. W. 886.

It is not doubted that the county board does designate the depository in which the treasurer shall deposit public funds. The sections of the statute hereinbefore cited so state. In the instant case the county board acted in excess of its authority.

In 46 C. J. 1032, it is said: "While officers are presumed to have acted within their authority, statutes delegating powers to public officers must be strictly construed, and all persons dealing with public officers must inform themselves as to their authority, and acts which are within the apparent, but in excess of the actual, authority of officers will not bind the government which they represent." At page 1033, it is further said: "Powers conferred upon a public officer can be exercised only in the manner, and under the circumstances, prescribed by law, and any attempted exercise thereof in any other manner or under different circumstances is a nullity."

The amended petition of the county is sufficient in form to disclose that the county treasurer failed to turn over to his successor at the end of his term the amount of money involved in this action. Under the authorities as herein announced, the defendants cannot prevail.

The defendants contend that estoppel *in pais* applies; that the defense of equitable estoppel may be asserted, and the conduct of the county commissioners constitutes constructive fraud. The applicability of the foregoing authorities to the circumstances of this case, as disclosed by the pleadings, makes the defendants' contention in this respect untenable.

It is also contended by defendants that this action is prematurely brought, for the reason that the customers' notes, constituting the security for the deposits, have not been liquidated, and the amount determined to be due the county is not certain. These securities, in the first instance, were not the kind of security provided for by statute, to warrant the deposits to be made in any instance, and, further, the pleadings fail to show in whose hands the customers' notes are at the present time. Any action with reference thereto, where said amounts may be used in determining the amount due the county, is separate and distinct from the present action, under the pleadings and law.

The judgment of the trial court, in sustaining plaintiff's demurrer to the amended answers of the defendants, is hereby

AFFIRMED.

STATE, EX REL. SCOTT CASHMAN, APPELLEE, V. HEMEAN CARMEAN, MAYOR, APPELLANT.

295 N. W. 801

FILED JANUARY 10, 1941. No. 30932.

1. **Municipal Corporations.** Each city in this state, containing less than 5,000 and more than 1,000 inhabitants, is a city of the second class and becomes such without any action being taken on the part of the municipality except such as required of the mayor of such city under the provisions of section 17-162, Comp. St. Supp. 1939.
2. ———. Section 17-162, Comp. St. Supp. 1939, imposes a definite and distinct duty upon the mayor of a city, having less than 5,000 and more than 1,000 inhabitants. This duty is a continuing one, devolving upon the mayor in his official capacity.
3. **Mandamus.** "Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear." *State v. Anderson*, 122 Neb. 738, 241 N. W. 545.
4. ———. Mandamus will lie to compel a public officer to perform a ministerial duty, and the duty of the mayor in the instant case is purely ministerial.

5. **Statutes.** "The word 'may,' when used in a statute or enactment to impose a duty or delegate a power, the performance of which involves the protection of public or private interests, will be read as 'must,' and construed as mandatory." *Doane v. City of Omaha*, 58 Neb. 815, 80 N. W. 54.
6. ———. Section 16-101, Comp. St. 1929, and section 17-162, Comp. St. Supp. 1939, examined, and *held* to be separate and distinct provisions, not in conflict with each other.

   Other sections of the statute, set out in the opinion, *held* not to be in conflict with section 17-162, Comp. St. Supp. 1939.
7. **Estoppel.** The bar of the statute of limitations, acquiesence or laches cannot be availed of to defeat a continuous duty imposed, in the absence of special circumstances showing it would be unjust or inequitable to grant the relief asked.

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

Edwin D. Crites, for appellant.

Porter & Porter and *G. E. Price, contra.*

Heard before SIMMONS, C. J., EBERLY, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

MESSMORE, J.

This is an action brought in the name of the state of Nebraska, upon the relation of an elector and taxpayer, for a writ of mandamus to require the respondent mayor, in his official capacity, to certify to the governor of the state that the city of Chadron has decreased in population to a city of less than 5,000 and more than 1,000 inhabitants, as ascertained and officially promulgated by the census and enumeration taken under and by authority of the United States government in the year 1930 (in compliance with section 17-162, Comp. St. Supp. 1939). The relator's petition sets forth the foregoing contention as the basis for the issuance of the writ. The respondent's answer contains a general denial and alleges several affirmative defenses, which will be discussed in the opinion, in connection with assignments of error raised. The trial court granted a peremptory writ of mandamus. From this order the respondent appeals.

The title to House Roll 231 (Laws 1933, ch. 112; now Comp. St. Supp. 1939, secs. 17-162 to 17-166), here involved, as well as the act itself, discloses that its sole purpose was to correct the classification of cities of the first class when their population decreased to a number less than 5,000 and more than 1,000 inhabitants.

Section 17-162, Comp. St. Supp. 1939, provides: "Whenever any city of the first class, having not more than five thousand and less than twenty-five thousand inhabitants, shall have decreased in population, until it shall have attained a population of less than five thousand inhabitants, and more than one thousand inhabitants, *as ascertained and officially promulgated by the census return and enumeration taken under the authority of the United States in the year 1930, or as hereafter ascertained and officially promulgated by the census, enumeration and return taken by the United States, or by the State of Nebraska, or by the authority of the Mayor and City Council of any such city, the Mayor of any such city may certify such fact to the Governor of the State of Nebraska,* who, upon the filing of such a certificate, shall by proclamation so declare, and shall declare such city to have become a city of the second class * * * and thereafter such city shall be governed by the provisions of the statutes of the State of Nebraska applicable to such cities of the second class, now, or hereafter in force. Upon such proclamation being made by the Governor, each and every officer of such city shall, within thirty days thereafter, qualify and give bond as provided by the statutes of the State of Nebraska in cases of cities of the second class: Provided, that in any city which may hereafter become a city of the second class, having been a city of the first class, any councilman, whose term shall extend by reason of his prior election under the provisions governing cities of the first class, through another year or years, shall continue to hold his office as councilman from the ward in which he is a resident, as if elected for the same term under the statutes of the State of Nebraska governing cities of the second class." (Italics ours.)

Section 17-163, Comp. St. Supp. 1939, provides for the continuation of government until reorganization; section 17-164, for the wards, number, how determined; section 17-165, as to council, number and qualifications; section 17-166, as to ordinances, rules and regulations to remain in effect. It is definitely established that the federal census of 1930 disclosed the population of the city of Chadron to be 4,606 inhabitants, and there is no dispute with reference to this enumeration.

The Constitution of Nebraska does not provide for classification of cities as to different classes. The classification of cities and prescribing the government thereof are purely matters of legislative control, and the classification is made in accordance with the population. See *State v. Babcock,* 25 Neb. 709, 41 N. W. 654; 43 C. J. 80, 103; *State v. District Court of Ramsey County,* 84 Minn. 377, 87 N. W. 942; *Town of London v. Brown,* 183 Ky. 63, 208 S. W. 317. The transfer of a city from one class to another is a matter of legislative control. See *State v. Northup,* 79 Neb. 822, 113 N. W. 540. Under the provisions of section 1, art. 1, ch. 14, Comp. St. 1895, each village in this state, containing the population required by the statute, becomes a city of the second class, without any action being taken on the part of the municipality. See, also, *Osborn v. Village of Oakland,* 49 Neb. 340, 68 N. W. 506.

Section 17-162, Comp. St. Supp. 1939, imposes a positive duty and obligation upon the mayor of a city of the first class, having a population of more than 5,000 and less than 25,000. When, within the purview of this section, it is definitely shown that the city possesses a population of less than 5,000 inhabitants, the mayor of the city may certify such fact to the governor, so that he may issue a proclamation in conformity therewith. The word "may" appears in said section in the following manner: "may certify such fact to the Governor of the State of Nebraska." The intent of the legislature must be gathered from the whole act. In *Doane v. City of Omaha,* 58 Neb. 815, 80 N. W. 54, this court held: "The word 'may,' when used in a statute or en-

actment to impose a duty or delegate a power, the performance of which involves the protection of public or private interests, will be read as 'must,' and construed as mandatory." See, also, *People v. Commissioners of Buffalo County,* 4 Neb. 150; *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910; *State v. Bartholomew,* 103 Conn. 607, 132 Atl. 30.

Since the provisions of section 17-162, Comp. St. Supp. 1939, impose upon the mayor a mandatory duty, the question arises as to the propriety of an action in mandamus to compel the performance of such a duty. The relator seeks to require the mayor to conform to the provisions of said statute by issuing a certificate to the governor, as required therein. There is no allegation of damages or establishment of a right or any other form of relief, but an action to compel the mayor to do what the statutes of Nebraska require him to do. We need not define mandamus or the nature or object of the writ, to determine its applicability to the case at bar.

This court has held: "Mandamus may issue against a public officer to compel him to act, when (1) the duty is imposed on him by law, (2) the duty still exists at the time the writ is applied for, and (3) the duty to act is clear." *State v. Anderson,* 122 Neb. 738, 241 N. W. 545.

Section 20-2156, Comp. St. 1929, provides in part: "The writ of mandamus may be issued to any * * * person (mayor), to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

Respondent contends that the statute of limitations applies, citing *State v. School District,* 30 Neb. 520, 46 N. W. 613, and *State v. King,* 34 Neb. 196, 51 N. W. 754. The former case may be summed up by the following language in the opinion (p. 528): "Mr. J. L. High, in his important work on Extraordinary Remedies, sec. 355, lays it down that, in cases where the aid of *mandamus* is sought to compel public officers to draw their warrant for the payment of money 'the right to relief, in this class of cases, may be

barred by the statute of limitations.' That we believe to be this case, and we hold broadly that our statute of limitations, although confined in terms, applies to all claims that may be made the ground of action at law in whatever form they may be presented; the same falling within the meaning and purport of section 16 of the Code, when not falling within any other." The case of *State v. King, supra,* was an action in mandamus to compel respondent to pay into the treasury a sum of money alleged to be due from respondent as the former treasurer of the county, and the action was brought more than four years from the time the right to the writ accrued. The statute of limitations was applied. The rule stated in *State v. School District, supra,* prevailed. An entirely different situation exists in the instant case. See, also, *State v. Bartholomew, supra,* wherein the court held:

"A writ of mandamus may issue when the duty which the court is asked to enforce is the performance of some precise, definite act in relation to which the respondent has no discretion, and when the right of the party applying is clear and he is without other adequate and specific remedy."

Mandamus will lie to compel a public officer to perform a ministerial duty, and the duty of the mayor in the instant case is purely ministerial. See *State v. Thayer,* 31 Neb. 82, 47 N. W. 704; *State v. Bartholomew, supra*; Maxwell, Pl. & Pr. (1889) p. 735.

Again referring to section 17-162, Comp. St. Supp. 1939, there is a definite and distinctive duty imposed on the mayor of the city of Chadron. This duty is a continuing one, devolving upon the mayor in his official capacity. It is the duty of the person who occupies the office and is continued from one mayor to another. We are convinced that the distinction between the cited cases and the instant case is apparent.

While the facts in the case of *Stoddard v. Keefe,* 278 Ill. 512, 116 N. E. 193, are not analogous to those in the instant case, the following principle of law announced therein is applicable: The bar of the statute of limitations, acquies-

cense or laches cannot be availed of to defeat a continuous duty imposed, in the absence of special circumstances showing it would be unjust or inequitable to grant the relief asked.

Respondent makes reference to section 16-101, Comp. St. 1929, enacted in 1901 and still intact, which provides: "All cities having more than five thousand and less than twenty-five thousand inhabitants, as ascertained and officially promulgated by the census return and enumeration taken under the authority of the laws of the United States in the year 1900, or as may be hereafter ascertained and officially promulgated by the United States or under the authority of the State of Nebraska or by the authority of the *mayor* and *city council* of any such city, shall be governed by the provisions of this chapter and be known as cities of the first class," etc. (Italics ours.)—and to section 16-102, Comp. St. 1929, providing: "Whenever any city of the second class shall have attained a population of more than five thousand inhabitants as provided by the next preceding section, the mayor of such city may certify such fact to the governor," etc.

The contention is that, having attained the corporate existence of a city of the first class, as far as section 16-101, *supra,* is concerned, the city of Chadron would remain in that class indefinitely, because said section of the statute does not provide for retrogression to the status of a city of the second class. It is further contended that the duty of certification to the governor is a joint one by authority of the mayor and city council; that in the instant case the city council did not, by ordinance or resolution, provide for the certification, as contained in section 17-162, Comp. St. Supp. 1939.

Our attention is further called to section 16-201, Comp. St. 1929, defining the general powers of a city of the first class, and to section 16-202, Comp. St. 1929, providing that these powers shall be exercised by the mayor and city council of such city (i. e. that the statute here under consideration, section 17-162, ignores the city council entirely); further, that section 16-308, Comp. St. 1929, prescribes the

duties of the mayor of a city, and section 16-309, Comp. St. 1929, the powers of the mayor and of the council. Respondent contends, from an analysis of the sections heretofore referred to, that the intent of the city charter contemplates that the mayor acts only by authority of the city council, acting by ordinance or resolution; that the city council shall have discretion in the matter. This would meet respondent's contention of a misjoinder of parties defendant and a defect of parties defendant, and lack of jurisdiction of the court to determine the case.

Section 16-101, Comp. St. 1929, is not in conflict with section 17-162, Comp. St. Supp. 1939, in any particular. The former refers to and designates when a city shall become a city of the first class. The city of Chadron became such a city in March, 1919. Section 17-162 classifies a city of the second class and relates the circumstances under which the classification is made. Obviously, both sections are separate and distinct, each from the other. Section 17-162 makes no requirement for action on the part of the city council by ordinance or resolution, but places a positive, definite and mandatory duty upon the mayor, and he exercises no discretion in the matter. The council cannot exercise such discretion, as it has no part in the certification, as required by the act. The other sections of the statute, cited above, are pertinent to the classification of cities, but they do not conflict in any manner with section 17-162, *supra*. If the contention of the respondent should prevail, it would be exceedingly difficult for a city of the first class to lose its status as such until and unless the city council and mayor should decide, by ordinance or resolution, to classify the city in a separate class. Section 17-162, *supra*, simplifies the classification. The object is to benefit the taxpayer by a reduced burden in governmental expenses.

We conclude that the respondent's position, under the circumstances, is not tenable. Other assignments of error need not be considered.

For the reasons given in this opinion, the judgment of the trial court is

AFFIRMED.

POWER OIL COMPANY ET AL., APPELLEES, V. R. L. COCHRAN ET AL., APPELLANTS.

295 N. W. 805

FILED JANUARY 10, 1941. No. 31068.

1. **Inspection.** An inspection fee which is in an amount reasonably necessary to defray the expense of inspection is proper and will not be disturbed.
2. ———. If inspection fees are in excess of an amount reasonably necessary to defray the expense of inspections and due, proper and timely challenge is made, it is required of the courts that they hold the excess over the then amount reasonably necessary to defray the expense of inspection unconstitutional, null and void.
3. ———. After the expiration of each biennium and the first fiscal quarter after the next regular session of the legislature, all excesses of inspection fees over and above costs of inspection lapse and cannot be spent or used for any purpose except by appropriation of the legislature.
4. ———. After the expiration of the six-year period from July 1, 1933, to June 30, 1939, it was beyond the power of the courts to determine directly the question of the excessiveness of inspection fees for that period, the excess fee, if any, for that period having lapsed could not be spent or used for any purpose except by appropriation of the legislature.
5. ———. The state and all of its various supported departments and agencies operate on a biennial basis requiring estimates and legislative appropriations for their requirements.
6. ———. Following the enactment of Legislative Bill 331 (Laws 1939, ch. 85, Comp. St. Supp. 1939, sec. 66-320), it became the duty of the chief of the bureau of motor fuels to make estimates of the probable income from inspection fees and also an estimate of the cost of necessary equipment, facilities and operations expense for proper, necessary and sufficient inspection.
7. **Constitutional Law.** The legislature having entrusted the function of determining the program for inspection of refined petroleum products to the division of motor fuels, the only subject for determination by the courts is the question of whether or not in the light of the program outlined the inspection fees provided by statute are reasonably necessary to defray the expense of inspection. If they are reasonably necessary, they will not be disturbed.
8. ———. Whether or not the legislature acted wisely in reposing these broad powers in the division of motor fuels is not a matter

for judicial determination. The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power.

9. **Inspection.** In case of a statute fixing the amount of inspection fees, such legislation should be construed prospectively, unless the statute itself clearly indicates that it shall be construed retrospectively.

10. ———. Evidence examined and *held* that the difference between estimated income from inspection fees after July 1, 1939, and estimated cost of inspection is not shown to be unreasonable.

11. ———. Evidence examined and *held* that no evidentiary basis appears from which the reasonable cost of inspection after July 1, 1939, can be ascertained or reasonably estimated.

12. ———. The bureau of dairies, foods and drugs being a legal and proper agency of state government and entitled to appropriations for its support out of revenues of state and the sum of $97,198.60 appropriated to it under Legislative Bill 521 (Laws 1939, ch. 133) having been appropriated from lapsed funds accumulated from inspection of refined petroleum products, the action of the legislature was a valid and constitutional act.

13. **States.** The power resides in the legislature of this state to make expenditures for advertising which advertising is for the public benefit.

14. **Constitutional Law.** The legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate.

15. **Inspection.** *Held* that the act creating the Nebraska Advertising Commission and the appropriation for its use is not unconstitutional, the purposes contemplated by the act not being inhibited by the Constitution and they being in the interest of the public welfare.

16. **Appeal.** Section 20-2231, Comp. St. 1929, which provides that no bond for costs, appeal or supersedeas shall be required of the state, state officer, state board, state commission, head of any state department, agent or employee of the state, in any proceedings or court action in which said state officer, board, commission, head of department, agent or employee is a party litigant in its or his official capacity, was applicable in the appeal of the defendants from the district court.

17. ———. In cases where the statute makes no provision for a supersedeas as a matter of right, the court may in its discretion allow a supersedeas upon conditions which it may affix.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed in part and reversed in part.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for appellants.

George I. Craven, contra.

Kennedy, Holland, De Lacy & Svoboda, amici curiæ.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

YEAGER, J.

This is a case wherein Power Oil Company, a corporation, a dealer in, and importer of, refined petroleum products in the state of Nebraska, and 92 other such dealers similarly situated, joined in the institution of this action in the district court for Lancaster county, Nebraska, against R. L. Cochran, governor, and a member of the Nebraska Advertising Commission; Louis Buchholz, director of the department of agriculture and inspection; John A. Ainlay, chief of the department of motor fuels, secretary and a member of the Nebraska Advertising Commission; John Havekost, state treasurer; Ray C. Johnson, auditor of public accounts; Grove Porter, Frank Bell, Jr., Harry Miller, Wade Martin, and Keith Neville, members of the Nebraska Advertising Commission; the department of agriculture and inspection, and the Nebraska Advertising Commission. The action is for the benefit of the plaintiffs and all others similarly situated in the state of Nebraska.

The purposes of the action, briefly stated, are (1) to have declared unconstitutional, null and void section 3 of House Roll 388 (Laws 1933, ch. 116, Comp. St. Supp. 1939, sec. 66-303), being the section of the statute providing for inspection fees for inspection and testing of motor or vehicle fuels, gasoline, kerosene, and other products of petroleum manufactured, sold or offered for sale in this state for illumination, heating, cleaning and power purposes, herein-

after referred to as refined petroleum products; (2) to have Legislative Bill 471 (Laws 1939, ch. 130), being the so-called State Advertising Law, declared unconstitutional, null and void; (3) to have section 38 of Legislative Bill 521 (Laws 1939, ch. 133) declared unconstitutional, being a part of a general appropriation bill wherein $97,198.60 was appropriated to the bureau of dairies, foods and drugs from excess fees in the refined petroleum products inspection fund, which fees had accumulated as an unexpended balance for the biennium beginning in 1937 and ending in 1939; (4) to enjoin and prevent the defendants from collecting inspection fees fixed by said section 3 of House Roll 388, or, in the alternative, that they be enjoined from collecting fees in excess of 0.7 cents per 50-gallon barrel, the statutory fee being 1½ cents per 50-gallon barrel; (5) to enjoin the defendants from enforcing any part of section 3 of Legislative Bill 471, being the section providing the appropriation of $50,000 for the Nebraska Advertising Commission; and (6) that an accounting be had of all fees collected under said section 3 of House Roll 388, and that the court devise a plan whereby the plaintiffs and all others similarly situated could present and make proof of claims against the claimed excess in the fund accumulated from inspection fees provided for by the act; that the claims be apportioned and that no further fees be collected until future fees of the plaintiffs at the rate of 0.7 cents per 50-gallon barrel should equal the claimed excess fees in the fund and that thereafter the inspection fee should be collected but not exceed 0.7 cents per 50-gallon barrel.

The case was tried to the court and at the conclusion of the trial the court found that said section 3 of House Roll 388 was not unconstitutional *in toto*, but that the collection of inspection fees thereunder in excess of 0.7 cents per 50-gallon barrel was unconstitutional, null and void, and enjoined collection of fees in excess of such rate; that said Legislative Bill 471 was not unconstitutional, null and void; that said Legislative Bill 521 was not unconstitutional, null and void; that an injunction to enjoin the enforcement of

any part of section 3 of said Legislative Bill 471 should not be granted; and that an accounting of the fees collected under section 3 of House Roll 388 and the other relief prayed for in connection therewith should be denied. From the parts of the decree which are favorable to plaintiffs the defendants have appealed and from those that are in favor of defendants the plaintiffs have cross-appealed. And incidentally on order of the district court, duly and timely excepted to by plaintiffs, the defendants were allowed to supersede without bond. The propriety of this order is attacked by motion in this court and it will be discussed later herein.

For convenience and clarity in discussion, plaintiffs and cross-appellants will be referred to as plaintiffs and defendants and appellants will be referred to as defendants.

On the proposition of the constitutionality and validity of said section 3 of House Roll 388 in its entirety, which is the inspection fee section of the act providing for inspection of refined petroleum products, there is no need for extended discussion, since it is well settled that an inspection fee which is in an amount reasonably necessary to defray the expense of inspection is proper and will not be disturbed. *Century Oil Co. v. Department of Agriculture,* 112 Neb. 73, 198 N. W. 569; *State v. Bartles Oil Co.,* 132 Minn. 138, 155 N. W. 1035; *State v. Pure Oil Co.,* 134 Minn. 101, 158 N. W. 723; *Pure Oil Co. v. State of Minnesota,* 248 U. S. 158, 39 S. Ct. 35, 63 L. Ed. 180. In truth, the plaintiffs in their brief concede the rule and do not question its soundness.

A much more serious problem arises in connection with the claim that the statutory fee of 1½ cents per 50-gallon barrel is in excess of an amount reasonably necessary to defray the expense of inspection. In a determination of this question a number of elements must be considered.

Is the act, or section 3 thereof, now, or has it been in the past, by results of operation and enforcement, a revenue measure? The decree of the district court holds that it is and has been a revenue measure to the extent of the excess over 0.7 cents per 50-gallon barrel since July 1, 1933. As-

suming that it has been a revenue measure in part, is it necessary to consider that question for the entire period? If it need not be considered for the entire period, must it be considered and determined for a part of the period? If for a part of the period, then what part?

In connection with the answer to these questions section 2 of the 1933 act provides the functions of the department of agriculture and inspection, which are numerous. They need not be enumerated here. Section 1 provides the power and provides for the mechanics of inspection and is as follows:

"The department of agriculture and inspection shall enforce the provisions of this article. It shall make, or cause to be made, all necessary examinations and shall have authority to promulgate such rules and regulations as are necessary to promptly and effectively enforce the provisions of this article."

Section 3, as hereinbefore indicated, contains the inspection fee provisions and none other.

By Legislative Bill 331 (Laws 1939, ch. 85, Comp. St. Supp. 1939, sec. 66-320), which became effective May 31, 1939, there was created in the department of agriculture and inspection a division of motor fuels which was designed to take over the administration of House Roll 388, and three other functions relative to motor fuels. Thus, at the time of the commencement of this action, there had been no change in the law relating to the collection of inspection fees since the enactment of House Roll 388 in 1933, except the transfer of enforcement generally from the department of agriculture and inspection to a division of motor fuels in the department with a chief and necessary deputies and assistants appointed by the governor.

It will be observed that the purpose of the act is a matter of legislative declaration, but the mechanics of inspection from 1933 to 1939 were, by legislative declaration, placed in the hands of the department of agriculture and inspection and thereafter in the division of motor fuels. For the period prior to May 31, 1939, or the effective date of said

Legislative Bill 331, we are not favored in the bill of exceptions with any competent evidence of any rules or regulations under which inspections were made. It appears that none were made or promulgated. It appears further that none came into being by departmental custom and usage. It appears that the work involved in inspection in its various phases was assigned to employees of the department of agriculture and inspection who at the same time were engaged in the execution of the more than 25 other functions of the department. A limited number of employees of the department were engaged full time in connection with the particular function of refined petroleum products inspection. The respective heads of the department of agriculture and inspection, on the basis of a general knowledge of the functionings of the various divisions of the department, without statistical data or foundation, and in the form of opinion, except as to full time employees in the refined petroleum products inspection division, were allowed, over objection, to testify to the proportion of time the employees of the department devoted to motor fuel inspection and to the proportion of the expense of the facilities of the department which was attributable to this division.

With this as a basis for salary and operations expense and with the biennium as the unit for calculation and computation, an auditor found that for the biennium beginning July 1, 1933, and ending June 30, 1935, inspection fees amounted to $171,108.37, with a total cost of inspection in the amount of $60,746.81, leaving a balance of $110,361.56; that for the biennium beginning July 1, 1935, and ending June 30, 1937, inspection fees amounted to $203,332.14, with a total cost of inspection in the amount of $90,175.25, leaving a balance of $113,156.89; and that for the biennium beginning July 1, 1937, and ending June 30, 1939, inspection fees amounted to $208,411.30, with a total cost of inspection in the amount of $101,737.93, leaving a balance of $106,673.47, which represents a total excess over cost of inspection for six years or three bienniums of $330,191.92.

If this computation is basicly sound, it would appear that

for the period covered the inspection fees were much in excess of requirements for inspection. It would then necessarily follow, if due, proper and timely challenge had been made, that the courts would have been required to hold that the excess over the then amount reasonably necessary to defray the expense of inspection was unconstitutional, null and void. *Century Oil Co. v. Department of Agriculture, supra*; *Century Oil Co. v. Department of Agriculture,* 110 Neb. 100, 192 N. W. 958; *State v. Standard Oil Co.,* 100 Neb. 826, 161 N. W. 537.

We think, however, that a determination of that matter is not now before the court. All fees paid for this entire period were paid by all plaintiffs and others similarly situated voluntarily and without protest and without any demand for refund ever having been made, unless the prayer of the petition in this case for an accounting amounts to a demand for refund. This being true, after each biennium and the first fiscal quarter after the next regular session of the legislature, all such excesses lapsed and could not be spent or used for any purpose except by appropriation of the legislature. Const. art. III, sec. 22; *State v. Moore,* 36 Neb. 579, 54 N. W. 866; *State v. Babcock,* 22 Neb. 33, 33 N. W. 709; *State v. Brian,* 84 Neb. 30, 120 N. W. 916; *Opinion of the Judges,* 5 Neb. 566; *Bollen v. Price,* 129 Neb. 342, 261 N. W. 689.

This being true, it was beyond the power of the district court and is beyond the power of this court to determine directly the question of excessiveness of inspection fees for the six-year period from July 1, 1933, to June 30, 1939. This is especially true in the light of the biennial basis of the operation of the state and its various supported departments and agencies which requires departmental and agency estimates and legislative appropriations to meet the requirements. Const. art. III, sec. 22; Comp. St. 1929, secs. 81-301 to 81-315; *State v. Moore,* 50 Neb. 88, 69 N. W. 373; *State v. Cornell,* 60 Neb. 276, 83 N. W. 72; *State v. Babcock, supra*; *State v. Moore, supra.*

Whether this procedure was followed in whole or in part

in the matter of motor fuel inspection for the three biennial periods beginning July 1, 1933, and ending June 30, 1939, is not ascertainable from the record in this case.

