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FLORENCE MAY CLARK, APPELLANT, V. EDWARD PATRICK CLARK, APPELLEE.

297 N. W. 661

FILED APRIL 25, 1941. No. 30926.

1. **Divorce.** Where a divorce decree provides for a payment of stipulated sums monthly for the support and maintenance of the wife and for the support, maintenance and education of minor children, contingent upon the further order of the court, such payments become vested in the payee as they accrue, and courts are without authority to reduce the amount of such accrued payments.
2. **Judgment.** Where parties, voluntarily or by acquiescence, try an issue not made by the pleadings to a court that has jurisdiction of the subject-matter, the parties, and the question decided or the relief granted, and evidence is adduced on such issue, which is determined by the court, and judgment is entered on this issue, from which no appeal is taken, and the term of court has ended, the judgment is binding on the parties.
3. **Appeal.** The district court does not have authority to determine an issue not pleaded and render a judgment thereon in an action where one of the parties to the judgment is not a party to the action nor before the court. Such a judgment must be reversed on appeal by a party against whom the judgment was rendered.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed.*

Hotz & Hotz and *Gordon Diesing*, for appellant.

L. B. McDonald, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

MUNDAY, District Judge.

The plaintiff, Florence May Clark, appellant herein, obtained a decree of divorce from the defendant, Edward Patrick Clark, appellee herein, on March 4, 1930. This decree, among other things, provided that the plaintiff should have custody of the children of the parties, namely, Janet Clark, then aged 16 years, and Edward Paul Clark, then aged 12 years; that the defendant should pay the plaintiff for her support and maintenance and for the support, maintenance and education of said children the sum of

$300 each and every month thereafter until further order of the court.

Since this decree was entered there have been several applications for orders, and hearings have been held and orders made. As this appeal is in part determined by these proceedings, it seems necessary to consider part of them. On August 26, 1930, defendant filed a motion asking for reduction in alimony payments from $300 per month to $250 per month. On August 29, 1931, a supplemental decree was entered providing the payments be reduced to $250 as of July 1, 1930. The decree recites that plaintiff and defendant were in court and represented by counsel. On November 6, 1935, defendant filed a motion asking for orders *nunc pro tunc,* one, as of June 25, 1932, when it was claimed an order was pronounced reducing the payments to $200 per month, the other, as of April 20, 1933, when it was claimed an order was pronounced reducing the payments to $150 per month. It was further claimed that, through inadvertence or neglect, these judgments were not reduced to writing or filed. On December 30, 1935, an order was made fixing the payments at $150 per month until a hearing could be had upon the merits of the above application for the *nunc pro tunc* orders, or until further order of the court.

On February 25, 1936, there was an order denying said *nunc pro tunc* application for orders, and a finding made in the order that there was an agreement made on or about June 25, 1932, whereby the $250 monthly payments, mentioned above, were to be reduced to $200 per month, and it was adjudged "that the amount of alimony to be paid as set out in the supplemental decree heretofore entered on or about the 10th (29th) day of August, 1931, providing for monthly alimony of two hundred and fifty dollars ($250) per month was by agreement of both parties reduced to two hundred dollars ($200) per month from date of June 25, 1932." There was also a finding in this order that the court made no finding as to any further reduction of alimony. The decree recites that plaintiff and defendant

were in open court and represented by counsel, and that the findings were made from evidence adduced.

On September 18, 1939, defendant again filed an application for modification of the decree and supplemental orders fixing the amount of alimony. On November 1, 1939, motion was made by plaintiff for an order requiring the defendant to show cause why he should not be punished for contempt for nonpayment of alimony. Citation issued on this last motion on the same day. On November 6, 1939, defendant filed an amended and supplemental application for modification of the decree and orders. On November 13, 1939, reply to the order to show cause was filed by the defendant. On the above pleadings trial was had, which resulted in the decree of January 20, 1940, which is now here for review.

In this amended application for reduction of the payment and in the reply, the defendant, after denying he was in default of payment of alimony, alleged, in substance: The provisions of the original decree, and the modification thereof on August 29, 1931, providing for reduction to $250 per month; that on June 25, 1932, by agreement of parties, payments were to be further reduced to $200 per month; that the defendant's income was reduced in 1932 and 1933; that an agreement for reduction of alimony payments to $150 a month was made on April 7, 1933, with the plaintiff's attorney, who agreed to the same out of court, and on behalf of the plaintiff; that defendant relied upon this agreement; that defendant made said reduced payments under the belief that the necessary legal arrangements by plaintiff's counsel would be carried out, and that plaintiff is now estopped from asserting further claims; that he has paid $150 per month since April 7, 1933; that his assets have depreciated in value; that his daughter was 21 years of age in 1934 and his son reached that age in 1939; that he has been under the doctor's care for the past two years and has been required to spend some time in the hospital for recovery.

In the decree of January 20, 1940, the trial court ordered:

"That the order of this court heretofore entered on the 1st day of November, 1939, be and hereby is vacated; that the defendant be and hereby is purged of any and all contempt in the premises; that the decree heretofore entered and orders entered subsequent thereto, be and hereby is modified according to the finding herein, and that in lieu of any and all alimony claimed by plaintiff to be due her as well as all future alimony, defendant pay to plaintiff the sum of $2,700 and no more, in payments of $75 per month beginning February 1, 1940.

"It is further ordered that defendant turn over to Edward Paul Clark the proceeds of said savings bank account in the Oneida New York bank in the sum of $196."

At the trial the court examined the evidence leading up to the original decree, and the evidence taken at hearings when subsequent applications were made for modifying the original decree. Also new evidence was adduced. This evidence is all in the bill of exceptions.

The plaintiff contends:

(1) The district court had no jurisdiction to set aside and to cancel out retroactively accumulated payments of alimony awarded under the original decree, and under the subsequent modifying orders of the original decree made by the court.

(2) The record does not justify the order relieving the defendant from paying alimony after the payment of $2,700 at $75 per month from February 1, 1940.

For cross-appeal the defendant alleged error by the court in ordering him to turn over to the son, Edward Paul Clark, the proceeds of a savings bank account in the sum of $196.

The law is well established in this state that instalments of alimony become vested as they accrue, and that past-due instalments become final judgments, and courts have no authority to cancel or reduce the amount of such accrued payments. *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428; *McIlwain v. McIlwain,* 135 Neb. 705, 283 N. W. 845; *Wassung v. Wassung,* 136 Neb. 440, 286 N. W. 340.

The rule is stated in 19 C. J. 359: "Payments exacted by the original decree of divorce become vested in the payee as they accrue, and the court, on application to modify such decree, is without authority to reduce the amounts or modify the decree with reference thereto retrospectively; the modifying decree relates to the future only and from the time of its entry."

While there is confusion in the record and it is not clear just what action was taken by the parties at some of the hearings, we are convinced, from a study of the record, that on August 29, 1931, a hearing was had, at which the parties and the counsel of each were present; that evidence was taken; that the court reduced the payments of $300 to $250 per month effective as of July 1, 1930; that there was no appeal from this order; that the term of court at which the order was granted has ended.

Also, that on February 25, 1936, another hearing was had, and the parties and counsel of each were present; that evidence was adduced; that the court made the order of February 25, 1936, above mentioned; that no appeal was taken from this order and the term of court at which it was made has expired. The evidence in the record at this last hearing shows that the issue as to whether this agreement for reduction of the alimony from $250 to $200 per month was made was submitted by the parties to the court for its determination.

The plaintiff contends that, not only the final order made on January 20, 1940, canceled out past-due and accrued instalments of alimony, and to that extent is void, but also contends that said order of August 29, 1931, in so far as it dated back to July 1, 1930, is void; that said order of February 25, 1936, is erroneous and void, principally because it did not conform to and was not supported by the pleadings.

We think the plaintiff's contention as to the final order of January 20 is in part correct and that she is entitled to the instalments of alimony accrued and unpaid at that time. However, the amount of these unpaid instalments is

determined by the amounts due on the supplemental orders of August 29, 1931, and February 25, 1936. As stated, these orders were made after a full hearing and evidence adduced. The issues were determined by the court. No appeal was taken from the orders, and the terms of court when they were made expired. These were appealable orders. *State v. Cook*, 51 Neb. 822, 71 N. W. 733; *O'Brien v. O'Brien*, 19 Neb. 584, 27 N. W. 640. The court had jurisdiction of the subject-matter, the parties, and the question decided and the relief granted. As an abstract statement of law, it is true that a judgment beyond the issues is void, especially in default cases. However, this rule has no application where the parties voluntarily try an issue not tendered by the pleadings to a court that has jurisdiction.

The supreme court of Minnesota states the general rule: "Where the parties have by consent tried issues not made by the pleadings, they are bound by the results the same as if the issues were within the pleadings." *Hommerberg v. State Bank of Slayton*, 170 Minn. 15, 212 N. W. 16.

The supreme court of Iowa sustains the rule: "The point is made that a judgment beyond the issues is void for want of jurisdiction. * * * But this rule has no application where the parties voluntarily try an issue not tendered by the pleadings." *Grimm v. Sargent*, 179 Ia. 750, 162 N. W. 57.

An excellent authority sustains the rule in this language: "Parties may, if they so elect, depart from the issues made by the pleadings, and try other questions relating to the merits of the controversy by consent or acquiescence, and in such cases the judgment is regular and binding upon them, the court treating as having been made the amendment which ought to have been made conforming the pleadings to the proof." 33 C. J. 1154.

This court has announced on many occasions that it will follow the theory on which the cause was tried below. In *Stuart v. Torrey*, 106 Neb. 608, 184 N. W. 215, recognition of the rule and practice is shown.

The case of *Domann v. Domann*, 114 Neb. 563, 208 N. W. 669, cited by plaintiff, is not in point. In the opinion in

that case Judge Day states that "the court went beyond any issue presented by the pleadings or tried in the case." In the instant case it was tried in the case. The opinion in the *Domann* case also indicates there was no proof on the issue on which the trial court entered judgment.

On the hearing of February 25, 1936, the issues as to the reduction of alimony by agreements to $200 per month and to $150 per month were tried and determined in the case. The orders of August 29, 1931, and February 25, 1936, are valid final orders.

Defendant contends that, since the court in its order of February 25, 1936, found that there was an agreement to reduce the payments of alimony to $200 per month, but stated in the decree that "the court makes no finding as to any further reduction of alimony," the court never passed on the alleged agreement to reduce the payments to $150 a month. The defendant asked only for two *nunc pro tunc* orders in the motion filed on November 6, 1935, which resulted in the order of February 25, 1936. At the hearing, when the order of February 25, 1936, was made, by mutual acquiescence of the parties, the evidence was taken as to both of the alleged agreements for the reduction of the payments of alimony. We have heretofore held that the plaintiff is bound by this hearing and order of February 25, 1936. The defendant is bound by the same order.

The decree of January 20, 1940, does not state the reason for the award of the $2,700, or how it was determined. It does not follow that the court attempted to give effect to, or to enforce, the alleged contract of April 20, 1933, as to reduction of the payments to $150 per month. If the trial court did so intend to give effect to this alleged agreement, it is error, not only because the issue had been determined, but the preponderance of the evidence at the hearing in 1936 and at the hearing in 1939, as shown by the record, was that such an agreement was not made. Plaintiff and her attorney both denied the making of such an agreement. After the defendant made the payment of $150 per month, instead of $200 per month, the plaintiff

wrote on each check she received from the defendant for alimony, "$50 due." She did this under instructions from her attorney.

Therefore, plaintiff would be entitled to the payments of $200 per month from June 25, 1932, to the date of filing the application in the present proceeding, except for January and February, 1936, when a temporary order was in force. The defendant paid $200 per month to April 1, 1933, and $150 per month from that date until September 18, 1939, so there is now due the plaintiff from the defendant $50 per month from April 1, 1933, to September 18, 1939, except for January and February, 1936. The decree as modified provides that the payments of instalments of alimony shall be made on the 2d and 16th of each month. There is a deficiency of $25 on each instalment. The number of instalments due is 18 in 1933, 24 in 1934, 24 in 1935, 20 in 1936, 24 in 1937, 24 in 1938, and 18 in 1939, or a total of 152. This makes a total of $3,800 due plaintiff from defendant on the instalments of alimony.

Should the plaintiff be given any future payments of alimony for support by the defendant? When the parties were married in 1908 it seems that neither had much property, and when the decree of divorce was granted in 1930 the husband had property of something over $9,000, and about one-third of it had been inherited from his mother. On January 20, 1940, the defendant had property of about the value of $9,600. It is difficult to arrive at the value of this property because much of it is in stock in the company for which the defendant is employed, and its value is not definitely fixed.

Also, defendant will receive a pension, when he retires, of 1 per cent. for each year of service based on his average salary for the last five years of employment, and he will receive the difference from what he would receive under this pension plan and the social security benefits. In addition defendant has sick benefits and group insurance. None of the amounts of these benefits or insurance is shown with certainty. However, in the defendant's brief, after stating

this uncertainty, it is stated that, if the defendant retires after 25 years of service, "that would give him $412.50 per year from which would be deducted any social security benefits," thus indicating there would be some income from that source.

In 1930 defendant's income from salary, commissions and dividends was $5,620, and from the same sources up to November, 1939, it was about $3,365. Defendant's income from 1930 to 1939 has averaged about $4,000 per year. The above amounts are exclusive of his business expense of about $1,600 per year, which is paid by his employer.

The two children have been well educated, and are now of age and self-supporting. The defendant is about 55 years of age and the plaintiff about 53 years. The testimony of the defendant shows that he has diabetes and is under the care of a doctor, who has told him to quit traveling on account of this condition. The plaintiff, by her testimony, is suffering from arthritis. The wife has no property except her furniture, nor income, nor means of earning a living. No property settlement was made at the time of the original decree of divorce. The plaintiff at all times during the marriage relation is shown to have been a sincere and dutiful wife. From the payments of alimony received she paid out about $8,325 for education, board, room and clothing and incidentals for the two children. The evidence in the record at the hearing for the original divorce shows: That during the married life the plaintiff never had a maid nor help in the home; that she made most of her own clothes and those of the children; that she was never given any social consideration by the defendant in those matters that assist in making the married life a success; that she never had much company in the home, and that her companions were mostly her children; that when the defendant was in Omaha, where the home was located, he was at the home only for short periods, and when he was there he was quarrelsome with the wife and children. It would serve no useful purpose to set out the unhappy life

of the plaintiff. After 22 years of married life she secured the divorce and there is no statement in the record that would indicate there was any fault on her part. This court is committed to the rule that an application to revive an alimony decree is not a retrial of the original case, nor can it be used simply to review the equities of the original decree. *McIlwain v. McIlwain, supra.* The new and changed conditions of the parties are considered by the court and the decree is adapted to them.

There is no doubt that the situation of the parties has changed since the original decree and the last modification of it on February 25, 1936. The children have become of age. The health of the defendant is impaired, and his wages are not as much as at the time of the decree. The plaintiff's health is not good. From his total income of about $40,359 from 1930 to November, 1939, the defendant has paid for support of the plaintiff and the children approximately $23,000. These are sufficient facts and circumstances to justify a modification of the original decree as modified. *Young v. Young,* 138 Neb. 294, 292 N. W. 923.

The defendant has cross-appealed from the part of the decree of January 20, 1940, which ordered him to turn over to Edward Paul Clark, son of the parties, the proceeds of a savings bank account amounting to $196, which is in the name of the defendant. The son was 21 years of age at the time of the trial, and was not a party to the suit. There is no issue in the pleadings on the ownership of this account. The attorney for the defendant objected at the trial that there was no issue here as to the rights between the father and son, but after the trial judge stated "this is a matter we ought to get adjusted definitely," evidence was adduced on this issue. Since the son was not a party to the suit, the court has no authority to render judgment against the defendant on behalf of the son. The rule is stated in 4 C. J. 1162:

"A judgment which the court had no authority to render must be reversed on appeal, regardless of the manner in

which the higher court is informed of the lack of jurisdiction."

Under all the facts and circumstances, the court has reached the conclusion: That the defendant must pay the balance due on the defaulted instalments of alimony after April 1, 1933, to September 18, 1939, the date of the filing of the petition for modification of the decree, with interest from the 2d and 16th of each month at 6 per cent. annually on each deficiency of $25, commencing with April, 1933, and continuing until paid; that beginning on June 1, 1941, the defendant shall pay to the clerk of the district court of Douglas county for the plaintiff the sum of $75 each month, and on the 1st day of each and every month thereafter the same amount, until said accrued and defaulted instalments and interest thereon are fully paid; that the defendant be purged of contempt, and that the order of November 1, 1939, be vacated.

We have further concluded that the defendant shall make no further payments for the support and maintenance of the plaintiff until further order of the district court. It is stated in the briefs that attorneys' fees have been paid.

The judgment of the district court is reversed, with instructions to enter judgment in accordance with this opinion.

REVERSED.

MARY RASMUSSEN, APPELLEE, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
297 N. W. 897

FILED MAY 2, 1941. No. 30939.

1. **Eminent Domain.** "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.
2. ———. "The jury in fixing the damages sustained by a land-

owner 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.

3. ———. The danger from an electrical power transmission line is not an independent item of damage, but, if established by competent evidence, may be considered in estimating depreciation, if any, in the market value of the land occasioned by condemnation of the right of way and the construction and maintenance of such transmission line thereon.

4. ———: TRIAL. The record in the instant case disclosing no competent evidence tending to establish the element of "menace or danger" in the operation of defendant's transmission line over and across the premises of plaintiff, the submission of that question by the trial court's instructions Nos. 7 and 8 was erroneous.

APPEAL from the district court for Clay county: FRANK J. MUNDAY, JUDGE. *Reversed.*

R. O. Canaday and *Stiner, Boslaugh & Stiner*, for appellant.

Carrico & Carrico, contra.

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

EBERLY, J.

This is a condemnation case instituted in the county court of Clay county by defendant, the Central Nebraska Public Power and Irrigation District, for a right of way and permanent easement for the construction, maintenance and operation of an electrical transmission line over and across certain lands of plaintiff, Mary Rasmussen. From the award of the appraisers, the plaintiff landowner appealed to the district court for Clay county. From a judgment in favor of plaintiff on the verdict of the jury, defendant has appealed to this court.

In plaintiff's petition filed in district court it was set forth that defendant had instituted condemnation proceed-

ings before the county judge of Clay county, Nebraska, and it was alleged therein that the transmission line would be located over and across the east half of the northeast quarter of section 21-7-6; that appraisers were appointed by the county judge who made an award in favor of plaintiff for $100; that the award was inadequate and insufficient and that the appraisers were illegally appointed, and that plaintiff was the owner of a quarter-section of land adjacent to and contiguous with the eighty-acre tract hereinbefore described, to wit, the southeast quarter of section 21, township 7 north, range 6 west of the 6th P. M., Clay county, Nebraska; that the transmission line of defendant will be a constant menace in the operation of all the lands of plaintiff; that in case of breakage or accident the defendant, by reason of its easement, would enter, trample upon and over the crops and land of plaintiff, and that there would be consequential damages to all of said land. Plaintiff prayed for $1,500 damages.

Defendant's answer admitted the filing of the petition before the county judge, the appointment of appraisers, the award made by them, and denied all other allegations.

To this a reply was filed which, in effect, amounted to a general denial.

The jury returned a verdict for $750 and costs in favor of plaintiff, and from the order of the district court denying its motion for a new trial, defendant appealed.

The one controlling question, in view of the record before us, is defendant's challenge to the correctness of instructions Nos. 7 and 8 given by the trial court on its own motion, wherein there was submitted to the jury the question of menace or danger in the operation of the transmission line of defendant over the premises of plaintiff.

In *Asche v. Loup River Public Power District*, 136 Neb. 601, 287 N. W. 64, we find the following:

"The measure of damages for the taking and damaging of private property for public use was stated in former opinions as follows:

" '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 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.

"The rules stated were followed in the recent power-line case of *Lilienthal v. Platte Valley Public Power and Irrigation District,* 134 Neb. 281, 278 N. W. 492. It was therein held that danger from the power line was not an independent item of damage but could be considered in estimating depreciation, if any, in the market value of the land by condemnation of the right of way and construction of the transmission line."

But the danger which may inhere in the existence and operation of a particular power line over and across a particular farm at a particular time, to justify consideration in estimating depreciation, if any, in the market value of the land involved, is not a matter of which courts may take judicial notice, but if such exists it must be established by competent evidence.

In the instant case, a careful examination of the evidence introduced by the plaintiff in the district court discloses that not a single word of competent testimony appears therein relative to "menace or danger" to the use of farm machinery or the carrying on of other farming operations in the vicinity of this transmission line of defendant. Plaintiff's witnesses, it is true, testified to inconveniences created by the presence of this improvement, but the element of danger is by them wholly omitted. Plaintiff relies solely upon his cross-examination of certain of defendant's

witnesses to supply this missing element. However, if this testimony elicited on cross-examination be considered in connection with the examination in chief to which this cross-examination applies, in view of the total absence of proof as to how farming operations might be affected thereby, we are compelled to find that the record, as an entirety, is wholly insufficient to justify instructions Nos. 7 and 8 given by the trial court on its own motion, so far as the same relates to the question of "menace or danger" in the operation of the defendant's transmission line. There is no competent evidence in the record to support such instructions. It is erroneous to submit to the jury a material issue upon which there is no competent evidence.

It follows that in the giving of instructions Nos. 7 and 8 on the subject of "menace or danger" in the operation of the defendant's transmission line the district court erred.

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

REVERSED.

DRAINAGE DISTRICT NO. 1 OF LINCOLN, APPELLEE, V. SUBURBAN IRRIGATION DISTRICT ET AL., APPELLANTS.
298 N. W. 131

FILED MAY 2, 1941. No. 31075.

1. **Courts.** "If a judge makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the *personnel* changes or not." *Perry v. Baker*, 61 Neb. 841, 86 N. W. 692.
2. **Syllabus** 1 in *Marvin v. Weider*, 31 Neb. 774, 48 N. W. 825, is overruled. Syllabus 1 in *Perry v. Baker*, 61 Neb. 841, 86 N. W. 692; *Tiernan v. Miller & Leith*, 69 Neb. 764, 96 N. W. 661, relating thereto; and syllabus 1 in *Follmer v. State*, 94 Neb. 217, 142 N. W. 908, adhered to and approved.

3. **Waters.** Prior to 1920, the established doctrine in this state was that "The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statutes." *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713.
4. ———. Rights of irrigation in Nebraska have their foundation and source in statutory enactments and constitutional provisions. They exist only as thus created and defined, and are necessarily limited in their scope by the language of their creation.
5. ———. The terms of the applicable statutes in the instant case, as well as constitutional provisions, limit the right of appropriation for irrigation purposes to the waters of the "natural streams" of the state.
6. **Eminent Domain.** The drainage ditches constructed and maintained by Drainage District No. 1 of Lincoln county, Nebraska, are established by the evidence to be strictly artificial constructions and creations. The waters which are contained therein and carried thereby have their sources in the low-lying lands they drain, which, in a state of nature, were too wet to farm and over which surface waters were diffused and through which subterranean waters percolated. The waters in such drainage ditches are not subject to legal appropriation under our irrigation laws as waters of "natural streams."

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL and ISAAC J. NISLEY, JUDGES. *Affirmed.*

Hoagland, Carr & Hoagland, for appellants.

Beeler, Crosby & Baskins, contra.

Heard before SIMMONS, C. J., EBERLY, PAINE, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

EBERLY, J.

The appellee in this action, who will hereafter be referred to as plaintiff, is Drainage District No. 1 of Lincoln county, Nebraska, and is a public corporation organized under the provisions of our statutes, which now appear as article 4, ch. 31, Comp. St. 1929. In the early twenties it constructed, and has since maintained, certain drainage ditches some thirty miles in length in and through a narrow projection of land that separates the North Platte and South Platte rivers in Lincoln county, Nebraska. The ditches maintained

by plaintiff are strictly of artificial construction. They do not have sources in running streams or public waters but drain low-lying lands, in their natural state too wet for farming, of accumulated surface waters diffused thereon and thereover, and of subterranean waters percolating therethrough.

The Suburban Irrigation District, a defendant and appellant, hereinafter referred to as defendant, is a public corporation organized under and by virtue of the irrigation laws of the state of Nebraska, and the members of its board of directors are also named as defendants and appellants.

This is an equity action to determine whether or not the defendant has the lawful right by eminent domain to place obstructions, dams or checks in the drainage ditches of plaintiff, and thereby divert therefrom waters carried therein into the irrigation canal of defendant under an optional diversion permit and appropriation granted by the proper state authorities under date of October 17, 1938.

This is a companion case to *Drainage District No. 1 v. Suburban Irrigation District* (No. 31001) *ante*, p. 333, 297 N. W. 645, in which, by an opinion adopted by this court, the defendant, under the facts contained in the record of that case, was, in effect, enjoined from constructing or maintaining checks or dams in the drainage ditches here in suit, and required to remove from said ditches a check by it constructed, and also enjoined from diverting the waters thereof into its irrigation ditch. Reference is hereby made to the opinion in the case above cited for a description of the terrain involved, the ditches maintained by each of said parties and the mutual intersections thereof, all of which also constitute the *locus in quo* in the instant proceeding.

The record discloses that the final decree enjoining the defendant in case No. 31001 was entered by the district court for Lincoln county on December 12, 1938. At a later date said judgment was superseded by defendant filing a proper bond as provided by law. On February 19, 1940, defendant presented to the county judge of Lincoln county a

petition and application to appropriate property by eminent domain, the purpose of which was, according to this pleading, "to acquire the right to use the right of way and the drainage canal of Drainage District No. 1 at a point on said section 25 approximately 1,200 feet east of the west line of said section 25, township 14, range 32 in Lincoln county, Nebraska; to maintain a check in the flume now constructed and in use at said point by the Suburban Irrigation District; and to acquire the right of way and use of the drainage canal of Drainage District No. 1 and to maintain the same for a distance of approximately 5,000 feet west of said point 1,200 feet east of the west line of said section 25; to place timbers or other materials in said checks at said point; and to divert the waters from said drainage canal into the irrigation canal of the petitioner. Said checks to be used in said drainage canal between the 1st day of April of each year and the 1st day of December of each year and said checks to be released at other times during said year; to acquire the right of the use of the right of way and canal of Drainage District No. 1 for such purposes for a distance of 5,000 feet west of said checks in sections 25 and 26, township 14, range 32 in Lincoln county, Nebraska, and to keep and maintain said drainage canal for such purposes in a manner that will not interfere with the use of said drainage canal for the purposes for which it was constructed by the said Drainage District No. 1."

On March 7, 1940, plaintiff instituted the present action in the district court for Lincoln county, Nebraska, by filing therein its petition challenging the right of defendant to the relief demanded in its condemnation proceeding hereinbefore referred to, and praying that the defendant be enjoined from placing obstructions in plaintiff's drainage ditches, and that defendant be enjoined from proceeding with such condemnation proceeding, and for general relief. On the filing of this petition a restraining order was issued by the district court restraining the proceeding in which defendant was engaged, and, in addition, the hearing on the application for temporary injunction was set down for

March 22, 1940, at 9 o'clock a. m. Thereafter defendant on March 15, 1940, filed its answer joining issue with plaintiff. On March 22, 1940, pursuant to former order of this district court, the matter of the restraining order theretofore issued and the application for temporary injunction was heard by the district court for Lincoln county, and that court, on March 23, 1940, entered an order, by Honorable I. J. Nisley, district judge presiding, "that the temporary injunction be and the same is hereby dissolved and is no more continued in force and effect and the injunction is hereby dismissed at the costs of the plaintiff." The transcript in this case, which imports absolute verity, discloses that at the time of this hearing the time for filing plaintiff's reply had not elapsed and the issues on the merits had not been made up; that no temporary injunction had as yet been issued, and that the restraining order of March 7, 1940, and the application for a temporary injunction were all that was then presented, or all that it was possible to present, to the district court for determination. From a consideration of the entire record, it fairly appears that the effect of the order made on March 23, 1940, was to set aside the restraining order and to deny the issuance of the temporary injunction applied for. On March 30, 1940, defendant filed in the district court its motion that the court "enter a final order of dismissal in this action. * * * In the event that the court does not enter the order of dismissal * * * the defendants move the court to require the plaintiff to file their reply instanter * * * and that the court set this case down for final trial and hearing before the court at once," etc. On the same day the court entered its order, by Honorable I. J. Nisley, district judge, presiding, "that said motion be and the same hereby is overruled. The matter then came on for hearing upon the matter of whether said cause should be set for trial, and after consideration it is ordered that the matter be taken under advisement by the court." The record further discloses that on May 15, 1940, with Honorable J. L. Tewell, district judge, presiding, "The same being one of the days

of the regular May, 1940, term of the district court in and for Lincoln county, Nebraska, the above entitled matter came on for hearing before the court, having been assigned for trial on this date, and upon application of the plaintiff to withdraw its motion to strike from the answer of the defendant, and for leave to file a reply instanter, and the court being fully advised in the premises, grants said leave." Whereupon the parties announced that they were ready for trial. The record discloses that plaintiff filed formal reply on May 15, 1940. At the conclusion of this trial, on May 16, 1940, the district court entered a decree for plaintiff, including a finding "that by virtue of said facts (recited in this decree), and by virtue of the laws of the state of Nebraska, all condemnation proceedings had by the defendant and involved herein are wholly void, on account of having been had without any legislative authority to take the same." In this decree the court permanently enjoined defendants as prayed in plaintiff's petition. From the order of the trial court overruling the motion for a new trial, the defendants appeal.

Of the many contentions presented under this record we find two are controlling, and to them we will devote our attention.

The first is that the action taken by Judge Nisley, as disclosed by the record sketched above, in effect deprived Judge Tewell, who presided at the regular May, 1940, term of that court, of jurisdiction to make any orders in or try said cause, without Judge Nisley's consent.