The first time, from the standpoint of the record in this case, that appropriate estimates were made was after the enactment of Legislative Bill 331, being the act which created a division of motor fuels in the department of agriculture and inspection. Pursuant to authority contained in this act, John A. Ainlay was duly appointed head of the division with the title of chief of the bureau of motor fuels. In compliance with legal requirements, Ainlay made an estimate of probable income from inspection fees and also an estimate of cost of necessary equipment, facilities and operations expense for proper, necessary and sufficient inspection. An exhibit containing the detailed estimates is in evidence in this case. The estimated income is $102,000 a year and the inspection cost $98,360. This excess of inspection fees over cost of operation could not be considered unreasonable under the rule that the fees must not produce a greater amount of money than is reasonably necessary to defray the cost of inspection.

The design of inspection, as set forth in the estimate, was definitely that of Ainlay, one that he considered necessary for proper inspection. This was proper, since the 1933 act impressed the duty on the department of agriculture and inspection, but the 1939 act transferred it to the division of motor fuels.

The legislature having, wisely or unwisely, entrusted these functions to the division of motor fuels, the only proper matter for determination by the courts is the question of whether or not, in the light of the program outlined, the inspection fees provided by the act in question are reasonably necessary to defray the expense of inspection. If they are reasonably necessary they will not be disturbed.

It may be true that the legislature by reposing the broad powers it did in the department of agriculture and inspection in the first instance and later in the division of motor fuels acted unwisely, but the courts cannot take note of it.

The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power. *Nebraska Telephone Co. v. State,* 55 Neb. 627, 76 N. W. 171; *Schultz v. State,* 89 Neb. 34, 130 N. W. 972; *Bradshaw v. City of Omaha,* 1 Neb. 16. This rule is accepted generally in all jurisdictions.

The plaintiffs raise the question in their brief that the program and its costs as set forth by the division of motor fuels in its estimate is, in part, unnecessary, and excessive. If this is a matter of proper inquiry, it is sufficiently met by the evidence of the plaintiffs. The evidence, fairly summarized, on this subject is to the effect that during the three previous biennial periods some of the kinds and character of equipment and facilities designated in the Ainlay estimate were not supplied or used; that in the opinions of respective former heads of the department of agriculture and inspection they were not necessary to a proper inspection; that in the opinion of these former department heads the increased number of employees was not necessary; that in the opinion of these same department heads the cost of inspection for the previous six years was sufficient and that the expenditure of a like annual amount would be sufficient and adequate for proper and reasonable inspection in the future. These opinions are recorded without foundation of detailed past practices, or of future needs except such needs as are outlined in the estimate supplied by the division of motor fuels. There is therefore no evidentiary basis for the claim that the program and its cost is, in part, unnecessary and excessive when viewed prospectively as must be done. This court has adopted and followed the rule that in case of a statute fixing the amount of inspection fees such legislation should be construed prospectively, unless the statute itself clearly indicates that it shall be construed retrospectively. *War Finance Corporation v. Thornton,* 118 Neb. 797, 226 N. W. 454; *Travelers Ins. Co. v. Ohler,* 119 Neb. 121, 227 N. W. 449; *Bliss v. Redding,* 121 Neb. 69, 236 N. W. 181.

The showing of plaintiffs is neither prospective nor retro-

spective. It fails to disclose detailed functioning before and failed to break down the program of the division of motor fuels so as to show that cost of proposed equipment and facilities was too high or that there was substantial lack of propriety in the use of such equipment and facilities.

As has already been indicated, it appears that, over the periods before the enactment of Legislative Bill 521, large excesses over cost of inspection accumulated in the inspection fund. It further appears that a considerable excess accumulated after the operative date of this act and the date of the commencement of this action.

As to the latter, it appears that from July 1, 1939, to October 31, 1939, inspection fees collected amounted to $49,522.52, while inspection cost for the same period amounted to $18,876.16, thus creating an excess of fees over costs paid out in the amount of $30,646.34. On the face this would indicate that fees in prospect for the biennium beginning July 1, 1939, were excessive. However, while this in time may prove to be the fact, in the light of the record in this case this cannot be determined at this time. This becomes apparent when we recall that a sufficient opportunity has not been afforded to put into effect more than a part of the program of the division of motor fuels. Time as an element and ability to procure equipment, together with the injunctive processes of the district court, have militated against a completed program. It may be that in time experience will show that cost of inspection will be far less than the fees provided by the statute in question, but until it does so tangibly appear, that is a question which is beyond the power of the court to determine. On the face of the record it cannot now be said that the inspection fee for the inspection of refined petroleum products is excessive.

We now approach the determination of the constitutionality and validity of the reappropriation of $97,198.60 by Legislative Bill 521 (Laws 1939, ch. 133) from inspection fees to the bureau of dairies, foods and drugs; and $50,000 by Legislative Bill 471 (Laws 1939, ch. 130) for the uses

of the Nebraska Advertising Commission. In the light of the view that all claimed excess fees which accumulated between July 1, 1933, and June 30, 1939, were unexpended balances, that they lapsed and became the subject of reappropriation by the legislature, and in light of the fact that the bureau of dairies, foods and drugs is a legal and proper agency of state government and entitled to appropriations for its support out of revenues of state, it can hardly be questioned that the appropriation of $97,198.60 was a valid and constitutional act of the legislature.

The constitutionality and validity of the appropriation of the $50,000 for the Nebraska Advertising Commission, we think, must depend on the question of the constitutionality of the act creating the commission. The two must stand or fall together. It is hardly necessary to state that an appropriation of public funds for the sole purpose of making effective an unconstitutional law is void.

The creation by legislative action of a commission to function at public expense to advertise the products of the state and its advantages with the purpose of attracting tourists and industries is something new in this state and, perhaps, in its scope, is more far reaching than legislation of this character in any other state. However, the principle of state advertising is not new, even in this state. The principle and practice of state advertising extends back into antiquity. This fact is pointed out graphically in the opinion in *City of Jacksonville v. Oldham,* 112 Fla. 502, 150 So. 619. The principle has been recognized in *State v. Cornell,* 53 Neb. 556, 74 N. W. 59; *Board of Directors of Alfalfa Irrigation District v. Collins,* 46 Neb. 411, 64 N. W. 1086; *State v. Robinson,* 35 Neb. 401, 53 N. W. 213; *State v. Miller,* 104 Neb. 838, 178 N. W. 846. It is true that the cases have reference to expenditures for advertising by counties, but counties are only arms of the state. The rules announced are not grounded in any sense in county organization but on the principle that legislative power exists to make expenditures for advertising which is for the public benefit. The courts of certain other states have adopted a similar

attitude toward advertising in the interests of the public welfare at public expense. *City of Jacksonville v. Oldham, supra*; *C. V. Floyd Fruit Co. v. Florida Citrus Commission,* 128 Fla. 565, 175 So. 248; *State v. Enking,* 59 Idaho, 321, 82 Pac. (2d) 649; *City of San Antonio v. Paul Anderson Co.,* 41 S. W. (2d) (Tex. Civ. App.) 108; *Anderson v. City of San Antonio,* 123 Tex. 163, 67 S. W. (2d) 1036; *Moreland v. City of San Antonio,* 116 S. W. (2d) (Tex. Civ. App.) 823; *Davis v. City of Taylor,* 123 Tex. 39, 67 S. W. (2d) 1033; *Sacramento Chamber of Commerce v. Stephens,* 212 Cal. 607, 299 Pac. 728; *Lewis v. LaGuardia,* 172 Misc. 82, 14 N. Y. Supp. (2d) 463.

In this field, if limited to the public benefit, the legislature has power to act. Whether it enters the field or not is a matter of legislative discretion. Whether or not the legislature exercised a wise discretion is not a matter that can properly be determined by the courts. The legislature, subject only to the initiative and referendum, and constitutional inhibitions, and provided that legislation is for a public purpose, has an unlimited field within which to legislate. Const. art. III, secs. 1 and 18; *State v. Sheldon,* 78 Neb. 552, 111 N. W. 372; *Smithberger v. Banning,* 129 Neb. 651, 262 N. W. 492; *State v. Board of County Commissioners,* 109 Neb. 35, 189 N. W. 639; *Davis v. State,* 51 Neb. 301, 70 N. W. 984; *State v. Nickerson,* 97 Neb. 837, 151 N. W. 981; *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643; *Stewart v. Barton,* 91 Neb. 96, 135 N. W. 381.

No constitutional inhibition has been found against the kind, character and purpose of the advertising contemplated by the language of the legislation in question, and attention has not been directed to any such inhibitory provision or provisions. And again, he who knows only a little of the broad acres, the incomparable beauties, the tremendous natural resources, the potential industrial advantages and possibilities, the need for men and women and capital for development and utilization of our state's potentialities must be blind indeed if he cannot see that advertising which is

calculated to bring people within the borders of Nebraska would be of general benefit to the state, rather than of special or local benefit within the meaning of constitutional inhibitions. The argument that certain individuals engaged in the mechanics of advertising will benefit from this work fails to impress. The adoption of such a theory would bar the functioning of all government.

The determination that the Nebraska Advertising Commission law is not unconstitutional, but that the legislature in enacting it was in the exercise of its legislative power, in the light of what is determined with reference to the appropriation of $97,198.60 to the bureau of dairies, foods and drugs, disposes of the question of the constitutionality and validity of the appropriation of the $50,000 for the commission. The act creating the commission being valid, the appropriation for its functions becomes valid.

This being an action in equity and being tried *de novo* on the record in this court, we find that the district court was correct in determining section 3 of House Roll 388 (Laws 1933, ch. 116, Comp. St. Supp. 1939, sec. 66-303), was not, in its entirety, unconstitutional and null and void; we find however that the court was in error in determining that, as to this act, the collection of an inspection fee in excess of 0.7 cents per 50-gallon barrel, on the evidence adduced and presented, was unconstitutional and null and void. Accordingly, the decree in this respect is reversed, without prejudice, however, to the right to maintain an action to enjoin collection if it may in the future be made to appear by competent evidence that the statutory fee is in excess of what is reasonably necessary for inspection purposes and requirements in the light of the program set up by the division of motor fuels in the department of agriculture and inspection. We find that the court did not err in refusing to declare Legislative Bill 471 (Laws 1939, ch. 130), being the so-called State Advertising Law, unconstitutional and null and void; that the court did not err in refusing to declare section 38 of Legislative Bill 521 (Laws 1939, ch. 133), being a part of an appropriation bill

wherein $97,198.60 was appropriated to the bureau of dairies, foods and drugs from excess fees in motor fuels inspection fund, unconstitutional and null and void; that the court did not err in refusing to enjoin the enforcement of section 3 of Legislative Bill 471 (Laws 1939, ch. 130), and the court did not err in refusing to devise a plan whereby plaintiffs and all others similarly situated could present claims against the defendants or some of them.

On appeal by defendants to this court, the defendants were allowed to supersede without bond. This action was challenged in this court by motion of the plaintiffs requesting the court to set aside the order for supersedeas. It was deemed advisable to treat of this matter in the opinion.

The defendants contended that section 20-2231, Comp. St. 1929, is applicable here. It provides as follows:

"No bond for costs, appeal, supersedeas or attachment shall be required of the State of Nebraska, or of any state officer, state board, state commission, head of any state department, agent or employee of the state, the secretary of the department of trade and commerce as receiver of insolvent state banks or any receiver appointed on application of the State of Nebraska; in any proceedings or court action in which said state, officer, board, commission, head of department, agent or employee is a party litigant in its or his official capacity."

The district court so determined in the order allowing supersedeas. We think the district court was correct in its determination, notwithstanding the efforts of plaintiffs to make this an action against the defendants in their individual rather than their official capacities. This is particularly true in view of the decree which upheld the constitutionality of the act as an act which was the subject of the relief granted plaintiffs and only declared invalid collection of inspection fees under the said act in excess of 0.7 cents per 50-gallon barrel.

There is no question that in cases where the statute makes no provision for a supersedeas as a matter of right, the court may in its discretion allow a supersedeas upon

conditions which it may affix. *Home Fire Ins. Co. v. Dutcher,* 48 Neb. 755, 67 N. W. 766. Viewed practically, we think that discretion was not abused in this case. The motion is overruled.

The decree of the district court, therefore, in accordance with the foregoing is reversed in part and affirmed in part.

AFFIRMED IN PART AND REVERSED IN PART.

HOWARD KENNEDY III, TRUSTEE, ET AL., APPELLANTS, V. HERBERT E. GOTTSCHALK, APPELLEE.

295 N. W. 813

FILED JANUARY 10, 1941. No. 30910.

1. **Appeal.** Where the evidence is conflicting, a finding by the trial court in a proceeding to establish lost corners and boundary lines will not be disturbed, when such finding is sustained by competent evidence.
2. **Boundaries.** To establish a boundary line by acquiescence, it is essential that the owners of adjoining tracts mutually recognize and accept such line as the boundary line for a period of ten years or more.
3. **Landlord and Tenant.** One who takes possession of real estate as tenant of another cannot hold said real estate adversely to his lessor until he surrenders possession or, by some unequivocal act, notifies the landlord that he no longer holds under the lease.

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

Victor Westermark, for appellants.

Butler, James & McCarl, Leon L. Hines and *Daniel E. Owens, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

KROGER, District Judge.

This case involves a boundary line dispute. Plaintiffs-appellants are the owner and tenant in possession of the northeast quarter of section 10, township 1, range 36 west,

Dundy county, Nebraska, the same having been homesteaded by the plaintiff Crow about 1898, and later title was acquired by Howard Kennedy, trustee, and Crow is now in possession as tenant. Defendant-appellee is the owner of the northwest quarter of section 11, in said township and range, having acquired same by purchase from Stull Brothers in 1930. A county road runs north and south between the sections. Defendant claimed the dividing line between said sections was some 300 feet west of the county road and attempted to erect a fence along what he contends is the boundary line. Plaintiffs filed a petition to enjoin defendant from trespassing on any of the land west of the county road and defendant filed a cross-petition asking the court to establish the boundary line under the provisions of section 34-301, Comp. St. 1929. From a judgment establishing the boundary line approximately where defendant claimed it to be, plaintiffs appeal.

Plaintiffs contend, first, that the road was the true boundary line according to the original government survey, second, that the road had been established as the boundary line by acquiescence for a long period of years, and, third, that plaintiffs had obtained title to all land west of the county road by adverse possession.

While there is evidence in the record to the effect that a stone, such as was used by government surveyors in marking section corners, was at one time in the center of the county road where it is now located, the overwhelming weight of evidence is that the true section corner was some 16 to 20 rods west of the county road where it intersects the north line of sections 10 and 11. In addition to the testimony of witnesses that a stone, such as was used by the government surveyors in marking corners, was at a point some 300 feet west of the county road, there were three separate surveys offered in evidence, all of which were in close agreement, and all of which found the true corner to be approximately where the court found it to be. Then, too, the road itself forms an ox-bow as it passes through sections 10 and 11 and is not in line with the section lines

to the north and to the south, whereas the line as established by the trial court is in alignment with the section lines to the south and north. While the evidence as to its location was conflicting, the weight of the evidence was in favor of the location established by the trial court.

On the question of acquiescence, the record discloses that the northwest quarter of section 11 was, for a long period of years, owned by Stull Brothers of Omaha, Nebraska, and that they, from about 1906 on until 1930, had leased said land to the plaintiff Crow. The record also discloses that Stull Brothers never personally visited the land, but that the leases executed by plaintiff Crow and Stull Brothers covered all of the northwest quarter of section 11; that, beginning with the year 1913, one Druliner looked after the renting of this land as agent for Stull Brothers, and Druliner testified that the question of the boundary between the Stull and Crow land was never discussed, but that he assumed it was the county road. So far as the record discloses, the rental of the Stull land was on a cash basis. Upon this state of facts, defendant contends, on the authority of *Romine v. West*, 134 Neb. 274, 278 N. W. 490, and earlier Nebraska cases, that the county road had been established as the boundary line by acquiescence. In the cases relied upon by plaintiffs, the respective owners had, by their conduct, shown an acceptance of a given boundary line as the true boundary line and, where such mutual acceptance had continued for more than ten years, this court held that the boundary thus became established and could not be altered. In the instant case, there is no evidence of any agreement that the county road should constitute the boundary, and in fact there is no evidence that Stull Brothers, the then owners, had accepted or acquiesced in any given point as the boundary line. It is true that their agent testified that he assumed the road was the boundary line, but he further stated that the matter was never discussed by him with any one and there was never any question raised about it. Neither was there any conduct on the part of the owners or their agent which would indicate that they

accepted the road as the dividing line. They rented the quarter-section as one tract. Nearly all of it was in pasture. There was no overt act on their part that would indicate a recognition of the road as a dividing line.

Under the facts of this case, the trial court did not err in finding that the boundary line had not been established by mutual agreement or acquiescence.

This leaves the question of adverse possession upon which the plaintiffs rely. The record discloses that some time before 1917, but considerably after the original lease which was executed in about 1906, the plaintiff Crow built a fence along the west side of the county road from the half section line north to a point some 60 rods south of the north section line, and that part of said strip was in hog lot and the balance was farmed, being planted mostly to corn. In addition, he placed some improvements on the disputed strip of ground, consisting of hog sheds. This evidence is not disputed and, on the strength of same, plaintiffs contend that they have acquired title by adverse possession. The question thus raised has been determined adversely to the plaintiffs in a number of decisions of this court. See *Reed v. Wellman*, 110 Neb. 166, 193 N. W. 261, and cases therein cited. The basis of these decisions is that one who has taken possession of real estate as tenant of another cannot hold said real estate adversely to his lessor until he surrenders possession or, by some unequivocal act, notifies the landlord that he no longer holds under the lease. The plaintiff Crow did nothing to indicate that he was claiming any of the land belonging to Stull Brothers prior to his becoming their tenant; while he was in possession as tenant there was nothing done by him that was inconsistent with his position and rights as lessee, and, since surrendering his lease, not enough time has elapsed to give him title by adverse possession, the record disclosing that the last lease terminated in 1931.

Finding no error in the record, the judgment of the trial court is

AFFIRMED.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. CLARENCE H. HENDRICKSON, RESPONDENT.

295 N. W. 892

FILED JANUARY 17, 1941. No. 30792.

1. **Attorney and Client.** "An attorney cannot, without actual authority from his client, sell and assign his client's judgment." *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616.
2. ———. An attorney who officiously assigns a judgment of his client to another client as a gift and so manipulates the transfer as to mislead a court, by means of set-off, into canceling a judgment against the assignee, thus becomes a trustee for the owner of the judgment wrongfully assigned and accountable as such without demand for restitution.
3. ———. Settlement by an attorney for a liability to his client does not necessarily settle the accountability of the attorney to the court for his misconduct in creating such liability or prevent disbarment therefor.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, against Clarence H. Hendrickson. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for complainant.

Webb Rice, for respondent.

Heard before EBERLY, ROSE, PAINE and MESSMORE, JJ., and ELDRED, District Judge.

ROSE, J.

The state of Nebraska, on the relation of the State Bar Association, instituted this proceeding in the supreme court by means of a complaint charging that Clarence H. Hendrickson, respondent, a licensed practicing attorney residing in Wayne, Wayne county, was guilty of unprofessional conduct, subjecting him to disbarment.

The facts constituting the principal charge in the complaint are, in substance, that, as attorney for Albert Pick Company, respondent recovered a judgment in its favor against Francis C. Jones; that respondent, without authority from his client, Albert Pick Company, and without

its knowledge or consent, sold the judgment and assigned it to James W. Wright, another client of respondent, and, by means of set-off, so manipulated the transfer as to satisfy and cancel a judgment against the assignee and in favor of Francis C. Jones; that neither respondent nor Wright paid anything to Albert Pick Company on the assigned judgment until after respondent had been informed of inquiry into his misconduct.

By answer containing a general denial, respondent put in issue the incriminating facts stated in the complaint.

A referee was appointed to take the testimony and report it to the court with his findings of fact and conclusions of law. In the performance of those duties the referee found that the evidence proved the charges in respect to the unauthorized sale, assignment and manipulation of the transfer and recommended disbarment. The cause was heard on exceptions to the referee's report and was elaborately argued by both sides at the bar and in briefs.

It was insisted on behalf of respondent that the assigned judgment was worthless; that Albert Pick Company made no demand on respondent for payment of the judgment when it learned of the assignment; that respondent paid his client the full amount of the claim evidenced by the judgment; that consequently there was no cause for disbarment.

The position thus taken on behalf of respondent is clearly untenable under the facts established by evidence and rules of law and equity formerly announced by this court. While the referee found that respondent did not receive any money for the assignment and that the assigned judgment was at the time uncollectible, he did find on conclusive evidence that the assignment was unauthorized and that it was effective for the satisfaction of a judgment against the assignee, another client of respondent who made the sale and assignment in writing, and by pleading and proof misled the court into allowing it as a set-off in satisfaction of a judgment against the assignee. Albert Pick Company traced its judgment debtor, Francis C. Jones, to Portland,

Oregon, and from there heard about the assignment of its judgment, and asked respondent by letter whether, in fact, the assignment had been made, and if so by what authority. Albert Pick Company received in reply an evasive answer in which respondent did not answer the questions asked, but did say the judgment was uncollectible and that he never received a cent on it. In the manner indicated he deprived his client of its judgment without authority and did not account for his misconduct as an attorney at law or pay the claim evidenced by the assigned judgment until after investigation for misconduct was started. The amount involved in these transactions was small, but that did not change the turpitude of respondent's misconduct. The law is that "An attorney cannot, without actual authority from his client, sell and assign his client's judgment." *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685, 79 N. W. 616.

When respondent officiously assumed to act for Albert Pick Company, as he did, in selling and assigning its judgment and in manipulating the transfer for the benefit of another client, he thus became a trustee, answerable as such to his principal, Albert Pick Company, in the fiduciary capacity in which he placed himself. In that relation it was his duty, without demand for restitution, to inform his principal what he had done with its interests and to account for the gift of its judgment to Wright. *Nebraska Power Co. v. Koenig,* 93 Neb. 68, 139 N. W. 839. Settlement with the principal by payment of the claim evidenced by the assigned judgment, under the circumstances, after exposure and investigation by the State Bar Association, did not settle respondent's accountability to the court, to the bar and to the public. *State v. Priest,* 123 Neb. 241, 242 N. W. 433; *State v. McGan, ante,* p. 665, 294 N. W. 430.

The misconduct under consideration betrayed the attorney's client, violated established standards and codes of professional ethics and honor and cast reproach on the courts and on the bar. On facts conclusively established by the evidence, the supreme court has no alternative but disbarment.

JUDGMENT ACCORDINGLY.

E. H. LUIKART, RECEIVER, APPELLANT, V. RAY F. QUINN, ADMINISTRATOR, ET AL., APPELLEES.

295 N. W. 890

FILED JANUARY 17, 1941. No. 30912.

Executors and Administrators. A claim by the receiver of an insolvent state bank against the estate of a deceased stockholder for a liability imposed by the Constitution is barred by statute unless an application for the appointment of an administrator to settle the estate of decedent is made within two years after his death. Comp. St. Supp. 1939, sec. 30-609.

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

F. C. Radke and *Leon L. Hines,* for appellant.

Victor Westermark, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

ROSE, J.

This is a proceeding by E. H. Luikart, receiver of the insolvent Citizens State Bank of Benkelman, Dundy county, Nebraska, to enforce a 2,500-dollar claim in favor of its creditors against the estate of Milton Earl, deceased, for a stockholder's liability on 25 shares of capital stock of the par value of $100 a share, held by him at the time of his death—a liability created by section 7, art. XII of the Constitution. Earl died intestate and his heirs at law and the administrator of his estate objected to the allowance of the claim on the ground that more than two years elapsed between Earl's decease and the appointment of the administrator, thus barring the claim under the two-year statute of limitations. Comp. St. 1929, sec. 30-609. On appeal from the county court's disallowance of the claim, the district court also disallowed it and the receiver appealed to the supreme court.

Is the claim barred by statute? Following is a chronology of events disclosed by the record: June 11, 1929, Earl was owner of 25 shares of stock and the bank was adjudged insolvent in hands of receiver; June 4, 1930, Earl died in-

testate owning the 25 shares of stock; May 28, 1935, judicial order of liquidation with debts of $236,956.51 in excess of assets; April 29, 1937, receiver first petitioned county court of Dundy county for appointment of an administrator of the Earl estate; May 26, 1937, Ray F. Quinn appointed and qualified as administrator and ordered to notify creditors of Earl to file their claims within four months, or by September 26, 1937, and compliance with order for notice; August 2, 1937, receiver filed in the county court against the Earl estate a 2,500-dollar claim for the stockholder's liability to creditors, reduced to $2,396.57 by dividends of $103.43 on the stock; May 13, 1938, action by the receiver in the district court for Dundy county to recover the amount of the claim; December 16, 1938, judgment in the district court for Dundy county in favor of receiver and against Quinn as administrator for $2,430.91; January 4, 1939, amended claim for the amount of the judgment, less a credit of $34.34 in dividends, filed by the receiver in the county court, leaving unpaid $2,396.57; March 28, 1939, amended claim disallowed by county court; September 9, 1939, amended claim against Earl estate disallowed by district court. The foregoing facts were established without dispute or stipulated by the parties. After an elaborate argument counsel for the receiver summarized his case as follows:

"The undisputed facts of this case show that the bank went into receivership on June 11, 1929. Milton Earl died on June 4, 1930. There was no administration of the estate by his heirs or his then existing creditors. The bank was liquidated and the deficiency was determined on May 28, 1935. The receiver's claim was and remained contingent. The receiver petitioned for administration of the Earl estate on April 29, 1937, so that the estate by its administrator could be sued as a stockholder. The stockholders were sued on May 13, 1938, and on December 16, 1938, judgment was recovered against the estate. The receiver's claim by that judgment became absolute, and capable of being exhibited to the county court for allowance. The re-

ceiver filed a contingent claim within the time fixed. He filed his absolute claim within three weeks after it became absolute."

The position of the receiver is that his claim, being contingent, was not presentable to the county court until reduced to judgment; that it was presented within a year from the entry thereof or within the time limited by the statute which provides:

"If the claim of any person not capable of being exhibited within the time limited for creditors to present their claims, shall become absolute at any time thereafter, the person having such claim may present it to the court, and prove the same at any time within one year after it shall become absolute." Comp. St. Supp. 1939, sec. 30-704.

The heirs and the administrator insist that the claim was barred for the reason it was not presented to the county court within two years from the death of Earl as required by the following provisions of statute:

"Every person having a claim or demand against the estate of a deceased person 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 setting off the same in any action whatever; Provided, if any person having such claim or demand shall fail for two years from and after the death of such decedent to apply for or take out letters of administration on the estate of such deceased person, or cause such letters to be taken out as provided for in this chapter, then such claim or demand shall likewise be forever barred." Comp. St. Supp. 1939, sec. 30-609.

The liability of a stockholder to the creditors of an insolvent state bank was imposed by the Constitution which provides:

"In all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall

be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." Const. art. XII, sec. 4.

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

These provisions by their own terms apply to "all cases of claims" against state banks and to "every stockholder." At first the claim herein was contingent, but it was nevertheless a "claim" capable of being exhibited to the county court. *In re Estate of Edwards, ante,* p. 671, 294 N. W. 422. In the proceeding to reduce the contingent claim to an absolute one by recovery of a judgment against the estate of the deceased stockholder, an administrator was a proper party defendant for the purpose of determining the validity of the claim and the extent of the liability, if valid. *Brownell v. Anderson,* 117 Neb. 652, 222 N. W. 55; *Parker v. Luehrmann,* 126 Neb. 1, 252 N. W. 402. In the present instance no individual creditor or heir applied for the appointment of an administrator. The duty to do so fell on the receiver, acting for all creditors of the bank. He was appointed receiver after the bank was adjudged insolvent June 11, 1929. Adjudicated insolvency implied a contingent claim for a deficiency. In absence of an amicable settlement, the validity and amount of the claim were litigable questions. A legal representative of decedent's estate is a proper defendant in such litigation. Earl died June 4, 1930, and the application for the appointment of an administrator was not made until April 29, 1937, with the claim still contingent. As a claim against the Earl estate it was therefore barred by the two-year statute of limitations. Comp. St. Supp. 1939, sec. 30-609. The county court and the district court so held.

AFFIRMED.

WILLIS BRICE V. STATE OF NEBRASKA.

295 N. W. 894

FILED JANUARY 17, 1941. No. 30979.

1. **Criminal Law.** Defects in a preliminary complaint charging a felony are waived, where the accused is bound over to the district court, appears therein, pleads not guilty under a valid information charging the same felony and goes to trial without objecting to such defects.
2. ———. "It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form." *Samuels v. State*, 101 Neb. 383, 163 N. W. 312.
3. **Homicide.** Evidence considered in opinion *held* sufficient to sustain a conviction for manslaughter.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed.*

John T. Marcell and *Harold P. Caldwell*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and YEAGER, JJ., and ELDRED, District Judge.

ROSE, J.

In a prosecution by the state of Nebraska in the district court for Douglas county, Willis Brice, defendant, was convicted of manslaughter under an information charging that he unlawfully shot and killed Napoleon Merritt Jackson in Omaha, Douglas county, May 14, 1938. For that felony he was sentenced to serve in the state penitentiary a term of five years. As plaintiff in error he presents for review the record of his conviction.

The sentence is attacked as erroneous and prejudicial on the ground that the original complaint is irregular and defective on its face, showing as it does that the municipal judge before whom it was made signed both the complaint and the jurat. The assignment of error raising this point must be overruled for the following reasons: The complaint charged in direct and specific form that defendant

unlawfully shot and killed Jackson in Douglas county, May 14, 1938. It was effective for the purpose of binding defendant over to the district court for trial. The information in the district court was presented by the county attorney, was in due form and was complete in every particular. Defendant appeared in the district court, pleaded not guilty and went to trial without objecting to the original complaint. He therefore waived the defect of which he complains. *Lewis v. State,* 15 Neb. 89, 17 N. W. 366; *Shaffer v. State,* 123 Neb. 121, 242 N. W. 364.

Defendant also complains of rulings of the trial court in refusing to give a number of instructions requested by him. An examination of the record discloses that the substance of such requested instructions as were proper under the issues, the law and the evidence was given by the trial judge on his own motion. The instructions given do not as a whole contain error prejudicial to defendant. He is therefore not entitled to a reversal on account of the refusing or the giving of instructions. *Samuels v. State,* 101 Neb. 383, 163 N. W. 312; *Foreman v. State,* 126 Neb. 619, 253 N. W. 898.

Insufficiency of the evidence to prove the guilt of defendant beyond a reasonable doubt is urged as a ground for reversing the conviction.

While much of the testimony is conflicting, many of the facts are conclusively shown. A homicidal shot was fired from a revolver during the evening of May 14, 1938, in the Apex Billiard Parlor, a gambling place at 1847 North Twenty-fourth street, Omaha, Nebraska, and Jackson, a bystander therein, was fatally injured by a bullet and died the same evening. Lee Washington was proprietor of the Apex Billiard Parlor and Willis Brice, defendant, was in charge of the gambling. Both were playing poker at a round poker table with Bennie Bates, John Beasley, Percy Holmes and Tom Nelson. Brice came to the poker table with an automatic .45 caliber revolver on his person. Bates and Beasley threatened each other in offensive language where a game of poker was in progress. Addressing Bates, de-

fendant told him to "cut that out." Some one started the shooting. About thirty persons present generally ducked under or behind tables or rushed for the outer door. Jackson remained standing and a bullet passed through his body near the nipple line, taking an upward course and coming out at a point higher than the point of entry. After the shooting ceased the walls of the room and some of the furniture were marred with bullet holes or bullet marks and five or six .45 caliber shells were found near the poker table at which defendant had been seated. The foregoing facts were fully established.

The record contains evidence that defendant gave himself up the same night at the police station, handed his revolver to the inspector of detectives there, said it was the gun he used when he shot Jackson and made a voluntary statement of events that occurred at the poker table.

On the witness-stand, defendant's own version of what occurred at the gambling table may be summarized in part as follows: About 9:30, Bennie Bates came in and tried to get into the game, but he only had $2.50, and defendant told him he could not play because the stakes were $5. Bates sat down at the table, put $2.50 in front of him and tried in vain to catch a hand. Lee Washington lent him $2.50 and he entered the game, played 40 minutes, lost his money, was out of the game and asked defendant for a loan, which was refused. Washington gave him 35 cents, which he also lost and he left the room, but came back in 20 minutes with $1.35, got into the game again, lost the $1.35 and asked defendant for a dime, which was refused. Defendant laughed and was cursed by Bates. Beasley said to Bates: "Come on. Let us get up from the table. We are broke." Bates replied, "You tell me to leave the table and I will come over there." In that event, he was threatened by Beasley with a kick. Defendant told Bates, whose nickname was Tex, to "cut that out" and got from him the warning: No one "can tell me what to do." While defendant was dealing the cards some one yelled: "Look out. He is fixing to shoot." Defendant shouted, "Don't do that,

Tex." Bates at the time had a gun in his hand and it was pointed at defendant. Bates fired twice, one bullet making a flesh wound in one of defendant's legs. Defendant said in his testimony: "After he fired the second time I jumped up on a chair and fired back at him and tried to get across the table, and the table turned over with me." He said the table threw him and his gun kept firing and he fell on the floor, got up after the firing ceased and saw Jackson holding his side and heard him say he was shot.

Testimony of defendant that Bates pointed the revolver at him while firing it is at variance with testimony of some of the other witnesses. Testimony as to relative positions of defendant, Bates, Beasley and Jackson during the exchange of shots was also in conflict. Some of it tends to prove that Jackson was exposed to the danger of a shot from defendant's position at the poker table. The number of .45 caliber empty shells on the floor and the widely scattered bullet marks on walls and furniture and the upward course of a bullet through the body of Jackson are in some degree corroborative of defendant's statements that his revolver kept firing after he started to fall by the overturned poker table and that he shot Jackson.

There is a conflict in the evidence relating to the asserted defense that the life of Brice was in known imminent danger and that he fired his revolver at Bates in self-defense. Defendant admitted he laughed when Bates lost his last dime and his credit at the poker table, and from this and other circumstances there is a legitimate inference that defendant invited the hostility of Bates. It is otherwise shown, however, that the quarrel leading to the homicide was between Bates and Beasley and that the last of the verbal argument between them was just before the shooting, implying settlement with Beasley on the part of Bates by the use of his revolver.

A consideration of the entire record leads to the conclusion that the verdict is sustained by the evidence.

Rulings in admitting and in rejecting evidence are free from error prejudicial to defendant.

AFFIRMED.

H. J. COFFIN, APPELLANT, V. OLD LINE LIFE INSURANCE COMPANY ET AL., APPELLEES.

295 N. W. 884

FILED JANUARY 17, 1941. No. 30823.

1. **Taxation.** "The lien for taxes is not satisfied by a statutory sale of the property for the same, nor by the payment of prior or subsequent levies by the purchaser. Such sale only operates to transfer the lien to the purchaser." *City Safe Deposit & Agency Co. v. City of Omaha*, 79 Neb. 446, 112 N. W. 598.
2. ———. Tax liens take priority in reverse order of other liens. As to all other liens the first in order of time is *prima facie* superior to those of a later date. However, in the case of tax liens, the "last shall be first and the first last." So that, "Taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued (prior) thereto." *Medland v. Van Etten*, 75 Neb. 794, 106 N. W. 1022.
3. **Lis Pendens.** "The filing and recording of a *lis pendens* does not give notice of rights under a cause of action not pleaded." *Shafer v. Wilsonville Elevator Co.*, 121 Neb. 280, 237 N. W. 155.
4. **Taxation.** The title or lien conveyed under a tax sale is not derivative, but a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes the same free from any encumbrances, claims or equities connected with the prior title, and the title properly completed therefrom gives to the owner an independent perfect title to the land and cut off from every other claim or equity existing against it.
5. **Lis Pendens.** Since the scope of a *lis pendens* is determined by its end and purpose, it has no application to independent titles not derived from any parties to the suit or in succession to them.
6. ———. A sale for taxes being based on grounds which are adverse to all parties to an action involving the title, and which are not in any way involved in the action, the filing of a *lis pendens* does not make the purchaser at the tax sale a purchaser *pendente lite*.
7. ———. "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting the relief sought." *Merrill v. Wright*, 65 Neb. 794, 91 N. W. 697.
8. ———. Under the facts set forth in this case, there was no merger of the Coffin title, derived solely from his tax foreclosure, with the fee simple title previously existing.

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

B. A. Rose and *Prince & Prince,* for appellant.

Albert S. Johnston and *Squires, Johnson & Johnson, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

EBERLY, J.

This is an action instituted by H. J. Coffin against the Old Line Life Insurance Company, a corporation, *et al.,* to quiet his title in and to a fractional tract of land situated in Custer county, Nebraska, against the claims of defendants evidenced by a decree foreclosing certain tax liens upon said premises, rendered in the district court for Custer county on April 2, 1929, in favor of plaintiff in a case wherein E. B. Cowles was plaintiff and Christie Pool, Mary E. DeBusk *et al.,* were defendants, and of which decree the Old Line Life Insurance Company was and is the assignee and owner. A trial to the court resulted in a finding and judgment in favor of defendants and against plaintiff. Plaintiff appeals.

It appears without question that defendant insurance company's rights as assignee are based upon the following, viz.: A purchase by E. B. Cowles of the real estate in suit at a tax sale duly held by the county treasurer of Custer county on March 8, 1926, for the delinquent taxes for the years 1920, 1921, 1922, 1923, 1924 for the sum of $190.53 and the subsequent payment by E. B. Cowles of the taxes assessed thereon for the years 1925 and 1926. A tax foreclosure proceeding was instituted thereon in the Custer county district court on February 12, 1929, by E. B. Cowles against Mary E. DeBusk and ——— DeBusk, first name unknown, her husband, as owners of such real estate. In said court and in said cause, after service of process had been duly had upon said defendants above named and each

of them, a decree of foreclosure and sale was on April 2, 1929, duly made and entered in favor of E. B. Cowles in the sum of $338.95 with interest at 12 per cent. from date of decree, together with attorney fees in the sum of $33.89, which was adjudged a first lien on the premises referred to herein, and which remains wholly unsatisfied. By stipulation of parties it appears that this decree has been duly assigned to and is now owned by the Old Line Life Insurance Company, a corporation. It also appears that on November 5, 1928, the land here in suit was by the county treasurer of Custer county sold to and purchased by H. J. Coffin for the delinquent taxes for the year 1927, amounting to the sum of $27.34, and that as the owner of such certificate of tax sale thereof he made payments of taxes assessed against said premises for the years subsequent to 1927; further, that said H. J. Coffin thereupon commenced an action to foreclose such tax sale certificate, and upon taxes subsequently paid by him as holder and owner thereof, and thereafter upon due service of process upon the defendants therein named, did procure a decree of foreclosure for nonpayment of such taxes. Said property was not redeemed as provided in the decree so entered, and a sale thereof was duly had in accordance with the decree of foreclosure and as provided by law, and such sale was confirmed by the district court for Custer county on November 14, 1932. On November 25, 1932, pursuant to such decree of confirmation, the sheriff of Custer county duly made, executed and delivered to H. J. Coffin his sheriff's deed, which in terms properly conveyed to Coffin the real estate in suit. This sheriff's deed was duly filed for record in the office of the register of deeds of Custer county on July 31, 1933; and pursuant to a writ of assistance issued in this cause on April 5, 1934, Coffin entered into possession of the premises in suit and has since remained in exclusive possession thereof. In connection with these proceedings, it is to be noted that Coffin was not named a party defendant in the proceedings instituted by Cowles, and neither Cowles nor the Old Line Life Insurance Company were

named as defendants in the proceedings instituted and carried on by Coffin. It is the contention of Coffin that he had no actual knowledge of the pendency of Cowles' proceeding or of the existence of Cowles' decree of foreclosure and sale until after the confirmation of the sale under which he (Coffin) claims title. However, on February 28, 1929, E. B. Cowles caused to be filed in the office of the register of deeds of Custer county, Nebraska, a *lis pendens* which was indexed as E. B. Cowles v. Christie Poole, containing notice of three separate causes of action, but in which as the second cause of action Mary E. DeBusk and ——— DeBusk, first and full name unknown, were named as defendants, and the premises here in suit were described. We assume for the purpose of this opinion, but do not determine, that this *lis pendens* conformed to the statutory requirements as to sufficiency of description of the real estate involved and also as to filing and indexing thereof.

Preliminary to a discussion of the issues on appeal presented by the record, it is to be noted that our revenue act provides that "Taxes on all real property shall be a first lien thereon from and including the first day of December of the year in which they are levied until the same are paid," etc. Comp. St. 1929, sec. 77-203. See *Mutual Benefit Life Ins. Co. v. Siefken,* 1 Neb. (Unof.) 860, 96 N. W. 603; *Merriam v. Goodlett,* 36 Neb. 384, 54 N. W. 686; *Douglas County v. Shannon,* 125 Neb. 783, 252 N. W. 199.

This court is committed to the view that "The lien for taxes is not satisfied by a statutory sale of the property for the same, nor by the payment of prior or subsequent levies by the purchaser. Such sale only operates to transfer the lien to the purchaser." *City Safe Deposit & Agency Co. v. City of Omaha,* 79 Neb. 446, 112 N. W. 598, 21 L. R. A. n. s. 72.

The sale of real property by the county treasurer to a tax purchaser does not divest the lien of taxes. It merely transfers it to the tax purchaser. It is well settled in this jurisdiction that, even where the certificate of tax sale and the sale are void, the lien of the "legal tax then due and de-

linquent" covered by such sale is transferred to the purchaser. *Roads v. Estabrook,* 35 Neb. 297, 53 N. W. 64; *Grant v. Bartholomew,* 57 Neb. 673, 78 N. W. 314.

The consensus of judicial opinion under statutes similar to our own has been stated as follows: " 'Tax liens,' it is said, 'take priority in the reverse order of other liens. As to all other liens the first in order of time is *prima facie* superior to those of a later date. In the case of tax liens, however, the "last shall be first and the first last." The general and universal rule is that in proceedings *in rem* to enforce the payment of taxes the last tax levied and sought to be enforced is superior and paramount to the lien of all other taxes, claims, or titles.' This rule is well settled." 3 Cooley, Taxation (4th ed.) sec. 1242.

Agreeable to this view, this court in *Medland v. Van Etten,* 75 Neb. 794, 106 N. W. 1022, announced as the principle here applicable, "Taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued (prior) thereto."

It would seem that the lien possessed by Coffin by virtue of his certificate of tax sale, received by him on November 5, 1928, was clearly senior and superior to the rights and liens possessed by E. B. Cowles.

If it be conceded that this tax lien of H. J. Coffin was, at the date of the institution of the tax foreclosure by Cowles, senior and superior to the rights sought to be enforced by Cowles in that proceeding, do the allegations of the latter's petition form sufficient basis for an effective *lis pendens* as against Coffin? The allegations of this petition, as already summarized herein, relate simply to the purchase by Cowles at a tax sale, the payment of taxes subsequently assessed thereon by him, the ownership of the premises taxed by the DeBusks, and the seniority and priority of the lien for taxes paid to the right and title of fee simple owners thereof. This petition does not name Coffin as a defendant, and in no manner refers to the tax sale certificate which was owned by the latter when the petition was filed.

In *Butler v. Copp*, 5 Neb. (Unof.) 161, 97 N. W. 634 (an action to quiet title), it was contended that the lien of the Farmers Loan & Trust Company on the land in question was cut off and forever barred by a decree of the district court for Holt county foreclosing a certain mortgage thereon given by one Joseph Fuller. In this foreclosure case, service of summons had been made by publication, and there was no appearance therein by the Farmers Loan & Trust Company. The petition contained the following allegation: "Plaintiff alleges that Farmers Loan & Trust Company claimed to have some lien, or interest in said mortgaged premises, they are also made a party defendant." In holding the decree of foreclosure and sale so entered void, so far as affecting the tax lien, this court, by Barnes, C., (later of this court) employed the following language:

"It will be observed that the petition was insufficient, there being no appearance on the part of the Farmers Loan & Trust Company to sustain a decree cutting off its rights. It was neither a proper nor a necessary party, because its lien for taxes on the land itself was paramount and superior to all others. The object of the mortgage foreclosure suit was to sell the property and convey the interest of the mortgagor at the time of making the mortgage which passed under it to the mortgagee. There was no question of priority, and could be none as between the mortgage lien and the lien of the taxes upon the premises. *Stratton v. Reisdorph*, 35 Neb. 314; *White v. Bartlett*, 14 Neb. 320; *Forrer v. Kloke*, 10 Neb. 373.

"In order to support a decree against the Farmers Loan & Trust Company its interests should have been carefully and completely stated in the petition. Such was not the case and, although it was made a party defendant, it was not even called upon to set up its interest in the cause of action. Therefore, the decree could in no way cut off or bar the tax lien."

The principle here involved was adhered to in *Shafer v. Wilsonville Elevator Co.*, 121 Neb. 280, 237 N. W. 155, and in connection therewith it was there announced: "The fil-

ing and recording of a *lis pendens* does not give notice of rights under a cause of action not pleaded."

Query: There being no cause of action of any kind pleaded by Cowles in his petition as against Coffin, does the filing of the *lis pendens* by Cowles give to Coffin notice of the pendency of that proceeding?

Waiving the question of the sufficiency of the petition of Cowles to support the *lis pendens* filed, in the instant case under the admitted facts of the record it is ineffective because we are here dealing with an independent title vested in Coffin, which is wholly unconnected with and not derived from any of the parties to the Cowles proceeding.

On this subject our court has approved the following statement: "Again, the appellant claims title under a decree foreclosing a tax lien. The title conveyed under a tax sale is not derivative, but a new title in the nature of an independent grant by the sovereign authority, and the purchaser takes free from any encumbrances, claims or equities connected with the prior title. *Crum v. Cotting,* 22 Ia. 411. Had proper service been made to give the court jurisdiction in the tax foreclosure proceedings, the deed issued therein would have given appellant perfect title to the land and cut off every prior claim or equity existing against it. The appellant was not concerned with the record title to this land further than to see that the proper parties were made defendants in the tax foreclosure suit." *Topliff v. Richardson,* 76 Neb. 114, 107 N. W. 114. See, also, *Sanford v. Scott,* 105 Neb. 479, 181 N. W. 148.

The nature of the rights here presented for our consideration invokes the application of the following principle: Since the scope of *lis pendens* is determined by its end and purpose, it has no application to independent titles not derived from any parties to the suit or in succession to them. 17 R. C. L. 1027, sec. 24; *Harrod v. Burke,* 76 Kan. 909, 92 Pac. 1128, 123 Am. St. Rep. 179; *Merrill v. Wright,* 65 Neb. 794, 91 N. W. 697, 101 Am. St. Rep. 645; *In the Matter of Smith,* 4 Nev. 254, 97 Am. Dec. 531; *Green v. Rick,* 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2

L. R. A. 48; *Case v. Caddo River Lumber Co.*, 126 Ark. 240, 190 S. W. 440, Ann. Cas. 1918C, 80; 38 C. J. 61.

In 1 Freeman, Judgments (5th ed.) sec. 529, it is stated: "The rule of *lis pendens* has no application to independent titles not derived from any of the parties to the action or from any one in privity with them. * * * So, according to the weight of authority, a person who purchases property involved in litigation at a tax sale is not regarded as a purchaser *pendente lite*, and his title is not affected by the result of the pending litigation, since such a sale is made under the paramount power of the state and on grounds which are adverse to all parties to the litigation and which are not in any way involved in it."

In the note on page 78 of Ann. Cas. 1918C, we find the following: "A sale for taxes being based on grounds which are adverse to all parties to an action involving the title, and which are not in any way involved in the action, the weight of authority is to the effect that the filing of a *lis pendens* does not make the purchaser at the tax sale a purchaser *pendente lite*."

In *Merrill v. Wright*, 65 Neb. 794, 91 N. W. 697, the question here presented was determined by this court in harmony with the authorities above cited.. It is to be remembered in this connection that our *lis pendens* statute, now section 20-531, Comp. St. 1929, was amended by chapter 92, Laws 1887 (approved March 31, 1887). This was passed without the emergency clause, but the legislature enacting the same finally adjourned March 31, 1887. This enactment increased the scope of this statute to substantially as it exists at present, and was in force and effect during the entire period during which the proceedings in the *Merrill* case above referred to were had. In that case it appears that suit was brought in 1892 to foreclose a tax lien. The owners of the property and those in possession under them were duly made parties. Due to time consumed in litigation, a sale of the property under this proceeding was not had until 1902. Meanwhile one Scott had purchased the property for taxes subsequently assessed and afterwards

had taken a tax deed accordingly. Claiming under this deed he thereupon came into possession of the land as owner by virtue thereof. By this time sale of the premises involved had been had under the decree of foreclosure rendered in the action commenced in 1892. In the litigation that followed, the purchaser in the 1892 proceeding contended that his rights were superior to the claims of Scott under his tax deed based on taxes assessed subsequent to those involved in the 1892 foreclosure. He also contended that section 85 Code of Civil Procedure (our *lis pendens* statute) is broader than the general rule, and must constrain the court to extend it so as to include all interest acquired by third persons pending suit, whatever their nature or source. This contention was answered by this court's announcement of the doctrines, viz.: "The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting the relief sought." And, "Hence such rule has no application to independent titles, not derived from any of the parties to the suit nor in succession to them."

In this *Merrill* case it was determined that the rights of Scott, gained by virtue of his tax purchase, were in no manner affected by or through the doctrine of *lis pendens*.

In the instant case the matter involved being an independent title, in effect derived exclusively from the sovereign power, the State, we hold the rights of H. J. Coffin wholly unaffected by the *lis pendens* filed by Cowles and proceedings had by him subsequent to such filing.

Nor can we agree with the determination of the district court that there has been a merger in Coffin of the title derived by him through his tax foreclosure with the fee title as it previously existed. The service of due process upon the owners of the fee simple title to the premises by Coffin at the institution of his suit is not questioned. The land was within the jurisdiction of the court. The confirmation of the sale and the sheriff's deed executed pursuant thereto gave Coffin, not a derivative title, but a new title in the

nature of an independent grant of sovereign authority. The fact that he failed to make the owner of the Cowles decree a party to his proceeding, while operating to limit the conclusiveness of the decree involved so far as cutting off right of redemption of a subsequent encumbrancer, in no manner changed the essential character of the title received by him. So far as these proceedings were valid, the rights conferred were exclusively derived from a single source, viz., from the sovereign power. As a prerequisite to a possible merger, two or more separate rights, liens or titles must coexist in the same individual. Coffin's rights under the record in this case are an independent title derived directly and solely from the sovereign power, the State. He possesses no other. And even where the owner of a tax title subsequently acquired the previous title by quitclaim deed, this court answered the question presented by that situation by the announcement of the doctrine: "No merger of a tax with a title subsequently acquired by quitclaim deed takes place where the evidence shows that the possessor of both titles did not so intend." *Sanford v. Scott,* 105 Neb. 479, 181 N. W. 148. Therefore, under the facts disclosed by the present record, there can be no possibility of merger.

A situation comparable to that here presented was considered by this court in the case of *Merriam v. Goodlett,* 36 Neb. 384, 54 N. W. 686. In the *Merriam* case we announced the principle: "If parties affected (by a tax foreclosure and sale) are not before the court their remedy is an action to redeem. If the court had jurisdiction the decree cannot be treated as void." See, also, *Gillian v. McDowall,* 66 Neb. 814, 92 N. W. 991; *Smith v. Potter,* 92 Neb. 39, 137 N. W. 854.

It follows that the trial court erred in the entry of the decree appealed from. The judgment is, therefore, reversed and the cause remanded for further proceedings in harmony with this opinion, with directions that upon application of the parties amended pleadings may be filed.

REVERSED.

RALPH BRYANT, APPELLEE, V. RUTH F. FINGERLOS, EXECUTRIX, ET AL., APPELLANTS.
295 N. W. 896

FILED JANUARY 17, 1941. No. 30903.

1. **Executors and Administrators.** If a will directs an executrix to sell certain specified land and from the proceeds pay certain cash bequests, she is not required to sell immediately, but it is left to the discretion of the executrix as to the time of the sale, within reasonable limits, if she acts in good faith and without neglect.
2. ———. The question of what is a reasonable time must depend upon the facts in each case. That the market for the sale of land was not favorable is not a valid excuse to put off a sale indefinitely.
3. **Courts.** While the county court has exclusive original jurisdiction over the probate of wills, this does not operate to exclude the jurisdiction of the district court in a case in which the construction or consideration of a will is only incidentally involved and the relief demanded does not call for a direct exercise of probate power.
4. ———. If an executrix fails for nearly 15 years to exercise the power to sell real estate given her in a will, and pay off cash bequests, the district court may direct the sale of the real estate to pay the specific liens against it, after finding that the power to sell given the executrix had been forfeited, and become null and void, by the many years of failure to exercise the same.

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

William J. Ballard, for appellants.

John L. Chew and *Dorsey & Baldrige, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

PAINE, J.

This is a suit in equity in the district court for Burt county to have a legacy declared to be a first lien upon certain real estate, and to have the said real estate sold and the proceeds applied, first, to the payment of costs, and

then to the payment of plaintiff's legacy, and, next, to the payment of other legacies set out in the same will.

The plaintiff, Ralph Bryant, of Spokane, Washington, is a legatee, under the will of his mother, the testatrix, of a bequest in the sum of $5,000 cash. The defendant Ruth F. Fingerlos, formerly Ruth F. Roberts, a daughter of the testatrix, was named as executrix, and, furthermore, she was bequeathed, as the residuary legatee, all of the real and personal property of the estate, after the payment of the debts, and four bequests of $1,000 each, and a bequest of $5,000 to her brothers and sisters.

Mary O. Roberts died testate on August 2, 1924, owning the northeast quarter of section 22, township 22, range 10, in Burt county, Nebraska, and was survived by two sons and four daughters. The will provided that the executrix should sell, at public or private sale, and convert into money, the above described land as soon after the death of the testatrix as may be expedient, "but that she shall not be required to do so until she has had ample time and reasonable opportunity to obtain the highest and best prices therefor." Because of the steady and continued decline in the value of this real estate, the executrix was unable to sell the property for a price sufficient to pay the $9,000 in cash legacies, and therefore the matter dragged along year after year. The plaintiff finally filed his petition in the estate case in the county court for Washington county on June 12, 1929, in which he prayed for an order that the executrix render an account and show cause why she should not comply with the will. No action is shown to have been taken thereon.

The plaintiff thereupon dropped further proceedings in the county court for Washington county, and waited for more than eight years longer. Then on August 27, 1937, plaintiff brought an independent suit in the district court for Burt county, where the land was located, and where one of the heirs lived, and got service upon the others, and asked that an accounting be had of the amount due him, and also praying to have the lien of his $5,000 legacy de-

clared to be a first lien upon the real estate, and if defendant failed within 20 days to pay into court the amount due plaintiff, then an order should issue, directed to the sheriff of Burt county, commanding him to advertise and sell said premises as upon execution, and that the proceeds should be brought into court and applied, first, to the payment of costs, second, to the satisfaction of plaintiff's lien, and the remainder to abide the further order of the court.