It is true that in this district we have two district judges of coequal powers. Nevertheless, the order made by the court is the order of the court, not of the particular judge, and it may later be reviewed by the court though its personnel may have changed. It is to be noted that the order entered on March 30, 1940, in response to that part of defendant's motion that the court set this case down for final trial and hearing before the court is, "that the matter be taken under *advisement by the court.*" "Advisement" is defined by a law dictionary as, "Consideration; delibera-

tion; consultation. 'Upon deliberate advisement, we are of opinion,' etc. *In re Hohorst,* 150 U. S. 662, 14 S. Ct. 221, 37 L. Ed. 1211." 1 Bouvier's Law Dictionary, p. 155. Wherein does this order of the court pertaining to "advisement by the court" either expressly or by necessary implication preclude "consideration, deliberation, consultation" with reference thereto by Judge Tewell of that court and a final determination thereof by him at a subsequent term. It appears, however, that the orders entered by Judge Nisley on March 22 and 30, 1940, were not final orders, and in no manner interfered with a full and complete determination of the cause on the merits by Judge Tewell. *Manning v. Connell,* 47 Neb. 83, 66 N. W. 17; *Young v. City of Albion,* 77 Neb. 678, 110 N. W. 706; *Barkley v. Pool,* 102 Neb. 799, 169 N. W. 730; *Bartram v. Sherman,* 46 Neb. 713, 65 N. W. 789; *Stansbury v. Storer & Ellis,* 3 Neb. (Unof.) 100, 91 N. W. 147.

Defendant cites, as sustaining its contention on this part of the record, *Marvin v. Weider,* 31 Neb. 774, 48 N. W. 825, and *Western Newspaper Union v. Dee,* 108 Neb. 303, 187 N. W. 919. We are convinced that the doctrine of the *Dee* case is wholly inapplicable to the record before us. The *Marvin* case has been thrice overruled in this jurisdiction. The true rule is not as stated in the first paragraph of the syllabus of the *Marvin* case, but as stated in the body of the opinion in *Perry v. Baker,* 61 Neb. 841, 86 N. W. 692, as follows: "If a judge makes an erroneous ruling and afterwards in the trial of the case, with more exhaustive investigation of the question, finds his first ruling is wrong, he should not be bound by it. The principle of *res adjudicata* does not apply. The first ruling does not become the law of the case so as to bind the court in the further proceedings therein. The court remains the same whether the *personnel* changes or not. So far as a different rule was announced in *Marvin v. Weider, supra,* that case ought to be overruled." See, also, *Tiernan v. Miller & Leith,* 69 Neb. 764, 766, 96 N. W. 661, and *Follmer v. State,* 94 Neb. 217, 142 N. W. 908.

In addition, in the instant proceeding, it is disclosed that the case was regularly set down for trial at the regular May, 1940, term of the court; the district court regularly convened; the case was called; the issues completed in open court; both parties announced themselves ready for trial; the defendant then presented no challenge to the competency of Judge Tewell to preside and hear this contest, and no question was raised in reference thereto until after the trial was had and the decree rendered. If there was a valid objection to Judge Tewell's right to preside, it certainly had been waived by this conduct of the defendant.

As presented at the bar of this court the second and controlling question in this case is, does the irrigation district have the right of eminent domain to place obstructions and dams in plaintiff's drainage ditches, where they were not contemplated in the original plan of construction, and from what source and how does the irrigation district become vested with power to use and appropriate the water out of such drainage ditches?

It is to be remembered that Nebraska was first settled along the eastern borders and in its river valleys. These lands were not arid lands, nor, indeed, may the entire state be properly designated as an arid state.

Accordingly, in 1866, there was duly enacted by the territorial legislature, as section 1, chapter VII of the Revised Statutes of that year, the following: "So much of the common law of England as is applicable, and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory." 2 Complete Session Laws of Nebraska, 1866-1877, p. 12. This act, in substance, continues in full force and effect. Comp. St. 1929, sec. 49-101.

In compliance with the terms of this enactment, this court has consistently supported this doctrine: "The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered

or modified by statutes." *Meng v. Coffee*, 67 Neb. 500, 93 N. W. 713. See, also, *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781.

This being the fundamental and historical basis of water rights in Nebraska, the system of irrigation which was a subsequent development of our law has its foundation and source in statutory enactments and constitutional provisions. Rights of irrigation in this state only exist as thus created and defined, and are necessarily limited in their scope by the language of their creation. Our first enactment on the subject of irrigation was chapter 68, Laws of 1889. This act, entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes," etc., embraced a complete drainage code. It is to be noted that section 1, art. I of this act, provided: "The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska; *Provided*, that in all streams not more than fifty feet in width, the rights of the riparian proprietors are not affected by the provisions of this act."

This act, amended in 1893, was repealed in 1895, and chapter 69 of the session laws of that year enacted in lieu thereof. This 1895 act described the sources and extent of water dedicated and set apart for irrigation as follows:

"Sec. 42. The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided.

"Sec. 43. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same,

those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes." Laws 1895, ch. 69.

These sections were substantially incorporated in our Civil Administrative Code. See Laws 1919, ch. 190, title VII, art. V, div. 1.

The Nebraska constitutional convention in 1920 amended the Nebraska irrigation provisions to read as follows: Const. art. XV, secs. 4, 5 and 6.

"Sec. 4. *Water a Public Necessity.* The necessity of water for domestic use and for irrigation purposes in the state of Nebraska is hereby declared to be a natural want.

"Sec. 5. *Use of Water Dedicated to People.* The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.

"Sec. 6. *Right to Divert Unappropriated Waters.* The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user."

These sections, so changed, were submitted to the electorate on the official ballot under the title or designation: "To add sections 4, 5 and 6 to article XIV. Defines priority rights in water."

In the formal address of this constitutional convention to the people of Nebraska these proposed amendments were explained as follows:

"They declare water for domestic use and for irrigation, a natural want; dedicate the use of the waters in the natural streams of the state to the people; grant the right to appropriate the same for beneficial use, except in cases where the public interest requires a denial thereof; recognize the right of prior appropriation subject to the principles that water used for domestic purposes is the superior use, irrigation second, and power third, and provide that the superior user cannot take from the inferior user, without just compensation therefor.

"The purpose of the new sections designated as numbers 4, 5 and 6 and submitted as No. 35 on the ballot is to define the use of water and place the same under constitutional protection, to which, owing to its importance in the development of the agricultural interests of the state, it is entitled." Proceedings of the constitutional convention, 1919-20, vol. 2, p. 2850.

On this basis, these articles were formally adopted by the electorate at the ensuing election.

From the history of our irrigation laws and constitutional provisions, it clearly appears that the expressed purpose of our lawgivers, as now existing, is to limit the right of appropriation for irrigation to the waters of the "natural streams" of the state. No others are embraced in the public dedication thus made.

The drainage ditches of plaintiff are strictly artificial creations. The sources of the waters these ditches contain and carry are in the low-lying lands they drain, which in the state of nature were too wet to farm and over which surface waters were diffused and through which subterranean waters percolated.

The evidence is uncontradicted that for more than ten years there has been no "seeped" lands within plaintiff district. And we are not herein in any manner or to any degree considering or determining the question of irriga-

tion drains constructed or improved for the purpose of carrying the flow from "seeped lands" where such seeped condition was caused by or due to the presence of irrigation ditches and the irrigation waters carried thereby. This question is not before us, is not adjudicated, and this decision may not rightly be cited as determinative thereof.

These drainage ditches are not natural streams or natural watercourses, and their inherent nature exclude them from the class or kind of waters to which our laws of appropriation are now applicable. Not being subject to appropriation for irrigation purposes, the attempt to secure them for the defendant by the exercise of the right of eminent domain was unauthorized by our present laws and wholly ineffective. The proceedings before the county judge under the statutes of eminent domain are void, and the permit granted by the authorities of the state conferred no rights.

It follows that the district court, in the decree entered by it in this case denying the exercise of the power of eminent domain and protecting plaintiff's rights in its property, was correct, and the judgment is

AFFIRMED.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, APPELLANT, V. WILLIAM G. WAGNER ET AL., APPELLEES.
297 N. W. 906

FILED MAY 2, 1941. No. 30980.

1. **Evidence.** The character and scope of occupations classed as professions are matters of which the courts will take judicial notice.
2. **Pleading.** In the consideration of a pleading, a court must read the same as if it contained a statement of all matters of which it is required to take judicial notice, even when the pleading contains an express allegation to the contrary.
3. **Evidence.** In determining the meaning of the word "osteopathy," the court may resort to the definition and description of it given by the founder of the practice, by those who teach and practice it, and by the lexicographers who define it as a science.
4. **Physicians and Surgeons.** The legislature has by statute recog-

nized a difference between the practice of medicine and surgery and the practice of osteopathy, and has provided for the issuance of different certificates to the two classes of practitioners by different boards of examination and registration using different standards in harmony with their respective qualifications.

5. ———. The practice of osteopathy consists of a system of manipulation of the limbs and body of the patient with the hands by kneading, rubbing or pressing upon the parts of the body without the aid of medicine or operative surgery.
6. ———. A statute granting a licensed osteopath the right to practice osteopathy in all its branches as taught in recognized osteopathic colleges does not authorize such licensee to practice outside the recognized field of osteopathy, even if subjects outside such field are taught in such colleges.
7. ———. The practice of operative surgery in its commonly accepted meaning requires a license to practice medicine and surgery as provided by section 71-201, Comp. St. Supp. 1939.
8. ———. Osteopathic physicians are entitled to perform surgery under the provisions of the osteopathic statute if the surgery is confined to surgery as it was taught and used as a part of the osteopathic system of healing, which in the main was by manipulation, but are not entitled to enter into the general field of operative surgery with surgical instruments.
9. ———. The history and construction of the statutes relating to the practice of obstetrics require the conclusion that the legislature has recognized that the issuance of a license to practice osteopathy authorizes the licensee to engage in the practice of obstetrics.
10. ———. The act of 1919 (Comp. St. 1922, sec. 8174) recognized the use of anesthetics as a branch of osteopathy in this state, and the act of 1927 (Comp. St. 1929, sec. 71-1705) preserved such right by not depriving licensed osteopaths of the privilege previously granted.
11. ———. The practice of obstetrics and the use of anesthetics are not within the definition of osteopathy but are in addition to it, and except for legislative action they would not be within the scope of the license to practice osteopathy.

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

Walter R. Johnson, Attorney General, Don Kelley and *Rush C. Clarke,* for appellant.

Beeler, Crosby & Baskins and *Mothersead & York, contra.*

Heard before ROSE, PAINE, CARTER, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

CARTER, J.

This is a suit brought by the attorney general to enjoin the defendant, Roy Jackson Gable, an osteopathic physician, from engaging in the practice of medicine and operative surgery within this state and from publicly professing to be a physician, surgeon, or obstetrician. The defendant filed an answer in which he denied that he had ever engaged in the practice of medicine, or professed publicly any right to do so. He alleges, however, that he is an osteopathic physician, surgeon and obstetrician and asserts a right to engage in the practice of operative surgery and obstetrics and to hold himself out to the public as one qualified to do so. The attorney general thereupon moved for a judgment on the pleadings, which was overruled by the trial court, and a judgment entered in favor of the defendant. The state thereupon appealed.

The question whether the defendant may lawfully engage in the practice and dispensing of medicine is not an issue on this appeal. Whether defendant may lawfully engage in the practice of operative surgery and obstetrics and engage in the use of anesthetics in the manner alleged in defendant's answer are the questions presented by the motion for judgment on the pleadings. The correctness of the trial court's ruling on this motion is the controlling factor in this appeal.

The defendant alleges that he is a graduate of the American School of Osteopathy at Kirksville, Missouri, a school of osteopathy recognized by the American Osteopathic Association. On June 13, 1922, defendant was issued a license to practice as an osteopathic physician and surgeon by the department of public welfare of the state of Nebraska. The answer admits and alleges that defendant has performed surgical operations, including tonsillectomies, appendectomies, circumcisions, an amputation of a toe, rectal

operations, hysterectomies, operations for hooded clitoris and laparotomies, all of such operations being performed with instruments and by incisions of the patients' bodies; that he has engaged in the practice of obstetrics and has used anesthetics; all of which the defendant alleges that he will continue to do under claim of right.

It cannot be questioned that a person engaging in the practice of medicine and surgery without the required statutory license may be restrained by injunction. Comp. St. 1929, sec. 71-801. If, therefore, the admissions and allegations of defendant's answer constitute the practice of medicine and surgery as defined by section 71-1401, Comp. St. 1929, the defendant should be enjoined from so doing. If said acts are within the scope of the practice of osteopathy as defined by our statutes on the subject, the defendant is then within his rights and not subject to restraint for so doing.

The question is raised whether the character and general duties of occupations classed as professions are determined as questions of law or fact. We think the rule is that they are questions of fact of which the courts will take judicial notice. Certainly, the question whether a specific act constitutes the practice of osteopathy is not subject to proof by expert witnesses. The absurdities which would be certain to follow such a construction of the rule in question are too obvious to require an exposition here. The general rule of pleading, which admits as true all facts well pleaded upon the filing of a general demurrer or a motion for a judgment on the pleadings, has no application to facts of which a court may take judicial notice, and such demurrer or motion does not therefore admit a conclusion of law deduced from such facts.

The general rule seems to be: "There is apparently no dissent from the proposition that in the consideration of a pleading the courts must read the same as if it contained a statement of all matters of which they are required to take judicial notice, even when the pleading contains an express allegation to the contrary." *Chavez v. Times-Mirror*

Co., 185 Cal. 20, 195 Pac. 666. See, also, *Livermore v. Beal*, 18 Cal. App. (2d) 535, 64 Pac. (2d) 987; *Verde River Irrigation & Power District v. Salt River Valley Water Users Ass'n*, 94 Fed. (2d) 936; *Hinds v. Federal Land Bank of New Orleans*, 235 Ala. 360, 179 So. 194; *Richter v. City of Lincoln*, 136 Neb. 289, 285 N. W. 593.

Applying this rule to the pleadings before us, the allegations of defendant's answer to the effect that the acts admitted constitute the practice of osteopathy are mere conclusions of law. The allegation of a sound conclusion of law is always treated as superfluous and the allegation of an unsound conclusion is entirely disregarded. It matters not in the instant case whether the conclusions pleaded are true or not, for that which is judicially known may not be successfully controverted by pleadings, or made issuable by them. *National Supply Co. v. Chicago & N. W. R. Co.*, 108 Neb. 326, 187 N. W. 917; *State v. Rolio*, 71 Utah, 91, 262 Pac. 987.

This court is therefore required to determine the meaning of the term "osteopathy" in the same manner as any other fact of which it is required to take judicial notice. It may resort to the definition and description of it given by the founder of the practice, by those who teach and practice it, and by the lexicographers who define it as a science. *State v. Bonham*, 93 Wash. 489, 161 Pac. 377.

Much has been written by the founder of osteopathy, and others learned in the practice of its profession, as to the fundamentals of the science of osteopathy. To give a resumé of these writings would unduly lengthen this opinion. We think a fair conclusion to be drawn from all of them was ably expressed in *Bragg v. State*, 134 Ala. 165, 32 So. 767, where the supreme court of Alabama said: "The method of treatment by the practitioners of osteopathy is a system of manipulation of the limbs and body of the patient with the hands, by kneading, rubbing or pressing upon the parts of the body. In the treatment, no drug, medicine or other substance is administered or applied, either internally or externally; nor is the knife used or any form of surgery

resorted to in the treatment. The practitioner himself performs the manipulations. The teaching and theory of those skilled in osteopathy are, that it is a system of treatment of disease by adjustment of all the parts of the body mechanically. It is taught that any minute or gross derangement of bony parts; contracting and hardening of muscles or other tissues; or other mechanical derangements of the anatomical parts of the body which must be in perfect order mechanically, in order that it may perform its function aright, nerve centers, arteries, veins and lymphatics, which must function properly in order that health may be maintained. It is taught that such interferences lend to congestion, obstructed circulation of blood and lymph, irritation of nerves and abnormal state of nerve centers; that the result is disease which can be cured only by righting what is mechanically wrong. * * * The essential things taught in the schools of osteopathy are anatomy, physiology, hygiene, histology, pathology and the treatment of diseases by manipulation. The repudiation of drugs and medicine in the treatment of diseases is a basic principle of osteopathy and a knowledge of drugs or medicines, their administration for the cure of diseases, the writing and giving of prescriptions, are not essential to the graduation of, and the issuance of diplomas to, students of osteopathy."

The well-settled definitions of osteopathy, in the writings of Dr. Andrew Taylor Still, its founder, and in the writings of recognized practitioners, as well as in the dictionaries and the decisions of the courts, all uniformly hold that the system of osteopathy administers no drugs and uses no knife. See *Nelson v. State Board of Health*, 108 Ky. 769, 57 S. W. 501; *State Board of Medical Examiners v. Baudendistel*, 6 N. J. Misc. 249, 140 Atl. 886; *Harlan v. Alderson*, 55 Cal. App. 263, 203 Pac. 1014. With these definitions and observations in mind, the licensing statutes must be examined to determine the extent to which this definition has been modified in this state by legislative action. Section 71-1701, Comp. St. 1929, provides: "For the purpose of this article the following classes of persons shall be deemed

to be engaged in the practice of osteopathy: 1. Persons publicly professing to be osteopaths or publicly professing to assume the duties incident to the practice of osteopathy. 2. Persons who treat human ailments by that system of the healing art which places the chief emphasis on the structural integrity of the body mechanism as being the most important factor for maining (maintaining) the organism in health." Section 71-1702, Comp. St. 1929, sets out certain exceptions which are not relevant in this suit.

Provisions are then made for the examination and licensing of those who would practice osteopathy. Among the requirements is the presentation of proof that the applicant was graduated from an accredited school or college of osteopathy. Comp. St. 1929, sec. 71-1703. The following section defines an accredited school of osteopathy. Among the conditions required is that the course of study must include the following subjects: Anatomy; chemistry; pathology; toxicology; pediatrics; general surgery; obstetrics; histology; physiology; hygiene; dietetics; practice, therapeutics, general diagnosis and technique; dermatology and syphilis; orthopedic surgery; gynecology; embryology; bacteriology; comparative therapeutics; nervous and mental diseases; jurisprudence, ethics and economics; genito-urinary diseases; and eye, ear, nose and throat. Comp. St. 1929, sec. 71-1704. The section following this provides: "Every license issued under this division shall confer upon the holder thereof the right to practice osteopathy in all its branches, as taught in the osteopathic colleges recognized by the American Osteopathic Association." Comp. St. 1929, sec. 71-1705.

The argument is made that as general surgery, orthopedic surgery, anatomy, pathology and other subjects are included in the required course of study in an accredited school of osteopathy, their practice is included in the statutory authorization by virtue of the use of the words "The right to practice osteopathy in all its branches, as taught in the osteopathic colleges recognized by the American Osteopathic Association." The words of this statute

do not authorize a licensed osteopath to practice everything that he is taught in an osteopathic school. It contains expressions which have a limiting as well as an authorizing effect. The practice authorized must be osteopathic and it must also be as taught in accredited osteopathic colleges. The fact that branches of medicine and surgery may be taught to increase the knowledge of the student in the anatomy and functions of the various parts of the human body for the purpose of better fitting him to practice osteopathy will not warrant him to invade those fields on the theory that they constitute the practice of osteopathy. The scope of osteopathy is well known and schools and colleges of osteopathy must stay within its boundaries,—they cannot enlarge them. *People v. Fowler*, 32 Cal. App. (2d) Supp. 737, 84 Pac. (2d) 326. In a case similar in principle, the supreme court of California said: "While the section contains the additional clause 'as taught in chiropractic schools or colleges,' the entire section must be taken as a whole and it cannot be taken as authorizing a license to do anything and everything that might be taught in such a school. A short course in surgery or one in law might be given, incidentally, and it would not follow that the section would then authorize a licensed chiropractor to engage in such other professions. It is not sufficient that a particular practice is taught in such a school. Under the terms of the statute it must meet the further test that it is a part of chiropractic, whatever that philosophy or method may be, and further that it shall not violate the provision which expressly forbids the practice of medicine. If such a practice is not a part of chiropractic but does constitute the practice of medicine, it is not authorized under this license even though it may be taught in such a school." *In re Hartman*, 10 Cal. App. (2d) 213, 51 Pac. (2d) 1104.

This point is well summed up in *Georgia Ass'n of Osteopathic Physicians and Surgeons v. Allen*, 31 Fed. Supp. 206, wherein the court said: "His knowledge must be broader than his practice; he must know what he practices but may not practice all he knows."

The argument is advanced that the use of the words "osteopathic physician and surgeon" in the license implies the right to practice surgery. The word "surgery" used in its general sense in connection with the profession of osteopathy means surgery by manual manipulation and was never meant to include operative surgery as we now understand it. The correctness of this statement is evidenced by the very principles of osteopathy to the effect that the general use of a knife or other instruments in surgical operations was regarded as unnecessary and opposed to the osteopathic system of treatment. The practice of osteopathy and operative surgery has long been recognized as two separate and distinct things. Separate boards have been set up in this state for the examination of those applying for licenses to practice medicine and surgery and those desiring to practice osteopathy. It is urged that the principles of osteopathy have changed and that experience and learning have produced certain advances that must be recognized. If osteopathy has changed merely by a self-serving attempt to broaden its scope by invading fields requiring a different license, we can only say that the legislature has never recognized any such additions to the profession. If the changes are the result of advancements in the profession, of course, they still constitute the practice of osteopathy. But the practice of operative surgery by an osteopath is an invasion of the field of the physician and surgeon as it is generally known and is not an evolutionary advancement of the profession of osteopathy. *State v. Gleason,* 148 Kan. 1, 79 Pac. (2d) 911; *Burke v. Kansas State Osteopathic Ass'n,* 111 Fed. (2d) 250.

Respondent argues that, as the act of 1919 (Comp. St. 1922, sec. 8174) contained the provision that "osteopathic physicians shall perform only such operations in surgery as was fully taught in the school or college of which the applicant is a graduate at the time of his attendance," it thereby recognizes operative surgery as a branch of osteopathy. This contention is too broad. Much of the difficulty in this class of cases has arisen because of the varied

use of the term "surgery." It originated from the latin "chirurgia," meaning "hand work" or, as another writer puts it, "to work with the hand." See American Illustrated Medical Dictionary (16th ed.); *State v. Gleason*, 148 Kan. 1, 79 Pac. (2d) 911. This is the meaning attributed to it in all the earlier writings on the subject of osteopathy and accounts for the general usage of the word in designating an osteopath as an osteopathic physician and surgeon. The invasion of the field of medicine and operative surgery as it is generally understood seems to be based on an attempt to broaden the definition of the term "surgery" as formerly used so as to include operative surgery. The field cannot be so extended. The words in the 1919 act must therefore be construed as referring to operations in surgery consistent with the practice of osteopathy as originally defined, which excludes the practice of operative surgery in its commonly accepted meaning.

We conclude therefore that an osteopathic physician and surgeon is not authorized under the statutes of Nebraska to engage in the practice of operative surgery and that the trial court was in error in holding to the contrary.

Relator contends that respondent cannot engage in the practice of obstetrics without a license to practice medicine and surgery as defined by section 71-1401, Comp. St. 1929. That a practicing physician and surgeon, properly licensed under the statute, may engage in the practice of obstetrics is not disputed. The right to practice obstetrics is not specifically granted by the statute authorizing the licensing of osteopathic physicians and surgeons. It is not disputed that respondent graduated from an accredited school of osteopathy, the requirements of which include the study of obstetrics. In the respects noted, respondent is in no better position than he was as to his right to practice operative surgery. But we are again required to examine the statutes to determine to what extent, if any, they have modified this position. Under the provisions of the 1901 act, an osteopath was required to report to the proper authorities all cases of contagious diseases, deaths

or births. Comp. St. 1901, sec. 3702h. This same provision appears in the act of 1905. Comp. St. 1905, sec. 4340. In 1909 a new statute was enacted which provided that osteopathic physicians shall report all births the same as physicians of schools of medicine. Comp. St. 1909, sec. 4336. This provision was retained in the act of 1919. Comp. St. 1922, sec. 8176. In 1927 this section was amended to read as follows: "A birth certificate in the form prescribed by the department of public welfare, and conforming to all of the requirements of the United States census bureau shall be filled out by the physician in attendance, and signed in his own handwriting. If there is no physician in attendance, then said certificate shall be completed and signed by the parent or other person present. Such certificate shall be filed with the local registrar within five days after any birth." Comp. St. 1929, sec. 71-2404.

It will be noted that the present law does not specifically require an osteopath to file birth certificates with the department of public welfare, the requirement being that the birth certificate shall be filled out by the physician in attendance.

To obtain a license to practice osteopathy, respondent was required to exhibit a diploma issued by a regular school of osteopathy wherein the curriculum included instruction in certain subjects required by statute, one of which was obstetrics. He was also required to pass an examination in the required subjects. While these facts alone would not authorize respondent to engage in the practice of obstetrics, yet, when considered with the statute regarding the reporting of childbirths, together with the history of its development, we think the legislature authorized respondent, upon securing a license to practice osteopathy, to engage in the practice of obstetrics. As was said in *Stoike v. Weseman,* 167 Minn. 266, 208 N. W. 993: "Unless an osteopathic physician could lawfully attend a woman in childbirth, there would be no reason for requiring him to report the birth of the child." Of course, the present statute does not specifically require an osteopath to report

births, but the former statute did, and we do not think the enactment of the present law evidences any intent to limit the practice of the osteopath in the field of obstetrics from that which had theretofore existed. It is a fundamental principle of statutory construction that the legislature must be presumed to have had in mind all previous legislation upon the subject, so that in the construction of a statute we must consider the preexisting law and any other acts relating to the same subject. We therefore reach the conclusion that the legislature has recognized obstetrics as a branch of osteopathy, a conclusion which the court is obliged to follow until the legislature by specific action evidences a contrary view. We are therefore of the opinion, after an examination of the legislative history of the laws pertaining to osteopathy and their relation to obstetrics and regulatory requirements as to reporting childbirths, that the legislature has authorized a licensed practitioner of osteopathy to engage in the practice of obstetrics, and that the use of the word "physician" in section 71-2404, Comp. St. 1929, was intended to include regularly licensed osteopathic physicians.

The attorney general contends that defendant is not authorized to use anesthetics in his practice as an osteopath. The 1919 act of the legislature (Comp. St. 1922, sec. 8174) provided in part as follows: "Nothing in this act shall be construed so as to authorize the administration, by an osteopath, of drugs excepting anesthetics, antiseptics, antidotes for poisons and narcotics for temporary relief of suffering." This clearly shows that the legislature intended the use of anesthetics to be included in and authorized by the license to practice osteopathy. In 1927 a new statute was enacted which read as follows: "Every license issued under this division shall confer upon the holder thereof the right to practice osteopathy in all its branches, as taught in the osteopathic colleges recognized by the American Osteopathic Association." Comp. St. 1929, sec. 71-1705. We do not think the passage of the 1927 act manifests any legislative intent to deprive the defendant

of his previously acquired privilege to use anesthetics, antiseptics, antidotes for poisons, and narcotics for temporary relief of suffering. We are inclined to the view that when a legislative act grants a privilege, as was done in the case at bar, a subsequent enactment will not be construed to deprive a beneficiary of the privilege conferred unless a legislative intent to so do is clearly apparent from the legislation itself. For these reasons, we hold that the defendant, under the statutes as they now exist, is entitled to use anesthetics by virtue of his license to practice osteopathy.

The trial court erred in not granting an injunction enjoining the defendant Gable from engaging in the practice of operative surgery and from publicly holding himself out as licensed and otherwise qualified to perform operative surgery with surgical instruments. In all other respects the judgment of the trial court is correct.

AFFIRMED IN PART AND REVERSED IN PART.

ROBERT D. FITCH, JR., APPELLANT, V. CASS COUNTY, NEBRASKA, APPELLEE.

297 N. W. 905

FILED MAY 2, 1941. No. 31161.

Counties and County Officers. Judgment of the trial court reversed on the authority of *Hansen v. Cheyenne County*, p. 484, *post*, 297 N. W. 902.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Reversed.*

J. A. Capwell, for appellant.

Walter H. Smith, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

CARTER, J.

This is an action to recover for mileage which the plain-

tiff claims is due him as a result of his serving as county surveyor of Cass county from November, 1932, to January, 1939. The trial court sustained a demurrer to the petition and, when plaintiff stood thereon, dismissed the action. Plaintiff thereupon appealed to this court.

The petition alleges that plaintiff, while he was county surveyor, filed claims with the board of county commissioners for 24,347 miles actually and necessarily traveled in going to and from work. The claims were allowed for this mileage at the rate of 5 cents per mile. After his term of office expired, plaintiff filed a claim for an additional 5 cents per mile for the 24,347 miles traveled, in accordance with section 33-119, Comp. St. 1929, which claim was disallowed by the board of county commissioners. An appeal was taken to the district court, where a general demurrer to the petition was sustained and the action dismissed. The correctness of this ruling is now before this court.

We think this case is controlled by the recent decision in *Hansen v. Cheyenne County*, p. 484, *post*, 297 N. W. 902, and on the authority of that case we conclude that the trial court erred in sustaining a demurrer to plaintiff's petition. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

J. PAUL HANSEN, APPELLEE, V. CHEYENNE COUNTY, APPELLANT.

297 N. W. 902

FILED MAY 2, 1941. No. 30998.

1. **Counties and County Officers.** The fees fixed by the legislature as compensation for county surveyors are not subject to change by agreement of the parties, nor by the voluntary actions of county surveyors.
2. **Contracts.** An agreement by a public officer to perform services required of him for a less compensation than that fixed by law is contrary to public policy and void.
3. **Counties and County Officers.** "County commissioners act quasi

judicially in passing upon claims against the county, whenever their action is not merely a formal prerequsite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." *Mitchell v. County of Clay*, 69 Neb. 779, 96 N. W. 673.

4. ———. If a claim is one upon which judicial action is required by the county board, the passing upon the claim is a judicial act and unless appealed from cannot be disturbed.
5. ———. The matter of the ascertainment of the number of miles actually and necessarily traveled by a county surveyor presents a question for judicial determination by the county board.
6. ———. In case of a county surveyor making claim for mileage under the statute, the matter of ascertaining the mileage traveled is judicial, and when determined the judicial function of the county board comes to an end. The remaining function of applying the rate fixed by statute is ministerial in character.

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

R. P. Kepler, for appellant.

John H. Kuns, contra.

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

YEAGER, J.

In this action the facts are not in dispute. The plaintiff, appellee herein, was county surveyor of Cheyenne county, Nebraska, during all of the period between January 2, 1935, and January 4, 1939. During the month of January, 1935, plaintiff presented to the county board his claim for mileage traveled by him as county surveyor up to that time at the rate of 10 cents a mile. Following the filing of the claim a conference was had between plaintiff and the county board, wherein apparently it was agreed that plaintiff should present his claim for mileage at the rate of 5 cents a mile covering the period for which claim had been filed, and that future claims should be made at the rate of 5 cents a mile. This was done and all claims were made on

this basis, and allowed and paid by the county from January 2, 1935, to January 4, 1939.

The action is by plaintiff to recover an additional 5 cents a mile for the period mentioned, under the theory and claim that the statute fixed the rate of mileage he was entitled to receive as county surveyor, and that he was entitled to receive it in full, notwithstanding an agreement to the contrary with the county board, and notwithstanding an acceptance by him of warrants issued and based on his formal claims for the lesser amount.

The action was commenced by the filing of a claim with the county board on January 17, 1939, for $985.85, being 5 cents a mile for the number of miles traveled as county surveyor during the years 1935, 1936, 1937 and 1938, which was the difference between what he had received and the amount that he was entitled to receive under the terms of the statute. The county commissioners in regular session, on March 7, 1939, disallowed the claim. From the action of the county board an appeal was taken to the district court. The case was tried to the court on a stipulation of facts. A judgment was rendered in favor of plaintiff for the amount prayed for with interest, from which judgment the defendant has appealed to this court.

A determination of this case involves an examination of section 33-119, Comp. St. 1929. This section of the statutes fixes the compensation of county surveyors. In counties having the population of Cheyenne county, the statute provides, among other things, that the county surveyor "shall be entitled to receive the following fees as compensation for his services: For surveying lands and county roads, irregular tracts for entry in the tract book, ditches and drains, cross section surveys on county roads, office work preparing plans, specifications and estimates, drafting county roads and irregular tracts in tract book for the county, per day eight dollars; * * * for each mile actually and necessarily traveled in going to and from work, ten cents." As an alternative or option to the payment of fees as compensation for services, the same section

of the statute provides for the payment of a salary as follows: "Provided, that in any county with a population of less than 50,000 the county board of commissioners or supervisors, may, in their discretion, allow the county surveyor a salary of not to exceed $1,800 per annum, payable monthly, by warrant drawn on the general fund of the county, and all fees received by said surveyors so receiving a salary, shall be turned over to the county treasurer monthly, and shall be credited to the general fund of the county."

The alternative or option was not exercised, and during all of the period in question the appellee operated on the fee basis for compensation for his services as county surveyor.

The appellant admits substantially that the appellee was entitled to his claim and that he was paid only one-half of the amount to which he was entitled as fees for mileage under the statute, but urges that the settlement made between the parties was valid and binding. With this contention that the settlement was valid and binding we cannot agree.

The statute in question, in terms, specifies the schedule of fees for the various services of the surveyor, and equally specifically sets forth that he shall be entitled to receive such fees as *compensation for his services.* The fees thus fixed then become the pay of the county surveyor which has been fixed by the legislature. It is neither subject to change by agreement of the parties nor by voluntary action on the part of the surveyor. This court has repeatedly held that an agreement by a public officer to perform services required of him for a less compensation than that fixed by law is contrary to public policy and void. *Gallaher v. City of Lincoln,* 63 Neb. 339, 88 N. W. 505; *Abbott v. Hayes County,* 78 Neb. 729, 111 N. W. 780; *Dunkel v. Hall County,* 89 Neb. 585, 131 N. W. 973; *Scott v. Scotts Bluff County,* 106 Neb. 355, 183 N. W. 573; *Bishop v. City of Omaha,* 130 Neb. 162, 264 N. W. 447. On this ground a recovery by appellee cannot be denied.

The other ground on which appellant relies for reversal is that, appellee having filed his claims which were acted upon by the county board, and the action not having been appealed from, no action will lie for a recovery of the amount claimed to be due and owing, for the reason that the action of the board in passing on the claims was judicial in its nature.

There can be little, if any, doubt concerning the legal principles involved in a determination of this situation. In a very exhaustive review of all of the prior decisions on the subject, in the opinion in *Mitchell v. County of Clay*, 69 Neb. 779, 96 N. W. 673, it was stated: "County commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." This principle was reannounced in the case of *Red Willow County v. McClain*, 123 Neb. 209, 242 N. W. 423, and is still the settled law of this state on this subject.

It is likewise the settled law of this state that if the claim is one upon which judicial action is required by the county board, the passing upon the claim is a judicial act and unless appealed from cannot be disturbed. *Red Willow County v. McClain, supra.*

In the instance here before the court, was the action required of the county board judicial or ministerial, or in part one and in part the other? There can be no doubt that the rate of fee per mile actually and necessarily traveled involved no question of judicial determination. The rate was fixed by statute and upon the ascertainment of the number of miles traveled the county was in duty bound to pay.

It is equally clear that the matter of ascertainment of the number of miles traveled presented to the board a question for judicial determination. In the opinion in *Red Willow County v. McClain, supra,* it was stated: "But, if

the proper legal interpretation of the statute ruling the particular claim under consideration of the board required the allowance of actual expenses, or of the then current railroad rate, or of the actual mileage necessarily traveled, the determination of the facts in each instance would be a quasi judicial act on the part of the board."

An examination of the pleadings and the stipulation of facts shows conclusively that over the period in question appellee filed 80 separate claims, each of which set forth the mileage traveled over a given period of time. The question of mileage was separately adjudicated as to each claim and warrants drawn, not for the statutory rate of 10 cents a mile, but at the rate of 5 cents a mile.

Having adjudicated the actual mileage necessarily traveled, the judicial function of the board came to an end; the only function remaining being the ministerial duty of applying to the mileage established the rate fixed by statute. This the board failed to do.

It can make no difference that the appellee, in his formal claim, recited a mileage rate of 5 cents a mile, since payment or acceptance of a lesser rate of pay than that fixed by statute was contrary to public policy and void.

It then follows that, since no appeal from the action of the county board was required, on the record presented, the judgment of the district court was correct and should be, and is

AFFIRMED.

HOWARD L. WAHLGREN ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

297 N. W. 833

FILED MAY 2, 1941. No. 31016.

1. **Evidence.** In condemnation proceedings, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation.

2. ———. The determination of the qualifications of witnesses to testify as to damages in condemnation proceedings is one resting in the sound discretion of the court.
3. **Eminent Domain.** In condemnation proceedings, while the qualifications of witnesses to testify as to damages are matters resting in the sound discretion of the court, if that discretion is abused it is ground for a new trial.
4. **Evidence.** A party to an action in condemnation has a right to have all of the competent evidence of which he has availed himself on the question of damages submitted to a jury for consideration, and a failure of the trial court to allow its submission is reversible error.
5. **Eminent Domain.** The jury, whose province it is in condemnation cases to harmonize the testimony as far as possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses, have a right to consider all of the competent evidence offered on the subject of damages.
6. ———. As damages, the appellee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution in the value thereof.
7. ———. The jury, in the consideration of damages, must be limited in their consideration to the land taken, and the land upon which there was a restriction or limitation of use, or diminution in the value thereof.
8. ———. In the light of the evidence, the verdict was excessive.
9. ———. General fear, or fear which is not connected with or an incident of knowledge of present or potential danger, cannot be made the basis upon which to predicate depreciation in the market value of land.
10. ———. The only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger, and which tends to lessen the market value of the land.
11. ———. The productive quality and productivity of soil is one of the primary elements to be considered in the determination of farm land values.
12. ———. Anything connected with the land that would influence the market value of the land in the mind of a good faith intending purchaser would be an element for consideration in determining damage.
13. ———. "The compensation for land taken by right of eminent

domain is measured by its market value at the time taken, and 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.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Reversed.*

Francis P. Matthews, William P. Kelley, August Wagner and *C. N. McElfresh*, for appellant.

Robins & Yost, Gross & Crawford, Franklin L. Pierce and *Phillip M. Wellman, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

YEAGER, J.

This is an action in eminent domain by the Loup River Public Power District, a Nebraska public power corporation, appellant, the purpose of which is to acquire right of way for the construction and maintenance of an electric transmission line in Douglas county across the lands of Howard L. Wahlgren, one of the appellees, and referred to as appellee herein.

The farm in question consists of 264.54 acres. The length of the farm is north and south and is approximately three-fourths of a mile, and its width is east and west. The north end is approximately one-half mile in width, which width extends southward for one-fourth mile. The width for the remaining one-half mile of the length is one-half mile plus 400 feet. A public road runs the full length of the farm, north and south, on a line one-fourth mile east of the west line. Another public road, extending east and west, and one-half mile north of the south end of the farm, separates that portion of the farm which is east of the north and south road already mentioned. The farm buildings are situated on the west side of the north and south road, and somewhat more than one-half mile from the south end of the farm. The right of way enters the farm from the west at a point 317 feet north of the south

line of the farm, extends generally in an easterly and westerly direction and passes out on the east side, 286 feet north of the south line. The area of that portion of the farm between the right of way and the south line is approximately 21½ acres. On the right of way were constructed four structures spaced about 600 feet apart. The structures are all alike. Each consists of two poles of about the length of 50 feet. The poles were set in the ground 14½ feet apart, and to a depth of about 8 feet. Near the top is a cross-arm from which are suspended insulators. By attachment to the insulators on the structures, three wires or conductors of electric current are extended the length of the right of way in question. The conductors have a carrying capacity of 115 KV of electric current. The minimum distance between the wires or conductors and the ground is about 26 feet.

The action was instituted in the county court of Douglas county, Nebraska, in which court an award for damages was made and from which award an appeal was taken to the district court. In the district court trial was had to a jury, resulting in verdict and judgment in favor of appellee for $10,580. The Loup River Public Power District has appealed from this judgment.

The only issue presented to the district court was the amount of damages sustained by the appellee because of the construction of the power line over his lands.

As grounds for reversal of the judgment of the district court the appellant has assigned numerous errors. The first six assignments of error may be dealt with together. In these assignments, appellant asserts that the trial court erroneously refused to allow five witnesses to testify as to the damage to appellee's land, on the ground that no foundation for their testimony as to damage had been laid. Taking the witnesses in the order of their appearance, we find that the record as to foundation reflects the following:

Patrick Hughes, a farmer, lives on an 87-acre farm 8 miles from Elk City, title to farm being in his wife. He has known the Wahlgren farm for 25, 30 or 40 years. In

the old days he had been over the land, and recently has seen it about once each year. He has heard of and talked about sales in that vicinity, and he had an opinion as to the value of the land immediately before and after the establishment of the right of way.

James A. McArdle has lived in Omaha for 35 years. He was born and raised in the vicinity of the Wahlgren land, is interested in 45 acres near there and is agent for the 45 acres, and formerly owned other property in the vicinity. He watches for land sales in the vicinity, and has known the Wahlgren land since he was a kid.

William Markman, a farmer, lives 8 miles east of Elk City, and owns 600 acres of land. He has lived there over 50 years, and has been acquainted with the Wahlgren land for over 50 years. He has been around there lots of times, knows the soil, saw the land lots of times, has talked about and is acquainted with real estate values in the vicinity.

F. E. Winegar lives in Omaha, has been in the real estate business for 35 years, and has been in Omaha for 3½ years. He is familiar with the Wahlgren land, has seen it several times in the past several years, has been around the various roads, has talked with real estate men and has heard of sales being made. He has never actually gone into the fields, but has seen practically the entire farm from the roads and has been by the farm perhaps 100 times.

Allen W. Jones lives in Omaha, and is a real estate man engaged in the business of handling farm lands and acreage. He was never actually out in the fields but could see the entire farm from the highways. He has known the farm for 47 years and went past it probably 20 times a year. He has been on all of the highways, has talked with real estate men about land values in the vicinity and has kept informed on such values.

The court refused to allow each of these witnesses to give his opinion as to the value of the land immediately before and after the appropriation. In each instance of refusal to allow witness to give an opinion, an offer in

due and regular form was made, to which offer objection was made and sustained by the court. Two other witnesses for appellant were allowed, on the basis of qualification laid by them, to give opinions as to the damage to the land of the appellee.

That this kind of evidence is proper and admissible, if based on proper qualification, is not questioned by either of the parties to this action. The correct rule as laid down by this court applicable in these circumstances is that, where persons are shown to be familiar with the particular land in question, they may be permitted as witnesses to testify as to the value of the tract immediately before and immediately after the appropriation. *Republican V. R. Co. v. Arnold,* 13 Neb. 485, 14 N. W. 478; *Blakeley v. Chicago, K. & N. R. Co.,* 25 Neb. 207, 40 N. W. 956; *Burlington & M. R. R. Co. v. White,* 28 Neb. 166, 44 N. W. 95; *Chicago, R. I. & P. Ry. Co. v. Buel,* 56 Neb. 205, 76 N. W. 571.

Did then the court err in refusing to allow the witnesses named, or some of them, to testify on the ground of lack of foundation laid for the testimony? That these witnesses, and each of them, showed a familiarity with the land in question can hardly be questioned. In addition some of the witnesses disclosed an experience in, and observation of real estate transactions. It is urged by the appellee that the matter of allowing witnesses in these circumstances was one resting in the sound discretion of the court. This is a correct statement of the rule, but where the discretion is abused such abuse of discretion will be ground for new trial. *James Poultry Co. v. City of Nebraska City,* 135 Neb. 787, 284 N. W. 273.

We think that on the basis of the qualifying testimony of these witnesses alone, independent of any other considerations, the court erred in excluding the testimony as to damage, but when we consider that appellee offered the same kind of testimony based on no better or higher qualification, which was admitted over objection as to foundation, it becomes very clear that this exclusion of testimony was highly prejudicial.

On behalf of appellee, on the question of damage to the land, the record discloses the following:

Albert F. Gericke, a farmer, lives in Dodge county. He has been past the Wahlgren farm and has known it for 15 or 20 years. He is a landowner and is familiar with land values.

Ernest Schmidt is a farmer living near Fremont. He has been acquainted with the Wahlgren farm for a good many years and knows the character of the soil, and knows the reasonable market value of farms in the locality.

Frank Middaugh, a farmer, lives 7 miles east of Fremont. He has seen and is acquainted with the Wahlgren farm, and has inquired into and knows land values in his vicinity.

H. F. Turner, a farmer, lives 1 mile west of Elk City, and has lived in the vicinity of the Wahlgren farm most of his life. He knows the character and quality of the soil and of the crops grown thereon.

J. Emmett McArdle, a farmer, lives about one-half mile from the Wahlgren farm. He knows the farm well.

Fred A. Bailey, a real estate man living in Omaha, inspected the Wahlgren land in 1932, and is acquainted with the farm. He has tried to keep posted on the values of farm lands.

Fred A. Skow, a real estate man living in Omaha, knows the Wahlgren farm and has been on it. He has attempted to keep posted on land values.

These 7 witnesses were permitted to give their opinions, over objection, as to the value of the land before and after the appropriation.

This comparison of the qualifying testimony of the witnesses on the two sides of the case as to damage, and the rejection on the one side of witnesses with demonstrated qualifications comparable to the qualifications of the witnesses on the other, makes patent the fact that the parties did not receive the impartial consideration necessary in the presentation of controversies to juries. In this connection it has been suggested by appellee that, if the court

did err in this respect, it was without prejudice to the appellant, since there were other witnesses who were allowed to testify as to damage on behalf of the appellant. We cannot indulge the suggestion, and on the other hand we do not hold that this case was determinable on the basis of mere number of witnesses, but appellant had the right to have all of the competent evidence of which it had availed itself submitted for consideration. The jury, whose province it was to harmonize the testimony as far as possible, and in case of conflict to decide as to the weight to be given the testimony of the various witnesses, had a right to consider it. *Blakeley v. Chicago, K. & N. R. Co., supra.* These witnesses should have been permitted to give their testimony on the question of damage.

The appellant contends that the damages allowed are excessive. As damages, the appellee is entitled to recover full compensation for the land actually taken, if any was taken, and for such damages to the residue of the land as are equivalent to the diminution in the value thereof. *Fremont, E. & M. V. R. Co. v. Meeker,* 28 Neb. 94, 44 N. W. 79; *Beckman v. Lincoln & N. W. R. Co.,* 85 Neb. 228, 122 N. W. 994; *McGinley v. Platte Valley Public Power and Irrigation District,* 133 Neb. 420, 275 N. W. 593; *Lilienthal v. Platte Valley Public Power and Irrigation District,* 134 Neb. 281, 278 N. W. 492.

In this case no property was actually appropriated for exclusive use by appellant except the areas upon which the structures were erected. Under these circumstances the only thing to be considered is damage to the land resulting from a restriction of the use. It necessarily follows that consideration must be limited to that portion of the farm whereon use has in fact been restricted.

We have already described the farm, its boundaries, the roads running through it, the location of farm buildings, the dimensions, and the location of the right of way. From this description and the evidence in this case, it becomes possible to determine with reasonable accuracy the area of the portion of the farm affected by the right of way. We

find from the evidence that about 21½ acres of appellee's land lies south of the right of way. In this area none of the farm structures is located, and no use is indicated except that of raising or producing crops. All of the farm buildings are approximately one-half mile away, and the entire remaining farm area is to the north of the right of way. Appellee in his testimony limits the convenient use of the land to a distance of 15 feet from the right of way. The evidence, however, indicated that use over a wider area was limited by potential danger from the current carried and to be carried over the electric lines. However, the maximum distance from the line to which potential danger extends is 50 feet according to the testimony of the engineers called by appellee. The area between the right of way and a line 50 feet to the north would be about 3½ acres. Thus it appears conclusively from the evidence that there is no direct limitation upon the use of appellee's farm except as to about 25 acres. No testimony indicates an indirect limitation except it is suggested that in the area in the vicinity of the right of way a place is left for the growth of noxious weeds which, if allowed to grow, would prevent the sale of seed produced as certified seed. Over what area and to what extent interference would take place from scattering of seeds from noxious weeds are not pointed out, nor is it pointed out clearly what kind of weed seeds would prevent the certification of corn for seed.

With this situation made clear and the rules for assessment of damages in mind, and this coupled with a record containing no competent evidence upon which to ground a conclusion that the remainder of the farm has been damaged directly or as a farming unit, we can find no theory which would permit the assessment of damages over an area other than that between the south line of the farm and a line not more than 50 feet north of the right of way. The only taking and the only interference with use are within that area, a total area of about 25 acres. Even if we consider that this entire acreage was taken and ap-

propriated, and placing upon it the value placed by appellee before the construction of the line which was $250 an acre, the damage would have been but $6,250, which would be $4,330 less than the amount allowed by the jury ($10,580). But no one contends that the entire use of this area was destroyed, and no other witness places the value of the land before construction of the line in excess of $185 an acre.

In placing the most favorable construction on the evidence as to the value of the land taken by the defendant and the damages to the remaining portion of the land not taken resulting from the taking, we conclude that the verdict is clearly excessive. It is clear also that the jury were permitted to speculate on a theory of damage not supported by competent evidence.

In *Stull v. Department of Roads and Irrigation*, 129 Neb. 822, 263 N. W. 148, the court said: "Witnesses for both parties were permitted to testify without objection to the difference in value of the whole tract before and after the taking when, as a matter of fact, it should have been limited to the difference in value of the remainder of the land not taken before and after the taking for public use."

In *McGinley v. Platte Valley Public Power and Irrigation District*, 133 Neb. 420, 275 N. W. 593, in discussing this question, this court said:

"The jury were left free to find that all the land not taken was diminished a dollar in value on each acre, if the evidence so proved, though there was no proof that the summer pasture land in the sand-hills was of any less value for ranch purposes after the taking than it was before. There must be a limit to remote, unaffected lands that may be considered in estimating depreciation in their value by condemnation of contiguous lands taken for public purposes. * * *

"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 after the taking 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."

Appellant contends that the court erred in permitting appellee to testify to his personal fear of danger in carrying on farming operations in the vicinity of the structures and under the lines. This position, in the light of the evidence adduced, is well taken. This testimony of appellant deals simply with personal fear and is not connected with or an incident of his knowledge of present or potential danger. Fear as such cannot be made the basis upon which to predicate depreciation in market value of land. A fair statement seems to be that the only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger.

In relation to fear this court has said: "Mere general fears from the presence of a transmission line cannot be made the basis upon which to predicate any depreciation in market value, for ill-defined fear that at some unknown time in the future some misfortune may come to man or beast by reason of the transmission line cannot enter into the consideration of those who are required to fix the amount of the damages." *Dunlap v. Loup River Public Power District,* 136 Neb. 11, 284 N. W. 742.

It is urged that there was error in allowing the appellee to give testimony relating to crops produced on the land in previous years, particularly in the years 1935 and 1936. The phase of this subject which related to the quantity and quality of crop production for the year in which condemnation took place, and for previous years, was clearly admissible. It all went to the question of the productive quality of the soil, and productivity of soil is one of the primary elements to be considered in the determination of farm land values. Anything connected with the land that

would influence the market value of the land in the mind of a good faith intending purchaser would be an element for consideration in determining damage. *Chicago, B. & Q. R. Co. v. O'Connor,* 42 Neb. 90, 60 N. W. 326; *Chicago, R. I. & P. Ry. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343, 129 N. W. 554.

However, the prices received for crops produced must be considered in an entirely different light. In the case of *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918, this court said: "The compensation for land taken by right of eminent domain is measured by its market value at the time taken, and no evidence is admissible of its peculiar value for special reasons to its owner." This statement was quoted with approval in *In re Platte Valley Public Power and Irrigation District,* 137 Neb. 313, 289 N. W. 383. The prices received for certified seeds represent a peculiar value to the owner based on special reasons as may clearly be seen. The price of farm products is dependent upon many uncertainties, such as supply and demand, seasonal fluctuations, availability of markets and wisdom in marketing. To permit a jury to consider the prices of farm products in the determination of damages in eminent domain actions cannot be approved. Such evidence is too speculative to be of any real value and it was erroneously received.

Since this case must be reversed and remanded for a new trial, it becomes unnecessary to discuss the remaining assignments of error. They deal for the most part with rulings on evidence during the trial, and in the light of this opinion are not likely to be presented in the same manner when the case is again tried.

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

REVERSED.

PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. LORENA KATZ, APPELLANT: MARTHA YOUNG, APPELLEE.
297 N. W. 899

FILED MAY 2, 1941. No. 31008.

1. **Equity.** "Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded." *Sherwin v. Gaghagen*, 39 Neb. 238, 57 N. W. 1005.
2. ———. "Equity will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person." *Tarnow v. Carmichael*, 82 Neb. 1, 116 N. W. 1031.
3. **Mortgages.** An assignment of possession and rents by the mortgagor to the mortgagee, effective upon default and given as consideration for an extension of a mortgage then in default, is not against the public policy of this state and is valid and enforceable.
4. ———. When an assignment of the possession and rents is lawfully executed by the mortgagor and, upon default, demand for its observance is timely made but refused, parties plaintiff or defendant may file application for its adjudication in the foreclosure action still pending and, upon issues joined thereon, the court may retain the same for trial and award that relief to which the parties are entitled.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Ziegler, Dunn & Becker and *D. L. Manoli*, for appellant.

Sidney W. Smith and *Crofoot, Fraser, Connolly & Stryker, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

The question for decision is whether the mortgagor or the mortgagee is entitled to receive rents from the lessee of a rooming house in Omaha, Douglas county, Nebraska, after decree of foreclosure and request for stay pending redemption or sale and confirmation, the mortgagor in default having given a written assignment of the possession

and rents to the mortgagee as consideration for an extension.

The facts are not in dispute. On March 26, 1924, defendant Lorena Katz, a widow, mortgaged the property for $20,000, which mortgage, for valuable consideration, was assigned to plaintiff. Thereafter, on April 26, 1929, an extension agreement to April 1, 1934, was executed by the parties. Defendant being in default and the mortgage extension past-due, on May 11, 1934, they executed another extension agreement payable in instalments until April 1, 1939. At the same time that the latter extension agreement was executed, and as a part of the same transaction, defendant made, executed, acknowledged and delivered to plaintiff a written assignment of the possession of the mortgaged property, and all the rents due or to become due from the lessee thereof, until the obligation was paid or until plaintiff was entitled to possession by order of the court or operation of law. The assignment provided that, if defendant were in default 30 days, she would deliver all existing leases to plaintiff who would then be the owner thereof. The extension agreement and the assignment, separate instruments, were both recorded in Douglas county, Nebraska, as provided by law, on June 12, 1934. On January 6, 1939, defendant having been in default since October 1, 1938, plaintiff sent a written notice to defendant, her attorneys, and Martha Young, lessee, demanding payment of rents to plaintiff as provided in the assignment. Defendant failed to comply with the demand or pay the delinquencies, and on March 13, 1939, plaintiff filed foreclosure proceedings in the district court for Douglas county, Nebraska, making Lorena Katz, mortgagor, and Martha Young, hereinafter called the tenant, parties defendant. The tenant had been in possession of the property as lessee, conducting a rooming house, for 15 years. The parties concede that she was a proper party defendant. Issues were joined between plaintiff and defendant; the tenant defaulted, and on May 20, 1939, a decree of foreclosure was entered finding that the allegations of plaintiff's petition were true and

finding and adjudging generally for plaintiff. On May 23, 1939, defendant filed a request for stay of 9 months, thereby waiving appeal and staying the proceedings to give opportunity for redemption or permit a sale and confirmation. On September 28, 1939, and again on October 14, 1939, plaintiff, in writing, notified defendant, her attorneys of record, and the tenant, that payments of rent must be made to plaintiff as provided in the assignment of rents. Accordingly, on October 31, 1939, the tenant delivered to plaintiff her check for $140, the November, 1939, rent. Thereupon, defendant served a 3-day notice to quit upon the tenant who stopped payment of the check. Thereafter, on November 3, 1939, the tenant, being in doubt as to whom she should pay the rents, filed an application in the foreclosure suit, setting up the above facts, and asked the court for directions. Plaintiff filed answer to the application. Defendant did not file answer but stipulated in open court that the issues thereon might be heard and determined as if she had filed a general denial. There was a hearing, evidence was adduced in open court, all parties being present with their attorneys, and on February 29, 1940, the trial court found and adjudged that plaintiff, mortgagee, by reason of the assignment, was entitled to the rents, $140 a month, accruing from the tenant including and since November 1, 1939, and that for such purpose plaintiff was entitled to possession until title should pass to the purchaser of the premises at sheriff's sale. The court ordered that such rents be paid to plaintiff or to the clerk of the district court, to be accounted for and applied upon the interest accruing and the mortgage debt.

Defendant Lorena Katz appeals, contending that the trial court had no jurisdiction to enter such an order in this action, and that its decree is contrary to law and equity.

The question of jurisdiction in a technical sense is not presented by the record as submitted to this court. By stipulation, defendant proceeded to trial upon a general denial without presenting the question of jurisdiction in any manner except in this appeal. "The district courts are

courts of general legal and equitable jurisdiction, no forms of action are recognized, and the court has power to administer either legal or equitable relief according as the pleadings warrant and the proof requires." *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484, 58 N. W. 1016; *McGlave v. Fitzgerald*, 67 Neb. 417, 93 N. W. 692. "Equity will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person." *Tarnow v. Carmichael*, 82 Neb. 1, 116 N. W. 1031. "Ordinarily, equity rules are not fixed and rigid in order that equity courts may be free to mold remedies to fit the conditions with which they have to deal." *Ricketts v. Lincoln Safe Deposit Co., ante*, p. 318, 297 N. W. 544. "A court of equity will not draw fine distinctions or indulge in mere technicalities to favor the commission of a wrong." *Pettit v. Louis*, 88 Neb. 496, 129 N. W. 1005. The rule is that, where courts like ours are clothed with both law and equity powers, relief will not always be denied on the ground that a litigant has mistaken the remedy. "Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded." *Sherwin v. Gaghagen*, 39 Neb. 238, 57 N. W. 1005.

Defendant contends, relying upon *Huston v. Canfield*, 57 Neb. 345, 77 N. W. 763, that in a foreclosure action the court cannot divert the rents of the mortgaged premises from the tenant in possession claiming title under the mortgagor, except by the appointment of a receiver pursuant to statutory provisions. Of course, this contention is true unless the stipulation *inter partes* makes the rule otherwise. Section 76-235, Comp. St. 1929, provides: "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." Thus, we come to the question whether a stipulation permissible by statute is valid and enforceable.

The chief controversy in *Huston v. Canfield, supra*, was

between the first and second mortgagee. The court held that the second mortgagee having obtained possession by stipulation with the mortgagor, as permitted by the above statute, was entitled to the rents precisely the same as the owner mortgagor would have been, had he retained possession, and that, in the absence of the appointment of a receiver by the court, such mortgagee was entitled to the possession of the property and the rents therefrom. We have a similar situation in the case at bar, except that the controversy is between the mortgagor and the mortgagee. The statute, section 76-235, Comp. St. 1929, defines the public policy of this state by using the words "In the absence of stipulations to the contrary." *Felino v. Newcomb Lumber Co.*, 64 Neb. 335, 89 N. W. 755, confirmed it by saying: "A provision in a real estate mortgage that, in case of a default in the payment of the debt thereby secured, the mortgagee shall be entitled to the immediate possession of the premises, is valid as to the parties and subsequent purchasers and incumbrancers chargeable with notice. * * * In the absence of any statutory regulation, the mortgagee is entitled to the possession of the premises. Jones, Mortgages, sec. 667. The only statutory regulation on the subject in this state is that to be found in section 55, ch. 73, Compiled Statutes (now section 76-235, Comp. St. 1929). * * * This provision leaves it competent for the parties to a mortgage to stipulate for the investiture of the mortgagee with the legal title and right of possession, which carries with it the right to the rents and profits. As we have seen, in this case the mortgage expressly provided that upon the forfeiture of the mortgage, or in case of default in any of the payments, the mortgagee should be entitled to the immediate possession of the premises. * * * (Cases cited.) These cases, while not directly in point, clearly recognize the right of the mortgagee to the possession of the premises under a stipulation like the one under consideration. * * * That the mortgagee in possession would be required to account for the rents and profits, will be conceded, but such account should be taken in the suit to

foreclose or in a suit to redeem." See, also, *Higginbottom v. Benson*, 24 Neb. 461, 39 N. W. 418; *Kirkendall v. Weatherley*, 77 Neb. 421, 109 N. W. 757; *Pettit v. Louis*, *supra*; 41 C. J. 610; 19 R. C. L. 317, sec. 93. There are like authorities from other jurisdictions which we deem it unnecessary to cite in this opinion, this court having passed directly upon the questions presented for decision.