A motion to dismiss was filed by the executrix on October 11, 1937, on the ground that the action was one for the construction of a will now in process of probate and administration in Washington county, that if the prayer is granted it will deprive executrix of her powers and duties under said estate proceedings, and nullify the provisions of said will, and that the district court has no jurisdiction of the subject-matter. There was contained therein a demurrer that the petition does not state a cause of action. After argument by counsel, this motion and demurrer were overruled March 17, 1938, by the presiding judge, Arthur C. Thomsen. No appeal was taken from the ruling on the demurrer, nor was any other pleading filed by the executrix, or any other defendant.

After a further delay of over eleven months, a decree of foreclosure was entered February 27, 1939, by John W. Yeager, then presiding judge, and the decree was submitted to Reed O'Hanlon, attorney for the executrix, who countersigned the same as follows: "OK Reed O'Hanlon Defts, Atty."

On April 26, 1939, an order of sale was issued to the special master commissioner, directing that said land be sold to satisfy the following amounts adjudged to be due: (1) Costs of action; (2) to Ralph Bryant, $5,000; (3) to Irene Mary Wakefield, $1,000; (4) to Tom C. Roberts, $1,000; (5) to Mattie P. Scott, $1,000; (6) to Ellen J. Reid, $1,000.

In the decree the court finds that the executrix had authority to sell the real estate to pay the debts and legacies, but that the power of sale given the executrix has been

forfeited by lapse of time, and is now null and void by her failure to exercise the same within a reasonable time after her appointment, and finds that the real estate was to be sold by the executrix, subject to plaintiff's $5,000 legacy, charged as a first lien, and subject also to legacies of $1,000 each to four other heirs.

At the sale by a special master commissioner under the decree of foreclosure, the plaintiff bid $3,200, being the only bid received for the premises. The defendant executrix objected to the confirmation of the sale on the grounds that the court had no jurisdiction of the parties, and had no custody of, or jurisdiction of, the matter because the property was in the custody of the county court of Burt county, where probate proceedings were pending, and no final settlement made, and no decree of distribution entered, and no bond provided by the plaintiff to the county judge of Burt county to secure the payment of debts, expenses, and to indemnify the executrix against the same, as provided in section 30-1304, Comp. St. 1929.

The objections to confirmation being overruled, an order of confirmation was entered by the court on December 14, 1939, finding that Harvey R. Ellenberger, special master commissioner, to whom an order of sale had been issued, made due and legal notice, and sold the land at public auction to Ralph Bryant, plaintiff, on April 25, 1939, for the sum of $3,200, and that said property was sold for its fair value under the circumstances and conditions of sale, and that a subsequent sale would not realize a greater amount. The objections of the executrix being overruled, the special master commissioner was directed to make a good and sufficient deed to purchaser. The executrix appealed.

The principal errors relied upon for reversal were: (1) That the district court erred in holding that it had jurisdiction of the parties and of the subject-matter pending the administration; (2) that the court was without jurisdiction to adjudge that the authority given the executrix to sell the land had been extinguished.

There is no question that, if a will directs the executor

to sell "as soon as may be after my decease," he is not required to sell immediately, and it is left to the executor's discretion as to the time of sale, within reasonable limits, if he acts in good faith and without neglect. *Matter of Varet,* 181 App. Div. 446, 168 N. Y. Supp. 896.

In the case of *Trust Co. of New Jersey v. Glunz,* 121 N. J. Eq. 593, 191 Atl. 795, the estate amounted to $62,800 and the cash bequests $43,000. In four years rents had been collected of $22,000 and expenses paid out $13,600, leaving a net income of $8,400. It was conceded by all of the parties in interest that it would be unwise to sell the property at this time. The will in this case said: "My said executors and trustees shall have power to do any and everything in the management and disposal of my estate as if I could do, if I was living;" and it was held under these circumstances that the executor was right in deferring the sale of the real estate.

Let us now examine some cases passing upon the question of the lack of diligence of the executor in making a sale of the property.

"Where the will gives to the executor the power to sell real estate but does not fix the time within which such power must be exercised, the executor must exercise the power within a reasonable time. *Fischer v. Butz,* 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160. What is a reasonable time will depend largely on the facts in each case. If the executor is not diligent in the exercise of the power, any tenant in common may proceed to partition the estate. The filing of the bill to partition will suspend the power to sell until disposition is made of the suit to partition." *Vierieg v. Krehmke,* 293 Ill. 265, 127 N. E. 735. In this case the executor delayed the sale for more than two years. His excuse was that the market was not favorable, but the court did not consider his excuse valid, and having failed to exercise the powers given him within a reasonable time, held that he had forfeited his right to exercise that power.

The will provided in *Jones v. Hext,* 67 S. W. (2d) (Tex. Civ. App.) 441, that the widow should be sole executrix,

and cash bequests of $5,000 were left to each of two sisters of the testator, to be paid when certain ranch lands were sold. His wife and daughter were to have the rents and revenues from the ranch until sold. It is contended that, as the lands have not been sold, the legacies have not vested. The court construed the will to impliedly direct a sale of the ranch lands to pay the legacies within a reasonable time, but the court would not assent to a construction of the will which places it within the power of a residuary devisee to completely defeat a plain provision thereof by refusing to perform its implied command, especially when such refusal increases the estate of such residuary devisee and her daughter by the amount of the legacy. Such an interpretation would amount to writing a new will giving the residuary devisee the option of paying the legacies. The ranch lands had been mortgaged to secure the sum of $70,000, all of which the widow and daughter have received, which may probably defeat the payment of the legacies. The trial court was right in holding that the ranch lands were charged with the legacies, and subject to foreclosure and sale for the payment thereof.

Under a will devising the residue of testatrix's estate to her husband, and giving him the power to sell and convey the realty at such times as he deemed it most advantageous, it was held in *Clayton v. Kingston*, 202 App. Div. 165, 195 N. Y. Supp. 909, that it was not the testatrix's intent that he should sell the property and pay the legacies only when he saw fit, although he might wait a reasonable time before exercising the power, the legacies being a prior lien to any devise to him. Testatrix gave $1,000 each to three nephews and nieces. The value of the property was $26,000; the mortgages against it, $14,000. There was no personal property. The executor was 82 years of age, and said the intent of his wife was that he should enjoy the real estate and the rents therefrom to support him in his old age, and that he was only required to sell the property when he saw fit, if at all. It was held that the will was not capable of this construction. The legacies were bequeathed absolutely,

and charged upon the real estate, and are a prior lien to any devise to the husband. The executor might wait a reasonable time before selling, but that time is to be determined by the circumstances of the case, and not by the executor's caprice, or conclusion as to what the testatrix intended to accomplish, or by his determination to postpone indefinitely the payment of the legacies.

In *Hood v. Shively,* 31 S. W. (2d) (Mo. App.) 283, five years had elapsed when the district court partitioned the realty. This was held not in contravention of the will, in view of the unreasonable delay in effecting a sale.

An examination of the Nebraska cases discloses that this is a case of first impression in this jurisdiction. Somewhat similar situations have been presented to this court, but they have usually been decided on some other proposition of law.

It is argued by the executrix that since 1873 county courts have had exclusive original, legal and equitable jurisdiction in all estate matters in Nebraska, and that the district court has appellate jurisdiction only, citing section 27-503, Comp. St. 1929.

"County courts of the state, which are by the Constitution and laws given exclusive original jurisdiction in all matters of probate settlements of estates of deceased persons, etc., have the power and authority, with respect to the subjects mentioned, to try and determine actions of an equitable character, and grant equitable relief, when proper, to the same extent as a district court regarding other subjects in the exercise of its general equitable jurisdiction." *Williams v. Miles,* 63 Neb. 859, 89 N. W. 451.

In section 30-1409, Comp. St. 1929, it is provided that an executor shall render an account of his administration within one year, and it is expected that every estate shall be closed as speedily as possible.

In *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124, this court said: "The presumption that the testatrix intended that the legacy should be paid in the first year after the appointment of the executor under the will, and if not so

paid should bear interest from that time, is a reasonable and fair presumption, under the circumstances."

Section 30-611, Comp. St. 1929, clearly limits the time allowed for closing estates to three years, and if an estate has not been closed in that time the county court may enter an order to require the executor to file his final account and make final settlement.

In *Lincoln Nat. Bank & Trust Co. v. Grainger,* 129 Neb. 451, 262 N. W. 11, it was said: "Without much regard to canons of construction, the court will place itself in the position of the testator, ascertain his intent from the provisions of the will and enforce it, if lawful. *Weller v. Noffsinger,* 57 Neb. 455; *Krause v. Krause,* 113 Neb. 22; *Elliott v. Quinn,* 109 Neb. 5; *Heywood v. Heywood,* 92 Neb. 72."

Can there be any doubt in the case at bar that the testatrix intended this land to be promptly sold and the five brothers and sisters to receive the amount of the cash bequests?

The case of *Klug v. Seegabarth,* 98 Neb. 272, 152 N. W. 385, was an action brought in the district court to have a specific bequest of money declared a lien upon real estate in the hands of the residuary legatee. It was said in that case that, while the county court had exclusive original jurisdiction over all matters of the probate of wills, "this does not operate to exclude the jurisdiction of the district court in a case where the construction or consideration of a will is incidentally involved and the relief demanded does not call for a direct exercise of probate power."

The question generally involved under our law is whether or not the executor was negligent in causing unnecessary delay in the settlement of the estate.

If the executrix of an estate, because of an advantage which she might gain by prolonging the administration of an estate, or for any other reason, fails to carry out the provisions of the will within a reasonable time, it is proper for a court of equity, upon application of any one aggrieved thereby, to sell the property to pay the liens against the same. As to what is a reasonable time for the executrix

to sell property as directed in the will, the courts differ very decidedly, some holding that it must be done within two years, and others granting a longer period, but in our opinion it would be equitable to all parties concerned to presume the power granted the executrix to sell had expired if she refused and neglected to exercise the same for a period of nearly fifteen years, and, as in the case at bar, conditions might arise in which such a period of time would be too long. *Burton v. Defenbaugh,* 132 Neb. 851, 273 N. W. 489; *Bratt v. Wishart,* 136 Neb. 899, 287 N. W. 769; 18 Neb. Law Bulletin, 124.

After a study of the facts in this case, we are forced to the conclusion that only a court of equity can bring relief. It is plain that the testatrix expressly directed that the executrix should sell this property, pay off the $9,000 of bequests, and keep the remainder for herself. The executrix did not hold title to this farm under the will, but did have the power of disposition, and the direction to sell must be complied with within a reasonable time.

The district court for Burt county, where the land was located, clearly had jurisdiction of the land, and also had the right to determine that the power of the executrix to sell the land had been forfeited by the many years of delay. A sufficient showing being made, the district court rightly decided that the lien of the legacy could be enforced in equity.

Admitting that the exclusive original jurisdiction over all matters relating to the probate of this will was in the county court for Washington county, this did not operate to exclude the jurisdiction of the district court in Burt county in a matter wherein the construction or consideration of the will was only incidentally involved and the relief demanded did not call for the direct exercise of probate power.

The trial court was right, and its action is hereby

AFFIRMED.

MARILYNN MIERENDORF, APPELLEE, V. ROBERT SAALFELD ET AL., APPELLANTS.
295 N. W. 901

FILED JANUARY 17, 1941. No. 30906.

1. **Automobiles.** Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1939, has been defined as an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
2. ———. "When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law." *Johnk v. Scanlon*, 136 Neb. 187, 285 N. W. 488.
3. **Evidence.** "Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate." *Knoche v. Pease Grain & Seed Co.*, 134 Neb. 130, 277 N. W. 798.
4. **Appeal.** "Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error." *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882.

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

Rosewater, Mecham, Shackelford & Stoehr, for appellants.

Gross & Crawford, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ., and ELDRED, District Judge.

MESSMORE, J.

The plaintiff recovered a judgment in the district court for Douglas county, in the amount of $2,000, for alleged injuries received by her in an automobile collision. Defendants appeal.

The plaintiff, a guest, charged defendant Robert Saalfeld, driver of a 1937 Ford V-8 coach, with gross negligence in the following particulars: Excessive speed (40

miles an hour); failing to keep a proper lookout; failing to yield the right of way to an Oldsmobile driven by one Clara Smith and failing to observe such automobile in the intersection; and failing to keep the car he was driving under control. The defendants answered, in substance, by admitting the occurrence of the accident; denied negligence on the part of defendants; affirmatively alleged negligence on the part of Clara Smith; further, that if defendant Robert Saalfeld was guilty of negligence it was, in no event, more than slight, and that the guest, Marilynn Mierendorf, was guilty of negligence, at least equal in degree, which contributed directly and approximately to the accident and the injuries received by her. The reply was a general denial.

The record discloses: Clara Smith was driving a 1937 model Oldsmobile north on Fifty-first street in the city of Omaha on the evening of May 18, 1938. When she approached Dodge street, which runs east and west, she came to a complete stop at a stop sign, looked to the left, or west, and saw a car approaching two blocks distant; then, looking to the right, or east, she saw the Ford car, driven by the defendant Robert Saalfeld, which was proceeding west on Dodge street. She proceeded to cross the intersection in low gear at a speed of three or four miles an hour, then shifted into intermediate gear, increasing her speed to about eight miles an hour. Dodge street, an arterial highway, comprises four driving lanes, approximately nine feet in width, and two parking lanes, approximately six feet in width, one on the south and one on the north side of the street. While proceeding across the intersection the driver glanced to the east, as she stated, for a second and saw the Ford car at a distance of 20 feet from the intersection; she estimated the speed of the Ford at 40 to 45 miles an hour. The lights on both cars were burning.

Defendant Robert Saalfeld testified: He had proceeded west on Dodge street from Thirty-third street, through the traffic light when in his favor, at a moderate rate of speed; the lights being placed about three blocks apart. At Fiftieth

street he retarded the speed of his car to 15 or 18 miles an hour and subsequently approached the intersection of Fifty-first and Dodge streets at a speed of 28 miles an hour. He was looking to the right, or north, where cars were parked along the parking lane, to ascertain whether any person might be running out from the cars parked. He looked to the left and saw the Oldsmobile 5 to 10 feet distant. Clara Smith's version of the impact is that at the time thereof the front wheels of the Oldsmobile were about even with the north parking lane on Dodge street, approximately six feet from the curb; that the Oldsmobile was struck by the Ford at the right front door; that the left side and front of such car were not damaged; that the Oldsmobile had proceeded across the parking lane from the south side of Dodge street to the two south travel lanes and through the north middle travel lane, and the front wheels of her car were across the north travel lane. Robert Saalfeld's version is that when he first saw the Oldsmobile it was at a distance of 5 to 10 feet to the left of him, crossing the intersection, going north. The front of the Oldsmobile was on his side of the middle lane. He was straddling the black stripe on the south travel lane. He stated, in substance, that while so driving he did not look either to the left or right until about 10 feet, or such a matter, from the intersection; then looked to the right and started to look to the left, and the Oldsmobile was directly in front of him. He then attempted to apply his brakes and to swerve to the right and did so. The left front of the Ford car came in contact with the right front wheel of the Oldsmobile and knocked the front wheel toward the motor. The respective positions of the two cars after the impact were: The Oldsmobile was standing on the northwest corner of the sidewalk; the left side of such car was close to an underpass, which had a high stone railing around it. The car was facing northwest at an angle. The Ford car was facing due north on the east side of Fifty-first street, approximately four or five feet north of the sidewalk, running east and west.

At the time of the accident Robert Saalfeld was about 17

years of age, Marilynn Mierendorf 16 years, both pupils of the same high school and friends. They had known each other for a year or more, and Marilynn had often ridden with Robert in the Ford car. On the evening in question Robert called at her house shortly after 8 o'clock; they had no particular destination, and had been riding for about an hour when the accident occurred. Marilynn had not objected to, protested against or found fault with Robert's driving at any time during the course of their ride. At the time of the accident, she did not notice Robert; she was looking out of the right window of the car and was humming or singing. She testified that the first she knew of it was when "I heard the crash and was thrown forward in the seat then, and I struck the windshield and the dash board with my chest and the side of my face made a hole in the windshield." She did not know the speed of the Ford car, but testified it had not slackened before the collision, and "there weren't any brakes applied at all, for quite a ways." Broken glass from the Oldsmobile was found in the northeast corner of the intersection. Marilynn's mother testified as to a conversation she had with Robert at the hospital about an hour after the accident, wherein she asked him how it happened, and he replied: "I don't know. I never saw the woman. I don't know where she come from." Robert testified that when Marilynn's mother saw him "she threw her arms around me, and I couldn't say very much. I was all broken up I know." We deem a further review of the evidence unnecessary.

This action was brought under the guest statute. Comp. St. Supp. 1939, sec. 39-1129. For the purposes of this case, to enable the plaintiff to recover, it is incumbent upon her to prove, by a preponderance of the evidence, that defendant Robert Saalfeld was guilty of gross negligence in the driving of the Ford car. There is no evidence of the use of intoxicating liquor in any manner by any of the parties here involved. At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence, the defendants moved for a directed verdict, which was overruled.

The pertinent question is whether or not the evidence is sufficient to constitute gross negligence, within the meaning of the guest statute and the law, and whether or not such evidence is sufficient to have warranted the submission of the case to the jury.

This court said in *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96: "What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine." The foregoing language has been approved in many cases subsequently. See *Larson v. Storm,* 137 Neb. 420, 289 N. W. 792.

Gross negligence has been defined as great or excessive negligence. It indicates the absence of even slight care. *Morris v. Erskine, supra.* It is the entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. *Larson v. Storm, supra.*

Larson v. Storm, supra, is cited by the plaintiff as a case similar to or in point with the instant case. With this contention we cannot agree. Without reciting the facts, the speed of the car in the *Larson* case was 50 to 55 miles an hour; the traveled road was a country road, and the terrain and physical conditions were distinctly different from those in the case at bar. The guest in the *Larson* case had made repeated protests; there was a continued course of negligent driving, and the driver looked back at the guest for some period of time.

Inasmuch as the question of gross negligence depends on the facts in each individual case (*Morris v. Erskine, supra*), we deem unnecessary an analysis of the many cases decided by this court on the question. In the instant case, there is no evidence of a continued course of conduct by

defendant Robert Saalfeld, in driving the Ford car, that would tend to establish gross negligence. Marilynn Mierendorf had ridden with him on many occasions, knew of his driving ability, and, in fact, seemed perfectly contented; she was humming or singing; she had no fear of danger due to his driving, and there was no apparent danger or peril at this well-lighted intersection that could be anticipated by Robert, as developed by the circumstances of this case.

The plaintiff adjudicated her claim against the driver of the Oldsmobile. The evidence with reference to the speed of the Ford car is not convincing. Clara Smith stated that when she saw the Ford, before she drove into the intersection, it was a block or more away. She drove into the intersection in low gear at a speed of three or four miles an hour, shifting into second gear and increasing her speed to eight miles an hour. She had paid no attention, during that time, to the speed of the Ford car. Her testimony on the speed is based upon a glance at the Ford when she looked the second time, which lasted for a second, when her car was approximately in the center of the intersection, and the Ford was then 20 feet east of the intersection.

"Ordinarily, the speed of an automobile is not a matter of exclusive expert knowledge and skill and any one with a knowledge of time and distance is a competent witness to give an estimate.

"Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject." *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673.

In the instant case Clara Smith, under the circumstances, did not have the time, means, distance or opportunity to formulate a basis for an opinion as to the speed of the Ford car. The evidence is barren of any additional evidence of the Ford's speed, with the exception of the statement of defendant Robert Saalfeld. Under the circumstances, the

foregoing authority applies to the testimony of Clara Smith with reference to speed.

This court in *Knoche v. Pease Grain & Seed Co.*, 134 Neb. 130, 277 N. W. 798, applied the rule as appearing in *Bergendahl v. Rabeler, supra,* and, in addition, held: "Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate."

In *Roseland v. Chicago, M., St. P. & P. R. Co.*, 130 Neb. 637, 265 N. W. 882, it was held: "Where a question of fact that is material to the case is submitted to the jury by the trial court, upon which there is no evidence to support a finding, it constitutes prejudicial error."

Under the circumstances in the instant case, the submission of the issue to the jury on the question of speed constituted prejudicial error.

"This court has consistently held that the intent of the legislature in adopting the guest statute was that evidence of some act amounting to more than ordinary negligence should be required before a guest could recover from his host. In the absence of any evidence of such an act, directed verdicts for the hosts have been approved by this court. Several sessions of the legislature have gone by since this interpretation was placed upon the guest statute without any further legislative action with reference to it. Under these circumstances we feel obliged to abide by the established interpretation until the legislature sees fit to assert its legislative powers on the subject." *Johnk v. Scanlon,* 136 Neb. 187, 285 N. W. 488.

"When evidence in a guest case is resolved most favorably toward the existence of gross negligence, and a fixed state of facts thus obtained, the question whether such facts will sustain a finding of the existence of gross negligence is a question of law." *Johnk v. Scanlon, supra.*

The record fails to establish gross negligence on the part of defendant Robert Saalfeld. The judgment of the district court is reversed and the cause remanded.

REVERSED.

RUTH BLANTON, ADMINISTRATRIX, APPELLANT, V. MICHAEL, SWANSON & BRADY PRODUCE COMPANY: JOHN BROWN ET AL., APPELLEES.

295 N. W. 883

FILED JANUARY 17, 1941. No. 30922.

1. **Negligence.** Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and prudent person would have done under the existing circumstances.
2. **Evidence** examined and *held* to raise no question for jury to determine.

APPEAL from the district court for Scotts Bluff county: CLAIBOURNE G. PERRY, JUDGE. *Affirmed.*

Auburn H. Atkins and *Floyd E. Wright,* for appellant.

Mothersead & York, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE and MESSMORE, JJ., and HASTINGS and KROGER, District Judges.

KROGER, District Judge.

This is an action for wrongful death brought by Ruth Blanton, as administratrix of the estate of her deceased husband, George Blanton. At the conclusion of plaintiff's evidence, the court sustained defendants' motion for a directed verdict. Plaintiff appeals.

The only allegation of negligence relied upon by plaintiff is that defendants "failed to keep said truck under proper control, and released the brakes on it, and carelessly, negligently and recklessly allowed said truck to back over said blocks of wood and across the body of the deceased, George Blanton, * * *."

The record discloses that on February 18, 1939, George Blanton, aged 35 years, was given temporary employment by Michael, Swanson & Brady Produce Company, of Scotts Bluff county, to assist in loading 200 sacks of potatoes from a potato cellar into a truck owned by John Brown and Alvin Brown and which truck at the time in question was operated by one Nolls (Knowles). The floor of the potato

cellar was six feet below the ground level, and access was by means of a ramp at either end. On the day in question, the truck was backed into the cellar and loaded; while attempting to drive out, the truck began to stall and it was stopped on the ramp by applying the brakes. At this time the rear wheels of the semi-trailer truck were about ten feet up the ramp. The deceased and a man by the name of Kelly obtained some timbers and proceeded to block the rear wheels of the truck. When this was done, Kelly called to Blanton and asked him if he was in the clear and, upon receiving a reply from Blanton that he was in the clear, Kelly called to the driver of the truck to "try it." The driver released the brakes, the blocking started to slip, the wheels went over the blocking and the truck rolled back some distance. Right here is the only conflict in the evidence: One witness stated that the truck rolled back about five feet, two placed it at between six and seven feet, and one witness stated it was between fifteen and eighteen feet. When the truck came to a stop, the rear wheels were on the right arm and shoulder of George Blanton. As quickly as possible he was removed and taken to a hospital, where he died within a few hours. No witness saw what happened to cause Blanton to be under the wheels of the truck when it came to a stop. One witness testified that he saw Blanton turn as if to run when the blocks failed to hold, but saw no more.

In the foregoing statement of facts we have not indicated by whom the various witnesses or participants were employed as, in view of our disposition of the case, that is immaterial.

Plaintiff argues that the foregoing facts raise a question for a jury to determine as to whether the driver of the truck was negligent in permitting the same to roll back over the blocks and down the ramp a distance of from five to eighteen feet.

The defendants take the position that the evidence fails to disclose any negligence on the part of the truck driver and that it affirmatively shows that the deceased was guilty

of contributory negligence which was more than slight under the circumstances.

Negligence consists of doing what a reasonable and prudent person would not have done, or in not doing what a reasonable and prudent person would have done under the existing circumstances. Viewed in the light of this definition, what did the truck operator do or fail to do that a reasonable and prudent person would have done otherwise? He did not release his brakes until he was told to do so. He had no way of knowing what kind of blocks had been placed back of the wheels as, from his position in the cab of the truck, it was impossible for him to see the rear of the truck. After the blocking proved insufficient, even if it had been possbile for him to stop the truck sooner than he did, there was nothing to warn the driver that it would not be safe to let the truck back onto the cellar floor. The men doing the blocking had stated that they were in the clear. From where they placed the blocks to the cellar floor was but a few steps. It would have been a simple matter for them to get to a place of safety and, at no time, did the driver know that they were in a position of peril.

In view of the evidence in this case, we are of the opinion that there is no evidence of negligence on the part of the driver of the truck which justified submitting the case to the jury, and the motion for a directed verdict in favor of the defendants was properly sustained.

AFFIRMED.

ANDREW HIEF, APPELLEE, V. ROBERTS DAIRY COMPANY, APPELLANT.

296 N. W. 331

FILED JANUARY 31, 1941. No. 30949.

1. **Trial.** The rule that a nonsuit should be directed, if the physical facts disprove plaintiff's case, is inapplicable where there is a substantial conflict in the evidence tending to prove the physical facts.

2. ———. An instruction which conflicts with a proposition of law properly and correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead or confuse the jury in deliberating on conflicting evidence is erroneous and prejudicial.

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

Ziegler, Dunn & Becker and *D. L. Manoli,* for appellant.

Edward F. Leary and *Wear, Boland & Nye, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

ROSE, J.

This is an action to recover damages in the sum of $5,500 for alleged negligence resulting in personal injuries and financial losses. On Dodge street near Seventy-fourth street, Omaha, about 11 o'clock p. m., March 2, 1939, there was a collision between an automobile truck owned and driven by Andrew Hief, plaintiff, and a motor truck owned by Roberts Dairy Company, defendant, while operated by Orthwin Gertsch. The two cars were headed east upgrade on the south side of Dodge street, plaintiff in the rear. It is alleged in the petition that defendant's employee, Gertsch, had stopped his employer's truck without displaying any tail or clearance side light thereon and that when plaintiff was in the act of passing the truck in front of him it was backed suddenly and without warning into his own truck, thus breaking his right arm and causing other damages of which he complains.

The answer to the petition contained a general denial and allegations that any injuries sustained by plaintiff as a result of the collision were caused by his own negligence which was more than slight in comparison with any alleged negligence of defendant and that defendant was not guilty of any negligence causing or contributing to plaintiff's injuries.

In a reply to the answer plaintiff denied contributory negligence.

Upon a trial of the cause, the jury rendered a verdict in favor of plaintiff for $3,300. From judgment therefor, defendant appealed.

Among the questions presented on appeal are insufficiency of the evidence to sustain the verdict and assigned errors in the instructions of the court to the jury.

On material issues of fact relating to negligence the evidence is in conflict. The truck drivers testified to different versions of the collision. There was no other witness present at the time. Some of the evidential facts, however, are not in controversy. Dodge street from the west into Omaha is four lanes wide. The two outer lanes are paved with concrete and the two inner lanes with brick. The lines between the different paving materials are distinct. A few feet apart just before the collision, the drivers were both in the south or right lane on their way to Omaha, plaintiff in the rear. There was a violent collision between the trucks. As a result plaintiff suffered a compound comminuted fracture of his right arm and the front right side of his truck was crushed by the impact.