The court concludes that an assignment of possession and rents by the mortgagor to the mortgagee, effective upon default and given as consideration for an extension of a mortgage then in default, is not against the public policy of this state and is valid and enforceable. When an assignment of the possession and rents is lawfully executed by the mortgagor and, upon default, demand for its observance is timely made but refused, parties plaintiff or defendant may file application for its adjudication in the foreclosure action still pending and, upon issues joined thereon, the court may retain the same for trial and award that relief to which the parties are entitled.

The decree of the trial court was correct, and it is

AFFIRMED.

OLE OLSEN, APPELLEE, V. MCMAKEN & PENTZIEN, APPELLANT.

297 N. W. 830

FILED MAY 2, 1941. No. 30970.

1. Sales. In a contract of sale, if delivery is made by carrier, the place of shipment is ordinarily deemed the place of delivery, unless a contrary intent appears.
2. ———. But, "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." Comp. St. 1929, sec. 69-447.
3. ———. What constitutes a reasonable opportunity for examination depends upon the facts in each case; however, generally speaking, when articles are sent to the buyer at a distant point,

such opportunity does not ordinarily exist at the point of loading, and in the absence of special circumstances or agreement otherwise the vendee is entitled to examine the goods when they arrive. Under the record herein, an instruction depriving the buyer of such right is erroneous.

4. Appeal. When the defendant admits that there is a balance due the plaintiff and counterclaims for damages, an instruction which tells the jury that, if they find for the plaintiff on his claims against the defendant, they need not consider the claims of the defendant, is prejudicially erroneous, unless the claims are so inconsistent that a finding for the plaintiff would, as a matter of law, necessarily negative the defendant's claims.

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

Joseph S. Goldware, Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem,* for appellant.

W. W. Wenstrand and *Simon A. Simon, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ., and MEYER, District Judge.

MEYER, District Judge.

In 1937 the defendant was doing revetment work on the Missouri river near Tekamah, Nebraska, under contract with the United States government. This action grows out of an agreement for sale by plaintiff to defendant of rock for use on that project. Both parties allege the agreement was oral, but disagree as to its terms. Plaintiff's petition contains four causes of action. In the first and second recovery is sought for the balance alleged to be due for rock shipped at the rate of 92 cents per ton f. o. b. Weeping Water, Nebraska, in the third for certain machinery repair and other expense which plaintiff says defendant agreed to pay, and in the fourth for loss of profits based on defendant's alleged refusal to take all of the stone ordered.

Defendant admitted that there was a balance due for stone, but averred that the agreed price was $2.30 per ton delivered at the site of construction, said price per ton to include 92 cents to plaintiff, 84 cents freight, 12 cents un-

loading charge, and 42 cents trucking to river bank, the defendant to pay said charges as seller's agent and remit the balance to plaintiff monthly; that the stone was to be of the size, quality and character required by government specifications and be delivered at a minimum rate of three cars per day; that plaintiff defaulted in the last two particulars; that defendant was compelled to purchase stone elsewhere at an increased price, and in five causes of action defendant counterclaimed for this and other items of damage.

The evidence discloses that shipments were prolonged over a two-month's period, that while the contract called for over 100 cars of stone, not more than 62 cars were shipped, and that some of it was rejected at the point of arrival. The defendant also asked damages for freight and other expense incurred in connection with stone rejected. There was a trial to the jury and a verdict for the plaintiff on his first two causes of action and no other recovery. Defendant appealed, alleging, first, that the trial court erred in excluding from evidence a certain writing in the form of a letter.

Pentzien testified that during negotiations he wrote and signed the paper in question and handed it to the plaintiff who retained it, and that the writing contained the terms of sale. Plaintiff, on the other hand, said that he refused to approve the conditions set out in the letter. We think that the paper might properly have been admitted; however, witnesses testified to its contents and the arrangements for sale and no prejudice appears.

Objection is also made to the eighth instruction, wherein the court told the jury that, if they found "by a preponderance of the evidence that the agreement was as plaintiff contends, f. o. b. Weeping Water, then, in the absence of any other agreement between the parties for inspection elsewhere, the defendant is presumed to have accepted and did accept in law the shipments at Weeping Water, and if it made no inspection at that point, plaintiff would not be liable for any loss suffered by defendant due to refusal of

engineers to accept the material, or any part of it, at the place of unloading."

The letters "f. o. b." are an abbreviation of the words "free on board," and standing alone in a contract of sale they simply mean that the subject of the sale is to be loaded for shipment without expense to the buyer. See 23 R. C. L. 1337, sec. 159; *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Hurst v. Altamont Mfg. Co.,* 73 Kan. 422, 85 Pac. 551. However, if delivery is made by carrier, unless a contrary intent appears, the place of shipment is ordinarily considered the place of delivery. 55 C. J. 333. See *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.,* 54 Neb. 321, 74 N. W. 670.

Applicable statutes from the Nebraska uniform sales act on the subject of delivery, acceptance and examination provide: "Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19 (69-419) Rule 5, or unless a contrary intent appears." Comp. St. 1929, sec. 69-446.

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * Rule 5: If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon." Comp. St. 1929, sec. 69-419.

"Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." Comp. St. 1929, sec. 69-447.

What constitutes a reasonable opportunity for examination depends upon the facts in each case. On the ground that such opportunity cannot usually be had at the place of delivery, Williston, Sales, 842, sec. 480, says: "Where goods are shipped to the buyer inspection need not be made on delivery to the carrier, though title passes at that moment, and the carrier becomes bailee to the buyer."

An early case generally followed and much in point is *Pierson v. Crooks*, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831. The contract called for delivery of iron f. o. b. Liverpool for shipment to New York. The vendee claimed that the iron shipped did not comply with the contract. The seller contended that, in the absence of express words on the subject, the law ascertains and fixes the intention that examination should be made at the point of delivery, and that the defendant not having made examination at that point, there was an acceptance, which precluded subsequent questioning of quality. The court held otherwise, stating that the carrier was not the agent of the vendee to accept the goods as corresponding with the contract, and that such title as vested in the purchaser on delivery to the steamer was a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York. See, also, *Eaton v. Blackburn*, 52 Or. 300, 96 Pac. 870; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 126 N. W. 293; *Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153, 59 N. W. 681; *Pope v. Allis*, 115 U. S. 363, 6 S. Ct. 69; 23 R. C. L. 1426, 1432, secs. 250, 256.

When articles are sent to a distant point, we believe the rule announced offers the only reasonable opportunity for examination in the vast majority of cases, and that it is also the rule of general practice. In fact, under the uniform sales act, before examination can be made at the point of loading the opportunity must be specifically requested. Comp. St. 1929, sec. 69-447, subd. 2. This for the reason that examination at the point of loading is seldom contemplated, and, as pointed out in *Phœnix Iron & Steel*

Co. v. Wilkoff Co., 253 Fed. 165, may be injurious to the seller by delaying him in making shipment, if not otherwise.

It was the jury's duty to determine the agreement from the evidence adduced. Plaintiff denied that he was to furnish stone to conform with government specifications and, if the jury so found and that the stone shipped was reasonably suitable for the purpose intended, then of course the plaintiff would not be liable for damages resulting from stone rejected at the site of construction and, obviously, if the jury found that there was an agreement for inspection at a certain point, then under the instruction given that agreement would apply.

On the other hand, in the absence of special circumstances or agreement otherwise, if the jury found that the contract called for stone of specific quality or character loaded on board cars at Weeping Water for transportation to the defendant elsewhere, then the defendant would have the right of inspection at the point of arrival, even without specific agreement to that effect, and might reject such stone as failed to conform to the contract and recover any resulting damage. The instruction excluded the defendant's right to have its damages considered under such circumstances, and for want of cure in other instructions is, in our opinion, erroneous.

Elsewhere in the instructions the court told the jury that, if they found for the plaintiff on his claims against the defendant, it would not be necessary for them to consider the claims of the defendant. The defendant admitted that there was a balance due the plaintiff for stone shipped, but alleged that this balance was exceeded by its items of counterclaim and urges that the instruction precluded the jury from considering such claims.

Counterclaim is an offensive as well as a defensive plea and is not necessarily confined to the justice of plaintiff's claim. It represents the right of the defendant to have the claims of the parties counterbalanced in whole or in part, judgment to be entered for the excess, if any. 24 R. C. L. 793, sec. 4 *et seq.*

A careful examination of the record discloses that, had the jury found for the plaintiff on his fourth cause of action, such finding would necessarily negative the allegations upon which the defendant's claims are based. Actually, however, plaintiff's fourth cause was not supported by sufficient evidence and in our view should not have been submitted. No such inconsistency necessarily existed between the other claims, and since a verdict for the plaintiff on some of his claims would not, as a matter of law, preclude a verdict for the defendant on its cross-petition, we think the instruction erroneous.

We have examined the other assignments of error and find them to be without sufficient merit to warrant special treatment under the circumstances. Reversed and remanded for further proceedings.

REVERSED.

ORVILLE MOFFITT, APPELLANT, V. STATE AUTOMOBILE INSURANCE ASSOCIATION, APPELLEE.
297 N. W. 918

FILED MAY 2, 1941. No. 30989.

1. Insurance. Exceptions to general liability provided in automobile policy are to be strictly construed against insurer.
2. ———. The exclusionary clause of automobile insurance policy which provided that the policy should not apply while insured truck was being used for towing or propelling any trailer or vehicle did not exclude liability for an accident which occurred while the truck was towing a hay grinder.

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

Horace V. Noland and *Peterson & Devoe,* for appellant.

Wear, Boland & Nye, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ., and MEYER, District Judge.

MEYER, District Judge.

This is an action to require the defendant to pay a judgment rendered in favor of plaintiff against one Ralph Dean for injuries suffered as a result of being struck by Dean's truck, which truck was insured by the defendant. The case was tried on an agreed statement of facts without the intervention of a jury. The trial court dismissed the action and plaintiff appealed.

At the time of the accident the truck was towing a hay grinder. Parties agree that the sole question involved is the interpretation of the following clause of the insurance contract: "This contract does not cover losses resulting * * * while any automobile described herein is being used or maintained under any of the following conditions: * * * (d) Loss or damage while the automobile described is being used for towing or propelling any trailer or vehicle (incidental assistance to a stranded automobile on the road being permitted)." Was the hay grinder a trailer or a vehicle within the meaning of said provision?

While in our opinion little ambiguity exists, yet it is an established rule that in case of doubt an insurance policy is to be liberally construed in favor of the insured. *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397. If an exception to liability is susceptible of two meanings, that construction will be adopted which is most favorable to the assured. *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 121 N. W. 996; *Crowe v. Merchants Life & Casualty Co.*, 202 Ia. 43, 209 N. W. 406.

The terms "trailer" and "vehicle" are often carelessly used, yet their meaning is well established. A trailer is usually referred to as a conveyance designed to supplement the carrying capacity of the vehicle to which it is attached and is ordinarily defined either in terms of vehicle or conveyance. In one instance we find a vehicle classed as "Any mechanical device moving by any other power than human power over the highways of the state excepting only such as move exclusively on railroad tracks." However, by the great weight of authority it too is defined as "That by

which anything is conveyed or transported, or which serves as a means or way of carriage." 13 C. J. 896. See, also, 18 C. J. S. 90. In the Nebraska motor vehicle laws and official state highway rules and regulations of the Nebraska department of roads and irrigation issued in accordance with legislative authority, 1939, page 144, it says: "A trailer means every vehicle without motive power designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight or load rests upon the towing vehicle." And at page 141 a vehicle is defined as "Any conveyance propelled or drawn by its own or other power."

Webster's International Dictionary says a trailer is "A vehicle or one in a succession of vehicles hauled, usually, by some other vehicle." In 63 C. J. 763, it is defined as a "separate vehicle, which is not driven or propelled by its own power." In *Maryland Casualty Co. v. Aguayo,* 29 Fed. Supp. 561, it was held that a cement mixer was not a trailer within the meaning of the California statute defining trailer as "A vehicle without motive power designed for carrying persons or property on its own structure and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle." See, also, *Long v. Hicks,* 173 Wash. 17, 21 Pac. (2d) 281; *Coleman Bros. v. Union Street R. Co.,* 292 Mass. 557, 198 N. E. 917.

A vehicle is defined as "That in or on which a person or thing is or may be carried from one place to another * * *; a means of conveyance." Webster's International Dictionary. "Any carriage moving on wheels or runners used, or capable of being used, as a means of transportation on land;" 1 Berry, Automobiles (6th ed.) sec. 19. "A means of conveyance; an instrumentality for transporting persons or things from place to place; * * * specifically, a means of conveyance upon land." 66 C. J. 427. "Every device in, upon, or by which any person or property may be transported or drawn upon public street 'excepting devices * * * used exclusively upon stationary rails or tracks.'" 5 Words and Phrases (5th Series) 1043. See 44 Words and Phrases

(Perm. ed.) 92, 98; *Di Gulio v. Rice*, 27 Cal. App. (2d) Supp. 775, 70 Pac. (2d) 717. In passing upon an exclusionary provision of somewhat similar import the court in *Waddey v. Maryland Casualty Co.*, 171 Tenn. 112, 100 S. W. (2d) 984, 109 A. L. R. 654, defined vehicle as "Any conveyance moving on wheels or runners used or capable of being used as a means of transportation on land."

It is difficult to find a definition anywhere which classifies either trailer or vehicle in any other terms than that of conveyance, and it is stipulated that the hay grinder in question was not constructed or designed to carry passengers or any goods or merchandise, therefore in our view it was not included within the meaning of the exclusionary provisions of the policy.

In support of its position defendant cites *Trussell v. Ferguson*, 122 Neb. 82, 239 N. W. 461, wherein the court in deciding a question of evidence stated that a mower was a vehicle, within the meaning of the rule of the department of roads and irrigation providing that "A vehicle shall not tow more than one other vehicle * * *." The action was for personal injury and the rule has been superseded by the provisions of section 39-1034, Comp. St. Supp. 1939, which now deals with the over-all length of vehicles and combinations of vehicles on the highway and farm machinery is specifically excluded from its provisions.

Defendant likewise urges that by section 60-328, Comp. St. Supp. 1939, entitled "Motor Vehicle Registration, Fees, Enumerated," implements of husbandry including hay grinders are classed as vehicles. If so classed it is merely because under this heading farm implements are named along with passenger cars, trailers, semi-trailers, and trucks as subject to registration. If anything, they are classed as motor vehicles, but whatever the classification, it is limited and indefinite and nowhere in the motor vehicle code do we find either a vehicle or a trailer specifically defined or farm implements referred to as either. In fact, they are named in addition to trailers and vehicles and therefore excluded from the coverage of said terms. In the

absence of specific definition or more certain classification, certainly it could not be claimed that the insurance contract was entered into with reference to this section. See *Paltani v. Sentinel Life Ins. Co.*, 121 Neb. 447, 237 N. W. 392.

The attachment of a trailer or a vehicle to a truck while being operated is clearly an added hazard for which extra premium is properly charged. It is significant we think that only vehicles and trailers are named in the exclusionary provision of this policy. Had it desired to do so, the insurance company could likewise have excluded farm machinery and other implements or made the provision all-inclusive by providing that the policy would not apply when the truck was used for towing. Adopting the reasoning of *Maryland Casualty Co. v. Aguayo, supra*, it may be that the insurance company was willing to assume the risks incidental to the casual towing of farm machinery in order to secure business in a competitive field. Whatever the reason, its exclusionary clause named two items but did not mention others, and the company must be held strictly to its contract. To hold that the hay grinder in question was included in the exclusionary clause would be to extend the meaning of the words employed by the company beyond their ordinary meaning in disregard of the well-established rules of construction.

The judgment of the trial court is reversed and the cause remanded for further proceedings.

REVERSED.

KUNKEL AUTO SUPPLY COMPANY, APPELLEE, V. HUGH LEECH, APPELLANT.

298 N. W. 150

FILED MAY 9, 1941. No. 31024.

1. **Contracts.** The mere apprehension of legal proceedings, unaccompanied by any act of hardship or oppression allegedly causing a person to enter into a contract, is not sufficient ground for avoiding the contract so made.

2. **Payment.** Where the parties are on equal terms, one threatened with civil suit must make his defense to the merits in the first instance.
3. ———. One who pays a disputed demand under such circumstances may not ordinarily recover back the amount so paid.
4. **Contracts.** The doctrine of commercial frustration is not applicable to the facts alleged and admitted by the demurrer in the instant case. The rule is applicable to executory contracts only.
5. **Sales.** Where one purchases property, agrees to pay therefor, and accepts delivery, performance of his contract to pay is not excused by the fact that the purpose for which he purchased the goods turned out to be unprofitable, nor by the fact that the legislature repealed the law upon which the business venture depended for which the property was purchased.

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

Meeker & Curtis and *Charles R. Shopp,* for appellant.

Beatty, Maupin, Murphy & Davis, contra.

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

SIMMONS, C. J.

This appeal presents the sufficiency of the allegations of an answer to constitute a defense and of a counterclaim to constitute a cause of action.

So far as material here, the allegations of plaintiff's petition may be summarized as follows: On or about August 1, 1938, defendant, for a valuable consideration, executed and delivered to plaintiff his promissory note promising to pay the sum of $71 on each of the 24 succeeding months; that thereafter plaintiff indorsed and delivered said note to a credit company and agreed to pay any amounts not paid by the maker; that defendant paid upon said note a total of $192 and failed to make other payments; that plaintiff paid the holder $518 for which it prays judgment.

Defendant admits the execution and delivery of the note, the payments, and denies other allegations. For further defense and counterclaim defendant alleges the following

history of the transaction which is the basis of this litigation. Defendant operated a garage at Imperial, Nebraska. Subsequent to the passage of Legislative Bill 147 by the 1937 legislature (Laws 1937, ch. 141) and on February 19, 1938, plaintiff solicited defendant to buy certain equipment which plaintiff advised defendant would be sufficient to equip and qualify defendant's garage as an official inspection station of automobiles under the provisions of said act, and that no other equipment would be needed. The defendant, relying upon said statements and apparent special knowledge of the plaintiff, purchased the property, made certain down payments and gave his note for the balance. The plaintiff sold the note to a *bona fide* holder for value, to whom defendant made certain payments. The equipment was delivered March 4, 1938. Later, about June 1, 1938, plaintiff revealed to the defendant that the equipment failed to meet the requirements of the state so as to obtain recognition of defendant's garage as an official testing station, and that for his garage to be qualified under the act additional equipment would have to be purchased. The defendant proposed to rescind the purchase and made the necessary tenders and demands. Plaintiff refused to accept rescission, advised defendant that the holder of the note would bring suit thereon and that defendant's way out was to buy additional equipment. Defendant, believing he would be sued on the note, and that he had no defense thereto and apprehensive of the effect of litigation on his business, entered into a new contract, purchased additional equipment, and executed and delivered the note which is the basis of plaintiff's cause of action. The plaintiff sold the new note to a *bona fide* holder and defendant made certain payments to it.

Defendant further alleged that the purchase of the equipment and the execution and delivery of the note in question were based upon the continued existence and enforcement of Legislative Bill 147, and that the continued existence and enforcement of the act were implied terms of said note; that it was assumed that all owners of vehicles would be

required to have their vehicles tested, and that by reason thereof said property would earn enough to pay the instalments on the note; that plaintiff assured defendant that that would happen and defendant relied thereon when he executed the note in question. Both plaintiff and defendant were mistaken. It never was compulsory thereafter for the owners of vehicles to have their cars tested; the law never was enforced in defendant's trade territory and on April 22, 1939, the act was repealed. Laws 1939, ch. 78. The defendant had had no profits and the equipment has been valueless and useless to him. The objects contemplated by plaintiff and defendant were frustrated, so as to excuse defendant from payment. Defendant alleged that, by reason of the breach of warranties, fraud, misrepresentations, business compulsion, coercion, constraint and duress, and mutual mistake and frustration, the consideration for the note failed and that the note is void.

February 1, 1939, defendant elected to rescind, offered to return the equipment on the condition that plaintiff repay the payments made in the sum of $589.61. Plaintiff refused to accept. Defendant tendered the equipment into court. Defendant prayed that the petition be dismissed, that the note be adjudged void so far as any interest of the plaintiff therein is concerned, that he have judgment for $589.61 and a lien on the equipment until the sum is paid. Defendant prayed for equitable relief.

Plaintiff demurred for the reason that defendant's answer and counterclaim did not state facts sufficient to constitute a defense, nor plead facts sufficient to constitute a cause of action against the plaintiff. The court sustained the demurrer and defendant elected not to plead further. Judgment was entered against defendant in the sum of $553.88, interest and costs.

Defendant appeals. He presents no assignments of error as required by rule 13-a-1(d) of this court. Plaintiff not raising that matter, it will be deemed waived and the case considered on the questions presented by the demurrer in the trial court.

Defendant's allegations may be reduced to these propositions: He purchased the original equipment believing that it would enable him in his business to meet the requirements of the act, test vehicles thereunder and profit therefrom. It was subsequently revealed that the equipment would not meet the requirements of the act. He attempted to rescind. Confronted with the fact that his note was in the hands of an innocent purchaser, believing that suit would be brought and that he had no defense and desiring to avoid litigation thereon, and rather than litigate his alleged right of rescission, and desiring to qualify for business under the law, he purchased the additional equipment, gave the note in question upon the representations of the plaintiff and his belief that the law would be enforced and continue in effect and that he would profit thereby. The law was not enforced; it was repealed. The profits did not materialize, both the plaintiff and defendant were mistaken and because thereof defendant seeks to avoid liability so far as the plaintiff is concerned.

If the answer fails to state a defense, it is obvious that the counterclaim likewise must fail. The alleged transactions leading up to the execution and delivery of the note in question do not present a defense. Defendant knew of the facts of the failure of the equipment to meet requirements on June 1, 1938. The note in question was executed August 1, 1938. During that time, the defendant had ample time and opportunity to determine his rights and liabilities and determine the course he was to follow. There are in the situation no elements of duress of person or goods which would enable plaintiff to avoid liability on the note. This court has said: "The mere apprehension of legal proceedings, unaccompanied by any act of hardship or oppression, has never been held sufficient ground for the avoiding of a contract. * * * Where the parties are on terms of equality towards each other, one threatened with civil process is required to make his defense in the first instance to the merits of the claim, and cannot postpone litigation by paying the demand and afterward maintain an

action therefor." *Weber v. Kirkendall,* 44 Neb. 766, 63 N. W. 35. See, also, *Karschner v. Latimer,* 108 Neb. 32, 187 N. W. 83. Also, "Where one has voluntarily, with full knowledge of the facts, paid a disputed demand, which he claimed he did not owe, he cannot ordinarily recover it back on the ground of its invalidity." *Meyer v. Rosenblatt & Son,* 119 Neb. 471, 229 N. W. 771. "A threat to do what one has a legal right to do cannot constitute duress. Such as * * * a threat of * * * a lawsuit." 13 C. J. 399. See 55 C. J. 1079; 66 C. J. 630; 17 C. J. S. 530, sec. 172.

Defendant's second defense is based on the proposition that the parties contemplated at the time the note was given and the equipment purchased that the law as it then existed would be continued in effect and enforced; that the subsequent failure to enforce the law and its repeal excuse performance. Defendant cites in support of his position what he terms the doctrine of commercial frustration. He cites 13 C. J. 642 (to which we add 17 C. J. S. 956, sec. 464); 12 Am. Jur. 10, sec. 383; 6 Williston, Contracts (Rev. ed.) secs. 1935, 1972; Restatement, Contracts, sec. 288, and supporting cases.

The rule urged by the defendant cannot be applied to the facts upon which his defense is based. This court reviewed the legislation in question in *Beisner v. Cochran,* 138 Neb. 445, 293 N. W. 289. It was there said: "Plaintiffs are presumed to have known that the continued existence of the license was dependent upon the willingness of the legislature to keep the statute creating it in force." So here the parties must be presumed to have contracted, not on the basis that the law would be continued in effect and enforced, but that any rights or business opportunities resting upon the law were contingent upon the willingness of the legislature to keep the act in force. Plaintiff cannot be held to have contracted by implication that the law would continue in existence. It contracted to sell the defendant certain property which defendant proposed to use for certain purposes. Plaintiff performed. Defendant charged himself with an obligation possible to be per-

formed, to wit, pay for the property purchased and delivered. He must perform his part of the contract. 13 C. J. 635; 17 C. J. S. 946, sec. 459. His performance is not excused by the mere fact that the purpose for which he purchased the goods turned out to be unprofitable. 13 C. J. 636; 17 C. J. S. 946, sec. 459.

The contract, so far as the plaintiff is concerned, was fully performed before the alleged defense arose. The rule relied upon by the defendant applies to executory contracts alone. 17 C. J. S. 952, sec. 463e; Restatement, Contracts, sec. 289.

Defendant states that the doctrine of commercial frustration arose in England as a result of the coronation case. In the cited case, a party contracted to pay for a flat from which to view the parade. The parade was not held and the defendant was excused from paying the balance of the rent. It is noted that in the development of that litigation it was held that money paid for seats could not be recovered. 6 Williston, Contracts (Rev. ed.) sec. 1954.

The judgment of the trial court is

AFFIRMED.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. CLARENCE H. HENDRICKSON, RESPONDENT.
298 N. W. 148

FILED MAY 9, 1941. No. 30792.

Disbarment in *State v. Hendrickson*, 138 Neb. 846, 295 N. W. 892, approved on motion for rehearing.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, against Clarence H. Hendrickson. Opinion on motion for rehearing of case reported in 138 Neb. 846. *Motion overruled.*

Walter R. Johnson, Attorney General, and *Clarence S. Beck,* for complainant.

Webb Rice, Leonard A. Flansburg, Mark J. Ryan and *C. A. Kingsbury*, for respondent.

Heard before ROSE, EBERLY, PAINE and MESSMORE, JJ., and ELDRED, District Judge.

ROSE, J.

In a former opinion the court directed the disbarment of Clarence H. Hendrickson, an attorney at law residing at Wayne, Nebraska, for misconduct in the practice of his profession. *State v. Hendrickson*, 138 Neb. 846, 295 N. W. 892. The misconduct on which the judgment is based is challenged on motion for a rehearing as insufficient to justify disbarment. Counsel in their brief say that the opinion mentioned but one charge under which it was found that respondent, without authority, assigned a small judgment, and entered judgment of disbarment; that the amount of the judgment in favor of respondent's client was $40.24, $20 of which belonged to the attorney. In a vigorous but respectful brief counsel, referring to the misconduct attributed by the court to respondent, came to the conclusion:

"The respondent received nothing, the assigned judgment was worthless, no fraud was intended, and no moral turpitude involved. The most that can be said of it is that it was a technical violation of the rules."

The assigned judgment evidenced a debt owing by the debtor to respondent's client. The client had a right to have it stand on the record as entered to await any change in the fortunes of the debtor. Respondent unlawfully interfered with that right. He officiously sold the judgment and made the assignment effective by set-off for the benefit of another client to the full amount of the debt. Moral turpitude is not measured by the amount involved in a betrayal of trust or in a failure to perform a professional duty. In addition to the assignment of the judgment without authority, the evidence, the finding of the referee and the former opinion show that respondent so manipulated the transfer as to mislead the court of original jurisdiction into allowance of the wrongful set-off. The former opinion, the

evidence and the referee's report also show that respondent failed in his duty to inform his client of the assignment. Fidelity to trust and performance of duty are standards of professional conduct that an attorney at law cannot violate without exposing himself to discipline.

Adherence to the former opinion and judgment is unanimous, but further reasons for disbarment are found in proofs of other specifications of misconduct and in other findings of the referee. The evidence shows and the referee properly finds that respondent is addicted to the habitual use of intoxicating liquors; at times is incapacitated to transact business for his clients or to attend court; was under the influence of liquor in the trial of a case and another attorney took his place; staggered along a public street with a small boy following him and imitating his movements; addressed a female client in profane language; drove his car into a yard; spent a night in jail; threatened jurors with reprisal for their verdict; applied a vile name to a county judge and made an assault upon him; referred in court to attorneys by insulting names; was fined in police court for making an unprovoked assault upon a member of a committee charged with the duty of inquiring into his unprofessional conduct.

One of the statutory duties imposed upon an attorney is to maintain the respect due to the courts of justice. For the performance of that duty respondent bound himself by an oath when he was admitted to practice law but has frequently violated it. The course pursued by him under his license to practice law casts reproach upon the judicial department of government and upon the legal profession and shows he is now unworthy of his license under the standards of professional conduct established by the bench and the bar. The motion for rehearing is therefore

OVERRULED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. MARTHA M. DYMEK ET AL., APPELLANTS.
297 N. W. 896

FILED MAY 9, 1941. No. 31028.

1. **Appeal.** "'In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence.' *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839." *Federal Farm Mtg. Corporation v. Hughes*, 137 Neb. 820, 291 N. W. 475.
2. **Mortgages.** "In such a case, the mortgagor is not entitled to continue in possession because of growing crops but may reenter temporarily for the sole purpose of harvesting the crop." *Jensen v. Gurley Grain Co.*, 128 Neb. 266, 258 N. W. 549.

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

E. W. Moehnert, for appellants.

Robert H. Mathew, Franklin L. Pierce, and *Philip M. Wellman, contra.*

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

ROSE, J.

This is an action by the Federal Land Bank of Omaha, plaintiff, against Martha M. Dymek and Lloyd Dymek, defendants, to foreclose a mortgage on 320 acres of land in Sherman county. Default of defendants was entered and foreclosure decreed for a debt of $8,743.92. The sheriff sold the mortgaged premises to plaintiff for $9,386.29. Defendants were granted a stay of execution for nine months. The only objection to confirmation of the sale was inadequacy of price, the reasonable value of the land as estimated by defendants being $15,000. The sale was confirmed and the sheriff directed to put the purchaser in possession, but defendants were permitted to reenter temporarily during 1940 for the purpose of harvesting any wheat which they had planted. From the order confirming

the sale and depriving defendants of possession, they have appealed.

It is argued on appeal that the trial court erred in confirming the sale and in refusing to permit defendants to retain possession on just and equitable terms conforming to public policy and to social and economic conditions.

The evidence has not been preserved for the purposes of the appeal. In absence of a bill of exceptions, there is nothing to show error in the proceedings and judgment of the district court. The law has been stated as follows:

" 'In the absence of a bill of exceptions containing the evidence, an order made by the district court confirming sale of real estate is presumed to be correct, and supported by sufficient evidence.' *Keeler v. Manwarren*, 61 Neb. 663, 85 N. W. 839." *Federal Farm Mtg. Corporation v. Hughes*, 137 Neb. 820, 291 N. W. 475.

"In such a case, the mortgagor is not entitled to continue in possession because of growing crops but may reenter temporarily for the sole purpose of harvesting the crop." *Jensen v. Gurley Grain Co.*, 128 Neb. 266, 258 N. W. 549.

AFFIRMED.

JOSEPH VENEZIANO V. STATE OF NEBRASKA.
297 N. W. 920

FILED MAY 9, 1941. No. 30963.

1. **Indictment and Information.** An information which alleges all the facts or elements necessary to constitute the offense described in the statute and intended to be punished is sufficient. *Chadek v. State*, 138 Neb. 626, 294 N. W. 384.
2. **Constitutional Law.** An information drawn in accordance with the law 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.
3. **Homicide.** In a prosecution for murder in the first or second degree, the court, in instructing the jury, is required to state only the law applicable to the facts proved and those which the

evidence tends to prove. Where there is no evidence tending to prove manslaughter, as defined by the statute, the court is not required to charge the jury with reference to the law applicable to such a nonexistent situation.

4. **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, MESSMORE and YEAGER, JJ., and LANDIS and MUNDAY, District Judges.

MESSMORE, J.

The information charged the defendant with murder in the first degree substantially in the form as set forth in *Nichols v. State,* 109 Neb. 335, 191 N. W. 333, which has been followed from its inception to and including the case of *Chadek v. State,* 138 Neb. 626, 294 N. W. 384, wherein the form of information was reaffirmed. Defendant was convicted of murder in the second degree and sentenced to 10 years in the penitentiary. As plaintiff in error he brings the record of his trial and conviction to this court for review.

Plaintiff in error (hereinafter referred to as defendant) first contends that the information is insufficient in law, in that it fails to charge the crime of murder in the first degree and lacks a sufficient allegation of intent to commit murder in the first degree. The argument in support of such contention has been carefully reviewed. We conclude that, in view of the decisions of this court dealing with the same subject-matter, such argument is without merit. This court has determined adversely to the defendant on such question in *Nichols v. State, supra; Phegley v. State,* 113 Neb. 138, 202 N. W. 419; *Ringer v. State,* 114 Neb.

404, 207 N. W. 928; *Pembrook v. State,* 117 Neb. 759, 222 N. W. 956; *Sherman v. State,* 118 Neb. 84, 223 N. W. 645; *Bourne v. State,* 118 Neb. 862, 226 N. W. 784; *Trosper v. State,* 128 Neb. 165, 258 N. W. 62; *Chadek v. State, supra.*

In *McKenzie v. State,* 113 Neb. 576, 204 N. W. 60, this court held: "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." Followed in *Chadek v. State, supra.*

The information in the instant case does not violate due process of law and equal protection of the law as guaranteed by the federal Constitution. *In re Robertson,* 156 U. S. 183, 15 S. Ct. 324; *Bergemann v. Backer,* 157 U. S. 655, 15 S. Ct. 727; *Caldwell v. Texas,* 137 U. S. 692, 11 S. Ct. 224; *Chadek v. State, supra.* In the *Chadek* case it was held: "The sufficiency of an information charging an offense under the law of a state (murder in the second degree) is not a federal question." The information in the instant case is sufficient in form to charge the offense of murder in the first and second degree.

Defendant next contends that it was error on the part of the trial court not to submit the crime of manslaughter to the jury. This question arises over the sufficiency of the evidence to disclose whether or not there was a sudden quarrel. From the record it is apparent that defendant's theory is that he was attacked; that from the nature of the attack he had reason to believe, and did believe, there was a design to take his life or do him great bodily injury; that he was justified in killing his victim to prevent loss of his own life, or the infliction of great bodily harm upon him; that is, he killed Tony Tarascio in lawful defense of his own person.

Manslaughter is the unlawful killing of another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of an unlawful act. Comp. St. 1929, sec. 28-403.

The record discloses: The defendant, a man 25 years of age, weighing about 130 pounds, was engaged, with Tony

Tarascio, in the trucking business for about three months. Both had gone together on the trips, with the exception of the last two, when defendant gave as his reason for not going that Tony carried a gun. The moneys collected from the enterprise and accounts thereof were kept at the home of defendant's mother, who apparently financed the partnership. The defendant was to handle the money and pay the bills. Tony had not accounted for moneys collected on the last two trips. The defendant went alone to Tony's home, failed to find him, and later that evening, September 1, 1939, at 9:25, defendant, accompanied by three men, returned to the Tarascio home, defendant's purpose being to collect some money which he and Tony owed an employee. When they arrived, Tony was near his truck.

Mrs. Tarascio testified: On the evening her husband was killed, he came home from Milwaukee about 6:30; defendant had been there and inquired about him, but he was not at home; Tony returned, about 9:25, with his truck; she was standing by the truck, telling him how it should be parked, when defendant and three others came in a car. The defendant and Simon, an employee, jumped out of the car; at this time her husband "was standing by the fender." Defendant asked him something, saying "Take this," and shot at him. He first shot at her, the gun clicked, and he then shot at her husband. When about 10 feet from Tony, defendant said: "Talk now;" she ran and stood in front of her husband and told the defendant not to shoot him; defendant ordered her to move, threatened her, and called her a name. After the defendant shot, he ran away, leaving Simon to help her move her husband's body to the sidewalk, which they did and took from his pockets a handkerchief, spectacle case, billfold, a comb and keys, but not a gun. A sister of Mrs. Tarascio saw the shooting, but heard no conversation between the defendant and Tony. She testified that at the time Tony was standing by the front fender of the truck, with his right hand in the hip pocket of his overalls; that she heard defendant say: "Let's go, boys, I got him."

One witness, who accompanied defendant to the Tarascio home, testified: Tony was east of the truck, leaning on it. Defendant said: "Let me see the bills," and Tony said: "Come in the house." Defendant turned and said: "Now, say something," and stepped toward Tony. The gun clicked the first time, the defendant shot into the ground and then shot Tony. This witness did not see Tony make any motion toward producing a gun and he saw no other gun at the time. After the shooting the defendant ran. Tony's father-in-law testified that he was home on the evening of the shooting, sitting in front of his house, with his family, Tony's wife and another daughter; he saw defendant and Simon come and heard an argument, and then "heard one shot quick, and the other two" shots immediately thereafter, and he heard defendant say: "Let's go." Defendant then ran away.

The inspector of detectives testified: Defendant came to the station after 12 o'clock on the same night and they had a conversation about the shooting, in which defendant stated, in substance, that he was in partnership with Tony Tarascio, who had hired Al Simon to go with him on different trips. Defendant asked Simon to go with him to Tony's home and have Tony account for some business. After arriving at the Tarascio home, defendant asked Tony to explain about the trip and expenses incident thereto, how much money he had, and to go to his, defendant's, home and check over the books. Tony said he would not go there, but for them to come to his home; one thing led to another and "they got talking pretty loud, so that Tony straightened up from the fender, on which he had been leaning, with his right hand in his pocket." The defendant thought he was going to shoot, so he shot first. The shot did not go off, so he fired two more shots; then ran. Defendant said he had purchased a small blue steel gun from a colored man for the sum of $2.

Defendant's version of what happened is, in substance: As soon as he got out of the car he asked Tony if he had any trouble on the last trip; Tony said "No;" defendant

went back of the truck and kicked the tires; he had worried about them because he had just paid $258 for them. He came back and said: "Al Simon wants some money; how about figuring up and paying him off." Tony said: "We will figure at my house from now on." Defendant said: "What do you mean?" Tony replied: "From now on I take care of all of the money and all of the bills." Defendant said: "That is not according to the agreement." One word followed another, and Tony started cursing and said something about breaking defendant's neck, put his hand in his right rear pocket. Defendant further testified he knew that his gun had an empty cylinder; that he shot once in order to stop Tony from pulling out a gun, and told him: "Don't take your hand out of your pocket." He had told him the same thing a short time before; he did not aim at him. After he shot, he stood there and saw Tony's hand "slide down in his pocket" and heard his wife screaming. Defendant was backing up all the time. He saw Tony fall and ran away. He further testified that Mrs. Tarascio was not near her husband at the time; that when he was examining the tires he saw her down in front of the house; that he did not go to the house to shoot the deceased, but shot him to save his own life. Defendant's gun was not registered, as provided by city ordinance. He denied that he said: "Now, say something," or "Let's go, boys, I got him." He further testified that the reputation of Tony Tarascio in the community "for being a violent, dangerous man" was bad; that Tony never "completely" got his hand out of his pocket and was four or five feet from him at the time of the shooting.

The witness Simon testified: He went with defendant to the Tarascio home to get some money due him. When they arrived, Tony, who was 29 years of age and weighed about 200 pounds, was near the front of the truck. The defendant said: "Tony, I want to talk to you." The witness then related the conversation about the books and money, as heretofore set out; that Tony "started yelling pretty loud about expenses" and told defendant he "would break his

neck." Witness saw that Tony had his hand in the right rear pocket of his overalls, and "it went down in his pocket further;" defendant and Tony talked about five or six minutes. Witness then told about helping to remove the body and taking from the right rear pocket a "twenty-two automatic gun." Simon and other witnesses testified that Tony was a dangerous man and carried a gun, and that his reputation in the community was bad.

The foregoing constitutes the evidence upon which defendant contends the court should have submitted to the jury the crime of manslaughter.

We conclude that the evidence is insufficient to disclose a sudden quarrel, or in any manner to meet the statutory conception of manslaughter. The defendant purchased the gun the day before the killing and from the time he bought it had carried it, loaded, in his pocket. Two witnesses who accompanied defendant and Simon to the Tarascio home testified that Tony did not change his position of leaning on the truck and did not remove his hand from the right rear pocket of his overalls during the entire episode. The defendant was not in immediate danger; his gun clicked once without firing; he fired one shot into the ground, and the third shot killed the victim, while he still had his hand in his pocket. No motion was made by the deceased to get a gun. No threats were made by him. He did not strike at the defendant, or go toward him as if to attack him. There was some controversy over the books, money and business, but not out of the ordinary. The evidence discloses the shooting was unprovoked. Some question arose, and the evidence is in conflict, as to whether or not the deceased had a gun. Simon told the police that, when he and Mrs. Tarascio removed articles from deceased's pockets, they found a gun. One time he said it was a revolver; then said it was an automatic, and, when challenged by the widow, he said he might have mistaken the spectacle case for a gun. Deceased never displayed a gun at the time, nor said anything to warrant any one in believing that he had a gun. Some contention is made that deceased said he would

break defendant's neck, but he surely made no effort to make the threat good, assuming it was made.

We are met with the argument: "It is the duty of the trial judge, particularly, in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not; and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from their consideration an essential issue of the case, it is erroneous." *Young v. State*, 74 Neb. 346, 104 N. W. 867.

The inference to be drawn from the voluntary use of a deadly weapon upon a vital part of another is entirely for the jury, and whether the defendant acted with malice is a question of fact for the jury, to be determined like any other question of fact, from all of the facts and circumstances shown by the evidence. This is true when the facts and circumstances surrounding the killing are fully testified to by eyewitnesses, as in the instant case. *Davis v. State*, 51 Neb. 301, 70 N. W. 984.

Under the evidence, it is obvious that, if we give to it a proper legal construction and application, the defendant was guilty of murder in at least the second degree, or he was entitled to an acquittal, because he acted in defense of his life. It was the theory of the prosecution that the crime was either murder in the first degree or murder in the second degree; the evidence tended to establish such theory, and the ingredients of the offense of second degree murder are present. The defense was that the defendant lawfully killed the deceased in order to save his own life. This was the issue submitted to the jury by the instructions of the trial court. No instruction, defining manslaughter, was requested at the time, and it is apparent from the evidence that such an instruction would have been inappropriate. The court is only required in instructions to state the law applicable to the facts proved and those which the evidence tends to prove. *Clark v. State*, 79 Neb. 473, 113 N. W. 211, on rehearing, 79 Neb. 482, 113 N. W. 804; *Kennison v. State*, 83 Neb. 391, 119 N. W. 768; *Williams v. State*, 103

Neb. 710, 174 N. W. 302; *Braunie v. State,* 105 Neb. 355, 180 N. W. 567; *Simmons v. State,* 111 Neb. 644, 197 N. W. 398; *Wever v. State,* 121 Neb. 816, 238 N. W. 736.

Other assignments of error are without merit. For the reasons given in this opinion, the judgment and sentence of the trial court are

AFFIRMED.

MUNDAY, District Judge, dissenting.

I am unable to agree with my brothers, in approving the opinion of the majority, on the question of submitting the crime of manslaughter to the jury.

Section 28-403, Comp. St. 1929, defines manslaughter as the unlawful killing of another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of an unlawful act.

A "quarrel" is defined in Webster's New International Dictionary as "a breach of concord, amity, or obligation; a disagreement; an antagonism in opinion, feeling, or conduct; esp., an angry dispute, contest, or strife; a brawl; altercation."

That part of the definition applying to "an unlawful act" is not applicable to the instant case. How is that part applying to "the unlawful killing of another without malice * * * upon a sudden quarrel" applicable?

The controlling distinction between murder in the second degree and manslaughter is whether the defendant acted with malice, that is, with the purpose and intent to unlawfully kill the deceased. *Lucas v. State,* 78 Neb. 454, 111 N. W. 145. The question of malice, in any degree of homicide, is for the jury, where the circumstances are described by eyewitnesses and detailed by the defendant. *Vollmer v. State,* 24 Neb. 838, 40 N. W. 420. Therefore malice is not presumed in the instant case.

This leaves one element of the crime of manslaughter to be considered, in determining the defendant's right to have the crime of manslaughter submitted to the jury, i.e., the "sudden quarrel."

The trial court should not submit the charge of man-

slaughter if there is no evidence applicable to the charge. In other words, the court should instruct on the law applicable to the facts proved, and which the evidence tends to prove. An analysis of the cases cited in the majority opinion to sustain this well-recognized rule, and to sustain the trial court in not submitting the crime of manslaughter, reveals that the evidence is entirely different in the cases cited, excepting the *Kennison* case as hereinafter indicated, than in the instant case. These cases are authority for requiring the submission of the manslaughter charge under the facts and circumstances in the instant case. The cases are: (1) *Clark v. State,* 79 Neb. 473, 482, 113 N. W. 211, 804. The defendant was convicted for the death of a conductor, while attempting to rob him. There is no evidence of a sudden quarrel; (2) *Kennison v. State,* 83 Neb. 391, 119 N. W. 768. The court gave instructions on *all degrees of homicide,* as well as self-defense and intoxication. There appeared to be no evidence that the killing was accidental; (3) *Williams v. State,* 103 Neb. 710, 174 N. W. 302. Defendant and others committed robbery. Officers went to arrest them, and the robbers immediately shot and killed an officer. There was no element of manslaughter; (4) *Braunie v. State,* 105 Neb. 355, 180 N. W. 567. Insanity was relied upon as a defense. The opinion states: "The only possible defense in this case was insanity;" (5) *Simmons v. State,* 111 Neb. 644, 197 N. W. 398. Judge Good in the opinion states: "There is no evidence in the record of any quarrel;" (6) *Wever v. State,* 121 Neb. 816, 238 N. W. 736. Defendant was found guilty of murder by administering strychnine. Where a defendant denies administering poison, there could be no sudden quarrel.

The question reduces itself to the exact point: If the defendant and his witnesses testify to facts, from which different inferences, as to a sudden quarrel, may be reasonably drawn, even though these facts are disputed, should the trial court submit the crime of manslaughter to the jury? Or, putting it differently, does the trial court have authority to pass upon such a state of facts and circum-

stances, and not submit them to the jury to determine the grade of homicide? For the court to pass upon such a state of facts would be denying the defendant a material right.

This court has answered the question. The second paragraph of the syllabus in *Denison v. State*, 117 Neb. 601, 221 N. W. 683, is:

"Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, the degree ordinarily being for the jury; *and where the evidence and circumstances of the killing are such that different inferences may properly be drawn therefrom as to the degree, the court should submit the different degrees to the jury for them to draw the inference.*" (Italics by writer.)

A brief statement of the evidence for the defendant on this phase of the case is necessary to show the error in passing on the facts as to a "quarrel," and in not instructing on the crime of manslaughter: That the decedent's wife, who is a material witness for state, knew of no trouble between defendant and deceased; that there was no previous serious quarrel between defendant and deceased; that defendant went alone to deceased's home and deceased was not there and nothing was stated as to action indicating ill will on defendant's part; that defendant started to deceased's home a second time with Al Simon, who had the money coming to him from defendant and deceased, but had a flat tire, and then went with Barta and Benak, witnesses for state and Simon; that none of these witnesses related any statement made by defendant of ill will towards deceased; that Barta did not hear many of the statements made by Mrs. Tarascio and her sister, Mary Bersane; that deceased was a violent and dangerous man, as testified to by several witnesses; that defendant weighed about 130 pounds and deceased about 200 pounds.

Al Simon stated that he went to the deceased's home with the defendant, Barta and Benak to get the money that was due him; that deceased was near the front of his truck at

the time they arrived; that defendant said to deceased, "Tony, I want to talk to you," and that the defendant further said, "Did you have a good trip?" and that the deceased said, "Yes; I had a nice trip this time;" that defendant said, "Did you get all the bills?" and deceased replied, "I have all of them in the house." The defendant then said, "Go and get them and give Al his money, Tony; get your books and then come back and we'll check it at my house." Deceased then said, "We will not check it at your house no more," and then the defendant said, "Well, * * * what do you mean? We put in all the money. You were supposed to let me take care of the books." To this the deceased said, "We are not doing it any more. I will take care of my own money and my own books." Witness then stated that deceased started yelling pretty loud about expenses and things like that, and deceased told defendant he would break his neck; that the first he saw, deceased moved and had his right hand in his rear pocket, and when he moved he put his hand down further in his pocket; that they talked back and forth at each other for 5 or 6 minutes; that the deceased was physically strong and was about 29 years of age and weighed 190 to 200 pounds; that after the shooting he and Barta carried the body over to the fence by the house and that he and Mrs. Tarascio took different articles from the pockets of the deceased, including a ".22" tan automatic gun from the right rear pocket, being the same pocket the deceased put his hand in before the shooting; that he had made trips with the deceased and the deceased had a gun on him; that deceased's reputation for carrying a gun and for being a law-abiding citizen was bad.

The defendant testified in part:

"As quick as I got out of the car I told him, I said, 'Tony, did you have any trouble on this last trip?' and he said 'No.' And I went in the back of the truck and I kicked the tires, that was the only thing I was worried about was the tires; we just got through paying $258 for them, and I came back and I said, 'Al Simon wants some money; how about figuring up and paying him off?' So he said, 'We will figure

at my house from now on.' I said * * * 'That is not according to the agreement,' and he said a word and I said a word and he started cursing and said something about breaking my neck and * * * when he went in his hip pocket I fired. Q. Into what pocket did he go? A. Into the right rear pocket. * * * Q. Now, did you go over there for the purpose of shooting Tarascio that night or having any trouble with him? A. No, sir. Q. Why did you shoot him? A. To save my own life."

Defendant then stated: That he knew of the reputation of the deceased in the community for being a violent and dangerous man and that it was bad; that he did not say just before he shot, "Now, say something;" that immediately before he fired the shot the deceased seemed to be very angry with him and defendant was afraid of him; that he did not say after the shooting words in substance "Let's go, boys; I got him;" that he bought the gun with which he did the killing the day before the killing; that he kept the gun in his pocket loaded from the time he purchased the gun up to the time of the killing; that he did not buy the gun for the purpose of using it the way he did; that he carried it as he did not want his mother to know there was a gun in the house; that he tried to sell the gun the day he purchased it; that after he arrived at the truck where the deceased was they talked back and forth two or three minutes; that he (the defendant) was talking in a loud tone of voice, and that the deceased's wife was not near at the time of the shooting.

The foregoing testimony and evidence and inferences therefrom show that there is a dispute between the witnesses for the state and the defendant in some of the testimony relating to the sudden quarrel. The fact, that there is such a dispute and that the dispute is partly caused by defendant's statements, does not make the question as to the sudden quarrel any less a question for the jury. Al Simon in his testimony also disputes some of the witnesses for the state. He relates a rather extended conversation between the defendant and deceased continuing about 5 or

6 minutes. Simon's testimony shows that the defendant and the deceased disputed, and that there was a sudden altercation.

Referring to the defendant's theory of the defense in the case of *Young v. State,* 74 Neb. 346, 104 N. W. 867, the following language is used by Judge Barnes:

"With these conflicting statements in evidence, it was for the jury to determine who of the witnesses was entitled to the most credit, and which of them should be believed; and it was error for the court, by refusal to instruct, to ignore any part of the evidence. So we are satisfied that there was sufficient evidence introduced in support of defendant's theory of the homicide to require the court to submit it to the jury by proper instructions."

Who decides which of the witnesses are correct as to this sudden quarrel, the trial court or the jury? The facts and inferences therefrom should be submitted to the jury to decide as to the quarrel and the degree of homicide.

The fact, that no instruction was asked, is not controlling; it was the duty of the court to instruct as to rules of law applicable without request. *Young v. State, supra.* It is the information and the evidence submitted that determine the issues that are to be submitted to the jury.

It is stated in the opinion submitted that the defense was that the defendant lawfully killed the deceased to save his own life. The defendant was not obliged to rely only on the theory of self-defense. The defendant in pleading not guilty put in issue every charge and element of the crime included in first degree murder. Under the evidence there would be nothing inconsistent in the court instructing both on the crime of manslaughter and self-defense.

Judge Sedgwick, in *Lucas v. State, supra,* states the correct rule of law that should have been followed in instant case. In that case the defendant shot the deceased at a distance; defendant thought the deceased armed; he was not; defendant saw the deceased coming and went into the house and secured a gun and shot deceased; after the defendant shot once he shot a second time through the smoke

without waiting to see the result of the first shot. It is difficult to find as much evidence of a sudden quarrel as in the instant case. This court held that the questions of self-defense and manslaughter should be presented to the jury. The following well-reasoned statement from the opinion puts it well:

"If he (defendant) was not actuated by such desire and purpose to kill the deceased unlawfully, but killed the deceased under a mistaken notion that the circumstances were such as to justify the killing in self-defense, that is, if he acted unreasonably, rashly, and unnecessarily, but with a belief at the time that the law would justify him in so acting, and without any purpose or intent to kill the defendant unlawfully, he is guilty of manslaughter. If in killing the defendant he acted reasonably under the circumstances, that is, if the circumstances and appearances were such as to cause a reasonably prudent and cautious man to believe that such action was necessary to defend his life, then he is not guilty, and such action would be justifiable in self-defense."

The jury recommended leniency. The jury may have thought that the defendant was guilty, but that second degree murder was too severe.

For the reasons stated, the writer is of the opinion that a new trial should be ordered.

ARTHUR KLEMENT, APPELLANT, V. LAURA LINDELL ET AL., APPELLEES.

298 N. W. 137

FILED MAY 9, 1941. No. 31044.

1. **Automobiles.** A driver of an automobile, entering an intersection first, is entitled to the right of way over vehicles approaching the intersection from his left. Comp. St. Supp. 1939, sec. 39-1148. Having entered the intersection, such driver is obligated to use the care of a reasonable and prudent person, having regard for approaching traffic, the condition of the highway and the protection of life, limb and property.

2. Negligence. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.
3. ———. Where the evidence establishes that the plaintiff was guilty of negligence more than slight, it becomes a question for the court, and it is the duty of the court to direct a verdict for the defendant.

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

Dewey Hanson and *Paul I. Manhart,* for appellant.

Wear, Boland & Nye and *Zacek & Nicholson, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

MESSMORE, J.

Plaintiff's action is predicated on defendants' negligence in causing a collision of defendants' truck with plaintiff's automobile, and is for damages sustained by reason of personal injuries. At the close of plaintiff's case, defendants moved for a directed verdict which was sustained. Plaintiff appeals.

The acts of negligence charged against defendants, briefly stated, are as follows: Defendant Boyer, driver of the truck, was negligent in that he did not stay in the usual line of travel or avail himself of the opportunity to safely pass behind plaintiff when there was ample room to do so, or to stop the truck. He violated the plaintiff's right to pass through the intersection first, plaintiff having entered the intersection from the right, and in not slowing down, but in driving at a speed of 55 miles an hour in violation of law. Defendants' answer alleged contributory negligence on plaintiff's part more than slight; that plaintiff's negligence constituted the direct and proximate cause of the accident. The reply was a general denial.

The record discloses that plaintiff, a farmer, 49 years of age, with his family, residents of Minnesota, left their

home April 2, 1939. Plaintiff drove a two-door 1930 model Chevrolet. On April 3, between 5:15 and 5:30 p. m., plaintiff was proceeding south on a graveled highway, No. 31, in this state. On the trip the car had been driven at a speed of from 40 to 45 miles an hour, and, on account of loose gravel on highway 31, the speed was lessened to 30 or 35 miles. As plaintiff proceeded south on highway 31, he was confronted by and saw different signs, indicating the traffic procedure on the highway; that is, slow signs and signs indicating traffic to different towns, junction sign and stop sign near the intersection. Highway 31 runs north and south; highway 36 east and west, intersecting No. 31. Highway No. 8 joins highway 36 at a distance of 450 feet or more east of the intersection of highways 31 and 36. Highway No. 8 runs in a southeasterly direction from highway 36, and where No. 8 joins No. 36, highway 36 is designated 36 and 8. Two hundred feet north of highway 31, plaintiff noticed a state highway sign; then looked to the left, or east, and kept his eyes on the traffic lane of highway 36, as he approached the intersection. On his left, at a distance of about 300 feet was a farm house. Between this house and the fence line on highway 31 were some small and medium-sized trees and small brush; at the corner of the intersection was a large tree. As plaintiff approached the intersection he reduced his speed to 20 miles an hour. He noticed a stop sign as he came up to it.

Plaintiff's testimony as to just where he stopped before entering the intersection is contradictory, but, briefly summarized, is as follows: The stop sign is 21 feet north of the north edge of the paved highway, No. 36. Plaintiff testified he stopped 25 feet north of the center of the highway, which is 18 feet in width; therefore, he stopped 16 feet from the north edge of the pavement. In another part of his testimony he stated that he stopped 26 feet north of the north edge of the pavement. In still another part, he testified he stopped 10 feet north of the stop sign. There is a dispute as to whether, if plaintiff stopped at the stop sign, as he claimed, his view was obstructed to the east

by the brush and trees and by the large tree at the corner.

After stopping, the plaintiff proceeded to cross the intersection at a speed of from zero to five miles an hour. The testimony of members of his family fixed the speed at a maximum of six or seven miles an hour. As plaintiff proceeded into the intersection three to five feet, he looked to the east and for the first time saw defendants' truck approaching from a distance of 100 to 150 feet and at an estimated speed of 55 miles an hour. The truck had come off highway No. 8 onto highway 36, which is level from such point. At the rate of speed at which plaintiff approached the intersection,—20 to 25 miles an hour,—he testified he could have stopped his car, which had good brakes, within a radius of eight to ten feet, and at the rate at which he crossed the intersection,—five miles an hour,—he could have stopped his car within a radius of five feet. If the plaintiff's evidence is to be believed, that he stopped 25 feet north of the center of the highway and proceeded two feet south of the center at five miles an hour, he traveled 27 feet before the impact, which would take him approximately four seconds. If he stopped 26 feet north of the north edge of the pavement, he would then travel, before the impact, 26 feet and 11 feet in and across the intersection, in all 37 feet, which would require five to six seconds. If he stopped 10 feet north of the stop sign, as he further stated, he would then proceed 21 feet to the north edge of the pavement and 11 feet across the intersection, or a distance of 42 feet, which would require from six and a half to eight seconds.

Plaintiff's contention is that his view was obstructed to the east. This is probably true, if he stopped even with the stop sign. However, one exhibit shows a clear view to the east at this point. Plaintiff's testimony is indefinite as to where he stopped; therefore, we are unable to determine accurately whether his view was obstructed. In any event, there is evidence that, at least at two places where he stated he stopped, his view to the east was not obstructed. At the time of the impact the plaintiff's car was two feet

beyond the center of the intersection. The right corner of the right front bumper of the truck struck ahead of the left rear fender of plaintiff's car, the running board thereunder, and tore the left front fender. Plaintiff's car was 14 feet in length, bumper to bumper, which would indicate that 12 feet of the car still remained north of the center of the intersection. The paving on highway 36 at the intersection is 18 feet in width. Plaintiff and the occupants of his car were thrown from the west side of the car.

When plaintiff saw defendants' truck coming, he did not accelerate his speed, but continued to move straight across the intersection and merely pulled his car slightly to the right. He testified the truck veered to the left. When the plaintiff first saw the truck, it was straddling the center line of highway No. 36. After the collision the truck was facing south and west of the center of the highway; the plaintiff's car to the west. Members of the plaintiff's family corroborated his testimony, except that his wife fixed the speed of the truck at 75 miles an hour. There is testimony that plaintiff shifted gears in entering the intersection.

The plaintiff contends that the court erred in directing a verdict; and further that the plaintiff made a case sufficient to warrant submission to the jury.

Being cognizant of the rule, requiring the admission of the truth of all material and relevant evidence submitted on behalf of the party against whom a motion for a directed verdict is made, and that said party is entitled to have every controverted fact resolved in his favor, and, in addition, the benefit of every inference that may be reasonably deduced from the facts in evidence (*Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163), we consider the evidence in conformity to the rule.

The plaintiff further contends that he entered the intersection first and had the right of way over vehicles approaching from his left,—in this case the truck was coming from the east, or left,—citing section 39-1148, Comp. St. Supp. 1939.

After entering the intersection the plaintiff still had a

duty to perform; to use reasonable care in driving his car with respect to approaching traffic, and to consider the condition of the highway and the protection of life, limb and property.

We have heretofore set out the distances which the plaintiff traveled in and across the intersection from the various points where he stated he stopped. When he first looked to the east, he did not see the truck; he could see for a distance of about 300 feet east; he could not see where highway No. 8 intersected highway 36. Plaintiff estimated the speed of the truck, when he first saw it, at 55 miles an hour, and, at such a rate of speed, it would travel a distance of 160 feet within approximately two seconds. The plaintiff made no attempt to accelerate his speed, to clear a path for the driver of the truck to pass behind him, and made no effort to stop, to enable the defendant driver to proceed in front of him to the left, but he kept on going at the same rate of speed across the intersection and pulled his car only slightly to the right. If the plaintiff's testimony is true, it is obvious, under the circumstances, that defendants' truck could not have cleared the plaintiff's car to the right. Plaintiff, by his own negligence, failed to see the truck when he was in a position to see it, and, when he did see it, continued a negligent course of conduct by driving directly in front of the truck, thereby exposing himself to danger that was imminent. His failure to use proper precaution, under the circumstances, makes him guilty of contributory negligence more than slight.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." 45 C. J. 942. See *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620. Want of ordinary care, and not knowledge of the danger, is the test of contributory negligence. *Welsh v. City of South Omaha*, 98 Neb. 148, 152 N. W. 302.