Plaintiff testified in his own behalf and in substance his version of what occurred is in part as follows: While going 25 miles an hour, he saw defendant's truck in front of him at a distance of 70 or 75 feet and there was no clearance or tail lamp in operation on it. When he was within 25 feet of the car in front of him, he observed it was standing still, slackened his speed to 15 miles an hour, started to pass, turned his car to the northeast and, when the front end was in the brick lane, defendant's truck, moving suddenly and rapidly backward without warning, struck the front end of plaintiff's car on the right side.

On the contrary defendant's driver testified in effect that his employer's car was in constant forward motion until it was struck from the rear by plaintiff's truck; that he did not back up after it was hit, but that there may have been a slight rebound of the tires after the brakes were applied; that the left front wheel of plaintiff's car was "about a foot and a half or two feet on the inside of the brick paving."

It was argued by counsel for defendant that the physical facts disproved plaintiff's case and that consequently a nonsuit should have been directed on motion therefor. This position is untenable for the reason that the rule of law thus invoked on behalf of defendant is inapplicable where there is a substantial conflict in the material evidence of the physical facts, as there is in the case at bar and as already indicated herein, the credibility of witnesses and the weight of evidence being questions for the jury. *Hill v. Interstate Transit Lines,* 137 Neb. 110, 288 N. W. 508. On the issue of actionable negligence of defendant's driver in backing his employer's truck without warning into the truck operated by plaintiff, the latter made a case for the jury as shown by the evidence. There was therefore no error in the overruling of the motion for a peremptory instruction in favor of defendant.

Did the trial court err to the prejudice of defendant in the instructions to the jury? Defendant requested and the trial court gave the jury the following instruction:

"You are instructed as a matter of law, that the failure of the defendant to display clearance lights and a tail light on the rear of defendant's truck was not a proximate cause of the accident, and in determining the proximate or contributing cause of the accident you will therefore disregard the testimony of the plaintiff that the defendant failed to display clearance lights and a tail light on the rear of said truck and that the failure to display said lights caused or contributed to the accident."

This instruction was properly given. While rear and clearance lights at night were required by statutory regulations and were not displayed on defendant's truck and while failure to comply with the law in these particulars was evidence of negligence, such negligence was not a proximate cause of the collision or of the resulting injuries. The testimony of plaintiff himself shows that he saw defendant's truck and had a constant view of it in time to avoid the collision, in absence of negligence on the part of defendant. Though the instruction quoted was properly given, it was

immediately followed by another instruction in this form:

"It is the duty of operators of motor vehicles on the highway at such a place as was the scene of the accident known to this case, to keep a careful lookout for other cars, and to drive on the outside lane unless in the act of going by a car ahead that is driving on the outside lane, and, when a car has stopped in the highway, to display a light or to give a signal indicating such stopping, and to use reasonable and due care to keep the car in its place and not to allow it to back onto an inside lane, as far as due and reasonable care will permit. It is the duty of cars that are on the inside lane, for the purpose of going around the car on the outside lane, to be under such control by the operator that reasonably expected movements of the front car may be readily seen and controlled against."

This instruction emphasizes the duty of a motorist, when stopping on a highway, to display a light or to give a stop signal notwithstanding the former instruction to disregard testimony that there was a failure to display clearance lights and a tail light, and notwithstanding testimony of plaintiff that he observed defendant's truck was standing still while approaching it at a speed of 25 miles an hour, when the distance between the trucks was 25 feet. In view of the conflicting testimony, the two instructions as given were well calculated to confuse or mislead the jury on the vital issue in the case. Without determining on appeal the controverted issue of fact, and thus invading the province of the jury, the obvious error in the instruction last quoted cannot be held harmless. It is well-settled law that, "Instructions which state conflicting propositions of law and tend to confuse the jury are erroneous." *Bryant v. Modern Woodmen of America,* 86 Neb. 372, 125 N. W. 621; *Sanderson v. Huffman,* 132 Neb. 321, 271 N. W. 870. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

EDWARD ASCHE, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

296 N. W. 439

FILED JANUARY 31, 1941. No. 30887.

1. **Waters.** The measure of damages for the permanent taking of land by seepage is the difference, if any, between the fair and reasonable market value of the land taken, including improvements thereon, before the damage occurred, and its reasonable market value, including improvements thereon, after the damage from seepage, if any, occurred.
2. ———. Evidence as to separate items of damage from seepage, such as, for instance, to the basement and the driveway of residence, as to muck in cow-yards and poultry-yards, and damage to pasture and stubble land, is properly admissible in showing the difference in market value of the land before and after the taking. Such claims may not, however, be submitted to the jury as separate items of damage if they all constitute but parts of the permanent damage to the land itself.
3. ———. When a power and irrigation district, for the purpose of carrying out an approved project, brings on its land, and collects and keeps there in a reservoir, a sufficient head of water to force it to seep into adjacent lands, the district is answerable for such damage as is a natural consequence thereof.
4. **Appeal.** The power of setting aside a verdict on the ground that it is excessive is one to be used sparingly, and a verdict will not be set aside simply because the appellate court might have decided differently on the same facts.
5. ———. If a verdict is so large as to raise a presumption that it was based on prejudice, or mistake, or on something not apparent in the record, rather than on the sober judgment of the jury on the evidence submitted, it will be set aside and a new trial ordered.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

C. N. McElfresh and *August Wagner*, for appellant.

Charles H. Slama and *Wymer Dressler, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

PAINE, J.

This is an action to recover damages for loss of crops

and for permanent damage to plaintiff's farm caused by seepage from defendant's reservoir. The verdict and judgment were for $21,356, from which defendant appeals.

The record shows that plaintiff was the owner of 200 acres of land, six miles north of Columbus, in Platte county, which he used for many years in farming, stock-raising and dairying. The defendant is a public power district, organized under chapter 86, Laws 1933, and amendments thereto. At a point approximately one mile south of plaintiff's land, defendant constructed a large reservoir, known as Lake Babcock, to impound large quantities of water from the Loup river to furnish water power for the production of electrical energy. On or about August 1, 1937, sufficient waters had been impounded to cause plaintiff's land to become seeped and water-logged by waters escaping from defendant's reservoir.

The trial court, in submitting the case to the jury, instructed that recovery could be had, if sustained by sufficient evidence, for the loss of seven acres of a fourth cutting of alfalfa in 1937 in the amount of $224, loss of crops destroyed in 1938 in the amount of $3,828, for damage to poultry and cow-yards, $1,000, for damage to basement of residence, necessitating repeated pumpings, in the sum of $1,000, for damage to driveway leading to residence, $240, for damage to pasture, cornstalks and stubble land, $240, for total loss of certain lands and damage to balance of the farm in the amount of $46,000. The record shows that a recovery in some amount was had on each of the seven items listed, the total verdict amounting to the sum of $21,356. It was prejudicial error to thus submit the case to the jury.

The measure of damages for the permanent taking of land by seepage is the difference, if any, between the reasonable market value of the land taken, including improvements thereon before the damage from seepage, if any, occurred, and the reasonable market value of such land, including improvements thereon, after the damage from seepage, if any, occurred. The evidence of damage to the

poultry and cow-yards, the basement of the residence, the driveway to the residence, as well as damage to the pasture, cornstalks and stubble land, is evidence which is properly admissible in showing the difference in the market value before and after the taking, and the jury may properly consider such damage as proved in arriving at such difference. Such claims may not, however, be submitted as separate items of damage if they all constitute part of the permanent damages. To so do, when viewed with the instruction that plaintiff is entitled to recover the difference between the reasonable market value of the land not taken, before and after the taking, permits a double recovery upon these items. The same result would occur if the whole farm were permanently damaged but not taken, and the jury instructed that plaintiff was entitled to recover the difference in the reasonable market value of the whole farm before and after the seepage occurred. It is evident therefore that, when the jury returned a verdict upon the specific items of damage listed, and also a large sum for the difference in value of the whole farm before and after the seepage occurred, such verdict was necessarily excessive.

In considering the law in reference to damage from seepage, our statute is in line with the English rule established in the case of *Fletcher v. Rylands* (1866) L. R. 1 Exch. 265, 4 Hurlst. & C. 263, 1 Eng. Rul. Cas. 235. This case was in the various courts for many years, and in the long decision many judges gave their opinions upon various phases of it, and from the judgment of the Exchequer Chamber a proceeding in error was brought to the House of Lords, and the opinion of the Lord Chancellor and several others is set out in full, and the rule finally approved reads as follows: "The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, is *prima facie* answerable, if it escapes, for all the damage which is the natural consequence." See 38 A. L. R. 1244, Ann.

However, the Nebraska statute makes the liability for damages from seepage absolute.

The plaintiff was not required to allege or prove that the defendant was negligent in the construction or maintenance of Lake Babcock. The cause of action in this case did not accrue until damages had been sustained. The defendant public power district had a right to collect the water and store it in Lake Babcock, but such district was answerable for the damages caused when such water seeped onto the plaintiff's land.

In the recent case of *Applegate v. Platte Valley Public Power and Irrigation District,* 136 Neb. 280, 285 N. W. 585, a judgment for separate crop losses in addition to permanent damage to the land was sustained. An examination of the *Applegate* case discloses that it was also a seepage case, in which the plaintiff for a first cause of action sued to recover permanent damages to his lands, and the jury returned a verdict of $6,500 on this cause of action. The second cause of action was for damages for loss of alfalfa during 1936 and 1937, and the jury returned a verdict of $600 for these crop losses, and the judgment entered upon said verdict was affirmed by this court.

It will be noted, however, that in the *Applegate* case the first cause of action was for permanent damages to lands owned *in fee* by plaintiff, while the second cause of action for two years of crop damage was on land of which he had possession as a *tenant* only. There is also to be considered that the crop damage in 1937 was caused by a major break in the canal leading to the reservoir, instead of by seepage.

We have examined all the evidence in the record pertaining to the difference in the reasonable market value of the farm before and after the seepage. The jury fixed such damage at $19,000. The trial court limited to seven the number of witnesses which each side could call as to the damage to the farm as a whole. The plaintiff called to the stand as witnesses his son and his brother-in-law, who testified that the farm was worth $275 an acre before the seepage occurred. Two neighbors made it $265 an acre, three made it $250 an acre, and one said $230. Some of

these also had claims of their own pending for seepage damages. They testified that the farm since the seepage occurred was worth about $20 an acre. On the other hand, the defendant called real estate agents of many years' experience, who placed the value of the farm before the seepage occurred at $110 to $125 an acre. Reliable witnesses testified the entire farm was worth $20,000 to $23,000 before it seeped.

It is charged by the defendant that a recovery of $19,000 for the land damage, or an average of $190 for the 100 acres south of the creek, or $95 an acre for the whole farm, half of which is claimed to be outside of the seepage area, is so excessive in view of the testimony that it must have been arrived at through some influence brought to bear upon the jury, or by passion and prejudice, and that it is certainly not sustained by the evidence.

There was reputable evidence on the part of defendant that, with an expenditure of a little over $6,000 for tiling the farm and waterproofing the basement, the farm would then raise better crops than before.

We are obliged to hold that the evidence will not fairly sustain a verdict of $19,000 in addition to the specific items of damage allowed totaling $2,356. Whether the jury were misled by the erroneous method of submitting the case, or whether such excessive verdict was the result of passion and prejudice, we, of course, are unable to say.

It is the law of this state that the power of setting aside a verdict on the ground that it is excessive is one to be used sparingly, and that a verdict will not be set aside simply because the appellate court might have decided differently on the same facts. *Watson v. Miller,* 131 Neb. 74, 267 N. W. 230.

"A verdict so clearly excessive as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Collins v. Hughes & Riddle,* 134 Neb. 380, 278 N. W. 888. See, also, *Schulz v. Central Nebraska Public*

Power and Irrigation District, ante, p. 529, 293 N. W. 409.

Defendant devotes a considerable part of the reply brief to the alleged attempt of the plaintiff to improperly influence the jury, and insists that a new trial should be granted on that ground. We do not think this charge was established by the evidence, for the record does not disclose that any improper influence was, in fact, brought to bear upon any juror. There was no error, therefore, in overruling that part of the motion for a new trial based upon the claim that the jury were improperly influenced.

For the reasons set out in this opinion, the judgment is reversed and the cause remanded for a new trial.

REVERSED.

JOHNSEN, J., not participating.

KNOX COUNTY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

296 N. W. 157

FILED JANUARY 31, 1941. No. 31073.

ERROR to the State Board of Equalization and Assessment. *Affirmed.*

W. Keith Peterson, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

The board of equalization and assessment entered an order on July 26, 1940, increasing the total assessed valuation of farm lands and improvements in Knox county, Nebraska, for purposes of taxation for the year 1940.

The questions of law and procedure herein are practically identical with those involved and decided in the case en-

titled *Boyd County v. State Board of Equalization and Assessment*, p. 896, *post*, 296 N. W. 152, and decided at the same sitting of the court. The cases were considered at the same time on oral argument in this court. Our decision is governed by the rules therein announced.

It is ordered that the petition in error be dismissed, and the decision and final order of the state board of equalization and assessment be and hereby is

AFFIRMED.

BOYD COUNTY V. STATE BOARD OF EQUALIZATION AND ASSESSMENT.

296 N. W. 152

FILED JANUARY 31, 1941. No. 31074.

1. **Taxation.** Section 77-1004, Comp. St. 1929, as amended in 1933 (Laws 1933, ch. 129), does not require the state board of equalization and assessment to determine, at a preliminary meeting, the exact amount of increase or decrease which should be made in the assessment of farm lands returned by the various counties, and to notify each county that a further meeting will be held to determine whether or not such increase or decrease is justified.
2. ———. The notice sent out by the state board of equalization, copy of which is set out in the opinion, examined and *held* sufficient.
3. ———. Where a county has actual notice of a meeting of the state board of equalization, and its legal representatives attended the meeting and took part in the proceedings, it is not prejudiced by an insufficient service of the notice of the meeting.
4. ———. Since the statute does not require any particular method of procedure to be followed by the state board of equalization in the equalizing of the assessment of farm lands between the various counties, it may adopt any reasonable method for that purpose.
5. ———. The statute does not require the state board of equalization to secure a stenographer and to make a complete record of all its proceedings.
6. ———. The state board of equalization, in the equalization of the valuation of farm lands as between the various counties, is not required to have a formal hearing, to examine witnesses, or

to base its action on any particular kind of evidence. It may act on the abstracts of assessments returned by the various counties, the knowledge of its own membership as to value, or on other information satisfactory to it.

7. ———. It is the duty of the state board of equalization to equalize the assessments of farm lands of the various counties, as shown by the abstracts of assessments, to make such assessments conform to law, and in doing so there is no conflict with section 77-201, Comp. St. Supp. 1939.

8. ———. The proceedings and the record examined and *held* to support the decision and final order of the state board of equalization.

ERROR to the State Board of Equalization and Assessment. *Affirmed.*

W. L. Brennan, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Edwin Vail, contra.*

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and MUNDAY, District Judge.

MUNDAY, District Judge.

This is a proceeding in error to review the action of the state board of equalization and assessment for the state of Nebraska, in the matter of the equalization of the assessment of 1940 of improved and unimproved farm land in Boyd county.

Mention is made by the attorney general in his brief that the writ of error issued by this court was in the form of a writ of certiorari. But as this was not insisted on in his brief nor in oral argument to this court, the decision will be on the merits of the case.

The record shows that the state board of equalization and assessment, hereinafter referred to as the state board, met on July 1, 1940, and adjourned to July 11, 1940; that a meeting of the state board was held in pursuance to said adjournment on July 11; that the abstracts of property assessed for taxation in the various counties of the state were before the state board at this adjourned meeting; that

these abstracts showed the assessment made for each class of property in the different counties; that the state board examined these abstracts; that, after examining these abstracts, it was determined by the state board that a just, equitable and legal assessment of real property in the state could not be made without increasing or decreasing the value thereof as returned by the various counties; that the tax commissioner was directed to notify the counties deemed to be overvalued or undervalued of a date of hearing; that notice was sent to such counties that the state board would meet in the hearing room of the governor's suite in the capitol building at Lincoln, Nebraska, for the purpose of considering the equalization of real estate valuation in the respective counties for the year 1940 with the valuation returned from other counties of the state; that this notice was directed to the chairman of the county board, the county clerk, and the county assessor of each county; that said notice is recited to have been mailed to each of said officers, and that a date of hearing was set at least five days following the mailing of the notice; that groups of different counties were directed to appear at different dates, and Boyd county was directed to appear at 10 a. m. on July 17, 1940; that each county was advised that the total assessed value of its lands and improvements, as shown by the abstract, was a certain definite amount, as compared to another definite amount as shown in the assessment for 1939; that on July 17, 1940, as well as on other dates, the state board met and that representatives from various counties were present; that on July 17, 1940, there were present from Boyd county the county assessor, county clerk, county attorney, and a taxpayer from Boyd county; that the county clerk of Boyd county presented to the state board a statement of land sales in Boyd county from April 1, 1939, to July 13, 1940; that Mr. Hugh Ashmore, on behalf of the Nebraska federation of county taxpayers leagues, made a statement before the board at one of the meetings.

The record does not show that any sworn testimony was taken, but it does not appear that any interested party pre-

sented testimony or evidence which was offered to be given under oath. The hearings appear to have been informal. Lists similar to the list of sales of real estate offered by Boyd county were offered on the part of other counties. The state board caused to be made a part of the record a part of a bulletin dated January 30, 1940, relating to the transfer of farm lands in 86 of the 93 counties of Nebraska, which had been sent out to all county assessors and county clerks.

It does not appear that any person was prevented from taking a stenographic report of any portion of the testimony or evidence which might be desired, nor from presenting for settlement and allowance a bill of exceptions as to any or all of the evidence.

The valuation of farm lands and improvements, as shown by the abstract of assessment returned by Boyd county for 1940, is $4,580,230, compared with the 1939 assessment of $5,632,660. This was a decrease of $1,052,430, or 18.68 *per centum*. The 1939 valuation is taken from the statement sent with the notice mentioned above.

The final valuation fixed by the state board for 1940 for farm lands and improvements in Boyd county is $4,956,740, or a decrease of 12 *per centum* from the 1939 valuation.

After consideration, the state board increased the valuation of farm lands and improvements returned by Boyd county in 1940 from $4,580,230 to $4,956,740, or an increase of .082204 *per centum*, and the county clerk of Boyd county was given notice of this final decision.

The substance of the county's complaint may be summarized as follows: That legal notice was not given to the county prior to the final order of the state board; that there was no legal finding of the necessity for such order; that there was no competent evidence before the state board to sustain the final order; that the final order of the state board was arbitrary and capricious, and without authority of law; that the county was not afforded an opportunity to produce evidence, nor to be heard, and that a full hearing was not had; that the final order in effect reassessed the land of Boyd county at more than its actual value, contrary

to the provisions of section 77-201, Comp. St. Supp. 1939.

As to the question of notice, the principal complaint of the county seems to be that the state board did not hold a preliminary meeting and determine the exact amount of increase or decrease necessary in the assessment of real estate in Boyd and other counties before it equalized the assessment of real estate throughout the state between the various counties, and because it did not give notice to the county of said exact amount of increase which was to be made in the assessment. Also it is claimed that five full days' notice was not given of the hearing; that the record does not show when the notice was mailed; that the notice does not show the county the purpose of the meeting; that the final notice of the increase in assessment was only sent to the county clerk.

The first notice, addressed to the county board, county clerk and county assessor of Boyd county from the office of the state tax commissioner at Lincoln, Nebraska, and signed by "Wm. H. Smith" as state tax commissioner and secretary of the state board of equalization and assessment, was as follows:

"Notice is hereby given that the State Board of Equalization and Assessment will meet at the hearing room of the Governor's suite, in the Capitol Building at Lincoln, Nebraska, at 10 o'clock a. m., Wednesday, July 17, 1940, for the purpose of considering the equalization of real estate valuations in your county for the year 1940, with the valuation returned in other counties of the state.

"Representatives of your county desiring to appear in support of the valuations returned, as shown on the abstract of assessment, will be given an opportunity of being heard at that time.

"The total assessed value of lands and improvements in your county, as shown by the abstract, is $4,580,230 in 1940, as compared to $5,632,660 in 1939.

"The total assessed value of lots and improvements in 1940 is ..... as compared to ..... in 1939.

"In the foregoing, figures are supplied only for the classi-

fication in which changes are anticipated by the State Board."

As the issues of this case are mainly determined on the construction of section 77-1004, Comp. St. 1929, as amended in 1933 (Laws 1933, ch. 129), a copy of a part of this section is set out:

"They (state board) shall proceed to examine the abstracts of * * * property assessed for taxation in the several counties of the state, * * * and shall equalize such assessment so as to make the same conform to law, and for that purpose they shall have the power to increase or decrease the assessed valuation of * * * any county or tax district, and such increase or decrease shall be made by a *per centum* * * *. The state board shall have the power, in equalizing assessments, to increase or decrease the assessed valuation of any class, classes or kinds of property, * * * in any county or tax district, whenever in their judgment it shall be necessary to make such assessment conform to law; and such increase or decrease, when made, shall be certified to the county clerk * * *. In the event it shall appear to the state board of equalization and assessment that a just, equitable and legal assessment of the * * * property in the state cannot be made without increasing or decreasing the valuation * * * as returned by any county, the board of equalization and assessment shall issue a notice to the counties which the board deems either undervalued or overvalued * * *, and shall set a date for hearing at least five days following the mailing of such notice. At such hearing legal representatives of the counties may appear and show cause why the valuation or valuations of * * * their county should not be increased or decreased by the state board, and after a full hearing, the state board shall enter its order and certify the same to the county clerks of the proper counties as hereinbefore set forth in this section. The notice provided for in this section shall be mailed to the county clerk, county assessor, and chairman of the county board."

This notice informed the county that a hearing would be

had and that it would be given opportunity at such meeting to show why its valuation of farm property should not be increased or decreased as might be found necessary to equalize the assessment of the different counties. The statute does not require more. It was not necessary for the state board in this notice to inform the county that the state board had previously determined to increase or decrease its assessment a certain *per centum.* That was a matter to be determined at the hearing. The notice was sufficient to inform the county that its assessment was questioned and that if the county desired it could defend the same at the hearing. There was an affirmative statement in the record that the date of the hearing was set at least five days following the mailing of the notice. The county appeared at the designated time by its legal representative, and took part in the proceedings on July 17, 1940, and no complaint seems to have been made at that time that the notice was defective, or not mailed in sufficient time. The county had actual notice of the meeting. Since the county had actual notice it was not prejudiced. *State v. State Board of Equalization and Assessment,* 123 Neb. 259, 242 N. W. 609. The cases cited by the county, where no notice was given nor opportunity to be heard, are not applicable to the instant case.

The final notice of the decision of the state board in increasing the assessment was certified to the county clerk of Boyd county. This complies with the statute.

The contention of the county that a full hearing was not had is not sustained. The state board had before it the abstracts of assessments of the various counties, statements made at the hearing, the document presented by the county, the document of the state tax commissioner sent out to the county as to the average real estate sales, and knowledge of the 1939 assessment, and other evidence. The statute above quoted does not require any particular kind nor standard of evidence. The method to be used is left to the discretion of the state board. 61 C. J. 752. No formal hearing is required. In addition to the evidence mentioned in the

record, the state board may take into consideration matters within the general knowledge of its members. *Hacker v. Howe,* 72 Neb. 385, 101 N. W. 255; 61 C. J. 755. The case of the *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment,* 119 Neb. 138, 227 N. W. 452, is cited. The question in this case was the effect when no notice was given and sufficient opportunity to be heard was lacking. This case held that notice was necessary. While it was mentioned in the opinion that witnesses were not called and testimony was not taken, the case does not hold the state board of equalization must call witnesses and take sworn testimony in order to conduct a full and proper hearing.

The statute does not require the state board to have a stenographer, nor to keep a complete and exact record of all its proceedings. Unless the statute so required, it was not necessary for the board to do so. In proceedings of county boards, city councils, county boards of equalization, and in some inferior courts, there is no such requirement. This does not prevent any interested party from having a reporter and making a bill of exceptions of the evidence, nor from presenting for settlement and allowance a bill of exceptions of all or any part of the evidence. The county in these proceedings might have taken such a record of the evidence if it desired, but it apparently had no such desire, and cannot now assign as error that the state board did not do so.

There is nothing in the record to show that the county was prohibited from introducing testimony nor prohibited in any way from presenting its objections to the board. A fair and full hearing was had by the state board. *Hacker v. Howe, supra.*

Section 77-201, Comp. St. Supp. 1939, provides that in determining the actual value of farm property there shall be taken into consideration the market value and other elements. In determining this actual value, the local authorities must comply with this statute. It is claimed that this statute was violated by the state board, because the

final order of the state board increasing the valuation of lands and improvements, as determined by the proper local authorities of the county, was made without any evidence that such lands and improvements were assessed by the local authorities at a value less than their actual value, and that, in the absence of such evidence, the state board was wholly without authority to increase the county's assessment.

This contention implies that the assessment of the county's local authorities imports verity, and that the burden is on the state board to show that the assessment by the county authorities as returned and shown by the abstract was not the actual value, before the state board could increase the assessment so returned and shown by the abstract, even for the purpose of equalization. The statute does not place such a burden on the state board when making equalization of the values of farm lands between the various counties. Under the law, it is the duty of the state board to equalize the different assessments of farm lands so as to make them conform to law. For that purpose the state board has power to increase or decrease the assessed valuations as shown by the abstracts returned, whenever it shall be necessary to make such assessments conform to law. In doing this the state board has not violated section 77-201, Comp. St. Supp. 1939.

The brief of the plaintiff in error is largely devoted to matters other than the reasonableness or merits of the action of the state board in raising the assessment. From an examination and study of the record, we believe the decision and final order of the state board of equalization is not arbitrary nor capricious, but is reasonable, and in accordance with the record and the law.

It is ordered that the petition in error be dismissed, and the decision and final order of the state board of equalization and assessment be, and hereby is,

AFFIRMED.

GEORGE F. PIERCY V. STATE OF NEBRASKA.

FILED MARCH 21, 1941. No. 30883.

Error to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. Opinion on motion for rehearing of case reported, *ante*, p. 301. *Former opinion modified: sentence reduced.*

Arthur E. Perry, Perry, Van Pelt & Marti and *J. W. Boyd*, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Rush C. Clarke, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and YEAGER, JJ.

PAINE, J.

In the decision heretofore rendered in this case, *ante*, p. 301, 293 N. W. 99, a sworn statement of the deceased, set out in full in the opinion, was held to be a dying declaration and, as such, admissible in evidence. Defendant, by motion for rehearing, assailed the holding, contending that the statement did not meet the requirements of a dying declaration, that it was not admissible, and that its submission to the jury constituted prejudicial error. A reargument was granted.

An examination of the record clearly reveals that the deceased, some hours prior to making the statement in question, had related the story of her trouble to her father, mother and brother. These oral statements, more in detail than the written declaration, had been testified to by the father and mother without objection, and cross-examination had before the written statement was produced and received in evidence. Subsequent thereto, the story, in part, was related by the brother without objection.

Section 29-2308, Comp. St. 1929, provides: "No judgment

shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." See *Cooper v. State,* 120 Neb. 598, 234 N. W. 406; *Makin v. Attorney General for New South Wales,* 17 Cox Crim. Cas. 704; *Allen v. The King,* 44 Can. S. Ct. Rep. 331.