The evidence in the instant case establishes that the plaintiff was guilty of negligence more than slight; it becomes a question of law for the court, and it is the duty of the court to direct a verdict for the defendant. *Ritter v. Hering*, 135 Neb. 1, 280 N. W. 231; *Eaton v. Merritt, supra*; *McDonald v. Omaha & C. B. Street R. Co.*, 128 Neb. 17, 257 N. W. 489.

For cases holding a driver, such as plaintiff, guilty of contributory negligence more than slight, under like or similar circumstances, see, also, *Huber v. Paquette*, 293 Mich. 370, 292 N. W. 334; *Whittaker v. Hanifin*, 138 Neb. 18, 291 N. W. 723; *Davis v. Hoskinson*, 228 Ia. 193, 290 N. W. 497.

Other assignments of error need not be discussed.

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, GUARDIAN, APPELLANT, V. MAUD HAMMOND, APPELLEE.

298 N. W. 144

FILED MAY 9, 1941. No. 31006.

1. Appeal. As a general rule, a party who, after appealing from a decree in his favor, voluntarily accepts the benefits or receives the advantages of such decree, is thereby precluded from afterwards prosecuting an appeal.
2. ———. It is the general rule that one may not voluntarily accept payment of that part of a judgment in his favor and afterwards prosecute an appeal from the part which is against him.
3. ———. "The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. * * * It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from." *Weston v. Falk*, 66 Neb. 202, 93 N. W. 131; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391.

4. ———. The use of a judgment defensively in another action will not operate as a waiver of the right of appeal.
5. **Insane Persons.** Our courts, in cases where the interests of incompetent wards are concerned, recognize as paramount the rights of such incompetent wards to the end that such rights may not be waived or sacrificed by the unapproved acts of their representatives.
6. ———. A transfer of the personal property of a ward by his guardian must be authorized or directed by the proper court of probate.
7. ———. The right to an appeal in an action by a guardian on behalf of his ward is a substantial one belonging to the ward, and not the guardian, and it may not be waived or lost by the guardian without approval of the county court within the time allowed by law for appeal.
8. ———. The acceptance by the guardian of the benefit of the judgment affecting the property of the ward, without approval of the county court, will not operate to estop the prosecution of an appeal where the judgment is, in part, in favor of, and, in part, against the ward.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Motion to dismiss denied.*

Woods, Aitken & Aitken, for appellant.

Beghtol, Foe & Rankin, Walter E. Nolte and *Boehmer & Boehmer, contra.*

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

YEAGER, J.

The issues presented by the record in this case and a motion by the appellee to dismiss the appeal have been submitted to this court, but, in this opinion, the only question considered is the propriety of the appeal.

The action was instituted in the district court by filing a petition. It is not necessary to set forth the petition here but only its substance. In the petition it was alleged by plaintiff, appellant herein, that Willard Hammond and Maud Hammond are husband and wife, and that prior to the incidents and occurrences involved in this action Wil-

lard Hammond was possessed of a very considerable amount of property. On September 26, 1938, he was declared incompetent by the county court for Lancaster county, Nebraska, and on the same date the Continental National Bank was appointed guardian of his person and of his estate. On May 17, 1939, through proper proceedings, the First Trust Company of Lincoln became the substituted guardian.

The petition further alleged that prior to the adjudication of incompetency Willard Hammond kept property of substantial value consisting of real estate bonds, certificates of stock, negotiable securities, cash and other personal property, of which he was the sole owner, in certain safety deposit boxes, to which boxes the defendant, appellee herein, had access, and that said defendant refuses to deliver up the keys to such boxes and refuses access thereto to plaintiff; also that there were bank accounts belonging to Willard Hammond, some of which he alone had the right of withdrawal, and some of which he had the joint right of withdrawal with the defendant, knowledge of the location of which accounts the defendant refuses to give to plaintiff.

It is further alleged that plaintiff has demanded that defendant deliver over all of the property of Willard Hammond, which demand was refused.

It is further alleged that on August 6, 1938, Willard Hammond was placed in a sanatorium, and since said date the defendant has received the income from his real estate, the interest on his negotiable securities and the dividends from his stocks, all of which, together with moneys and other property of the said Willard Hammond, she has wrongfully and fraudulently converted to her own use.

The prayer is for injunctive relief, that defendant be declared a constructive trustee of all of the property in question, and that said property be impressed with a trust in favor of plaintiff as guardian, for an accounting and for an order on the defendant to pay to plaintiff all sums found to be due Willard Hammond.

The defendant answered the petition, and in the answer

set forth that she was the wife of Willard Hammond by marriage dated September 1, 1908; that Willard Hammond was declared incompetent on September 26, 1938, and that plaintiff was appointed guardian on May 17, 1939. For further answer defendant denied generally the other allegations of the petition.

On the issues thus presented a trial was had to the court, and a decree entered on April 3, 1940. The plaintiff adduced its evidence but none was offered by the defendant.

To the extent necessary to be set forth here the court, in effect, found that 47 certificates of stock, representing 3,071 shares in various corporations, were the property of Willard Hammond, and decreed that the defendant should deliver the certificates to the clerk of the court within 20 days for the use of plaintiff.

As to the balance of the property the petition of plaintiff was dismissed, and no finding made with regard to it. It may be noted here that the court found no fraud or misrepresentation, and that the portion of the findings and decree which was favorable to plaintiff was based on the proposition that the evidence failed to show a completed transfer of that portion of the property by Willard Hammond to the defendant.

Plaintiff filed its motion for new trial on April 3, 1940, which motion was overruled on April 25, 1940.

On April 4, 1940, the defendant delivered up the certificates which the court found to be the property of Willard Hammond, and they were receipted for by the clerk of the district court and the plaintiff herein by its trust officer.

On April 5, 1940, and 20 days before the ruling on the motion for new trial, plaintiff tendered back to the clerk of the district court the certificates of stock, which tender was refused. Thereupon plaintiff filed an application in the case requesting an order requiring the clerk to accept the tender. The court ruled adversely to the plaintiff on this application at the same time as the motion for new trial was overruled. The tender, to all intents and purposes, appears to have been kept open.

The case was presented to this court on appeal on May 13, 1940, and is predicated, in part, on the order overruling the motion for new trial.

On May 23, 1940, the defendant filed her motion in this court to dismiss plaintiff's appeal and assigns two grounds for dismissal. First, she urges that plaintiff has accepted full payment and satisfaction of that part of the judgment which was in its favor, and therefore cannot now prosecute an appeal from that part which is adverse to it. Second, that subsequent to the decree in the district court, the defendant made application to the county court for an allowance for support and maintenance out of the estate of Willard Hammond, which application was resisted by the plaintiff, not by formal pleading, but in a memorandum filed with the court, on the ground that in the decree of the district court in this case it was found that the larger portion of what had formerly been the property of Willard Hammond had been decreed to be the property of defendant, and that by reason thereof she was not entitled to an allowance. Defendant contends that by this action the plaintiff has forfeited its right to appeal.

At the outset of the discussion it may be well to note that no demand appears to have been made for delivery of the property in question, but that defendant voluntarily complied with the decree and made delivery for the use of the plaintiff in accordance with its provisions. Also, it may be noted that the record does not disclose that the acceptance received the approval of the county court. It appears, on the other hand, that approval of this appeal was had from the county court.

There can be little question that under the authorities, as a general rule, a party who, after appealing from a decree in his favor, voluntarily accepts the benefits or receives the advantage of the decree, is thereby precluded from afterwards prosecuting an appeal. *Harte v. Castetter,* 38 Neb. 571, 57 N. W. 381; *Weston v. Falk,* 66 Neb. 198, 92 N. W. 204; *McKee v. Goodrich,* 84 Neb. 479, 121 N. W. 577; *Thurston v. Travelers Ins. Co.,* 128 Neb. 141, 258 N.

W. 66. Likewise it is the general rule that one may not voluntarily accept payment of that part of a judgment in his favor and afterwards prosecute an appeal from the part which is against him. *Larabee v. Larabee,* 128 Neb. 560, 259 N. W. 520. But these general rules do not take into account those situations wherein the benefits are conceded. The rule of this court in such situations is the following: "The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. * * * It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from." *Weston v. Falk,* 66 Neb. 202, 93 N. W. 131; *Meade Plumbing, Heating & Lighting Co. v. Irwin,* 77 Neb. 385, 109 N. W. 391. This rule has been announced in *Tyler v. Shea,* 4 N. Dak. 377, 61 N. W. 468, and finds support in *Mellen v. Mellen,* 137 N. Y. 606, 33 N. E. 545; *United States v. Dashiel,* 70 U. S. 688; *Embry v. Palmer,* 107 U. S. 3, 2 S. Ct. 25; *Reynes v. Dumont,* 130 U. S. 354, 9 S. Ct. 486, and other decisions not necessary to be cited here.

Could the appeal in this case affect the right of the plaintiff to the benefit which came to it as a result of the acceptance of the property in question? The record presented on the motion to dismiss appears to be a sufficient answer to this question. The pleadings of the defendant asked for no affirmative relief. She rested at the close of plaintiff's evidence and offered no word of testimony which would show to the court that she had any legal or equitable claim upon the property. Then consistently upon entry of decree she surrendered it up. She took no appeal. Clearly, from all that is before the court no controversy remained as to this property. Clearly, under the circumstances, no

possibility existed that this appeal might lead to a result showing that plaintiff was not entitled to what it had received under the decree.

As to the assertion of the decree in this case, as a defense to an application for support and maintenance in the guardianship proceeding in the county court, little need be said. There was no formal or record presentation of the matter, and no record indicating that it was considered by the court in passing upon the application. It was presented merely as argument in a memorandum brief. If it is a matter for consideration here, it must be classified as a judgment used defensively in another action. In that connection the rule is that the use of a judgment defensively in another action will not operate as a waiver of the right of appeal. *Ostrander v. Campbell,* 20 N. Y. St. Rep. 806, 3 N. Y. Supp. 597; *Brewster v. Wooster,* 56 N. Y. St. Rep. 844, 26 N. Y. Supp. 912; *Pittsburgh, Ft. Wayne & Chicago R. Co. v. Swinney,* 91 Ind. 399; *Missouri, K. & T. R. Co. v. Bagley,* 65 Kan. 188, 69 Pac. 189; *Cornell v. Donovan,* 14 Daly (N. Y.) 292, affirmed 109 N. Y. 664, 17 N. E. 869; *Morris v. Butler,* 138 Mo. App. 378, 122 S. W. 377; *Melancon v. Wilson,* 107 La. 628, 31 So. 1029.

The appellant urges, in support of its contention that the motion to dismiss should be overruled, the proposition that, even if a dismissal would be required on account of a similar act in acceptance of benefits where the action was between parties in their individual capacities, such right would not be available here because of the relationship of guardian and ward, and the control of the relationship by the county court. In other words, it urges that the guardian, under the circumstances outlined, is without power to effectively waive or forfeit the right of appeal.

There has been found no decision bearing directly on this point. However, some pertinent and illuminating statements have been found in several of our decisions. *Wirth v. Weigand,* 85 Neb. 115, 122 N. W. 714, which was an action by guardian to set aside and to avoid the effect of a judgment quieting title in Valentine Wirth to real estate,

the title to which had been previously in Bridget A. Wirth and which judgment had been rendered eight years previously, is one such case. It was claimed that the judgment had been procured on perjured testimony and, there being no guardian, the guardian *ad litem* failed to protect the interests of the insane person. In holding the action proper the court said: "It was the duty of the court, as well as of the guardian *ad litem,* to see that the interests of the insane defendant in that suit were fully preserved in every respect." This language is significant in that it makes clear that our courts, in cases where the rights of incompetent wards are concerned, recognize the paramount duty of protection of the rights of an insane ward, and that such rights may not be waived or sacrificed by the unapproved acts of the representative.

In *Hendrix v. Richards,* 57 Neb. 794, 78 N. W. 378, in the first paragraph of the syllabus it is stated: "A transfer of the personal property of a minor by his guardian must be authorized or directed by the proper court of probate." That the right to appeal in this case was a substantial one belonging to the ward, and not the guardian, requires no citations in its support. May that right be sold, waived, bartered, negligently or carelessly lost within the time allowed by law for appeal, without approval of the county court? We think not. To the same effect on the legal proposition stated are *Coe v. Nebraska Building & Investment Co.,* 110 Neb. 322, 193 N. W. 708; *Wilkins v. Deal,* 128 Neb. 78, 257 N. W. 486.

Directly in point in principle is the Indiana case of *Scott v. Dilley,* 53 Ind. App. 100, 101 N. E. 313. There the court said: "We find no express authority in this state upon the subject of the effect of a guardian accepting for his ward the benefit of a judgment rendered in a suit against such ward affecting his real estate, but we are of the opinion that such acceptance by the guardian should not operate to estop the ward from prosecuting an appeal where the suit and judgment was against the ward."

After a full consideration of the motion to dismiss, to-

gether with its surrounding incidents and the status of the parties as disclosed by the record, we are of opinion that such motion should be and it is denied.

MOTION TO DISMISS DENIED.

GRACE MUNCHHOFF, APPELLEE, V. GEORGE H. MERTEN, APPELLANT.

298 N. W. 140

FILED MAY 9, 1941. No. 30960.

Attorney and Client. In equitable action for an accounting between a client and her former attorney, on trial *de novo* decree modified by allowing defendant an additional item of credit for money found to have been advanced to plaintiff by defendant, and, as so modified, affirmed.

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

O'Sullivan & Southard, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This is an action in equity by the plaintiff, Grace Munchhoff, against defendant, George H. Merten, her former attorney, for an accounting for funds advanced in connection with her property and affairs. Plaintiff in her petition alleges that defendant acted as her attorney for a number of years in matters connected with the management, title and ownership of property formerly owned by her deceased husband. Plaintiff alleges that on or about January 5, 1933, she delivered to defendant, as trustee, a check for $151.98; that on January 24, 1934, she paid defendant $800 to be held by him in trust; and that she advanced to the defendant at various times money for attorney's fees, court costs and expenditures in connection with the Joseph

W. Munchhoff estate, and matters in which he was acting as her attorney, amounting to approximately $1,373.45; and that said sum was more than sufficient to pay all legitimate attorney's fees, costs and expenses in connection with such matters.

Defendant's answer is a general denial.

Decree was entered December 8, 1939, and includes specific findings; by paragraph No. 4 of which the court finds that plaintiff paid defendant $250 out of a check for $823.45 received by her from the estate of Joseph W. Munchhoff, in part payment of widow's allowance, and received his receipt dated July 25, 1933; and by paragraph No. 5 the court finds that on January 24, 1934, plaintiff paid defendant $800 for the purpose of having him acquire for her the Clara M. Payson interest in certain property in Omaha; and by paragraph No. 6 finds that by said two items of $250 and $800 there was advanced to defendant by plaintiff a total of $1,050. There is a further finding that defendant has accounted for a part of said sum of $1,050 by payment of a number of small items specifically set forth therein, aggregating $397.71; that there remains a balance of $652.29 of such advances unaccounted for by defendant, which sum the court found plaintiff was entitled to recover with interest at 6 per cent. from date of same, aggregating $960.77. The trial court also made the following finding which is involved in this appeal:

"9. That the other items mentioned in the evidence in this case have to do with the probate proceedings in the estate of Joseph W. Munchhoff, deceased, and this court cannot sit in review upon credits, disbursements and allowances in the probate of the estate of Joseph W. Munchhoff, deceased, in this proceeding. That this court has no jurisdiction to examine or determine the matter of attorney fees allowed and paid in the Iowa and Nebraska probate proceedings of the estate of Joseph W. Munchhoff, deceased, or of the amount distributed to the heirs of such deceased or the source from where same was derived, or with regard to the payment of an amount to Walter E. Schroeder, or

the allowance of amounts to Carl C. Wilson and Jack Lewis, or the payment or source of payment of other claims allowed in such probate proceedings. That all of such matters are charges and credits and pertain to the Iowa and Nebraska probate proceedings in the estate of Joseph W. Munchhoff, deceased, and are not chargeable against the plaintiff in this action."

Judgment was entered for plaintiff against defendant for $960.77 with interest and costs. Defendant has appealed. No cross-appeal by plaintiff.

The intermingling by parties of the accounts pertaining to the probate proceedings in the estate of Joseph W. Munchhoff, deceased, in Douglas county, and the ancillary proceedings in Iowa, and partition proceedings had in Iowa, with the accounts between the defendant and the plaintiff in her individual capacity, has resulted in some involvement in the evidence in this case.

Appellant makes eight assignments of error. Numbers 1, 2 and 4 assign, in different phraseology, error in the court's finding number 4 wherein the court finds that plaintiff paid defendant $250 out of $823.45 received by her from the Iowa administrator of the estate of Joseph W. Munchhoff, deceased, in part payment of widow's allowance, and received receipt dated July 25, 1933. The following receipt was admitted in evidence as exhibit No. 3:

"July 25—1933

"Received of Grace Munchhoff the sum of $250 for legal services rendered in case of Munchhoff vs. Munchhoff in the district court of Pottawattamie county, Iowa.

"George H. Merten"

The evidence is conflicting as to the source from which the money came out of which this $250, evidenced by exhibit No. 3 was derived. That question becomes important in determining whether it is an item included in the transactions between the defendant and the plaintiff in her personal capacity, and, hence, for consideration in this accounting; or whether it represented either an estate transaction handled through the probate court or an expense

of estate in partition proceedings in district court, and not proper to be considered in this case.

As to this payment, evidenced by receipt, exhibit No. 3, the plaintiff's testimony is convincing as to the making of the payment; she testified she did not get the receipt at the time of payment, but did later. The money was not sent to Mr. Merten; that she met him at the bank and the check was cashed, out of which the payment was made; and he said, "I need money bad; let me have $250;" and he counted out the money for himself. The check was for $550. Could not say date gave him the money. Would not say date on receipt was date she gave him the money. "Q. Is it a fact that there was no $550 item and what he got was $250 out of the $823.45 item? A. If it was out of that $823.45, I don't know it. I met him at the bank and he didn't explain it. Q. Did you get anything out of the $823.45, yourself? A. Not unless it was that $300, no. Q. Do you think now it was out of the $823.45 check that you got the $300 at the bank? A. I don't know."

Witness J. Leo Connolly, the administrator in the ancillary probate proceedings in Iowa, testified to the remittances made to Grace Munchhoff, the Nebraska administratrix, appellee herein; June 22, 1933, $823.45, November 6, 1933, $100, and when he closed the estate in November, 1933, $1,851.29. Checks were made payable to Grace Munchhoff; that these were the only remittances. The check for $823.45 was mailed to defendant but payable to plaintiff; that there was no check for $550. The defendant as a witness also testified that there was no such item as a $550 check.

Further reference to the evidence on this point would serve no useful purpose. The conclusion fairly to be deduced from this evidence is that there was no $550 check or payment. The trial court so found. With that finding we are in full accord.

That there was a payment to the defendant as evidenced by the receipt, exhibit No. 3, above set out, is equally clear. The receipt was made out by defendant, all in his own

handwriting, reciting the specific item for which payment purports to have been made; but as to this the defendant testifies: "I never received this $250 on July 25, 1933. * * * I never did receive such an amount from her. * * * That refers to these two checks I had received, $151.98 as attorney's fees, which is exhibit number 1, and I told Mrs. Munchhoff that I was charging $100 for services rendered in Council Bluffs, and then I gave this receipt on July 25, 1933, to cover these two items. * * * Q. As I understand it, you contend now that the receipt for $250 covers exhibit number 1, which had been paid some seven months previously, and the $100 which had not yet been paid? A. Which had not been paid as yet, but which she consented to let me draw from Leo Connolly in Council Bluffs. Q. Can you explain why the amount of the receipt was $250, whereas the amount received was $251.98? A. Yes, sir. Q. How? A. Mrs. Munchhoff had been down town some time prior to this time, and she came in the office and said she was short of money, and asked me to let her have $2 and I gave her $2, two one dollar bills, and we took into consideration the $2 she hadn't paid back yet when I gave her this receipt, and called the bill square. Q. Can you explain why this receipt says, 'For legal services rendered in case of Munchhoff vs. Munchhoff, in the district court of Pottawattamie county, Iowa?' Is that correct? A. Well, this receipt was meant to cover both of those items, that is, the item of $151.98 for attorney's fees in the probate proceedings, and the $100 that Leo Connolly gave me for services rendered, so I just wrote it out, Munchhoff vs. Munchhoff. Q. But it is not strictly correct? A. No, not strictly correct."

Again, when the defendant was recalled to the witness-stand he testified as to the purpose of giving the receipt, exhibit No. 3, as follows: "Q. All right, what does that $250 receipt represent? A. That $250 receipt represents the $151.98 check she indorsed to me, she got it from Herman Munchhoff. Q. And what else does it represent? A. It represents the $100 that I got from Connolly. * * *

Q. And now you say the items making up the $250, receipt exhibit No. 3, did not contain at all any reference to any $2 cash item? A. No, not that I recall, that should have been if we had had that check, that should have been $251 and some cents over, that check, but neither one of us knew the exact amount of that check so I made it roughly $250." The receipt written by defendant himself recites the purpose for which it is given; that is dated July 25, 1933. He testified that was "not strictly correct;" and explains the purpose as intending to represent the payment made by check dated December 10, 1932, more than seven months prior to the receipt of $151.98, which, according to plaintiff, was given to start a trust account for the estate, and which check is indorsed, "George H. Merten, Trustee;" but which the defendant contends was fee for legal services rendered estate in Pottawattamie county, Iowa; and to further represent $100 on account of attorney's fees which he expected to collect from J. Leo Connolly of Council Bluffs on account of plaintiff, but which was not received until November 7, 1933, more than three months after the giving of the receipt. The excess of $1.98 in figures is accounted for by statement that some time prior thereto, the date not given, he had let Mrs. Munchhoff have $2 and "called the bill square." By his later testimony the receipt, exhibit No. 3, is accounted for without any reference to a $2 item. The testimony of the witness on the two occasions could not both be correct; and there appears such an implausibility as to detract from the credibility of the explanations made by the defendant in accounting for the giving of the receipt. This testimony of the defendant as to the purpose for which the receipt was given is denied by the plaintiff on rebuttal.

That the plaintiff received check, exhibit No. 2, for $823.45 from the Iowa administrator of the estate of Joseph W. Munchhoff, deceased, on or about June 22, 1933, in part payment of the widow's allowance authorized by the county court, is not questioned herein. The trial court finds: "That out of such funds the plaintiff paid to the

defendant $250 and received his receipt dated July 25, 1933." While it is true, as urged by defendant in his brief, that the plaintiff did not directly testify that the $250 came out of the $823.45 check, it was her thought that it came out of a $550 check, yet it seems she was mistaken in that; and at the close of a long and thorough examination she testified: "Q. Do you think now it was out of the $823.45 check that you got the $300 at the bank? A. I don't know."

That plaintiff made defendant a payment of $250 at one time is conclusive. That they were at the bank together on at least one occasion is clear. The $823.45 check which was payable to the plaintiff was delivered to the defendant. It bears defendant's indorsement. The $823.45 had been received a little more than a month before the receipt is dated. The trial court concluded that the $250 was not paid from a $550 check; and further rejected the contention of the defendant that the receipt was given to cover items testified to by him. While this court on trial *de novo* has formed its own conclusion from the evidence, the fact that the trial court had the benefit of seeing the witnesses and hearing them testify cannot be overlooked. The trial court found the $250 was paid by the plaintiff to defendant out of the proceeds of the check of $823.45 received by her as a part payment of the widow's allowance. This court likewise so finds.

Fifth, defendant assigns error on the part of the court in refusing to take jurisdiction of seven items for which the defendant claims he is entitled to credit, for the reason stated in paragraph 9 of its decree heretofore set out. The items referred to are as follows: (1) April 2, 1932, $10; (2) July 14, 1934, $15; (3) August 21, 1934, $105; (4) January 26, 1935, $105.27; (5) April 21, 1938, $20; (6) December, 1933, $100; (7) December, 1934, $170.

With the exception of item No. 5 all the amounts above specified were paid out and expended for costs, expenses or disbursements made in estate matters and were considered in the probate proceedings or in the partition pro-

ceedings had in Iowa in the distribution of the estate and under the jurisdiction of the courts where those proceedings were pending; and the trial court determined such items were not chargeable against the plaintiff, personally, in this action and were matters for adjustment in those courts. Appellant urges: "When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all the matters put in issue by the pleadings." Many authorities are cited in support of defendant's contention, all of which have been examined. There is no controversy as to the rule relied upon by appellant as announced in those cases; but such rule may not be extended to justify a trial court in an action such as this (a suit by plaintiff in her personal capacity against her attorney for an accounting) in assuming jurisdiction to determine items having to do with the probate proceedings in the matter of the estate of her deceased husband, or review the action of the court in such proceedings, to examine or determine the matters of attorney's fees, costs, expenses and disbursements made, and charges and credits in the probate proceedings in Iowa and Nebraska, or the distribution of the estate in said proceedings or in the partition proceedings brought in Iowa for the distribution thereof. If any such items were owing defendant they were not chargeable against plaintiff personally. The district court was right in not taking the items specified into consideration in making the accounting.

As to item No. 5 in the list, that is, "April 21, 1938, $20," a different situation exists; that appears to have been for money loaned plaintiff personally by defendant, and was an item for which defendant is entitled to be credited in the accounting in this case.

The third assignment of error goes to the ultimate fact as to the amount found due; while assignments 6, 7 and 8 assign error in overruling motion for new trial, and that findings and decree are contrary to the evidence and contrary to law.

On trial *de novo* the court finds that on or about the 25th day of July, 1933, the plaintiff paid defendant $250 out of the proceeds of a check of $823.45, which was received by her as a part of her widow's allowance; and that on or about January 24, 1934, plaintiff paid defendant $800 to be held in trust until agreement consummated for purchase of interest of Mrs. Payson in certain property in Omaha; that said agreement was never consummated; and that there was a total amount of $1,050 advanced by plaintiff to defendant and for which she is entitled to an accounting; that defendant has paid to plaintiff, or at her request, and in her behalf, all of the several items set out in finding No. 6 of the decree of the district court, aggregating $397.71, for which defendant is entitled to credit; and, also, that on or about April 21, 1938, defendant paid plaintiff the further sum of $20, for which defendant is entitled to credit, making total credit of $417.71, which deducted from the amount advanced, $1,050, leaves a balance unaccounted for of $632.29; that plaintiff is entitled to interest at 6 per cent. per annum on the balance remaining due from time to time after allowing the several credits to which the defendant is found entitled, which balance and interest aggregates $898.24, as of the date of the decree of the district court, December 8, 1939, from which date it should bear interest at 6 per cent. per annum. The decree of the district court is modified by reducing the amount of the decree to conform to the findings of this court, and, as so modified, the decree of the district court is

AFFIRMED AS MODIFIED.

GEORGE MOORE, APPELLEE, V. FRANK KREJCI ET AL., APPELLANTS.

297 N. W. 913

FILED MAY 9, 1941. No. 31013.

1. **Appeal.** Where the verdict is opposed to the undisputed physical facts of the case, or is in flat contradiction to recognized physical laws, it will be set aside.

2. ———. Where, however, there is a reasonable dispute as to the pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong.
3. **New Trial.** Evidence examined and *held* to sustain the action of the trial court in holding that there was a reasonable dispute as to the pertinent physical facts.
4. **Witnesses.** A written statement, purportedly given by the plaintiff to an action and offered for the purpose of impeachment, is not admissible in evidence without a proper foundation.
5. ———. Ordinarily, the proper foundation for the admission of such a statement must be made by calling the person who procured the same and establishing by him that it was correctly typed or correctly read to or by the plaintiff and contains the statements made by the plaintiff.
6. **Evidence.** Expert testimony is not admissible to prove the direction of force causing damage to one of the vehicles involved in a collision, since this subject does not call for special skill, knowledge or experience.

APPEAL from the district court for Cass county: WILMER W. WILSON, JUDGE. *Affirmed.*

Chambers, Holland & Locke and *Dwyer & Dwyer,* for appellants.

Rudolph Tesar and *Walter H. Smith, contra.*

Heard before SIMMONS, C. J., PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL and POLK, District Judges.

POLK, District Judge.

This is an action for damages for personal injuries sustained in a collision between an automobile operated by the plaintiff and a truck owned by the defendant Mabel Krejci and operated by the defendant Frank Krejci. From a verdict and judgment for the plaintiff for $17,594 the defendants appeal.

The record shows without contradiction that the collision occurred at about 7:30 to 8:00 o'clock p. m. on September 2, 1938, on highway 73-75 about a mile north of the city of Plattsmouth, Nebraska; that immediately prior thereto plaintiff was driving to the northward and defendant Frank Krejci was driving to the southward on said highway and

that the collision occurred on the paved portion of said highway a short distance from the crest of a hill extending upward from said city.

It is the contention of the plaintiff that at the time of the collision he was proceeding northward at 25 to 30 miles an hour to the right of the center of said highway and that the truck, traveling southward at a speed of 60 to 65 miles an hour, suddenly turned across the center line of the highway striking the automobile of the plaintiff. Defendant Frank Krejci contends that he was driving southward at about 25 to 30 miles an hour and that the collision resulted from negligence of the plaintiff in turning across the center of the highway in an attempt to pass two vehicles immediately preceding him and near the crest of the hill. It is apparent from the contentions of the parties that the point of collision with reference to the center line of the highway is the main fact in dispute and its location determinative of the rights of the parties.

The assigned errors of the trial court, while eight in number, are in truth only three, namely: (1) That the verdict is contrary to the physical facts disclosed by the evidence, hence not supported by the evidence; (2) the court erred in excluding exhibit No. 6; and (3) the court erred in refusing to permit a witness to testify concerning his opinion of the direction of the force which caused the damage to the truck, based upon an observation thereof after the accident.

We shall consider the assignments of error in the order named. First, is the verdict contrary to the physical facts disclosed by the evidence? A detailed examination of the record is necessary.