Upon a reconsideration of the entire record, we are of the opinion that it was not necessary to determine whether or not the written statement was a dying declaration, or admissible as such. If we should assume that its admission was error, our consideration is not terminated. Before the error requires a reversal, it must be determined that it was prejudicial to the rights of the defendant, and that as a result a substantial miscarriage of justice occurred. The statements of the deceased, as related by the mother, father and brother, to the jury without objection detailed all the substantial facts of the written statement, to which objection is made. The written statement added nothing to the story recited by the witnesses. It appears to us that the story as related by the witnesses must have been more impressive than the written statement, and that the effect upon the minds of the jurors would have been the same had the written statement not been produced. The written statement was merely cumulative of testimony already given. It follows that, even if erroneous, its admission in evidence must be disregarded on appeal as not prejudicial to the rights of the defendant. See *People v. Sprague,* 217 N. Y. 373, 111 N. E. 1077; *Lamb v. State,* 40 Neb. 312, 58 N. W. 963; *Ainlay v. State,* 89 Neb. 721, 132 N. W. 120; *Watson v. State,* 109 Neb. 43, 189 N. W. 620; *Mathews v. State,* 111 Neb. 593, 197 N. W. 602; *Townsend v. United States,* 106 Fed. (2d) 273.

The jury in the case at bar declared in their verdict that they found the defendant not guilty of causing the death

of Pauline Killough, as charged in the first count of the information, but did find him guilty of causing the death of a vitalized embryo, or fœtus, as charged in the second count of said information. The penalty for such crime shall be not less than one nor more than ten years in the penitentiary. Considering the age of the defendant, and other facts shown by the bill of exceptions, and considering section 29-2308, Comp. St. 1929, which provides that this court may reduce the sentence when in its opinion the sentence is excessive, the court has decided to modify the sentence. *Lorimer v. State,* 127 Neb. 758, 257 N. W. 217; *Greenough v. State,* 136 Neb. 20, 284 N. W. 740; 18 Neb. Law Bulletin, 300.

That part of the holding in the previous opinion that the written statement was a dying declaration, and was admissible as such in the case at bar, is withdrawn and no holding made with reference thereto, and, as so modified, we adhere to the former opinion and judgment of affirmance, with a reduction of sentence to the minimum allowed by law of one year.

FORMER OPINION MODIFIED: SENTENCE REDUCED.

H. JOE BOHMONT, APPELLEE, V. WILLIAM H. H. MOORE ET AL., APPELLANTS.

FILED APRIL 9, 1941. No. 30902.

APPEAL from the district court for Lancaster county: JOHN L. POLK, JUDGE. Opinion on motion for rehearing of case reported, *ante,* p. 784. *Rehearing denied.*

Mockett & Finkelstein and *Peterson & Devoe,* for appellants.

Lloyd E. Chapman, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

MESSMORE, J.

The motion for rehearing and briefs in support thereof complain of the original opinion, in that the court mistakenly construed the action as one in tort, when, in fact, it was one for breach of contract of bailment.

The plaintiff's petition sounds in contract and further contains a direct allegation of negligence, thus presenting two aspects of recovery. Suffice it to say that the rules of law set forth in the opinion are applicable to the plaintiff's cause of action, based on a breach of the bailment agreement. This supplemental statement is made as a means of clarification and to avoid confusion as to the nature of the action.

The motion for rehearing is denied.

REHEARING DENIED.

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8. It is not reckless operation of a truck, within the Iowa guest statute, for one, knowing that he is sleepy, to continue to drive the truck. *Bittner v. Corby* 738
9. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. *Mierendorf v. Saalfeld* 876

10. When evidence in an automobile guest case is resolved most favorably to existence of gross negligence, and a fixed state of facts thus obtained, whether such facts constitute gross negligence is a question of law. *Mierendorf v. Saalfeld* 876
11. Evidence *held* not to show that driver of truck causing death was negligent. *Blanton v. Michael, Swanson & Brady Produce Co* 883

Bankruptcy.
1. A trustee in bankruptcy of a corporation may intervene in a suit to foreclose mortgages, assigned as collateral to a loan to the corporation, to recover excess over amount of loan for benefit of creditors, and, by so doing, is not estopped to sue a bank to trace funds into the bank, where part of such loan was used by a managing officer of the bank to reduce his individual indebtedness to the bank, and to have same returned to the trustee for the use of creditors. *Burke v. Munger* 74
2. Discharge in bankruptcy releases a bankrupt from all his debts which are provable, except debts excepted from the discharge in bankruptcy. *Luikart v. Jones* 472
3. A bankrupt's liability as a bank stockholder may form the basis of a provable claim in a bankruptcy proceeding, where the liability is regarded as contractual, and it is not too contingent or uncertain. *Luikart v. Jones* 472

Banks and Banking.
1. Renewal of a certificate of deposit is not payment of the original indebtedness and will not discharge the superadded liability with respect to such deposit of a bank's stockholder who transferred his stock before the renewal. *Luikart v. Schmidt* 282
2. Stockholders are not liable for unauthorized acts in an attempted liquidation of a going bank, unless they have assented thereto, or have estopped themselves from denying liability therefor. *Luikart v. Jones* 472
3. Formerly, the double liability of a stockholder in a state bank was a secondary liability. *Luikart v. Jones* 472

Bills and Notes.
1. By assigning a note "without recourse," the indorser limits its responsibility at the time of sale, and is bound only as a qualified indorser. *Evans v. First Nat. Bank* 727
2. When a note is indorsed "without recourse," it does not relieve an indorser who was guilty of fraud. *Evans v. First Nat. Bank* 727

Boundaries.

1. To establish a boundary line by acquiescence, it is essential that owners of adjoining tracts mutually recognize and accept the line as the boundary line for a period of ten years. *Kennedy v. Gottschalk* 842
2. Where two tributary streams meet and form one stream, the center lines of the streams of the two tributaries are extended until those lines meet and form the center line of the main stream, and in absence of restrictions in the grants, such lines then become the boundary lines of the lands on either side of, between and immediately below the point of confluence of the two streams. *In re Central Nebraska Public Power and Irrigation District* 742

Carriers.

A carrier is not liable for an assault on a passenger by an intruder if it does not appear that carrier's employee has been negligent in failing to anticipate or prevent the act of violence. *Sanders v. Chicago, B. & Q. R. Co.* 67

Compromise and Settlement.

A written stipulation in settlement of a judgment may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by circumstances surrounding the transaction, conduct of the parties, and by express declarations. *Alpirn v. H. Epstein & Son* 311

Constitutional Law.

1. A person has no vested right in an existing law so as to preclude its amendment or repeal, and there is no implied promise on the part of the state to protect its citizens against incidental injury occasioned by changes in the law. *Beisner v. Cochran* 445
2. Generally, a person has no vested right in statutory licenses, permits or privileges. *Beisner v. Cochran* 445
3. A legislative enactment under the police power of the state, which is regulatory in character, is not violative of the due process clauses of the state and federal Constitutions, because it reduces or destroys the value of property acquired under a former law. *Beisner v. Cochran* 445
4. A legislative enactment which compels the owner of property to donate the use thereof without compensation is prohibited by the due process clauses of the state and federal Constitutions. *Beisner v. Cochran* 445
5. Where a statute is susceptible of two constructions, one of which will render it constitutional and the other un-

constitutional, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the statute, will render it valid. *Beisner v. Cochran* 445

6. Where a city charter is susceptible of two constructions, it is the duty of a court to adopt the construction which, without doing violence to the fair meaning of the charter, renders it in accord with the Constitution. *Bridge v. City of Lincoln* 461
7. A city zoning ordinance cannot operate retroactively to deprive a property owner of previously vested property rights. *Baker v. Somerville* 466
8. The provision in the employment agency statute fixing the maximum amount which an agency may charge for services contravenes the due process clause of the Federal Constitution. *State, ex rel. Western Reference & Bond Ass'n, v. Kinney* 574
9. The provisions of the Constitution empowering the legislature to enact laws to facilitate operation of the initiative power authorize it to enact laws to prevent fraud or to render intelligible the purpose of proposed law or constitutional amendment. *State, ex rel. Winter, v. Swanson* 597
10. Any statute which tends to insure a fair, intelligent and impartial result on the part of the electorate facilitates exercise of the initiative power. *State, ex rel. Winter, v. Swanson* 597
11. Information charging murder in the second degree *held* sufficient. *Chadek v. State* 626
12. The use of constitutional language does not validate an act, where the purpose and effect are not within a constitutional power. *State, ex rel. Woolsey, v. Morgan* 635
13. The legislature has an unlimited field within which to legislate, subject only to the initiative and referendum and constitutional inhibitions. *Power Oil Co. v. Cochran* 827
14. Whether the legislature acted wisely in reposing powers of petroleum products inspection in the division of motor fuels is not a question for judicial determination. *Power Oil Co. v. Cochran* 827
15. The legislature having entrusted inspection of refined petroleum products to the division of motor fuels, the only subject for determination by the courts is the question of whether statutory inspection fees are reasonably necessary to defray expense of inspection. *Power Oil Co. v. Cochran* 827

Contempt.

1. Proceedings in contempt are governed by the rules applicable to prosecutions by indictment, are in their nature criminal, and no intendments will be indulged to sustain a conviction. *Whipple v. Nelson* 514
2. Unless disobedience of an order of court is wilful, there is no contempt. *Whipple v. Nelson* 514

Contracts.

1. A written instrument is not subject to reformation except upon proof that clearly, convincingly and satisfactorily overcomes its positive recitations and provisions. *Jacobson v. Forster* 452
2. Evidence *held* insufficient to entitle a husband, by way of reformation, to have the name of his deceased second wife stricken from a deed as one of the grantees. *Jacobson v. Forster* 452
3. A defendant who seeks to excuse nonperformance of a contract on the ground of a supervening impossibility has the burden of establishing such defense. *Preston v. Farmers Irrigation District* 504
4. A court may not make a new contract for parties by construction, and its duties are limited to interpretation of contract made, viewed in the light of facts and circumstances existing at time it was entered into. *Bushman Construction Co. v. Sanitary District* 538

Corporations.

1. A managing officer of a corporation may not legally pay his individual debts by abstracting from the corporation moneys for that purpose. *Burke v. Munger* 74
2. A corporation may not lawfully assent to a loan to one of its managing officers, to be used by him to reduce his private indebtedness. *Burke v. Munger* 74
3. A legislative act granting powers, privileges or immunities to corporations applies only to corporations created under authority of that state which has the power of visitation and control, unless a contrary intent is plainly expressed in the act. *In re Estate of Robinson* 101
4. A corporation is not chargeable with knowledge nor bound by 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. *Steunenberg v. National Progressive Life Ins. Co.* 240
5. A corporation cannot escape liability for damages caused through its active fraud by pleading and proving former dissolution and subsequent incorporation, where its own

pleadings show that it participated in the fraudulent transactions and claimed the fruits thereof after reorganization. *Provident Savings & Loan Ass'n v. Booth* 424

Counties and County Officers.

1. A county board may once reconsider its action in allowing or disallowing a claim, on due notice to interested parties. *State, ex rel. Allen, v. Miller* 747
2. A reconsideration by a county board of allowance of a claim, without fixing time for hearing thereon and without notice, is void for want of jurisdiction, where notice has not been waived. *State, ex rel. Allen, v. Miller* 747
3. Action of county board in reconsidering and setting aside allowance of claims without notice to claimants was void for want of jurisdiction. *State, ex rel. Allen, v. Miller* 747
4. Notice of hearing on claims by direction of chairman of county board was not the action of the county board and was void. *State, ex rel. Allen, v. Miller* 747
5. A county treasurer is an insurer of funds that come into his hands by virtue of his office, and he and his bondsmen are liable for moneys lost by failure of banks in which county moneys are deposited, except where deposits are made in conformity with the depository act. *Garfield County v. Pearl* 810
6. A county treasurer must account for funds lost in an insolvent bank, where the bank is not a designated depository or where the deposit is otherwise unauthorized by law. *Garfield County v. Pearl* 810
7. Where a county treasurer's bond is conditioned on the faithful performance by him of the duties of the office, the sureties on the bond are bound in like manner and their responsibility is the same as that of their principal. *Garfield County v. Pearl* 810
8. Though county officers are presumed to have acted within their authority, statutes delegating powers to county officers must be strictly construed, and all persons dealing with public officers must inform themselves as to their authority, and acts which are within the apparent, but in excess of the actual, authority of the officers will not bind the government which they represent. *Garfield County v. Pearl* 810
9. Powers conferred on a public officer can be exercised only in the manner and under the circumstances prescribed by law. *Garfield County v. Pearl* 810
10. In an action on a county treasurer's bond to recover

public funds which treasurer had failed to account for, it was no defense that the funds were lost without fault or negligence of the county treasurer. *Garfield County v. Pearl* 810

Courts.

1. As precedents, the controlling features of an opinion of a court are the rules of law necessarily reached and stated in determining the issues presented, based on the facts found in the record. *Maxwell v. Hamel* 49
2. A court's opinion controls the syllabus, the syllabus being merely explanatory of the opinion and having no more force and effect than the statements made in the opinion on which the syllabus is based. *Maxwell v. Hamel* 49
3. The sufficiency of an information charging an offense under a state statute is not a federal question. *Chadek v. State* 626
4. The municipal court of the city of Lincoln is essentially a court of the city of Lincoln, and not of the justice of the peace district comprising Lancaster county. *State, ex rel. Woolsey, v. Morgan* 635
5. The district court has jurisdiction in a case in which construction of a will is only incidentally involved and the relief demanded does not call for direct exercise of probate power. *Bryant v. Fingerlos* 867
6. The district court properly directed sale of realty to pay specific liens against it, after finding that the power to sell given the executrix had been forfeited by delay of 15 years. *Bryant v. Fingerlos* 867

Criminal Law.

1. The trial court did not err in refusing a continuance of a forgery trial for two days in order that a handwriting expert might examine handwriting on certain exhibits. *Seiner v. State* 130
2. Generally, alleged prejudicial remarks made by the trial court must be seasonably objected to in order to save the question for review. *Seiner v. State* 130
3. An instruction defining "fleeing from justice," as used in the statute of limitations, approved. *Taylor v. State* 156
4. The terms "fugitive from justice," as used in the extradition statute, and "fleeing from justice," as used in the statute of limitations, are not synonymous terms. *Taylor v. State* 156
5. It is not necessary to first warn a prisoner under arrest that any statements he may make may be used against him as a condition precedent to proving inculpatory statements made by him. *Holthus v. State* 200

6. In laying a foundation for admission of a confession in evidence, it is sufficient to establish affirmatively all that occurred immediately prior to and at the time of making the confession, provided such affirmative proof shows it to have been freely and voluntarily made and excludes the hypothesis of improper inducements or threats. *Holthus v. State* 200
7. Where there were two counts in an information, under one of which a dying declaration was admissible, it was not reversible error for the trial court not to instruct the jury with relation thereto, where defendant did not request it. *Piercy v. State* 301
8. In a prosecution for homicide, it was not necessary to determine whether a written statement was a dying declaration, since the written statement was merely cumulative of testimony already given. *Piercy v. State* 905
9. On the issue of intent in a criminal prosecution, a sane adult person accused of a felony may be presumed to intend the natural and probable consequences of his voluntary acts. *Baskins v. State* 334
10. Criminal intent or felonious purpose may be shown by circumstances. *Baskins v. State* 334
11. In a criminal prosecution, record did not show that counsel appointed by the court to assist the county attorney was disqualified by prejudice against defendant. *Baskins v. State* 334
12. Counsel for defendant in a criminal prosecution cannot provoke the prosecuting attorney into unbecoming retorts or breaches of etiquette and thus make such conduct ground for a new trial without regard to defendant's guilt, though proved beyond a reasonable doubt. *Baskins v. State* 334
13. A breach of privilege by a prosecuting attorney in the use of language in his address to the jury is not necessarily ground for a new trial, where the import of his words was not more severe than legitimate inferences from evidence before the jury. *Baskins v. State* 334
14. Where an information charged defendant with kidnaping in one count and in another count with assault with intent to commit great bodily harm, and there was no evidence to support the kidnaping charge, it was prejudicial error to submit to the jury the question of guilt or innocence of kidnaping, though he was not convicted of kidnaping. *Hastings v. State* 365
15. Where the court, without the aid of the jury, is required to fix the punishment in the event of a verdict of guilt, it is not error for the court to fail or refuse to instruct

the jury as to the penalty which may be imposed. *Ayres v. State* 604

16. Evidence of commission of another crime cannot ordinarily be admitted against accused, but such evidence may be admitted, not to establish the other crime, but as confirmatory of evidence tending to show commission by accused of the crime charged. *Adams v. State* 613

17. In prosecution for larceny as bailee, whether proof of unlawful conversion of moneys by accused, for which he was not informed against, tended to prove unlawful conversion of the moneys which he was charged with having converted was a question for the jury. *Adams v. State* 613

18. County attorney's opening statement that "the evidence will further show that in county court the defendant pleaded guilty to the charge and later changed his plea in this court" was not prejudicial error. *Adams v. State* 613

19. It was prejudicial error requiring a reversal for the trial court, without notice to and in absence of defendant, to instruct the jury orally while the jury were deliberating on their verdict. *Strasheim v. State* 651

20. In a criminal prosecution, accused cannot be convicted on circumstantial evidence alone, unless the circumstances established exclude every reasonable hypothesis except his guilt. *Wiese v. State* 685

21. On conviction of accused for the second offense of chicken stealing under the Nebraska statute, an increase in penalty may be imposed for a previous conviction for chicken stealing in Iowa. *Wiese v. State* 685

22. Where the statute authorizes an increased penalty on a second or subsequent conviction, the record of the former conviction is admissible to establish such conviction. *Wiese v. State* 685

23. Accused waives defects in information which may be excepted to by a motion to quash or a plea in abatement by demurring to the indictment or pleading in bar or the general issue. *Wiese v. State* 685

24. It is better practice for the court to give a cautionary instruction on an accomplice's testimony, but failure to do so, where no such instruction is requested, will not ordinarily constitute reversible error. *Cornell v. State* 708

25. A criminal case will not be reversed for refusal of the trial court to grant a continuance, unless the supreme court is convinced from the record that the defendant was prejudiced thereby. *Cornell v. State* 708

26. In a prosecution for rape, failure to instruct as to lesser

crimes of assault and battery and simple assault was not error, in absence of request. *Guerin v. State* 724
27. The record for review imports absolute verity and cannot be altered or added to through medium of briefs. *Guerin v. State* 724
28. Alleged error in the giving of an instruction not challenged in the motion for new trial is not reviewable in a proceeding in error. *Guerin v. State* 724
29. The weight of evidence is for the jury. *Guerin v. State* 724
30. The credibility of witnesses is for the jury, who may consider the interest of a witness in weighing his testimony. *Guerin v. State* 724
31. In a criminal prosecution, statute of limitations need not be specially pleaded and may be raised under a plea of not guilty. *Emery v. State* 776
32. Where the state fails to produce evidence sufficient to sustain a finding that accused was fleeing from justice during the operating period of the statute of limitations, the trial court should direct a verdict of acquittal. *Emery v. State* 776
33. Where the state did not sustain the burden of proving that accused was fleeing from justice during the running of the statute of limitations, the statute was a complete defense. *Emery v. State* 776
34. Where testimony, admitted over defendant's objection, was later stricken from the record and the jury were instructed to disregard it, and defendant did not move for a mistrial or predicate error thereon in a motion for a new trial, he was estopped to predicate error thereon in the appellate court. *Millslagle v. State* 778
35. Defects in a preliminary complaint charging a felony are waived, where accused is bound over to the district court, appears therein, pleads not guilty to a valid information and goes to trial without objecting to such defects. *Brice v. State* 853
36. It is not error to refuse a requested instruction confined to a proposition of law correctly stated to the jury in another form. *Brice v. State* 853

Damages.

An instruction on measure of damages which tended to confuse the jury as to amount of damages recoverable under a hail insurance policy was erroneous. *Linch v. Hartford Fire Ins. Co.* 110

Divorce.

1. Where the husband in a divorce case failed to pay costs

of wife's appeal, as awarded by the supreme court, the decree was reversed. *Bonzo v. Bonzo* 92

2. It was not an abuse of discretion to provide in a divorce decree that custody of a minor child should be given to the paternal grandfather for 20 days each summer to permit the child to associate with his father, where fitness of grandparent and father was not subject to question. *York v. York* 224
3. An allowance of $25 a month for support of a four-year-old son was reasonable, where father's income averaged $2,000 a year. *York v. York* 224
4. It was not an abuse of discretion to provide in a divorce decree that a child should not be removed from the state without the court's consent, in absence of some controlling reason. *York v. York* 224
5. Whether a wife should be granted permanent alimony where there is no accumulated property from the marriage is not a question solely of the necessities of her situation, but equally one of fairness and justice. *York v. York* 224
6. Permanent alimony of $1,000 approved. *York v. York* 224
7. When an unconditional judgment for alimony has been entered, it is improper for the court to open the original divorce decree, retry the case, and determine anew whether the decree was proper at time it was entered. *Young v. Young* 294
8. A divorce decree which is conditional and subject to change may be modified on proper showing at a later date. *Young v. Young* 294
9. A divorce decree in which the amount of alimony is uncertain may be revised or altered, especially if the interests of minor children will be benefited thereby. *Young v. Young* 294
10. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in instalments, and whether intended solely as a property settlement or as an allowance for support, or both, is an absolute judgment not subject to modification. *Ziegenbein v. Ziegenbein* 320
11. The reduction in former wife's income and an increase in the income of the former husband were changes in the circumstances of the parties so as to justify an increase of the allowance for support of their minor child. *Grannell v. Grannell* 456

Elections.

1. The mere fact that election officers failed to sign elec-

tion returns, failed to string the ballots, and failed to seal the returns in the manner provided by statute did not invalidate the entire vote of a precinct. *Wheelock v. Haney* 547

2. Mail ballots are void if they are not transmitted to the county clerk by the United States mail in compliance with a mandatory provision of statute making that method of transmission a condition of the right to vote by mail. *Wheelock v. Haney* 547
3. The statute providing that a vacancy as to any person nominated on a nonpolitical county ticket may be filled by petition filed with the county clerk does not mean that such vacancy shall be filled by the nominee of the first petition filed, but it requires the clerk to accept and file all petitions presented in proper form and within the necessary time, and to place the names of all persons so nominated on the ballot as candidates at the general election. *State, ex rel. King, v. Hanson* 644

Electricity.

1. One who attempted to remove electric wires from a public highway and was injured thereby was not guilty of contributory negligence, as a matter of law, so as to preclude recovery for injuries. *Wolfinger v. Shaw* 229
2. Purchase of supplies and equipment by rural power district *held* within powers of the district. *Sorensen v. Chimney Rock Public Power District* 350
3. A public power district was liable for the reasonable value of electrical equipment which it purchased and retained, notwithstanding that the contract was unenforceable because its power to purchase was irregularly exercised. *Sorensen v. Chimney Rock Public Power District* 350

Embezzlement.

1. The gist of the offense of larceny as bailee is conversion of property without knowledge and consent of the owner thereof, with intent to steal it. *Adams v. State* 613
2. Evidence sustained conviction of larceny as bailee. *Adams v. State* 613

Eminent Domain.

1. In condemnation proceedings, dual or speculative or excessive damages are not recoverable for consequential depreciation in the value of land not taken, though it is severed from an entire tract of the owner. *Woodgate v. Central Nebraska Public Power and Irrigation District* 187
2. The measure of damages for condemned land is the fair

and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after taking. *Woodgate v. Central Nebraska Public Power and Irrigation District* 187

3. In a proceeding to condemn unimproved land adapted to and used exclusively for farm purposes, evidence that land not taken will produce crops after taking the same as before must be considered in determining consequential damages. *Woodgate v. Central Nebraska Public Power and Irrigation District* 187
4. In condemnation proceedings, an excessive verdict for consequential damages to land not taken, as a result of the jury's prejudice, may be set aside on appeal. *Woodgate v. Central Nebraska Public Power and Irrigation District* 187
5. A city of the first class has power to condemn property outside of and adjacent to the city limits for the purpose of extending its streets and boulevards. *Webber v. City of Scottsbluff* 416
6. A law enacted under the police power of the state, which is regulatory in character, does not amount to the taking or damaging of private property for public use without just compensation. *Beisner v. Cochran* 445
7. Section 60-421, Comp. St. Supp. 1939, *held* not to require inspection stations and garages to make motor vehicle inspections without compensation therefor. *Beisner v. Cochran* 445
8. An unliquidated claim, as that term is used in the Lincoln city charter, does not include a claim based on the constitutional provision that the property of no person shall be taken or damaged for public use without just compensation therefor. *Bridge v. City of Lincoln* 461
9. In an action against the city of Lincoln to recover compensation for the damaging of her realty for a public use, it was not necessary for plaintiff to plead or prove that she filed a claim therefor with the city as provided by its charter. *Bridge v. City of Lincoln* 461
10. Where it becomes necessary to take private property for a public improvement, and requirements of the law have been met, the only question is what is the owner's loss. *Schulz v. Central Nebraska Public Power and Irrigation District* 529
11. Compensation to the landowner under proceedings in eminent domain is measured by the loss occasioned to

him by the appropriation. *Schulz v. Central Nebraska Public Power and Irrigation District* 529

12. The measure of damages for condemned land is the fair market value of the land appropriated and the difference in the fair market value of the remainder of the land before and after the taking. *Schulz v. Central Nebraska Public Power and Irrigation District* 529
13. Compensation for land taken by right of eminent domain is measured by its market value at the time taken, and hence evidence is inadmissible as to its peculiar value to the owner for special reasons. *Schulz v. Central Nebraska Public Power and Irrigation District* 529
14. Where a certain theory as to the measure of damages in condemnation proceeding was relied on by the parties and adopted by the court in submitting the case to the jury, it will be adhered to on appeal whether such theory was correct or not. *Behle v. Loup River Public Power District* 566

Equity.

Where a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it and determine all matters put in issue by the pleadings. *Provident Savings & Loan Ass'n v. Booth* 424

Estoppel.

1. Admissions against interest made with reference to and pertinent to issues being tried are admissible in evidence against the party making them, and proof thereof will work an estoppel *in pais*. *Weisel v. Hobbs* 656
2. Limitations cannot be availed of to defeat a continuous duty imposed on a public official, in absence of special circumstances showing it would be inequitable to grant the relief asked. *State, ex rel. Cashman, v. Carmean* 819

Evidence.

1. A party is bound by the testimony of his own witness on the question of negligence, unless the circumstances or other evidence warrant the jury in disregarding such testimony. *Ross v. Carroll* 1
2. Though medical authorities are not admissible as independent evidence of statements therein expressed, they may be used on cross-examination, in the trial court's discretion, to test knowledge and accuracy of a medical witness, where inquiry is directed to extent of his knowledge and familiarity with accredited authorities on the subject about which he has testified. *Fonda v. Northwestern Public Service Co.* 262

3. A public administrative body is presumed to act in good faith, with honest motives, and for the purpose of promoting the public good and protecting the public interest. *Best v. City of Omaha* 325
4. If a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly reflect the facts proved, it will be sufficient. *Chambers v. Chicago, B. & Q. R. Co.* 490
5. A presumption of law exists that public officers will perform their public duties. *In re Application of Chicago, B. & Q. R. Co.* 767
6. A presumption is not evidence, but a presumption will serve in the place of evidence in favor of one party until *prima facie* evidence has been adduced by the opposite party, but the presumption should never be placed in the scale to be weighed as evidence. *Bohmont v. Moore* 784
7. Where a witness has had no opportunity to formulate a basis for an opinion as to speed of a motor vehicle, it is error to permit him to give an estimate. *Mierendorf v. Saalfeld* 876

Execution.

Evidence warranted quashing of execution. *Chitwood Packing Co. v. Warner* 800

Executors and Administrators.