Robert D. Fitch, Jr., a witness for the plaintiff, testified that, as the Cass county surveyor, he went to the scene of the accident, arriving there at 8:30 o'clock p. m. the day of the accident and made certain measurements and markings with reference to the vehicles involved, and that on the following day he measured certain skid marks; that plaintiff's automobile was headed in a northwesterly di-

rection with the left front wheel two-tenths of a foot east of the center line of the pavement; that the left front wheel was two and one-half feet back of its normal position and that had it been in a normal position it would have extended somewhat west of the center line; that the truck of the defendants was lying on its right side, headed to the northwest 110 to 112 feet south of the point of impact, with its radiator 19.9 feet west of the east curb; that there were two sets of skid marks made by four tires six feet apart and 36½ feet long west of the center of the highway, the nearest one to the center being two and six-tenths feet west of the center, and after extending along the highway 13.3 feet the distance of this skid mark was two and eight-tenths feet west of the center; that said skid marks then turned to the eastward and crossed over the center line at a point 27 feet south of the beginning thereof; that both sets of skid marks were of the same density and denoted a very great amount of friction; that a very pronounced amount of dirt had been shattered from the bottom of plaintiff's automobile and that the dirt was on the east half of the pavement, very nearly directly under the plaintiff's automobile; that the plaintiff's automobile stopped four feet north of the dirt; that the dirt extended possibly four feet by six feet north and south; that the headlight and fore part of the fender of plaintiff's automobile were untouched; that there was considerable glass strewn around on the pavement.

The plaintiff testified that immediately before the collision he was traveling about two feet to the east of the center of the highway; that he noticed lights coming toward him about 350 to 400 feet to the north; that he continued to watch the approaching vehicle, and that as the lights drew near and about the time they were 30 to 35 feet distant he noticed the truck getting closer to the center line and crossing it and, as he expressed it, "I jerked my wheels, my front wheels, and just as I jerked my front wheels trying to get out of the way, why the truck struck me;" that the collision occurred about two feet to the east of the

center line; that immediately prior to the collision he was following a car at a distance of 350 to 400 feet; that he was not gaining on this car; that in his opinion the car that struck him was going around 60 to 65 miles an hour.

The defendant Frank Krejci testified that as he reached the top of the hill prior to the collision he saw the plaintiff's car around 300 to 350 feet away; that the plaintiff's car was to the rear of another passenger car about 100 to 150 feet and this car was to the rear of Kausgaard's truck about 75 feet; that he was traveling from 25 to 30 miles an hour, and that when he was 15 feet away from the plaintiff's car the lights turned toward him and the next thing he knew there was a smash and he was flying through the air. On cross-examination, referring to what he saw the plaintiff do immediately before the collision, his attention was called to his deposition given on May 27, 1939, and in this connection the following questions and answers appear in the record: "Q. Let me ask you if I didn't ask these questions and you didn't make these answers: Question: 'When did he turn?' Answer: 'About the time I was to go behind him.' Question: 'At the time you were going behind him you saw him turn?' Answer: 'Well, he must have.' Question: 'Not what he must have. I want you to tell us just what you saw this Mr. Moore do?' Answer: 'I couldn't say as I saw him do anything.' Did I ask you those questions and did you make those answers? A. I must have; yes, sir." That after the accident plaintiff's car was setting in a northwesterly direction with the front part of the car about two feet ahead of the center line on the west side of the road; that he thought plaintiff's car stopped right where it was hit; that the truck box was 46 inches high and six and one-half feet wide and projected 16 to 18 inches out from the cab of the truck; that the wheels are one and one-half to two inches wider than the body; that when he first saw the plaintiff's car it was on the right-hand side of the highway and that he was watching the center line of the highway. In this connection he was again referred to his deposition and was asked the following questions: "Well, let me

ask you if at that time I didn't ask you this question and you didn't make this answer: Question: 'When you saw him he was on the right-hand side of the road, wasn't he?' Answer: 'When I saw him?' Question: 'To the right of the center?' Answer: 'I wouldn't say as to the center. I wasn't watching the center line.' * * * Did I ask you those questions and did you make those answers? A. I did." Defendant, in answer to a question as to how the accident happened, said: "Well, it seems to me when I passed the Kausgaard truck, it seemed to go by like a zip, and there was another zip and the next thing I knew I was flying through the air. That is just the way it seemed to me."

It is contended by the defendants that one of the conclusive proofs fixing the point of impact on the west side of the center line of the highway is the location of the skid marks made by the defendants' truck about two feet to the west of the said center line; that the wheels of the truck were locked by the force of the impact and that the beginning of the marks definitely fixed the place on the highway where the two cars came together, showing with absolute certainty that the collision occurred on the west side of the highway; that the plaintiff's description of the manner of the collision and the verdict of the jury cannot be reconciled with these undisputed physical facts.

The plaintiff contends that the skid marks started several feet south of the point of impact and that this was due to the fact that the truck wheels left the pavement and the truck itself was knocked through the air to the west from the point of impact. As to whether or not this was a reasonable explanation of the position of the skid marks the following questions and answers from the defendant Frank Krejci's testimony are significant: "Q. What was the next thing that you knew? A. The next thing I knew there was a smash and I was flying through the air. * * * Q. You say you were flying through the air? A. Me and the truck together. Q. You mean by that you were knocked up into the air? A. That's right. Q. You didn't stay up in the air? A. No. Q. When did you come down? A. I don't

remember; shortly after. * * * Q. After the rear wheels hit the pavement again, what next do you recall happened? A. The next I know I was climbing out of my truck upside down. Q. The next thing that you know is that you heard a smack and you and the truck together went up, is that right? A. That's right. * * * Q. Do you know what happened? A. You wouldn't want me to be able to tell you while I was flying through the air. * * * Q. Well, explain it to me then. A. After the accident happened it hit here on the left wheel and my truck seemed to raise up in the air after the accident and it went down the road and this wheel that locked, it couldn't turn, just as it come back down on the pavement and that forced the right-hand side of the truck around on the pavement like this (indicating), and after it got so far it flopped over. Q. You say they were locked for about eight feet? A. After we hit these wheels were up in the air and they didn't turn, but the right-hand side did, and that made it go across the road until it hit the shoulder and then flopped over."

The court is of the opinion that the testimony of the defendant Frank Krejci concerning the movement of the truck after the impact furnishes competent evidence from which the jury can reasonably conclude that the truck was knocked to the westward through the air and that the point of impact could reasonably have been found to have taken place at the point on the highway fixed by the plaintiff. We conclude also that the record contains competent evidence from which the jury could reasonably find that the defendant Frank Krejci was driving at an unlawful rate of speed.

The defendants refer in their brief to the case of *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514, and other cases in support of their contention that, where a verdict of the jury is contrary to the physical facts, it will not be allowed to stand. Plaintiff refers in his brief to the case of *Suhr v. Lindell,* 133 Neb. 856, 277 N. W. 381, and other cases in support of his contention that, where there is a reasonable dispute as to the physical facts, the conclusions to be drawn

therefrom are for the jury. The holdings in *Hessler v. Bellamy, supra,* and *Suhr v. Lindell, supra,* express the settled law of this state and they are in complete accord. The rule is that, where the verdict of the jury is opposed to the undisputed physical facts, or is in flat contradiction of recognized physical laws, it will be set aside, but where there is a reasonable dispute as to what the physical facts show, the conclusions to be drawn therefrom are for the jury. The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury. We conclude that the trial court did not commit error in holding that there was competent evidence showing a reasonable dispute concerning the physical facts and in submitting the matter to the jury.

The next error urged is the refusal of the trial court to admit in evidence exhibit No. 6. The exhibit is a typewritten statement claimed to have been given by the plaintiff on October 10, 1938, while in the hospital, and was offered on cross-examination for the purpose of impeaching the testimony of the plaintiff. The record shows that the statement was made to a scrivener and typewritten in the hospital and signed by the plaintiff with the words "I have read this and it is true" in his handwriting. The plaintiff testified that he remembered "talking to a fellow" and that this individual "wrote something," but that he did not read it over and did not know what he wrote and that he signed it because he "thought he put down the same thing that I told him." Inferentially the plaintiff denied the truth of exhibit No. 6. The record does not show any attempt to call as a witness the person to whom the purported statement was made, nor does the record show any explanation or reason for failure to do so.

In the case of *Seckinger v. Economy Laundry, Inc.,* 133 Pa. Super. Ct. 414, 3 Atl. (2d) 46, an action was brought for injuries, and error was assigned to the refusal of the court to admit a statement allegedly given to an insurance adjuster. The appellate court in holding that the refusal was not error said:

"The defendant, at the trial of the case, sought to offer in evidence a statement alleged to have been given by the plaintiff to his insurance carrier. The plaintiff admitted that the signature on the statement was his own, but stated that the facts set forth in the same were not as given by him to the adjuster who called on him. The defendant made no attempt to call the insurance adjuster who took the statement, to testify as to its correctness. The court sustained the objection to its admission. We see no error in this as the ground had not been laid for its admission, in view of the denial by plaintiff of its correctness."

In the case of *Altieri v. Public Service Ry. Co.*, 103 N. J. Law, 351, 135 Atl. 786, in which the admissibility of a statement was in question, we find the following language:

"In this situation, we are of the opinion that the exclusion of the paper was proper. If the defendant had desired to impeach the testimony of the witness while on the stand, it should have called the party who wrote the statement, or some one else having knowledge of the facts, to testify that it contained a true account of what the witness had then said. In the absence of such proof, the statement was not evidential for the purpose of impeaching the credit of the witness."

Where the record shows, as it does in this case, that the plaintiff signed a statement typewritten presumably by an agent of the defendants and it appears that upon it being shown to the plaintiff he testified that he did not read it, could not read it and did not know what was written in the statement, this statement is inadmissible without further foundation. Ordinarily, the proper foundation for the admission of such a statement must be made by calling the person who procured the statement and establishing by him that it was correctly typed or correctly read to or by the plaintiff and contains the statements made by the plaintiff. We hold that exhibit No. 6 offered by the defendants was properly excluded by the trial court on the ground of the insufficiency of the foundation laid for its introduction. In this connection see: *Curtis v. Ficken*, 52

Idaho, 426, 16 Pac. (2d) 977; *Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575; *Wisniewski v. New York Central R. Co.*, 228 App. Div. 27, 238 N. Y. Supp. 429.

The last error assigned relates to the refusal of the court to permit a witness to testify concerning his opinion of the direction of the force which caused the damage to the truck. If the witness was competent to testify it would be as an expert and this kind of testimony is only received where the subject-matter is complicated and embraces matters not of common knowledge. It is not to be used where the subject of inquiry does not call for special skill, knowledge or experience. The offer of proof would indicate that had the witness been permitted to testify he would have stated that the force came from the left, striking back of the cab or truck. This conclusion would be obvious to a casual observer of the truck. The offer of proof indicates the answer to be a patent observation at once discernible by a casual glance. It did not relate to a subject of inquiry calling for expert testimony. The exclusion of the testimony was not prejudicial for the reason that it would not be probative of the location of the vehicles on the highway, since the conclusion of the witness would be reconcilable with the theory of the case of both the plaintiff and defendants. The condition of the vehicles after the accident was before the jury and is presumed to have been considered by them together with all the evidence adduced at the trial. It was not error under the circumstances to refuse to permit the witness to draw his conclusion as to the direction of force causing damage to the truck.

We find no prejudicial error calling for a reversal of the case. The judgment is accordingly

AFFIRMED.

ALVENA PETERSEN ET AL., APPELLEES, V. EDWARD DETHLEFS, APPELLANT.
298 N. W. 155

FILED MAY 16, 1941. No. 31032.

1. **Bills and Notes.** A duly executed note "for value received" evidences a consideration, in absence of any defense to it in an action at law.
2. **Judgment.** The failure of defendant to appear and defend an action on a promissory note does not entitle plaintiff to any findings or judgment foreign to the pleadings in the case.
3. ———. For irregularity in obtaining a judgment, a district court has power to modify it after expiration of the term at which it was rendered. Comp. St. 1929, sec. 20-2001.
4. ———. A judgment irregularly obtained is one rendered contrary to the course of the law and the practice of the courts.
5. ———. A finding or other part of a judgment foreign to any pleading and not necessary to the relief grantable to any litigant in a case is contrary to the course of the law and the practice of the courts, is void and should be stricken from the record on motion.

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

Gerald E. La Violette, for appellant.

Paul I. Manhart, contra.

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

ROSE, J.

Alvena Petersen and Fred W. Heesch, plaintiffs, brought this action July 2, 1938, in the district court for Douglas county against Edward Dethlefs on a promissory note for $883.58, dated November 1, 1927. The note was payable to Louis Piittmann, now deceased, and Fred W. Heesch, but plaintiffs subsequently acquired the interest of Piittmann. The paper was an Iowa contract and contained a provision for an attorney fee under the law of Iowa in the event of litigation for recovery of the debt. The petition contained the plea that the action on the note was not out-

lawed because absence of defendant from Iowa prevented the statute of limitations from barring the claim of plaintiffs under the Iowa statute. The petition stated a cause of action on the note, but neither by plea nor prayer did plaintiffs ask for anything more than judgment for the debt, interest, costs and attorney fee.

By answer defendant denied each and every allegation in the petition.

A jury was waived. In advance of trial, defendant consented to the entry of judgment against him and did not appear to make a defense. The case was regularly called for trial March 27, 1939, and on that date the district court entered judgment against defendant for the following items: Debt and interest, $1,689.19; costs, $11.95; fees for plaintiffs' attorneys, $56.42. In addition to findings in favor of plaintiffs for these items the judgment recites:

"The court specifically finds that the consideration for the note in suit was moneys misappropriated by the maker from the J. R. Watkins Remedy Company in the breach of a fiduciary relationship between the defendant and that company, which the plaintiff, Fred W. Heesch, and the deceased Louis Piittmann was obligated to pay on behalf of the defendant."

Following the items recovered by plaintiffs, the judgment concludes:

"As for moneys misappropriated by the defendant from the J. R. Watkins Remedy Company, in the breach of a fiduciary relationship, which the plaintiff, Fred W. Heesch, and the assignors of the plaintiff, Alvena Petersen, had to pay for and on behalf of the defendant by reason of a fiduciary bond executed by them, and/or his assignor."

This objectionable matter was not mentioned by the trial judge in his minutes for findings and judgment in favor of plaintiffs for the items of debt recoverable. After expiration of the term of court at which the judgment was entered, defendant appeared and filed a motion to strike out of it and expunge from the record the matter identified

by the foregoing quotations as not within the pleadings, as beyond the power of the court to make thereunder and as void. Plaintiffs resisted the motion and upon a hearing thereon the district court made an order overruling it. From that order defendant appealed, there having been no objection to or appeal from the judgment on the note.

The petition shows on its face that the specific finding quoted and the other matter presented for review are wholly foreign to the case pleaded by plaintiffs. The offenses imputed to defendant were not mentioned in the pleadings. The note recites that it was given "for value received," and evidenced consideration. Other consideration was unnecessary under the circumstances. *Baker v. Thomas*, 102 Neb. 401, 167 N. W. 407.

By expiration of the term, did the district court lose power to strike the extraneous matters from its judgment? The statutory law is, for irregularity in obtaining a judgment, a district court has power to modify it after expiration of the term at which it was rendered. Comp. St. 1929, sec. 20-2001. Under the statute on this subject the general rule has been stated as follows:

"An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts." *Estate of McKenna v. McCormick*, 60 Neb. 595, 83 N. W. 844.

A finding foreign to any pleading and not necessary to the relief grantable to any litigant in a case is contrary to the course of the law and the practice of the courts. It follows that the expiration of the term did not deprive the district court of power to sustain the motion. Should the motion have been sustained? A law text reads thus:

"A judgment which determines questions not within the court's jurisdiction because not in issue, is to that extent void, although the question decided may be within the general jurisdiction of the court." 15 Standard Ency. of Procedure, Judgments, p. 41.

The following rule is in force in this state:

"A judgment of a court upon a subject within its gen-

eral jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is a nullity." *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, 55 N. W. 218. To the same effect see, also, *State v. Dickinson,* 59 Neb. 753, 82 N. W. 16; *State v. Haverly,* 62 Neb. 767, 87 N. W. 959; *Banking House of A. Castetter v. Dukes,* 70 Neb. 648, 97 N. W. 805; *Jarmine v. Swanson,* 83 Neb. 751, 120 N. W. 437; *Branz v. Hylton,* 130 Neb. 385, 265 N. W. 16.

"So much of the judgment as is invalid should be vacated, and not permitted to encumber the record." *Higgins v. Vandeveer,* 85 Neb. 89, 122 N. W. 843.

The wholesome course of the law and the practice of the courts tend to keep scandal, findings of impertinent crimes and other extraneous matters out of court records in civil cases.

The order from which the appeal is taken is reversed and the cause remanded to the district court, with instructions to sustain defendant's motion and strike from the record the void findings and that part of the judgment foreign to the pleadings, at the costs of plaintiffs.

REVERSED.

CATHERINE WALSH, APPELLANT, V. CHARLES P. MEGAN, TRUSTEE, ET AL., APPELLEES.
298 N. W. 158

FILED MAY 16, 1941. No. 31038.

Trial. Mere negative testimony by a motorist that, while approaching a railroad crossing over a public street, and keeping a sharp lookout, he did not see or hear any crossing signal in time to avoid an accident, does not make a case for personal injuries suffered by him on account of alleged negligence of the railroad company in causing a collision between his automobile and a locomotive at the crossing, where uncontradicted physical facts and affirmative testimony of unimpeached witnesses conclusively prove that all signals required by law were in view or given.

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

McKenzie & Dugan, for appellant.

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz, contra.*

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

ROSE, J.

This is an action by Catherine Walsh, plaintiff, to recover $3,000 for personal injuries and for damages to her Buick coupé as a result of alleged negligence of the Chicago & Northwestern Railway Company, defendant, in causing a collision between a locomotive and a Buick coupé driven by plaintiff with her sister, Margaret W. Swanson, beside her. The collision occurred about 3:30 in the afternoon of June 10, 1937, where the defendant's railroad crosses Eighth street in Seward, Nebraska. Eighth street is paved 24 feet wide with brick except for gutters and curbs of concrete. Plaintiff at the time was driving north on Eighth street and defendant was backing an engine or locomotive west over the crossing at the same time. The impact crushed the right front end of the coupé and bent the stirrup on the east side of the tender as it was moving backward. The coupé turned westward, went a few feet beyond the pavement and came to rest on its wheels free from the locomotive. Plaintiff was severely injured.

It was alleged in the petition in substance that the crossing was dangerous; that highway and railroad signals at or near the crossing were obscured from the south by trees, shrubs, weeds and other obstructions to vision; that the signals which the law required the train crew to give when approaching the crossing were not given and that the negligence of defendant was the proximate cause of the collision.

The negligence imputed to defendant was denied in its answer to the petition and negligence of plaintiff was al-

leged as the sole cause of the accident and of resulting injuries and damages.

Upon a trial of the cause the district court sustained a motion by defendant to discharge the jury and dismiss the action for want of sufficient evidence to support a verdict in favor of plaintiff. Plaintiff appealed.

It is argued on behalf of plaintiff that there was such a conflict of evidence on the issue of defendant's negligence as to require submission of the case to the jury and that consequently the nonsuit was erroneous.

In part the testimony of plaintiff herself is in substance as follows: She kept a sharp lookout; heard a shrill whistle when about 60 feet south of the railroad track, but could not tell the direction from which it came; saw the railroad track at the crossing when about 40 feet from it and at that distance applied the brakes while going about 15 miles an hour; collided with the tender of the locomotive at the crossing; could not avoid the accident; automobile dragged west by tender beyond the curb; hearing and sight good; did not hear or see any warning signals at or near the crossing except the whistle until too late to avoid the accident; vision of crossing which was sunken in the pavement obstructed by house, bank, trees, shrubs and weeds; brakes on automobile in good condition; pavement dry; day bright and sunny. The testimony of plaintiff was generally in harmony with specific facts alleged by her in her petition. The sister who sat beside plaintiff in the Buick coupé at the time of the accident also testified as a witness and her testimony in most particulars was the same as plaintiff's.

Notwithstanding the testimony of plaintiff and her sister, the following facts were shown by photographs or by an engineer's survey or by uncontradicted testimony of unimpeached witnesses: At the distance of 382 feet south of the center of the railroad track across Eighth street there was a highway and railroad warning in view of motorists indicating "R R" and a speed limit of 12 miles an hour; a cross-buck sign on the right side of Eighth street near the railroad track; a wigwag sign on the opposite side of

Eighth street. It was further shown by the survey that there was an unobstructed eastward view of 164 feet along the railroad track from a point 60 feet south of the crossing on Eighth street, where plaintiff said she heard the whistle. In addition, members of the train crew testified that the wigwag was in operation at the time of the collision; that the speed of the train was 10 or 12 miles an hour; that the crossing signals were given. There is also evidence by an eyewitness that the wigwag was swaying back and forth and flashing red and that the bell on it was ringing.

Mere negative testimony by a motorist that, while approaching a railroad crossing over a public street, and keeping a sharp lookout, he did not see or hear any crossing signal in time to avoid an accident, does not make a case for personal injuries suffered by him on account of alleged negligence of the railroad company in causing a collision between his automobile and a locomotive at the crossing, where uncontradicted physical facts and affirmative testimony of unimpeached witnesses conclusively prove that all signals required by law were in view or given. *Dodds v. Omaha & C. B. Street R. Co.*, 104 Neb. 692, 178 N. W. 258; *Oliver v. Union P. R. Co.*, 105 Neb. 243, 179 N. W. 1017; *Varnum v. Union P. R. Co.*, 112 Neb. 340, 199 N. W. 503.

In these views of the facts and of the law applicable thereto, the proximate cause of the accident was the negligence of plaintiff. She did not prove actionable negligence of defendant. The dismissal is therefore

AFFIRMED.

MARGARET W. SWANSON, APPELLANT, V. CHARLES P. MEGAN, TRUSTEE, ET AL., APPELLEES.

298 N. W. 160

FILED MAY 16, 1941. No. 31039.

Railroads. Where there is no evidence of actionable negligence of defendant in the trial of a lawsuit to recover damages for personal injuries, the sustaining of a motion to excuse the jury and enter a dismissal is not erroneous.

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

McKenzie & Dugan, for appellant.

Wymer Dressler, Robert D. Neely and *Hugo J. Lutz, contra.*

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

ROSE, J.

This is an action by Margaret W. Swanson, plaintiff, to recover $3,000 for personal injuries as a result of alleged negligence of the Chicago & Northwestern Railway Company, defendant, in causing a collision between a locomotive at the crossing of a public street and an automobile in which plaintiff was riding as a guest. The issues tried before the jury were negligence of the railroad company and negligence of the driver of the automobile. At the close of the trial the district court sustained a motion by defendant to excuse the jury and dismiss the case for want of sufficient evidence to support a judgment in favor of plaintiff. Plaintiff appealed from the nonsuit.

The evidence in this case is the same as in *Walsh v. Megan, ante,* p. 575, 298 N. W. 158, wherein it was held that actionable negligence of defendant was not proved. The judgment from which the appeal was taken is therefore

AFFIRMED.

JESSE BASHUS, APPELLANT, V. PHILIP F. ABBOUD, ADMINISTRATOR, ET AL., APPELLEES.
298 N. W. 153

FILED MAY 16, 1941. No. 31035.

1. **Lost Instruments.** A suit can be maintained in equity on a lost mortgage which has been duly recorded, when the petition alleges diligence in endeavoring to secure it.

2. **Mortgages.** When payment is pleaded in the answer, which is denied in the reply, the burden of proof is on the defendant to prove payment by a preponderance of the evidence; and if he does so, plaintiff's petition may be dismissed.

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

John W. Cooper, for appellant.

Anson H. Bigelow and *Philip F. Abboud, contra.*

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

PAINE, J.

Plaintiff brought suit in equity on a note and mortgage, neither of which was in his possession. Defendants pleaded payment. Court found for the defendants, and dismissed the cause of action. Plaintiff appeals.

The amended petition alleges that Jesse Bashus made a loan to Harry C. Farach, and on January 15, 1935, Farach and his wife, Sadie, gave him a promissory note for $200, bearing 9 per cent. interest. Plaintiff alleges he is unable to attach a copy, as it has been misplaced or lost, but sets out the substance thereof. He further alleges that, to secure payment of said note, the Farachs gave him a mortgage on lot 4, block 8, in Benson View Acres, in Douglas county, which was duly recorded on January 25, 1935, and a copy of said mortgage is attached to the petition as exhibit A.

It is further alleged that Sadie Farach and Harry C. Farach, the mortgagors, have both died; that the property was held as joint tenants, so that upon the death of Sadie Farach the title to the premises vested in said Harry C. Farach, and defendant Philip F. Abboud is administrator of his estate.

Vivian Farach, a minor daughter, is the sole heir of her parents, and Katie Farach is guardian of her person, and the Omaha National Bank is guardian of her estate.

The plaintiff prayed for accounting and foreclosure. Upon

motion, cause was dismissed as to Philip F. Abboud, administrator, and Anson H. Bigelow was appointed guardian *ad litem.*

The answer of Vivian Farach by her guardians admits the execution and delivery of the note and mortgage, and alleges that the note of $200 was fully paid, and the original surrendered to Harry C. Farach, and plaintiff promised at said time to release the mortgage of record, but has failed to do so, and now refuses to do so, and has fraudulently brought suit thereon; therefore, defendants pray that the petition be dismissed.

On March 12, 1940, the trial court found for defendants, and ordered that the cause be dismissed. Motion for new trial set out the usual grounds therefor.

The evidence discloses the testimony of J. J. Panuski, an abstractor, that the taxes were unpaid on the property for the years 1929 to 1938, in the amount of $47.26. The plaintiff testified to making the loan, and explains his failure to produce the note by saying: "In May when we had that hearing up here for the sale of this property, I had the note, and I don't seem to recollect exactly, it seems as though I turned it over to my lawyer, but he didn't seem to be able to locate it."

Plaintiff claims that on July 15, 1935, at his beer tavern near Fort Crook, Farach paid him $100, and he gave him back the abstract and deed so he could get a loan some place; that later on Farach's wife had to have an operation for cancer, and so he loaned him $50 back of the $100 he had paid.

John W. Cooper testified that plaintiff had given him the note to make an application in court for a license to sell real estate. On cross-examination he said he is not positive he got the note, but thinks he had it at one time.

The defendants' witness George I. Bero testified he went to the bank and got $300 to loan Harry C. Farach, and the two of them with H. J. Walsh, who owned the car, drove to plaintiff's tavern near Fort Crook, and he paid plaintiff $250 in currency, and the plaintiff gave abstract and mort-

gage back to Harry C. Farach, and that plaintiff wrote on the mortgage, "Paid in full," and signed his name, but that plaintiff did not have time to release the mortgage. This testimony is, in the main details, supported by the testimony of Walsh.

Defendants contend that positive and corroborated testimony proving payment of the loan in full, coupled with the fact that plaintiff failed to produce either the note or mortgage, takes from the plaintiff the presumption of nonpayment.

Plaintiff maintains that a suit can be maintained in equity on a lost mortgage, which has been duly recorded, and note secured thereby, if petition alleges diligence in endeavoring to secure them. *Mowery v. Mast & Co.*, 14 Neb. 510, 16 N. W. 839; *Kirkwood v. First Nat. Bank of Hastings*, 40 Neb. 484, 58 N. W. 1016, 48 L. R. A. n. s. 656, Ann.; *Thayer v. King*, 15 Ohio, 242, 45 Am. Dec. 571; *Palmer v. Carpenter*, 53 Neb. 394, 73 N. W. 690; 17 R. C. L. 1184, sec. 20; 8 Am. Jur. 333, sec. 621; 8 Am. Jur. 441, sec. 787; *Storey v. Kerr*, 2 Neb. (Unof.) 568, 89 N. W. 601; *Allendorph v. Ogden*, 28 Neb. 201, 44 N. W. 220.

The defendants set up payment in full in their answer, which was denied in the reply.

The law relating to this situation is that, when payment is pleaded, which is disputed, the burden is on the party pleading payment to prove the same by a preponderance of the evidence; and if he fails to do so, or if the evidence on that issue is evenly balanced, proof of payment is insufficient. *Mullally v. Dingman*, 62 Neb. 702, 87 N. W. 543; *Davis v. Hall*, 70 Neb. 678, 97 N. W. 1023; *Morris v. Equitable Life Assurance Society*, 109 Neb. 348, 191 N. W. 190; *Ashland Land & Live Stock Co. v. May*, 51 Neb. 474, 71 N. W. 67.

From a careful reading of the bill of exceptions, we find that the testimony of George I. Bero is positive as to payment of the note, and unchanged on cross-examination. This testimony was well supported by the testimony of H. J. Walsh. The trial judge saw all the witnesses and

heard their evidence, and decided that the note had been paid in full at the time and place and in the manner they described.

We see no good reason why the judgment of the trial court should be changed in any particular, and the same is hereby

AFFIRMED.

LIZZIE FISCHER ET AL., APPELLEES, V. ALBERT WILHELM ET AL., APPELLEES: HENRY WILHELM, APPELLANT.
298 N. W. 126

FILED MAY 16, 1941. No. 31042.

1. **Witnesses.** In the distribution of the net proceeds of a sale, in a partition action in which the administrator of the father's estate and all of the brothers and sisters are parties, the evidence of a sister of a conversation with her deceased father about deducting a debt due him from her brother, which testimony would have the effect of increasing her share in the proceeds, is incompetent under section 20-1202, Comp. St. 1929.
2. ———. The testimony is barred, for the words "representative of a deceased" person in such statute were intended to mean any person who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law. *Brown v. Forbes*, 1 Neb. (Unof.) 888, 96 N. W. 52.
3. **Executors and Administrators.** That a claim against an heir is barred by the statute of limitations should not prevent the application of the doctrine of retainer, such statute barring the right of action, and not the debt itself.
4. ———. "'Where a distributee is indebted to the estate, it is the duty of the executor to retain from his share the amount of such indebtedness.' *Hoffman v. Hoffman*, 88 Md. 60. * * * 'And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands as a debtor to the estate.' * * * *Smith, Admr., v. Kearney*, 2 Barb. Ch. (N. Y.) 533." *First Trust Co. v. Cornell*, 114 Neb. 126, 206 N. W. 749.

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

Wagner, Wagner & Albert, for appellant.

M. S. McDuffee and *Moyer & Moyer, contra.*

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

PAINE, J.