1. An order of the county court approving a final report and discharging an administrator can be set aside only on proof of such fraud as would justify the setting aside of any other judgment. *In re Estate of Josephson* 193
2. An executrix and her attorney could not be allowed fees and expenses out of the estate for handling of litigation by which the executrix, who was also sole beneficiary under the will, sought to repudiate a settlement agreement made in her personal capacity with the testator's children to avoid a threatened contest of the will, since such litigation could be undertaken only in her personal capacity. *In re Estate of Shierman* 221
3. An administrator appointed in this state is the only person entitled to foreclose a mortgage belonging to the estate on realty located in the state. *Boehmer v. Heinen* 376
4. An administrator on accounting is entitled to credit for advancements to an adult distributee or legatee. *In re Estate of Herman* 430
5. Payment by administrator of $75 to obtain extension of a mortgage on realty of the estate approved. *In re Estate of Herman* 430

6. Compensation to an administrator is within the discretion of the court. *In re Estate of Herman* 430
7. An administrator is not entitled to charge against the estate attorney's fees incurred by him in a contest with heirs and representatives of the estate as to his alleged mismanagement and misappropriation of estate funds. *In re Estate of Herman* 430
8. An unmatured but absolute obligation may be filed and allowed as a claim against a decedent's estate, with the right of immediate enforcement limited, so that the estate may make payment according to the contract terms. *In re Estate of Larson* 544
9. If an administrator desires to pay an unmatured note before it becomes due, he may at any time after the claim has been filed make application to have the present value of the note determined by the county court. *In re Estate of Larson* 544
10. The word "claim" as used in statutes relating to claims against decedent's estate includes every species of liability which an executor or an administrator can be called upon to pay or provide for payment of out of the estate. *In re Estate of Edwards* 671
11. The verb "exhibit" as used in statutes relating to claims against decedent's estate means to present in legal form as a charge against an estate. *In re Estate of Edwards* 671
12. A claim for stockholders' liability is a contingent claim against a deceased stockholder's estate until it is judicially determined. *In re Estate of Edwards* 671
13. When a claim against a decedent's estate is capable of being exhibited, it must be presented to the county court within the time limited for creditors to file claims, and if not so presented the claim is barred. *In re Estate of Edwards* 671
14. Bank receiver's claim for stockholder's liability against deceased stockholder's estate is a contingent claim capable of being exhibited within time limited for creditors to file claims, and if not filed within time the claim is barred. *In re Estate of Edwards* 671
15. It is the duty of an administrator to administer the estate promptly and to distribute the property to those entitled thereto without unnecessary delay. *In re Estate of McLean* 757
16. The county court may remove an administrator who is unduly prolonging administration of the estate for his own benefit. *In re Estate of McLean* 757
17. An administrator who unduly prolongs administration of the estate for his own benefit has become unsuitable

and incapable to discharge the trust. *In re Estate of McLean* 757

18. Claim of receiver of insolvent state bank against estate of a deceased stockholder for constitutional liability is barred unless application for appointment of an administrator is made within two years after stockholder's death. *Luikart v. Quinn* 849

19. If a will directs an executrix to sell realty, it is left to the executrix' discretion as to time of sale within reasonable limits if she acts in good faith; and what is reasonable time depends on the facts in each case. *Bryant v. Fingerlos* 867

Extradition.

A prisoner who accepted a parole which permitted him to go to another state and violated it by committing a crime in that state became, on revocation of the parole, a fugitive from justice, and could be apprehended and returned to the penitentiary to complete his sentence, and was not entitled to release by habeas corpus until the original sentence should be completed. *Bartel v. O'Grady* 184

Fraud.

1. Misrepresentation of the value or condition of realty, to be remediable, must have been made under such circumstances that the injured party had a right to rely thereon. *Dyck v. Snygg* 121

2. Where ordinary prudence would have prevented deception, an action for the fraud perpetrated by such deception will not lie. *Dyck v. Snygg* 121

Fraudulent Conveyances.

1. In a creditor's suit to set aside a conveyance by a debtor to a near relative in consideration of allegedly past-due indebtedness, the burden is on grantee to show that the debt is genuine, that his purpose was honest, and that he acted in good faith in obtaining title. *Peeks v. Nelson* 207

2. In suit to set aside conveyance from debtor to son, evidence did not show that conveyance was made in good faith. *Peeks v. Nelson* 207

Game.

The statute (Comp. St. Supp. 1939, secs. 37-428 to 37-431) to create and establish a state game refuge is not unconstitutional. *Bauer v. State Game, Forestation and Parks Commission* 436

Gas.

1. A gas company must exercise the high degree of care and diligence required in the handling of a dangerous commodity, and, if negligent, it is liable therefor. *Fonda v. Northwestern Public Service Co.* 262
2. A gas company must maintain an efficient system of inspection and superintendence and must use due and reasonable care in inspection of its equipment to insure reasonable promptness in discovery of leaks that may occur. *Fonda v. Northwestern Public Service Co.* 262
3. Liability of a gas company, which installed a gas burner, for injuries by escaping gas did not depend on notice of defect in burner, if defect was due to improper or careless installation and inspection. *Fonda v. Northwestern Public Service Co.* 262

Gifts.

1. To make a valid and effective gift *inter vivos,* there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee. *Ralston v. Marget* 358
2. A clear and unmistakable intention on the part of the donor to make a gift is an essential element of the gift, and this contention must be inconsistent with any other theory. *Ralston v. Marget* 358

Homestead.

1. Where the wife of an insane husband did not join with the guardian in the execution of a mortgage on the homestead, the mortgage was not enforceable as a lien against the homestead. *Evans v. First Nat. Bank* 727
2. A homestead, as between mortgagors and mortgagees, is not limited to a value of $2,000, but covers the value of the entire 160 acres. *Evans v. First Nat. Bank* 727

Homicide.

1. The law looks to the substance rather than to the form of a dying declaration. *Piercy v. State* 301
2. If the declarant understood a dying declaration and assented to it, it is immaterial who prepared it. *Piercy v. State* 301
3. In a prosecution for homicide in procuring an abortion, a dying declaration is admissible. *Piercy v. State* 301
4. An information charging murder in the second degree need not allege the exact location of the wound. *Chadek v. State* 626
5. In a prosecution for second-degree murder, failure to instruct on the law applicable to a killing on a sudden

quarrel, in absence of evidence thereof, was not error. *Chadek v. State* 626
6. In a prosecution for second-degree murder, when the fact of unlawful killing is proved and there was no evidence of express malice or justification, the law presumes malice, there is an inference that the killing was intentional, and the evidence requires submission of the case to the jury. *Chadek v. State* 626
7. Evidence was sufficient to sustain conviction for murder in the second degree. *Chadek v. State* 626
8. Evidence sustained conviction for manslaughter. *Brice v. State* 853

Husband and Wife.
1. A $5,000 bequest by testator to his married daughter is not part of her separate estate pledged as surety on note for her husband's debt, where the note was executed eleven years before testator's death. *Farmers State Bank v. Wheeler* 63
2. Authority to contract with reference to and upon the faith and credit of the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her. *Farmers State Bank v. Wheeler* 63
3. A wife living apart from her husband generally becomes entitled to alimony or separate maintenance when she offers in good faith to return to him and he rejects the offer. *Sinn v. Sinn* 621
4. The term "alimony" may be the equivalent of an allowance to be paid by a husband to a wife for her separate maintenance. *Sinn v. Sinn* 621
5. Without seeking a divorce, a wife, who has not violated any duty growing out of the marriage relation, may maintain a suit against her husband for separate maintenance, where he has violated his legal duty to support her. *Sinn v. Sinn* 621

Indictment and Information.
1. An information which alleges the facts necessary to constitute the offense described in the statute is sufficient. *Chadek v. State* 626
2. To authorize increase in penalty for the second offense of chicken stealing, conviction for the first offense must be charged in the information. *Wiese v. State* 685
3. A charge of rape necessarily includes a charge of assault to commit rape. *Guerin v. State* 724
4. Generally, it is sufficient in an information to describe

the crime charged in the language of the statute, and it is not ordinarily necessary to negative exceptions contained in a statute defining a crime if they are not descriptive of the offense. *Emery v. State* 776

Injunction.

An injunction may be issued to restrain the destruction of a tree on a boundary line, where no sufficient reason for the destruction appears, and whether injunction should issue is within the court's discretion. *Weisel v. Hobbs* 656

Inspection.

1. An inspection fee in an amount reasonably necessary to defray expense of inspection is proper. *Power Oil Co. v. Cochran* 827
2. If inspection fees are in excess of an amount reasonably necessary to defray expense of inspection and timely challenge is made, courts must hold unconstitutional the excess over the amount reasonably necessary to defray expense of inspection. *Power Oil Co. v. Cochran* 827
3. After expiration of each biennium and the first fiscal quarter after the next regular session of the legislature, all excess inspection fees over costs of inspection lapse and cannot be used for any purpose except by appropriation of the legislature. *Power Oil Co. v. Cochran* 827
4. Court had no power to determine the question of excessiveness of gasoline inspection fees which had lapsed and could not be used for any purpose except by legislative appropriation. *Power Oil Co. v. Cochran* 827
5. Under statute creating department of motor fuels, the chief of the bureau is required to make estimates of probable income from inspection fees and also of the cost of inspection. *Power Oil Co. v. Cochran* 827
6. A statute fixing the amount of inspection fees should be construed prospectively, unless the statute itself clearly indicates that it shall be construed retrospectively. *Power Oil Co. v. Cochran* 827
7. Evidence *held* not to show that the difference between estimated income from motor fuels inspection fees and estimated cost of inspection was unreasonable. *Power Oil Co. v. Cochran* 827
8. The statute appropriating lapsed funds from inspection of refined petroleum products to the bureau of dairies, foods and drugs is valid. *Power Oil Co. v. Cochran* 827
9. The act creating the Nebraska advertising commission

and appropriating lapsed motor fuels inspection fees to its use is constitutional. *Power Oil Co. v. Cochran* 827

Insurance.

1. Hail insurance policy *held* to be an open policy and not a valued policy, recovery thereon being limited to the actual value of crops damaged. *Linch v. Hartford Fire Ins. Co.* 110
2. In passing on a total disability clause of an insurance policy, courts will not penalize an insured who attempts to carry on with his occupation, if he is not actually physically able to do so. *Miceli v. Equitable Life Assurance Society* 367
3. Denial of liability for a particular disability under an insurance policy is a waiver of the right to insist on proof thereof. *Miceli v. Equitable Life Assurance Society* 367
4. An insured who is unable to do substantially any of the material acts of his usual vocation, or if, in attempting to do them, his health is jeopardized, is "totally disabled" within the meaning of a disability provision in an insurance policy. *Miceli v. Equitable Life Assurance Society* 367
5. Inability to do any of the material acts necessary for the transaction of an insured's usual vocation, so as to prevent substantial and practical conduct of his vocation, is equivalent to inability to do all substantial and material acts necessary to prosecution of the vocation in his customary and usual manner. *Miceli v. Equitable Life Assurance Society* 374
6. The statutory provision that a life insurance policy shall be incontestable after two years, except for nonpayment of premiums and violation of conditions relating to naval and military service in time of war, bars all other defenses after expiration of contestable period. *State, ex rel. Republic Nat. Life Ins. Co., v. Smrha* 484
7. Untrue representations by assured in his application to questions calling for matters of opinion, judgment, or belief, will not avoid a policy issued thereon, unless it is shown that the misrepresentations were knowingly made with intent to deceive. *Carpenter v. Sun Indemnity Co.* 552
8. To defeat recovery on policy on ground of misrepresentations, insurer must prove that insured's representations were untrue and were made with fraudulent intent, and that they were material to the risk, and were relied on by insurer. *Carpenter v. Sun Indemnity Co.* 552
9. For alleged misrepresentations in application for insurance to constitute a defense, it is incumbent on

insurer to plead and prove that the statements and answers were made as written in the application, that they were material and false, that they were made with intent to deceive, that insurer relied on the statements, and that they constitute part of the application annexed to the policy. *Carpenter v. Sun Indemnity Co.* 552

Interpleader.

1. A bill of interpleader is an equitable remedy whereby a disinterested stakeholder in possession of a fund claimed by rival defendants may require them to litigate among themselves the issue of ownership without embroiling him. *Provident Savings & Loan Ass'n v. Booth* 424
2. The statutory rule that a court may determine any controversy between parties before it when it can be done without prejudice to the rights of others may apply to issues in a bill of interpleader. *Provident Savings & Loan Ass'n v. Booth* 424
3. A motion by a defendant in a bill of interpleader to strike from the petition of another defendant a plea for recovery of damages resulting from fraud was properly overruled under the evidence. *Provident Savings & Loan Ass'n v. Booth* 424
4. In a bill of interpleader, a defendant is chargeable with notice of a cross-petition filed against him by another defendant before answer day designated in summons issued on petition of stakeholder, and such notice may prevent limitations from running against claim pleaded by cross-petitioner. *Provident Savings & Loan Ass'n v. Booth* 424

Judgment.

1. Where a second action between the same parties is on a different cause of action, the judgment in the first action operates as an estoppel only as to the point or question actually litigated and determined. *Burke v. Munger* 74
2. Averments essential in a plea of *res judicata* stated. *Burke v. Munger* 74
3. A judgment on the merits concludes parties and privies, not only as to every matter determined, but as to any other admissible matter. *Baker v. Somerville* 466
4. One relying on a former adjudication as a defense must aver in what court the judgment was rendered and plead facts showing that the recovery was on the same subject-matter and between the same parties or their privies as the suit in which the defense of *res judicata*

is made, and that the judgment is in full force. *In re Estate of Schuette* 568

Jury.

An action to quiet title is triable by the court. *Frank v. Smith* 382

Justices of the Peace.

1. Under the Constitution, the legislature has power to abolish justice courts only as an incident to exercise of the power to substitute "other courts" for justice courts. *State, ex rel. Woolsey, v. Morgan* 635
2. A court which is substituted for a justice court must be one which has the jurisdiction and performs the functions of a justice court. *State, ex rel. Woolsey, v. Morgan* 635
3. The use of the words "substituted by law" in the act creating a municipal court for justices of the peace and police judge did not validate the act, where the purpose was to abolish justice courts. *State, ex rel. Woolsey, v. Morgan* 635
4. The municipal court of the city of Lincoln is a city tribunal, and is not such a court as may be substituted for justices of the peace in precincts in Lancaster county outside the city of Lincoln. *State, ex rel. Woolsey, v. Morgan* 635

Landlord and Tenant.

1. The relation between landlord and tenant does not permit the tenant to obtain an independent title to the land through tax sale. *Macumber v. Gillett* 714
2. A tenant cannot hold realty adversely to his lessor until he surrenders possession or by some unequivocal act notifies the lessor that he no longer holds under the lease. *Kennedy v. Gottschalk* 842

Larceny.

1. Conviction for cattle stealing sustained. *Taylor v. State* 156
2. In prosecution for larceny, nonconsent of the owner of stolen property may, in a proper case, be inferred from circumstances. *Holthus v. State* 200
3. Evidence *held* sufficient to sustain conviction for chicken stealing. *Wiese v. State* 685

Licenses.

The power to require a license for and to regulate the conduct of private employment agencies is distinct from the power to fix prices. *State, ex rel. Western Reference & Bond Ass'n, v. Kinney* 574

Life Estates.

1. Though a remainderman has the right under statute to bring suit to quiet title during pendency of the life estate, he is not required to do so in order to protect his remainder estate from a claim of adverse possession made by a grantee of the life estate who is in possession under the grant. *Maxwell v. Hamel* 49
2. The period for which adverse possession may be computed begins from the date when a right of entry and a right of possession exist, and not from the date when the remainderman has a right to bring suit to quiet title as to his future interest. *Maxwell v. Hamel* 49
3. One holding realty by permissive possession under a conveyance from a life tenant cannot hold adversely as against the remainderman during the period of the life tenancy, where both the remainderman and the alleged adverse possessor are without actual notice of the rights of the remainderman in the premises. *Maxwell v. Hamel* 49

Limitation of Actions.

1. In action against school district on invalid warrant, school district has right to rely on limitations as a defense. *Pollock v. Consolidated School District* 315
2. Limitations begin to run against the obligation evidenced by an invalid, registered school district warrant from date of any payment made on it. *Pollock v. Consolidated School District* 315
3. Limitations do not run against an amended pleading setting forth a more complete statement of the original cause of action. *Macumber v. Gillett* 714

Lis Pendens.

1. The filing and recording of a *lis pendens* does not give notice of rights under a cause of action not pleaded. *Coffin v. Old Line Life Ins. Co.* 857
2. The scope of a *lis pendens* is determined by its purpose, and it has no application to independent titles not derived from any parties to the suit or in succession to them. *Coffin v. Old Line Life Ins. Co.* 857
3. A sale for taxes is based on grounds which are adverse to all parties to an action involving the title, and hence the filing of a *lis pendens* does not make the purchaser at the tax sale a purchaser *pendente lite*. *Coffin v. Old Line Life Ins. Co.* 857
4. The purpose of the rule as to *lis pendens* is to prevent third persons, during pendency of the litigation, from acquiring interests in the land which would preclude the

court from granting the relief sought. *Coffin v. Old Line Life Ins. Co.* 857

Mandamus.

1. To warrant issuance of a writ of mandamus against an officer to compel him to act, the duty must be imposed on him by law, must exist when the writ is applied for, and must be clear. *State, ex rel. Cary, v. Cochran* 163
2. Issuance of a writ of mandamus is within the sound judicial discretion of the court. *State, ex rel. Cary, v. Cochran* 163
3. Generally, a court will not issue a writ of mandamus where the alleged failure to act is general and not specific, and where the dereliction of duty is not clearly shown to exist at time application for writ is made. *State, ex rel. Cary, v. Cochran* 163
4. An action for a writ of mandamus will not lie against the department of insurance, or its officers, to compel approval of a form rider to a life policy, which does not state in concise terms the exact coverage prescribed by existing statutes. *State, ex rel. Republic Nat. Life Ins. Co., v. Smrha* 484
5. Mandamus will issue against a public officer to compel performance of a clear, existing duty imposed by law. *State, ex rel. Cashman, v. Carmean* 819
6. A mayor's statutory duty to certify to the governor the fact of decrease in city's population is ministerial and will be enforced by mandamus. *State, ex rel. Cashman, v. Carmean* 819

Master and Servant.

1. An injured workman who has duly made claim for compensation against his employer is not required to make a separate claim against a village to fix its liability for failing to require the employer to carry compensation insurance. *Dobesh v. Associated Asphalt Contractors* 117
2. A governmental agency of the state which fails to require a contractor to carry compensation insurance is liable to a compensation claimant. *Dobesh v. Associated Asphalt Contractors* 117
3. Mere suspicion that an employee simulated an automobile accident to procure workmen's compensation is not sufficient to defeat a claim therefor. *Klement v. H. P. Lau Co.* 144
4. Fee of $150 for employee's attorneys in a compensation case was not excessive. *Klement v. H. P. Lau Co.* 144
5. Evidence justified award of compensation for 300 weeks

for permanent partial disability of 35 per cent. caused by an accidental injury. *Klement v. H. P. Lau Co.* 144

6. Evidence sustained district court's finding that compensation claimant failed to show disability arising out of and in the course of his employment. *Hart v. American Community Stores Corporation* 149
7. Where an employee, to accomplish a private purpose wholly unconnected with the employer's business, creates the necessity for a trip in an automobile which would not otherwise have been taken, injuries occurring on such trip are not compensable under the workmen's compensation law. *Weideman v. Milburn & Scott Co.* 205
8. A city is not liable for injuries to an employee on a Works Progress Administration project in the city, where the administration controls details of the work and directs the mode and manner of doing it. *Williams v. City of Wymore* 256
9. In a personal injury action against a gas company and its employee, exoneration of the employee by the jury did not relieve the company from liability. *Fonda v. Northwestern Public Service Co.* 262
10. Where judgment for claimant in compensation case is affirmed on appeal in the supreme court, a reasonable attorney's fee is taxable against employer as costs. *Chatt v. Massman Construction Co.* 288
11. A preponderance of evidence is sufficient to establish complainant's claim in a compensation case. *Chatt v. Massman Construction Co.* 288
12. Dependents of claimant who fell into cold water thereby suffering a shock which reanimated a dormant disorder resulting in death were entitled to compensation under the workmen's compensation law. *Chatt v. Massman Construction Co.* 288
13. A deposition read in evidence in a compensation court is admissible on trial of the case on appeal in district court, though not previously filed in office of clerk of district court. *Chatt v. Massman Construction Co.* 288
14. The liability imposed by the federal employers' liability act is liability for negligence of a common carrier for damages to any person injured while in the carrier's employ in commerce between states, resulting, in whole or in part, from negligence of the carrier's officers, agents or employees. *Chambers v. Chicago, B. & Q. R. Co.* 490
15. An employee assumes the ordinary risks of his employment and unusual risks which he knows and appreci-

ates, or which an ordinarily prudent man would have known and appreciated. *Chambers v. Chicago, B. & Q. R. Co.* 490

16. Evidence authorized award of compensation for temporary total disability from a nerve pressure occasioned by a traumatic injury. *Hansen v. Paxton & Vierling Iron Works* 589
17. An employee will not be deprived of compensation because he has violated a rule which has fallen into disuse with the employer's knowledge. *Hansen v. Paxton & Vierling Iron Works* 589
18. The workmen's compensation law contains nothing to prevent an employee from receiving compensation for temporary total disability to perform duties in which he is engaged at time of an accident, merely because he is then receiving an unrelated allowance for permanent partial disability from a previous accident. *Hansen v. Paxton & Vierling Iron Works* 589
19. To entitle claimant to compensation, it was sufficient to show that injury and preexisting disease combined to produce disability, and it was not necessary to prove that the injury accelerated or aggravated the disease. *City of Omaha v. Casaubon* 608
20. The unemployment compensation law does not change the common-law definition of "independent contractor." *Hill Hotel Co. v. Kinney* 760
21. "Independent contractor" defined. *Hill Hotel Co. v. Kinney* 760
22. Compensation claim of an employee of an independent contractor engaged for specific services at a fixed price, who hired his own employees, paid and controlled them in performance of their duties without interference of others, was not allowable against the employer of the independent contractor. *Hill Hotel Co. v. Kinney* 760
23. In action by musician against hotel for compensation for injury, evidence established the fact that the orchestra leader was an independent contractor, and the musician was not an employee of the hotel. *Hill Hotel Co. v. Kinney* 760

Mortgages.

1. Confirmation in 1939 of a judicial sale held in 1936 was proper, where it did not appear that a resale would obtain a higher bid, and the sale was otherwise regular. *Equitable Life Assurance Society v. Buck* 203
2. A mortgage foreclosure sale of realty will not be set aside on appeal for inadequacy of price, in absence of

showing of fraud, or shocking discrepancy between value and sale price, or prospect of a higher bid in event of resale. *Equitable Life Assurance Society v. Buck* 203
Home Owners Loan Corporation v. Richards 333
Woodard v. Billingsley 707
Lincoln Nat. Life Ins. Co. v. Curry 741

3. In a suit to foreclose a mortgage given to secure payment of a note, possession and production of the note for cancelation are not required as a basis for a decree, but plaintiff must prove ownership of the debt, and that the note has not been disposed of. *Boehmer v. Heinen* 376
4. While section 20-2141, Comp. St. Supp. 1939, denies a deficiency judgment in a mortgage foreclosure suit, it leaves unaffected other remedies for collection of the debt. *Federal Farm Mtg. Corporation v. Claussen* 518
5. The purpose of section 20-2142, Comp. St. 1929, is to prevent the prosecution of proceedings at law to recover the debt concurrently with proceedings to foreclose the mortgage. *Federal Farm Mtg. Corporation v. Claussen* 518
6. Section 20-2142, Comp. St. 1929, does not allow an action at law on the note and also one in equity to foreclose the mortgage at one and the same time, unless authorized by the court. *Federal Farm Mtg. Corporation v. Claussen* 518
7. After a mortgagee has exhausted his remedy for foreclosure, an action at law may be had to collect any deficiency on the debt, without securing permission of the equity court. *Federal Farm Mtg. Corporation v. Claussen* 518
8. Evidence sustained finding that second mortgagee had waived deficiency judgment against second mortgagor for a consideration. *Shurtleff v. Forney* 600
9. Confirmation of mortgage foreclosure sale will not be reversed for inadequacy of price, in absence of showing of fraud, or shocking discrepancy between value and sale price, or prospect of a higher bid on a resale. *Forsythe v. Bermel* 802

Municipal Corporations. SEE MANDAMUS, 6.

1. A city of the metropolitan class has discretionary power to create a sewerage district and construct therein a sewerage system. *Wilson v. City of Omaha* 13
2. A city of the metropolitan class is not liable for damages caused by surface water because of insufficient capacity of storm sewers. *Wilson v. City of Omaha* 13
3. Evidence did not establish actionable negligence of city of Omaha in the construction and maintenance of a sewerage system. *Wilson v. City of Omaha* 13

4. A city cannot contract away powers conferred upon it by statute in the interest of the taxpayers. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
5. Future city councils cannot be legally bound to a price fixed in advance for an electric light and power system, where the statute leaves determination of reasonableness of the price to be fixed at time of determination by the city to buy the system. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
6. A municipality is bound by contracts relating to its business or proprietary interests, even though such contracts may continue long after the officers signing them have gone out of office. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
7. A revenue bond is a negotiable obligation, payable entirely from the revenues of a public utility. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
8. Revenue bonds do not come within constitutional provisions limiting the amount of indebtedness of a city. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
9. The purchase of an electric system by a city is not entered into by virtue of its governmental functions, or under its police power, but as a municipal business enterprise. *State, ex rel. Consumers Public Power District, v. Boettcher* 22
10. A conveyance of realty to a city for park purposes for the benefit of the public without charge is a governmental or legislative function. *Leidigh v. City of Nebraska City* 136
11. The mayor and commissioners of a city could not purchase realty for park purposes by deed providing for instalment payments by city beyond respective terms of office of such officers. *Leidigh v. City of Nebraska City* 136
12. A municipal corporation is a creature of the law established for special purposes, and its corporate powers must be conferred and its acts authorized, either expressly or by fair implication, by its charter or the laws which created it. *Falldorf v. City of Grand Island* 212
13. Municipal corporations do not possess inherent power to levy special assessments. *Falldorf v. City of Grand Island* 212
14. The power conferred on municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and the exercise of the power must be confined within the general principles of the applicable law. *Falldorf v. City of Grand Island* 212

15. Where statutes and city home rule charter fixed interest and penalties to be charged on delinquent special assessments, the city could not by general ordinance remit and cancel interest and penalties and accept original amount of the assessment in settlement, in absence of a grant of special power. *Falldorf v. City of Grand Island* 212
16. The policy of the law is not to prevent a public administrative body from properly exercising its discretion in administering affairs committed to its charge for the best interests of the municipality that it represents. *Best v. City of Omaha* 325
17. In absence of controlling legislative or judicial direction, a public administrative body, when acting within limits of its general powers, has the power to determine questions of public policy that primarily concern its municipality. *Best v. City of Omaha* 325
18. In absence of specific statutory direction, a city council, in specifications for public works, may permit bidders to propose and fix a time for completion of the proposed works. *Best v. City of Omaha* 325
19. In absence of specific statutory direction, a city council may reserve the right to omit any or all separate items from a contract for which separate price proposals are asked after the bids are opened and before the contract is awarded. *Best v. City of Omaha* 325
20. Public administrative bodies possess a discretionary power in awarding contracts, in considering the responsibility of bidders, and in determining questions of public advantage and welfare. *Best v. City of Omaha* 325
21. Where an administrative body acts in good faith in awarding a contract, a court will not substitute its judgment for that of the administrative body. *Best v. City of Omaha* 325
22. Excessive valuation of property for purpose of taxation, as determined by city assessor and city board of equalization, may be corrected by proceedings in error to the district court. *Eppley Hotels Co. v. City of Lincoln* 347
23. Where a city without consent of or compensation to the owner of residential property erects and maintains a nuisance on adjacent property, it is liable to respond in damages. *Walling v. City of Fremont* 399
24. In an action against a city for damages for maintaining a nuisance, instructions sufficiently defined and described the nuisance. *Walling v. City of Fremont* 399
25. Where, in an action against a city for damages for maintenance of a nuisance, a nuisance is found to exist

by the establishment and operation of a coal yard, an instruction to the jury that, if they find from the evidence that the nuisance would impair the market value of plaintiff's property, then such injury to the market value of the premises is permanent, and damages may be based on such depreciation in the market value as they find results from the nuisance, was proper. *Walling v. City of Fremont* 399

26. The initiative and referendum law for the city of Scottsbluff was properly adopted. *Webber v. City of Scottsbluff* 416
27. A city zoning ordinance based alone on æsthetic standards is void as beyond the police power of the city. *Baker v. Somerville* 466
28. Each city in the state containing the population required by statute becomes a city of the second class without any action being taken by the municipality except certification by the mayor as designated by statute. *State, ex rel. Cashman, v. Carmean* 819
29. Statutes pertaining to classification of cities do not conflict with statute requiring mayor of city of first class to certify to governor decrease in population to less than minimum required for city of first class. *State, ex rel. Cashman, v. Carmean* 819

Negligence.

1. In an action for injuries sustained in an automobile collision, plaintiff was guilty of sufficient negligence as a matter of law to bar recovery. *Whittaker v. Hanifin* 18
2. Where the evidence shows beyond reasonable dispute that plaintiff's negligence was more than slight as compared with defendant's negligence, the jury should be instructed to find for defendant. *Whittaker v. Hanifin* 18
3. One who voluntarily walks about in total darkness in a strange place must of necessity know that he faces the danger of obstructions and injury. *Wentink v. Traphagen* 41
4. Darkness alone calls on a person to exercise greater caution for his own safety than is ordinarily required. *Wentink v. Traphagen* 41
5. One entering an unfamiliar dark space does so at his own risk, and, if accident and injury follow, he is guilty of negligence, as a matter of law, which bars recovery. *Wentink v. Traphagen* 41
6. The exposure of oneself to danger in a reasonable effort to save a third person or his chattels from harm is not contributory negligence. *Wolfinger v. Shaw* 229
7. To relieve oneself from a charge of contributory negli-

gence as a matter of law for attempting to save persons or property from harm, it is sufficient if to a reasonably prudent person the existing circumstances create apprehension of danger. *Wolfinger v. Shaw* 229

8. The less the danger to a third person or property, the less the risk which a party may encounter in acting to save life or property without becoming guilty of contributory negligence. *Wolfinger v. Shaw* 229
9. Plaintiff in a personal injury action is not bound to exclude possibility that the accident might have happened in some other way, but is only required to show by fair preponderance of evidence that the injury occurred in the manner claimed. *Fonda v. Northwestern Public Service Co* 262
10. Negligence is want of that degree of care that an ordinarily prudent person would have exercised under the same circumstances. *Bohmont v. Moore* 784
11. Negligence consists of doing what a reasonable, prudent person would not have done or in not doing what a reasonable, prudent person would have done under the circumstances. *Blanton v. Michael, Swanson & Brady Produce Co* 883

New Trial.

1. A new trial on the ground of newly discovered evidence is properly denied, where it is not shown that the facts constituting the newly discovered evidence can be established by anything but hearsay. *Jacobson v. Forster* 452
2. No affidavit, deposition or other sworn statement of a juror will be received to impeach or explain a verdict, show on what grounds it was rendered, or mistake therein, or that jurors misunderstood the charge or mistook the law or result of the finding, as such matters inhere in the verdict. *Carpenter v. Sun Indemnity Co* 552
3. Affidavits or testimony of jurors will not be received to impeach or avoid verdict in respect to matters inhering in the verdict. *Carpenter v. Sun Indemnity Co.* 552

Nuisance.

Where one creates and maintains a nuisance which permanently injures adjacent residence and business property, the owner is entitled to be compensated, and the proper measure of damages is the difference between the fair and reasonable market value thereof immediately prior to time injury occurred and immediately after injury became complete, and the measure for like injury to the stock of merchandise is the difference between the fair and reasonable market value immediately be-

fore the injury and immediately after the injury became complete. *Walling v. City of Fremont* 399

Officers.

1. Where a public officer gives a bond for faithful discharge of his duties, "faithful" implies that he has assumed that measure of responsibility laid on him by law had no bond been given. *Thurston County v. Chmelka* 696
2. Where an officer charged with custody of public funds serves successive terms, he is presumed to have received in his new official capacity that which it was his duty to pay in his old, and hence sureties on his bond for the second term are *prima facie* responsible for such balance. *Thurston County v. Chmelka* 696

Pardon.

The board of pardons in paroling a prisoner may permit him to go outside the state and still retain jurisdiction over him. *Bartel v. O'Grady* 184

Payment.

Payment is an affirmative defense and must be pleaded. *Burke v. Munger* 74

Pleading.

1. A party may invoke the language of his opponent's pleading as rendering facts indisputable, and in doing so he is neither required nor allowed to offer the pleading in evidence in the ordinary manner. *Provident Savings & Loan Ass'n v. Booth* 424
2. A motion for judgment on the pleadings admits only facts well pleaded, but does not admit conclusions. *State, ex rel. Western Reference & Bond Ass'n, v. Kinney* 574

Principal and Agent.

1. A principal is not answerable for unauthorized fraud or misrepresentation of his agent. *Steunenberg v. National Progressive Life Ins. Co.* 240
2. The rule that an agent's knowledge is imputed to his principal does not apply where the agent is engaged in an independent fraudulent scheme without the scope of the agency. *Steunenberg v. National Progressive Life Ins. Co.* 240

Quieting Title.

Statutes authorizing suits to quiet title are enabling acts, and where authorizing suit, by one out of possession, are intended to enlarge the equitable remedy, and are not penal, restrictive, nor destructive. *Maxwell v. Hamel* 49

Railroads.

1. Evidence did not sustain verdict for plaintiff in an action to recover damages for alleged negligence of a railroad company in blocking, without proper signals, a public street with a freight car, where a truck driver negligently ran his truck into the freight car at night and killed his guest passenger, for whose death the action was instituted. *Fischer v. Megan* 420
2. The Nebraska state railway commission has power to determine a properly presented issue on application of a railroad company for permission to discontinue motor passenger trains on a branch line of railroad. *In re Application of Chicago, B. & Q. R. Co.* 767
3. The only question for determination on appeal to the supreme court from an order of the Nebraska state railway commission is the sufficiency of evidence to prove that the order is not unreasonable or arbitrary. *In re Application of Chicago, B. & Q. R. Co.* 767
4. A final order of the Nebraska state railway commission denying a railroad company permission to discontinue motor passenger trains operated at a loss is unreasonable and arbitrary if based on findings without support in evidence. *In re Application of Chicago, B. & Q. R. Co.* 767
5. Anything which tends to cripple seriously or destroy an established system of transportation that is necessary to a community is not a convenience and necessity for the public. *In re Application of Chicago, B. & Q. R. Co.* 767
6. In determining the necessity for continued operation of motor passenger trains on a branch line of railroad, consideration should be given to the public rather than to individuals. *In re Application of Chicago, B. & Q. R. Co.* 767
7. The loss of railroad transportation occasioned by operation of motor vehicles on highways constructed at public expense may properly be considered on a contested application to discontinue motor passenger trains operated at a loss on a branch line of railroad. *In re Application of Chicago, B. & Q. R. Co.* 767
8. Motor passenger trains operated on a branch line of railroad at a loss may properly be discontinued where adequate public transportation is otherwise furnished, though the main line is operated at a profit. *In re Application of Chicago, B. & Q. R. Co.* 767
9. An order of the Nebraska state railway commission denying permission to discontinue motor passenger trains on a branch line of railroad was based on findings with-

out support in evidence, and was unreasonable and arbitrary. *In re Application of Chicago, B. & Q. R. Co.* 767

Rape.

Sentence reduced from 15 to 5 years. *Guerin v. State* 724

Receiving Stolen Goods.

Sentence of four years for receiving stolen goods of the value of $41.75 *held* excessive. *Cornell v. State* 708

Sales.

Whether buyer's default justified seller in terminating contract was question for jury. *Sonken-Galamba Corporation v. Alpirn* 96

Schools and School Districts.

1. A school district's treasurer is authorized to register warrants only where no other reason exists for their nonpayment except that there are insufficient funds on hand to the credit of the proper fund with which to pay them. *Pollock v. Consolidated School District* 315
2. A school district warrant is a nonnegotiable instrument. *Pollock v. Consolidated School District* 315
3. Treasurer of school district is authorized to make payment on a warrant as such only when it is executed by the officers vested with authority to direct payment of the district's funds by that means. *Pollock v. Consolidated School District* 315
4. A school district's warrant which is not executed in accordance with statutory requirements is not entitled to registration. *Pollock v. Consolidated School District* 315
5. A school district warrant which is invalid simply evidences and converts into written form the obligation of the transaction out of which it arose. *Pollock v. Consolidated School District* 315
6. A school treasurer who succeeds himself in office should require first term balances in banks to be paid to him in money or its equivalent, but that he did not require payment to be so made does not *ipso facto* relieve him or his surety from liability for loss of the funds. *Thurston County v. Chmelka* 696
7. Where a school treasurer who succeeded himself in office deals with bank deposits of his first term as funds of his office for the second term and a loss results, the treasurer and his surety for the second term are liable, unless it be shown that the loss was complete during the first term. *Thurston County v. Chmelka* 696
8. A school treasurer must pay to his successor money

remaining in his hands at conclusion of his term, and his successor must require payment in money. *Thurston County v. Chmelka* 696

9. The guaranty required by statute and bond of "faithful" discharge of duties of school treasurer is a guaranty not only of personal honesty, but of competency, skill, and diligence in discharge of duties. *Thurston County v. Chmelka* 696
10. A school treasurer and his surety are accountable therefor as "insurers" of money received by the treasurer, except as relieved by statute. *Thurston County v. Chmelka* 696
11. The obligee of bond for second term of school treasurer who succeeds himself in office may recover for breach of duty during second term, though there may have been a different breach of duty by treasurer during first term arising out of handling of funds in such manner that surety of first term might be liable. *Thurston County v. Chmelka* 696

States.

The legislature has power to make expenditures for advertising the resources of the state. *Power Oil Co. v. Cochran* 827

Statutes.

1. Where there are different statutes *in pari materia*, though enacted at different times, or even expired or repealed, they shall be interpreted as one system. *In re Estate of Robinson* 101
2. Whatever has been determined in the interpretation of one of several statutes *in pari materia* is a sound rule of interpretation for the others. *In re Estate of Robinson* 101
3. In enacting a statute, the legislature must be presumed to have had in mind all previous legislation on the subject, and hence the court in the construction of a statute must consider previous legislation relating to the same subject, as well as the general policy which such legislation discloses. *In re Estate of Robinson* 101
4. If a law affects equally all persons who come within its operation, it is not a local or special law, within the meaning of the Constitution. *Bauer v. State Game, Forestation and Parks Commission* 436
5. A statute is not a special or local law merely because it prohibits doing a thing in a certain locality. *Bauer v. State Game, Forestation and Parks Commission* 436
6. If an act has but one general object, and contains no

matter not germane thereto, and the title fairly expresses the subject of the act, it does not violate the section of the Constitution providing that no bill shall contain more than one subject and that the same shall be clearly expressed in the title. *Beisner v. Cochran* 445

7. The section of the Constitution relating to amendments to statutes has no application to an act complete in itself and not in effect amendatory, even though it may modify or destroy the effect of previous legislation. *Beisner v. Cochran* 445

8. Statutory requirements that a form of initiative petition and names of those sponsoring the petition or contributing to the cost thereof be filed with the secretary of state before circulation of the petitions tend to facilitate operation of the initiative power, within the purview of the Constitution. *State, ex rel. Winter, v. Swanson* 597

9. Statutory requirements enacted to facilitate the exercise of initiative power by providing safeguards against fraud and deception are mandatory. *State, ex rel. Winter, v. Swanson* 597

10. A statute may adopt part or all of another statute by specific reference thereto. *Adams v. State* 613

11. The statute defining the offense of larceny by bailee merely incorporated by reference the penalty provision of the general statute on larceny and is not invalid as an amendatory statute. *Adams v. State* 613

12. In the construction of a statute, effect must be given, if possible, to its several parts, and no sentence, clause or word should be rejected, if it can be avoided, but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account in order to determine the legislative will. *In re Estate of Edwards* 671

13. The word "may," when used in a statute to impose a duty or delegate a power, the performance of which involves protection of public or private interests, will be read as "must" and construed as mandatory. *State, ex rel. Cashman, v. Carmean* 819

Taxation.

1. Where foreclosure of tax sale certificate is brought by a county and confirmed, subject to right of redemption, and application to redeem is filed and with it tendered to clerk of court amount for which realty was sold, together with interest at 12 per cent. from date of sale, and costs of suit, redemption may be had. *Lincoln County v. Shuman* 84

2. Sale of land to satisfy a tax sale certificate does not constitute a release or commutation of taxes. *Lincoln County v. Shuman* 84
3. A county may foreclose a tax sale certificate as provided in section 77-2041, Comp. St. 1929, or it may foreclose a tax lien as provided in section 77-2039, Comp. St. 1929. *Lincoln County v. Shuman* 84
4. Statutes exempting legacies from an inheritance tax should be strictly construed, and to be exempt a legacy must come within the strict letter of the statute. *In re Estate of Robinson* 101
5. While amounts paid on tax sale cannot ordinarily be made the subject of set-off in a suit by landlord against tenant to redeem, they may properly be set off by a court of equity against rents due landlord from tenant. *Macumber v. Gillett* 714
6. A suit to set aside a tax deed and redeem property from tax sale may be commenced before taxes due on the property are paid, but taxes due must be paid before entry of decree. *Macumber v. Gillett* 714
7. The title conveyed under a tax sale is an independent, perfect title to the land and cut off from every other claim or equity existing against it. *Coffin v. Old Line Life Ins. Co.* 857
8. The lien for taxes is not satisfied by a statutory sale of the property; the sale only operates to transfer the lien to the purchaser. *Coffin v. Old Line Life Ins. Co.* 857
9. Tax liens take priority in reverse order of other liens, so that taxes levied and assessed for general revenue purposes constitute a lien superior to the lien of a tax sale certificate issued prior thereto. *Coffin v. Old Line Life Ins. Co.* 857
10. The state board of equalization, in equalizing valuation of farm lands as between counties, is not required to have a formal hearing, to examine witnesses, or to base its action on any particular kind of evidence. *Boyd County v. State Board of Equalization and Assessment* 896
11. It is the duty of the state board of equalization to equalize assessments of farm lands of the various counties, as shown by the abstracts of assessments. *Boyd County v. State Board of Equalization and Assessment* 896
12. The statute dealing with the meetings of the state board of equalization and assessment does not require that board to determine, at a preliminary meeting, the exact amount of increase or decrease which should be made in the assessment of farm lands returned by the various counties, and to notify each county that a further meet-

ing will be held to determine whether such increase or decrease is justified. *Boyd County v. State Board of Equalization and Assessment* 896

13. Notice of meeting of the state board of equalization and assessment *held* sufficient. *Boyd County v. State Board of Equalization and Assessment* 896
14. Where a county had actual notice of a meeting of the state board of equalization and its legal representatives attended the meeting and took part in the proceedings, the county is not prejudiced by alleged insufficient service of notice of the meeting. *Boyd County v. State Board of Equalization and Assessment* 896
15. Since the statute does not require any particular method of procedure to be followed by the state board of equalization in equalizing assessment of farm lands between counties, it may adopt any reasonable method for that purpose. *Boyd County v. State Board of Equalization and Assessment* 896
16. The statute does not require the state board of equalization to secure a stenographer and to make a complete record of its proceedings. *Boyd County v. State Board of Equalization and Assessment* 896

Trial. SEE APPEAL. CRIMINAL LAW.

1. An instruction which sets out a state of facts and authorizes a verdict for one of the parties on a finding of such facts is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, except where the omitted facts are conclusively established. *Sanders v. Chicago, B. & Q. R. Co.* 67
2. Where an instruction which sets out facts and authorizes a verdict on a finding thereof is complete in itself, error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery. *Sanders v. Chicago, B. & Q. R. Co.* 67
3. Where defendant moves for dismissal at close of plaintiff's evidence, he thereby admits truth of plaintiff's evidence, together with every conclusion which may be reasonably drawn therefrom. *Lucas v. Lucas* 252
4. Where defendant pleads a counterclaim, and on the conclusion of plaintiff's evidence procures dismissal of plaintiff's cause of action, he thereby waives his counterclaim. *Lucas v. Lucas* 252
5. Where instructions given, in their entirety, adequately state the law, they are sufficient. *Fonda v. Northwestern Public Service Co.* 262
6. Trial court's refusal to instruct on contributory negli-

gence, though pleaded, was not error, if the evidence failed to show contributory negligence. *Tarkington v. Northwestern Public Service Co.* 278

7. A defendant entitled to open and close oral arguments to the jury will be deemed to have waived the right, where he fails to request it. *Horney v. McKay* 309
8. Generally, a judgment will not be reversed for refusing to give tendered instructions, where the issues involved are covered by instructions given. *Miceli v. Equitable Life Assurance Society* 367
9. If plaintiff does not make a case for negligence in an action for resulting damages, it is error to submit that issue to the jury. *Fischer v. Megan* 420
10. An instruction on the measure of damages under the federal employers' liability act should include damages for future losses of earning power in the amount thereof reduced to its present worth, but where such language is omitted and a specific instruction is not requested, an instruction, general in terms, is not prejudicial. *Chambers v. Chicago, B. & Q. R. Co.* 490
11. Instructions which, when considered as a whole, properly state the law are sufficient. *Chambers v. Chicago, B. & Q. R. Co.* 490
12. Failure to give a tendered instruction is not reversible error, where the issue involved is covered by given instructions. *Preston v. Farmers Irrigation District* 504
13. In action on policy for death of insured, the trial court properly refused to give insurer's instruction that plaintiff's failure to call a certain physician as a witness was, under the facts, to be considered by the jury and to be given such weight as the jury might see fit. *Carpenter v. Sun Indemnity Co.* 552
14. The credibility of witnesses is for the jury. *Porterfield v. Buffalo County Public Power District* 720
15. An instruction on the pleas should contain a simple and concise summary of the pleadings. *Evans v. First Nat. Bank* 727
16. Where the liability of a bank sued for tort is dependent on the culpability of its president and cashier, who, in an action against them by the same plaintiff for the same act, have been adjudged not culpable, the bank is entitled to a directed verdict. *Bohmont v. Moore* 784
17. The giving of conflicting instructions is error. *Bohmont v. Moore* 784
18. The rule that a nonsuit should be directed, if the physical facts disprove plaintiff's case, is inapplicable where

there is substantial conflict in the evidence tending to prove the physical facts. *Hief v. Roberts Dairy Co.* 885

19. An instruction which conflicts with a proposition of law correctly stated in another instruction in the same charge on a vital issue of fact and tends to mislead the jury is erroneous. *Hief v. Roberts Dairy Co.* 885

Trusts.

1. Constructive trust defined. *Wilcox v. Wilcox* 510
2. Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, without memorandum evidencing the trust, and the transferee refuses to perform the trust, the transferee holds the interest on a constructive trust for the transferor, if the transfer was procured by fraud. *Wilcox v. Wilcox* 510

Vendor and Purchaser.

A purchaser of land, to justify a rescission on account of a misrepresentation, must show that it was material and misled him to his damage. *Dyck v. Snygg* 121

Venue.

An action for mandamus against administrative state officers to compel enforcement of irrigation laws to prevent unlawful diversions of water by junior appropriators was maintainable in the county where the resulting damages occurred. *State, ex rel. Cary, v. Cochran* 163

Warehousemen. SEE APPEAL, 21.

1. Where lessee of a safe deposit box sued lessor thereof for negligence, the burden of proving negligence was on lessee, and the burden did not shift, though the burden of producing evidence to overcome a *prima facie* case of negligence might rest on lessor. *Bohmont v. Moore* 784
2. The duty of a bank which rents safe deposit boxes is to exercise such care and diligence as a reasonably prudent person would exercise under like circumstances in safeguarding the contents of the safe deposit boxes. *Bohmont v. Moore* 784

Waters.

1. The state may regulate and control irrigation by virtue of its police power, to prevent waste, to protect senior appropriators against unlawful diversions by junior appropriators, and to enforce adjudicated water rights in accordance with their terms. *State, ex rel. Cary, v. Cochran* 163
2. Administrative state officers, in regulating irrigation,

perform ministerial duties only and must give recognition to vested rights of appropriators. *State, ex rel. Cary, v. Cochran* 163

3. Junior appropriators may use available water within the limits of their appropriation so long as the rights of senior appropriators are not injured or damaged. *State, ex rel. Cary, v. Cochran* 163
4. The use of water by a junior appropriator does not become adverse to or damage a senior appropriator until it results in a deprivation of his allotted amount. *State, ex rel. Cary, v. Cochran* 163
5. A senior appropriator is entitled to water as against an upstream junior appropriator as long as water in usuable quantities can be delivered to him. *State, ex rel. Cary, v. Cochran* 163
6. Whether a quantity of water passing a given point on a stream would, if not interrupted or diverted, reach a senior appropriator downstream is a complicated question of fact to be determined by proper administrative state officers, and unless such determination of fact be unreasonable and arbitrary, the findings are final and not subject to review by the courts. *State, ex rel. Cary, v. Cochran* 163
7. Where all available water passing a certain point on a stream would not, if not diverted or interrupted, reach a senior appropriator downstream, a junior appropriator may lawfully divert water within the limits of his appropriation, and such diversion is not in law out of priority diversions. *State, ex rel. Cary, v. Cochran* 163
8. The doctrine of reasonable use has no application where delivery of a usable quantity of water can be made to a senior appropriator downstream, even though the losses of water suffered in so doing are great. *State, ex rel. Cary, v. Cochran* 163
9. Though the duty of administrative state officers is to enforce existing priorities as adjudicated, yet, in regulating distribution of water, they may determine as an incident to such regulation whether a senior appropriator is injured by a diversion above him. *State, ex rel. Cary, v. Cochran* 163
10. Evidence, in mandamus action to determine water rights, did not show that relator power company had waived or abandoned any part of its appropriation for power purposes. *State, ex rel. Cary, v. Cochran* 163
11. Accretion is the process of gradual addition of solid material, called alluvion, so as to extend the shore line out by deposits made by contiguous water, or by relic-

tion, the gradual withdrawal of the water from the land. *Frank v. Smith* 382
12. Where, by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the river and leaving land dry that was theretofore covered by water, such land belongs to the riparian owner. *Frank v. Smith* 382
13. The fact that accretion is due, in whole or in part, to obstructions placed in a river by third parties does not prevent the riparian owner from acquiring title thereto. *Frank v. Smith* 382
14. Where the thread of the main channel of a river is the boundary line between two estates and it changes by processes of accretion and reliction, the boundary follows the channel. *Frank v. Smith* 382
15. In action for damages for failure of irrigation company to deliver irrigation water as required by water-right contract, it was no defense that plaintiff had not joined in or contributed to expense of litigation resorted to by irrigation company to maintain its appropriation rights. *Preston v. Farmers Irrigation District* 504
16. An irrigation company which seeks, on ground of deficient water supply, to excuse its failure to deliver water pursuant to its contract obligation has the burden of proving such defense. *Preston v. Farmers Irrigation District* 504
17. In action against irrigation company for damages occasioned by its failure to deliver water pursuant to its contract, plaintiff establishes a *prima facie* case by proving company's failure to deliver the required quantity of water and extent of damage to his crops and land from such failure. *Preston v. Farmers Irrigation District* 504
18. In action against irrigation company for failure to deliver water, plaintiff was not required to adapt his proof of damages to the factors of excuse relied on by the company, where the acceptance and effect of those factors are wholly matters for jury's determination. *Preston v. Farmers Irrigation District* 504
19. The sources and conditions of water supply in Nebraska probably require that the court recognize as a supervening impossibility, excusing nonperformance of an irrigation company's contract obligation to furnish water, any natural failure of water supply. *Preston v. Farmers Irrigation District* 504
20. The measure of damages for permanent taking of land by seepage of water from reservoir of power district is

the difference between the reasonable market value of land taken, including improvements thereon, before and after the damages occurred. *Asche v. Loup River Public Power District* 890

21. Separate items of damage to land from seepage may not be shown if they constitute but parts of the permanent damage to the land itself. *Asche v. Loup River Public Power District* 890

22. A public power district maintaining a reservoir from which water seeped to adjacent lands was answerable for such damage as was a natural consequence thereof. *Asche v. Loup River Public Power District* 890

Wills.

1. Where testatrix devised a life estate in realty to her son, and, at his death, to his "heirs at law," the word "heirs" is a word of limitation and the son is vested with a fee in the realty. *O'Shea v. Zessin* 380

2. The life beneficiary of a testamentary trust for payment of income is entitled to the income from date of testator's death, unless it is otherwise provided in the will, even though the trust assets are part of the residuary estate, not capable of being determined or turned over to the trustee until administration of the estate is completed. *Folsom v. Strain* 497

3. The life beneficiary of a testamentary trust for the payment of income is not entitled to the income on assets which are subsequently used to pay debts, legacies, and expenses of administration, and which do not become part of the residuary estate. *Folsom v. Strain* 497

4. The expression "unless it is otherwise provided in the will," with reference to payment of income on bequest from date of testator's death, means provision fixing a different date, or other specific disposition of the income, or nullification of right to income from date of testator's death. *Folsom v. Strain* 497

5. Life beneficiary of income was entitled to income accumulating on assets allocated by trustees to trust of which he was life beneficiary, from date of testatrix's death, though the trust could not be set up until administration had been completed. *Folsom v. Strain* 497

6. Where a provision in a will is couched in correct grammatical language, it will be given the ordinary and natural meaning which that language imports, unless it clearly appears from the whole instrument that a different meaning was intended. *In re Estate of Schuette* 568

7. In construing a will, relevant circumstances surrounding

the testator at the time of its execution will be considered. *In re Estate of Schuette* 568
8. Devise to "children of my deceased brother" *held* not to include grandchildren. *In re Estate of Schuette* 568
9. Parol evidence is inadmissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity therein which makes his intent obscure or uncertain. *Martens v. Sachs* 678
10. In construing a will, the court is required to give effect to the testator's intent, as collected from the whole instrument, if such intent is consistent with rules of law. *Martens v. Sachs* 678
11. Refusal of a devisee to accept the devise on condition of payment of certain amounts to his brother and sisters will not affect the charge of the legacies on the realty so devised. *Martens v. Sachs* 678
12. Where realty is devised on condition that devisee pay his brother and sisters specific amounts of money, the realty is charged with payment of those legacies. *Martens v. Sachs* 678
13. Where an appeal bond, given in a probate proceeding, does not conform to statute, but is sufficient as a cost bond, it may be amended by obtaining leave of the district court upon perfection of the appeal within the required time. *In re Estate of McLean* 752
14. Proceedings to modify a judgment disallowing a will on the ground of fraud practiced by the successful party must be commenced within two years from rendition of the judgment, unless, in the exercise of reasonable diligence, the fraud was not discovered within that period. *In re Estate of McLean* 752
15. Where probate of a will, which contains an unexecuted testamentary trust, is contested in good faith, a family settlement under which the will is not admitted to probate is valid in absence of misrepresentation. *In re Estate of McLean* 752

Witnesses.

1. Cross-examination is a leading and searching inquiry of the witness for further disclosure touching the particular matters detailed in direct examination. *Seiner v. State* 130
2. Questions calling for evidence tending to show the improbability of, or to throw doubt on, statements made in the examination in chief are proper on cross-examination. *Seiner v. State* 130
3. Wide latitude should be given in cross-examination, but the court should not permit needless repetitions, nor al-

low counsel to make out his case in chief by cross-examination of opponent's witnesses. *Seiner v. State*.... 130
4. Where a witness has made a written statement before trial, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement. *Cornell v. State*.... 708