Deceased father owned a real estate mortgage, and mortgagor deeded the property to the administrator. Heirs brought partition action, and the district court directed that the amount due from certain heirs to the estate of their father be deducted from their shares of the proceeds of the sale in the partition action. One heir appeals.

Plaintiffs Lizzie Fischer and Lena Hastreiter, who are sisters, filed a petition in Madison county for the partition of real estate, alleging that their father, John Wilhelm, a widower, died testate in Platte county, Nebraska, on July 2, 1936, and at the time of his death owned a first real estate mortgage upon a tract of land of about 190 acres in Madison county, Nebraska.

Exhibit A, attached to said petition, is a copy of the will, dated March 31, 1931, which was duly admitted to probate in Platte county, in which will he gave to his daughters Kate and Rose the residence property in Humphrey, Nebraska, with all of the furniture therein. All the rest of his property was devised equally to his nine children, but the will provided that advancements to three children should be deducted, as follows: That the share of his son Fred was to be charged with $600, without interest, which had been advanced to him, and his son Joseph was to be charged with the sum of $1,450, without interest, and against the share of his daughter Kate the sum of $1,672, without interest, was to be charged, and "then the liens created on their respective shares shall be in favor of my children who have not received advances." It is further provided that, if any of the three children to whom advances had been made should repay any of said amounts, they should have proper credit therefor.

It is set out in said petition for partition that the maker of the note, secured by mortgage on the land in Madison

county, defaulted in his payments, and finally deeded this property to the administrator of the father's estate, upon the surrender of his note and mortgage. In addition to the indebtedness of each of the three children to their father as mentioned in his will, it is alleged that a son, Henry, was also indebted to his father in the sum of $1,350, with interest, and a daughter, Clara Labenz, was indebted to her father on two promissory notes in the total sum of $2,000.

It was alleged that an order had been entered in the county court for Platte county barring all claims against the estate; that all claims against said estate have been paid, except $170 due Rose Wilhelm, a daughter, and $170 due Victor Duesman; that the unpaid costs of the administration are $300; that the other personal property belonging to said estate amounts to more than $2,000, and is sufficient to pay all the unpaid claims and the costs of administration, and therefore the plaintiffs in said petition allege that the administrator of the estate of their father has no interest in the land taken on the mortgage, and is not entitled to the possession thereof.

The plaintiffs allege that the title to the said land taken in on the mortgages belongs in equal shares to the nine children of John Wilhelm, but that five of the one-ninth interests therein are each subject to the debts and advancements as hereinbefore set out, and plaintiffs pray that the court confirm the shares of each of the nine heirs, and ascertain the indebtedness due from each of five of said heirs, and set off the same against their respective shares in the property, and, if the property cannot be equitably partitioned, that the premises be sold and the proceeds distributed according to the respective rights of the several parties therein.

An answer was filed by Henry Wilhelm, admitting the allegations in six of the paragraphs of plaintiffs' petition, but alleging that the debt of $1,350, with interest, alleged to be due his father in paragraph 7 of the said petition was not a debt, but was a gift by his father to him, and defend-

ant alleges that he is not indebted to the estate for any amount whatsoever; further alleges that the cause of action on said alleged debt, if a debt, accrued prior to June 1, 1920, and more than 16 years prior to the death of John Wilhelm, deceased, and is barred by the statute of limitations, as found in sections 20-201, 20-205, 20-206, 20-212, and 20-215, Comp. St. 1929.

The defendant further alleges that he is now, and has been since March 15, 1918, a resident of the state of Colorado, and that the cause of action for the alleged debt is barred by the statute of limitations of the state of Colorado, as follows:

"6392. * * * The following actions shall be commenced within six years, next after the cause of actions shall accrue, and not afterwards: First—All actions of debt founded upon any contract or liability in action."

"6407. * * * When a cause of action has heretofore arisen, or hereafter arises in another state or territory or in a foreign country, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state."

"6408. * * * It shall be lawful for any person against whom an action shall be commenced in any court of this state, wherein the cause of action accrued without this state, upon a contract or agreement expressed or implied, or upon a sealed instrument in writing, or upon a judgment or decree rendered in any court without this state, more than six years before the commencement of the action in this state, to plead the same in bar of the action in this state."

The defendant therefore prays that his share of the real estate described in plaintiffs' petition be quieted and confirmed in him, free of the alleged debt, and that, if said real estate be sold, the distribution of the proceeds thereof be deferred until a final determination of his appeal from the order of the county judge of Platte county, listing against him the alleged debt due to the estate of his father.

After trial, the district court for Madison county on June 6, 1939, entered a decree in partition, finding the nine heirs are each the owners of an undivided one-ninth part of said real estate, and that the one-ninth interest in the real estate belonging to four of the heirs, to wit, Fred, Joseph, Kate and Clara, is each subject to the indebtedness due to the father's estate, as hereinbefore set out, each of said four heirs having defaulted and filed no answer in this partition suit.

As to the defendant Henry Wilhelm, the only defendant filing an answer in said suit, the court finds that he is the owner in fee simple of an undivided one-ninth part in said real estate, subject to later determination as to whether his share is to be charged with the indebtedness, or any part thereof, alleged to be due to the estate of his father.

It was therefore decreed by the court that each of the parties owned an undivided one-ninth interest in said real estate, and that the referee, George H. Moyer, partition the property into the requisite number of shares.

On March 25, 1940, a decree of distribution was entered, setting out that the referee had sold the property for the sum of $4,750, and that four of the heirs, to wit, Lizzie, Lena, Albert and Rose, should each receive a one-fourth part of the net proceeds of said sale, and that the indebtedness of the other five heirs, to wit, Fred, Joseph, Kate, Henry, and Clara, being charged against their share of said real estate, they received nothing out of the distribution of the proceeds.

The court found that Henry Wilhelm was indebted to the estate of his father in the sum of $1,350, which with interest thereon now amounts to $2,771.50, to which Henry Wilhelm duly excepts, and gives notice of appeal.

The defendant relies for reversal upon the ground that the findings of the court are not sustained by the evidence, and are based upon incompetent testimony, being the testimony of Rose Wilhelm relating to conversations and transactions had with her father, and that the decree is contrary to law.

The objection to the testimony of Rose Wilhelm is founded upon section 20-1202, Comp. St. 1929, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness." This section of our statutes is discussed at length in an article in 12 Neb. Law Bulletin, 282. It is said that the determination of the meaning of the words "direct legal interest" presents difficulties in the way of the application of the statute. These cases usually arise in actions where the financial interest of the witness is adverse to the interest of that of the representative of the estate, but in the partition case at bar the two plaintiffs and seven of the defendants are each and all children of the deceased, and the administrator is named as a party defendant in this litigation, and filed an answer and cross-petition. The question at once arises, does the statute apply under such conditions?

It was said in an opinion written by Commissioner Albert that the word "representative" as used in this statute was intended to designate any person who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law. *Brown v. Forbes,* 1 Neb. (Unof.) 888, 96 N. W. 52. See, also, *Wamsley v. Crook,* 3 Neb. 344; *Kroh v. Heins,* 48 Neb. 691, 67 N. W. 771; *Holladay v. Rich,* 93 Neb. 491, 140 N. W. 794.

To clarify this matter, a case where the testimony should have been admitted may well be examined. It is the case of *Oft v. Ohrt,* 128 Neb. 848, 260 N. W. 571, where the testimony of two sisters of the appellant had been rejected by the trial court on the ground that they had an interest in the result of the proceedings. However, it developed that their interests were based upon entirely separate deeds to the one in controversy. The decree was reversed on the ground that the two sisters did not have a legal interest within the meaning of section 20-1202, Comp. St. 1929. This was true, as the success of the plaintiff would not

affect them directly, as they were only interested in the same questions of law involved. Being competent witnesses, the trial court should have received their evidence.

In the case at bar, all nine heirs are parties to this partition action, and each one has a direct legal interest in the result, and all of them are representatives in a sense of their deceased father. See *Broeker v. Day,* 124 Neb. 316, 246 N. W. 490. Rose Wilhelm will increase her share if her testimony reduces the amount her brother Henry receives.

In the opinion of the court, the testimony of the witness Rose Wilhelm was incompetent, and the objection to her evidence should have been sustained.

This determination takes out of the bill of exceptions all of the testimony of Rose Wilhelm to the effect that her father stated to her that she should keep the three checks and the two letters of Henry, as he did not have a promissory note of his son Henry, and that those three checks would be evidence of the debt that Henry owed him, and she could testify to such facts in settling his estate.

Now, as to the evidence remaining in the case, we have photostatic copies of the three checks, amounting to $1,350, signed by the father and cashed by defendant Henry Wilhelm in Colorado, together with photostatic copies of two letters, in one of which it is claimed that Henry asked his father for money, and in the other he agreed to repay it, all of which were received in evidence without objection, as was a copy of the last will of the father, John Wilhelm.

The only evidence offered on behalf of defendant Henry Wilhelm was exhibit No. 7, a certified copy by the secretary of state of Colorado, under seal, of sections 6392, 6407, and 6408, Laws of Colorado 1921, as set out hereinabove, which was received without objection, whereupon all parties rested.

The answer of Henry Wilhelm alleged that this debt was barred by the Nebraska statute of limitations, as set out in the several sections above cited, and was also barred by the statute of limitations of the state of Colorado.

The evidence shows that the last check was dated March 3, 1920, and the petition in partition was filed on February 15, 1939.

In this case, at the time of the death of the father he owned notes and mortgage, which were personal property in the hands of the administrator with will annexed. While the mortgagor gave the administrator a deed to the mortgaged property, it will still be considered, for the purpose of distribution to the heirs, as personal property. At its sale under partition proceedings, the proceeds of $4,750 belonged to the estate, to be distributed according to the will.

The trial court found that the debt represented by the three checks, amounting to $1,350 with interest, had never been paid. The only defense is the statute of limitations.

The personal estate passes to the administrator, and while it is in the possession of such administrator, he may retain a sufficient amount of a devisee's share in the personal property to satisfy his claim against him. It is this situation that gives rise to the use of the term "retainer," which is defined as the right to have the debt of the legatee or distributee charged to him in the adjustment of the legacy or the distributive share. This right to retainer rests upon the broad principles of equity. *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98; *Stanton v. Stanton*, 134 Neb. 660, 279 N. W. 336.

The right of retainer is more correctly applied in such a case than the term "set-off," which exists only when the obligations of both parties are debts, but in these cases the interest of an heir in his ancestor's estate is not technically a debt due him from the estate, and so the term "retainer" is more accurate.

"The right to retain the debt of an heir from his distributive share is not affected by the lapse of time, and the deduction of the debt should be made although an action to recover the same would be barred by the statute of limitation. *Wilson v. Channell*, 102 Kan. 793, 175 Pac. 95, 1 A. L. R. 987, and cases cited in note page 1007. The same

rule prevails in Iowa where the note was made. *Woods v. Knotts,* 196 Ia. 544, 194 N. W. 953, 30 A. L. R. 768." *In re Sheley's Estate,* 35 N. M. 358, 298 Pac. 942. See, also, *Baca v. Chavez,* 32 N. M. 210, 252 Pac. 987.

Statutes of limitation are enacted on the presumption that one having a well-founded claim will not delay enforcing it, and they neither create nor destroy rights, but pertain to the remedy solely. *In re Hogan,* 75 Ind. App. 53, 129 N. E. 633.

The Indiana court said: "The doctrine is correctly and firmly settled in this state that a distributee is not entitled to receive his distributive share while he is indebted to the estate, and thereby retains in his own hands a part of the fund out of which his own and the shares of other distributees, or other claims on such fund, ought to be paid." *Holmes v. McPheeters,* 149 Ind. 587, 49 N. E. 452.

The New Mexico court held: "That a claim against an heir is barred by the statute of limitation should not prevent the application of the doctrine of retainer * * *; such statute barring the right of action, and not the debt itself." *In re Sheley's Estate,* 35 N. M. 358, 298 Pac. 942.

"In proceedings for partition of property of mother's estate, indebtedness of son to estate should be considered as an asset of the estate, and set apart to son as part of his distributive share, even though the effect of such allotment would be to diminish or eliminate acreage in land set apart to him." *Young v. Hollingsworth,* 16 S. W. (2d) (Tex. Civ. App.) 844.

The Nebraska case of *First Trust Co. v. Cornell,* 114 Neb. 126, 206 N. W. 749, is in point. When Dr. B. L. Paine died, March 13, 1921, his will gave to Herman L. Cornell a legacy of $2,000. The will was admitted to probate on April 11, 1921, and on April 30, 1921, Cornell assigned his legacy of $2,000, while he was indebted to the testator on notes in the sum of $15,000, which had not matured on the date of his assignment of his legacy, and the assignment was immediately filed in the probate proceedings in Dr. Paine's estate. The district court held that the assignment

of this legacy was good, but the decision on appeal to this court was reversed, and this court held: "'Where a distributee is indebted to the estate, it is the duty of the executor to retain from his share the amount of such indebtedness.' * * * 'And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands as a debtor to the estate.'"

The fact that this particular part of the estate, amounting to $4,750, was distributed by the district court for Madison county would not change the rules relating to the distribution of any estate. The administrator with will annexed was a party to these proceedings, and the only question was the proper distribution of this money between the heirs.

The decree of distribution of March 25, 1940, in reference to Henry Wilhelm, reads: "The court further finds that the defendant Henry Wilhelm is indebted to the estate of John Wilhelm in the sum of $1,350 with interest thereon at 5% per annum from April 1, 1920, making a total of $2,771.50 which greatly exceeds his distributive share in the proceeds of the sale of this real property, and none of said proceeds shall be distributed to him. * * * Henry Wilhelm excepts. Supersedeas bond fixed in the sum of $500 conditioned that Henry Wilhelm will prosecute his appeal without delay, and pay all damages and costs assessed against him. Referee shall retain, pending appeal of Henry Wilhelm, or until time for appeal has lapsed, $699.19."

In the opinion of this court, this finding and order in regard to the share of Henry Wilhelm is proper, and the same is hereby

AFFIRMED.

HERMAN ROSE, APPELLEE, V. GERALD M. GISI ET AL., APPELLANTS.

298 N. W. 333

FILED MAY 16, 1941. No. 31036.

1. **Abatement and Revival.** Objections to jurisdiction raised by special appearance may properly be preserved by appropriate allegations in the answer.
2. **Automobiles.** The nonresident motorists' law, section 20-530, Comp. St. 1929, is to be strictly construed and applies only to those persons specifically designated in the statute.
3. ———. Where an employee is placed in charge of a truck and permits an unauthorized person to operate it on the public highways of this state while it is being used in the master's business, the master, employee and operator, all being nonresidents, by such use of the highways are subject to service of process under the provisions of the nonresident motorists' law.
4. **Master and Servant.** The selection by an employee of a substitute is a wrong to the employer where such delegation is unauthorized, but it is not negligence toward the public if the substitute is competent and there is no failure of fitting supervision.
5. ———. If the act causing the injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to perform the particular act.
6. ———. But if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act is outside the scope of the employment and liability for the negligent performance of the act does not attach to the master.
7. **Appeal.** Misconduct of counsel in the argument to the jury cannot be properly shown by affidavit. To properly preserve such error, the statements must be taken by the official court reporter at the trial, together with the objections made thereto and the court's ruling thereon.

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

Butler, James & McCarl, Leon L. Hines and *L. R. Doyle,* for appellants.

J. J. Friedman, Victor Westermark and *Cordeal, Colfer & Russell, contra.*

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

CARTER, J.

This is an action to recover damages for personal injuries sustained by the plaintiff in a collision between two trucks on highway No. 34 at a point five or six miles east of Haigler, Nebraska. The verdict and judgment were for $6,000. Defendants bring the case to this court for review.

The record discloses that the plaintiff was riding in a truck with a number of other W.P.A. workers, when a truck belonging to Gerald M. Gisi of Yuma, Colorado, and driven by one Victor Wascher, also of Yuma, came up from behind and collided with the truck in which plaintiff was riding as Wascher attempted to pass it on the highway, causing the injuries for which damages are sought. There is no question raised in regard to the sufficiency of the evidence to sustain the verdict as to the negligence of the defendant Victor Wascher in the operation of the Gisi truck at the time of the accident. Neither is the amount of the judgment challenged as being excessive under the evidence. The principal questions raised by the appeal are whether the court obtained jurisdiction over the persons of the defendants and, if so, whether liability attaches to defendants Carter and Gisi under the evidence in the record.

The defendants Gisi, Carter and Wascher were residents of the state of Colorado at the time the accident happened. It appears that Gisi was the owner of an International truck which he was using in his produce and trucking business on August 31, 1938, the date of the accident. Defendant Carter was a regular employee of Gisi, his capacity being that of truck driver. On the day of the accident he was told by Gisi to go to Wray, Colorado, and Benkelman, Nebraska, to pick up some eggs and other produce. Defendant Wascher was also sent on the trip to assist in the loading and unloading of produce. The evidence of Gisi and Carter is to the effect that Gisi told Carter not to permit Wascher to drive the truck on the trip. The evidence

shows that Carter permitted Wascher to drive the truck and that the accident happened while Wascher was so engaged.

Plaintiff commenced his action in the district court for Dundy county, and service of process was had by serving the secretary of state in accordance with the provisions of the nonresident motorists' statute. Comp. St. 1929, sec. 20-530. Each of the defendants filed special appearances which were overruled by the trial court. The objections to jurisdiction raised by the special appearances were preserved by proper allegations in the answers of the respective defendants. This is proper practice. *Gaines v. Warrick,* 113 Neb. 235, 202 N. W. 866.

It is well settled in this state that the nonresident motorists' law is to be strictly construed and held to apply only to those persons specifically named in the statute. *Downing v. Schwenck,* 138 Neb. 395, 293 N. W. 278. It has been held by this court also that the only basis for sustaining the constitutionality of a statute permitting service upon nonresident motorists in the manner provided by section 20-530, Comp. St. 1929, is that the voluntary use of the highways by a nonresident constitutes consent and agreement to the designation of an agent for service of process. *Herzoff v. Hommel,* 120 Neb. 475, 233 N. W. 458; *Downing v. Schwenck,* 138 Neb. 395, 293 N. W. 278. See *Hess v. Pawloski,* 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; Restatement, Conflict of Laws, sec. 84. Without such a basis upon which to predicate a voluntary consent and agreement the law would be violative of the fourteenth amendment to the Constitution of the United States. *Flexner v. Farson,* 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250.

The applicable portion of section 20-530, Comp. St. 1929, is as follows: "The use and operation by a nonresident of the state of Nebraska or his agent of a motor vehicle over or upon any street or highway within the state of Nebraska, shall be deemed an appointment by such nonresident of the secretary of state of the state of Nebraska as his true and lawful attorney upon whom may be served all legal

processes in any action or proceeding against him, growing out of such use or operation." We are inclined to the view that the word "operation" as used in this statute means the actual physical driving and handling of the motor vehicle. *Morrow v. Asher*, 55 Fed. (2d) 365. But by the addition of the word "use," thereby making the statute read "the use and operation," it clearly evidences an intent to include persons other than the actual operator of the vehicle. The words "use" and "operation" are not interchangeable or synonymous. It is clear that the Gisi truck was being used on the highways of Nebraska in the furtherance of the business of Gisi at the direction of Gisi. These acts are sufficient to subject Gisi to the provisions of the nonresident motorists' law. The defendant Carter, also a nonresident, was the agent of Gisi and had the general control of the truck. He was in fact using the truck on a Nebraska highway as agent in the furtherance of his principal's business when the accident happened. It is true that he was not operating the truck at the time, but we think he was using the truck within the meaning of the nonresident motorists' statute. Defendant Wascher was also a nonresident and was actually driving the truck at the time of the accident. He being engaged in the actual operation of the truck when the accident happened, he is clearly subject to the provisions of the nonresident motorists' law. It is the contention of defendants that Wascher was performing an act outside the scope of his employment when he undertook to drive the truck. It is often difficult in cases of this kind to determine the difference between a question of jurisdiction and one of defense. If Wascher did not occupy a relationship with the other defendants that would impute his negligence to them, it matters little in this case whether it be decided as a matter of jurisdiction or as one of liability. A determination cannot be made until the facts are established, and at that time the decision on either ground would lead to the same result. It seems to us, however, that the plaintiff is obliged to establish that Wascher was acting within the scope of his employment in

order to sustain his cause of action as it is alleged in his petition. Jurisdiction is not dependent upon the establishment of liability. In the instant case, Wascher was an employee of Gisi and a presumption arises that he was within the scope of his employment in driving the truck, which presumption is sufficient to sustain the court's jurisdiction. When evidence to the contrary is adduced on this subject, the presumption disappears and plaintiff is then required to show by evidence that the act of driving the truck was within the scope of the employment. The case then resolves itself into a question of sustaining the issues by sufficient evidence rather than a question of jurisdiction of the parties. We therefore hold that each of the defendants was properly subjected to the jurisdiction of the district court for Dundy county under the provisions of section 20-530, Comp. St. 1929.

In the absence of error in the conduct of the trial, the liability of Wascher for negligence is sustained by the evidence. As to the liability of the defendant Carter, a more serious question is raised. The evidence shows that Carter was entrusted by Gisi with the management and control of the truck. It was also his duty to operate the truck on the road. At the time of the accident, Wascher was driving and Carter was sitting on the front seat beside him. We think the correct rule is that Carter was under a duty to exercise reasonable care to prevent Wascher from intentionally harming others, or from so conducting himself as to create an unreasonable risk of bodily harm to them if Carter knew or should have known that he had the ability to control Wascher and knew or should have known of the necessity and opportunity for exercising such control. Restatement, Torts, sec. 318. And in Comment "c" of such section appears the following: "If, however, the car is in good condition, being operated in the open country on a through highway, and the actor has no reason to suppose that the driver is incompetent, it would be unduly burdensome to require the actor constantly to center his attention on the road and the driver, and the actor, therefore,

would not be subject to liability if his attention is diverted to the surrounding scenery or if he talks to other occupants in the car, although he thereby deprives himself of an opportunity to exercise his control over the driver, since there is no particular reason to suppose that there will be any necessity for his doing so."

In the case of *Grant v. Knepper,* 245 N. Y. 158, 156 N. E. 650, the court announced the rule as follows: "The selection of any substitute is a wrong to the employer where delegation is unauthorized, but it is not negligence toward the public if the substitute is competent, perhaps more competent than the servant, and there is no failure thereafter of fitting supervision. * * * A different situation would be here if a competent substitute had been inattentive or remiss at a time when intervention by the servant would have been of no avail. The act of negligence may be 'so sudden or unexpected' (*Ricketts v. Tilling, supra,* p. 651) that there is no reason to foresee it nor opportunity to avoid it. This may happen oftener today in the management of automobiles than in the days of horse-drawn vehicles when Lord Abinger was able to say that the substitute who held the reins was the mere instrument of the driver who sat beside him on the box." See *Butler v. Mechanics Iron Foundry Co.,* 259 Mass. 560, 156 N. E. 720, and annotation in 54 A. L. R. 851.

The record shows that the accident happened on a clear day on a through highway in open country. The Gisi truck was less than a month old and in perfect mechanical condition. The collision happened suddenly, without any opportunity afforded the defendant Carter to avert it. There is no evidence in the record of any negligence on the part of Carter, either in selecting an incompetent operator or in being remiss in his duties at a time when he had a reasonable opportunity to have done something to prevent the accident. Plaintiff was permitted to recover against Carter for the negligence of Wascher and not because of any negligence on the part of Carter himself. No relationship was pleaded or proved that would fix a liability upon Carter for

Wascher's negligent acts. Under such circumstances no liability attaches to Carter, and the trial court should have directed a verdict in his favor.

The defendant Gisi also complains that the record does not establish liability on his part for the negligent acts of the defendant Wascher. The record shows that Wascher was employed as a helper to assist Carter in loading and unloading produce. There is no evidence that Wascher had any authority to operate the truck. In fact, it is not disputed that Gisi had directed Carter not to permit Wascher to drive the truck. In operating the truck, Wascher was clearly performing duties outside the scope of his employment. Restatement, Agency, secs. 228 and 229.

We think the fact that Gisi directed Carter not to permit Wascher to drive the truck is of importance in arriving at the foregoing conclusion. Disobedience of orders or directions by a servant does not always relieve a master from liability for his acts. If the act causing the injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to perform the particular act. But if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act is outside the scope of his employment.

In *Stone v. Commonwealth Coal Co.*, 259 Mass. 360, 156 N. E. 737, the court in passing upon a similar question said:

"It is not enough, in order to establish liability, to show that the master has an interest in what is being done. It must also be made to appear that the servant whose act is in question has authority from the master to perform the class of service to which the act belongs. If the act is within the class, the master is bound although the servant is forbidden to perform the particular act. * * *

"Driving motor trucks upon the roads was not within the class of work for which McDonnell was hired. His general employment did not confer the authority, and no special authority is shown to have been given. The distinction appears in the decision of Blackburn, J., in *Limpus v.*

London General Omnibus Co., 1 H. & C. 526, 542, where the master was held for conduct of the servant in driving although contrary to his orders; yet the judge suggests that he would not be liable if a footman had assumed to drive in the coachman's place."

In *Seaboyer v. Director General of Railroads*, 244 Mass. 122, 138 N. E. 538, one Donovan was employed as a helper on an express truck to assist in loading and unloading. Without authority from any one the helper undertook to drive the truck out of the way of another truck, resulting in an accident caused by his negligence. The court held that the helper was acting outside the scope of his authority and that the mere ownership of the truck by the defendant was not sufficient to cast responsibility upon the defendant for the negligent acts of the helper. This is the generally accepted rule. See Restatement, Agency, sec. 241. Under Comment "e" of said section it is stated: "A servant, while remaining with the instrumentality, may surrender its immediate control to another, as where the driver of a truck permits a boy to drive it. Although such surrender is not negligent, the master remains subject to liability for any negligence of the employee in supervising the conduct of the other. However, in the absence of negligence by his servant, the master is not liable for any casual negligence of the other while under the supervision of the servant."

In *Butler v. Mechanics Iron Foundry Co.*, 259 Mass. 560, 156 N. E. 720, the court said:

"Nor is the master liable because Welch was on the driver's seat. The entire transaction in allowing Doyle to ride and to drive the truck was unauthorized. It was contrary to the servant's instructions and in violation of the duty he owed the defendant. No negligence of Welch contributed to the plaintiff's injury and damage for which the defendant can be held responsible. Moreover, it does not appear that Welch was in a position to apply the brakes when the collision was impending; that he knew Doyle was about to pull the gas control instead of shutting it off; or that Welch did anything contributing to the injury and

damage, or could have done anything, at the moment of the accident, to prevent it.

"The defendant was not responsible on the ground that he entrusted the machine to Welch. A master is not responsible for the unauthorized use of an automobile by his servant." See *Rich v. Dugan,* 135 Neb. 63, 280 N. W. 225, and 18 R. C. L. 785, sec. 245.

We have not overlooked *Geiss v. Twin City Taxicab Co.,* 120 Minn. 368, 139 N. W. 611, and similar holdings relied upon by appellees, to the effect that when the master entrusts the performance of an act to a servant, he is liable for the negligence of one who, though not a servant of the master, in the presence of his servant and with his consent negligently does the act which was entrusted to the servant. We do not approve of the reasoning upon which this rule is based.

We therefore conclude that Gisi was not liable for the negligence of Wascher, the act of Wascher in driving the truck being outside the scope of his authority. The trial court erred in not directing a verdict in Gisi's behalf.

Defendant Wascher contends that the court erred in not submitting the question of the contributory negligence of the plaintiff to the jury. The record shows that plaintiff was sitting on a plank in the back of the W.P.A. truck, facing in the direction in which the truck was traveling at the time the accident occurred. We find no evidence in the record of anything that he did or failed to do which would be sufficient to take the question of his contributory negligence to the jury. The trial court is required to withdraw an issue from the jury which is not supported by evidence. *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677.

Misconduct of counsel is urged as a ground of reversal. This misconduct charged was with reference to statements made in plaintiff's opening statement and his closing argument to the jury. No record of the statements was made and they are shown only by affidavits filed at the time arguments were had on the motion for a new trial. To preserve such an error in the record the statements must be

taken at the trial, proper objection made and the court's ruling shown. Unless this be done, the alleged error will be deemed to have been waived.

The judgments entered against defendants Gerald M. Gisi and Floyd Carter are reversed and the judgment against Victor Wascher is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

ELLWYN A. CARD, APPELLANT, V. MINNEAPOLIS FIRE & MARINE INSURANCE COMPANY, APPELLEE.
298 N. W. 157

FILED MAY 16, 1941 No. 31158.

Insurance. Plaintiff's evidence examined and found to be insufficient to establish any liability against defendant.

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

Lee Card, for appellant.

E. D. Crites and *F. A. Crites, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

SPEAR, District Judge.

Suit on an automobile "collision" policy. Donald Fleming owned an automobile upon which Fred A. Hood, agent for defendant insurance company, had written a policy. The policy contains provisions that any waiver must be in writing; that, unless permission be given in writing, change in ownership voids the policy; and that, unless otherwise agreed to in writing, the company shall not be liable for loss while the insured property is subject to a mortgage. On January 7, 1939, Fleming sold or agreed to sell the car to the plaintiff Card. Fleming notified Hood of the transaction and Hood told him he would be entitled to a return premium. Fleming told Hood he did not want the return premium, but wanted the insurance to remain in force for

his protection. He did not specifically ask Hood to transfer the policy to Card, although Hood knew that Card was purchasing the car. At a later date Hood delivered the policy to Fleming, without any transfer to Card and without a "loss payable" clause to Fleming. Soon thereafter a loss occurred on the automobile and the company paid $20 to Fleming to settle the loss. Apparently Fleming was at that time in possession of the car and had not transferred it to Card. On February 18, 1939, Fleming gave a bill of sale to plaintiff and plaintiff gave Fleming a chattel mortgage on the car. An accident occurred March 12, 1939. Card then procured the policy from Fleming and brought this action on the policy.

Plaintiff admits that no formal transfer was made in accordance with the terms of the policy, but contends that the circumstances constitute a waiver by defendant.

We do not think it necessary to reexamine the authorities on waiver. It is sufficient to note that Fleming is not a party to this action; that no policy was ever delivered to Card; that Card did not testify that he relied upon any waiver, nor, except by inference, that he in fact knew anything of the deal between Hood and Fleming; and that no agreement of any kind was made between defendant and Card. Under these facts plaintiff manifestly cannot maintain a suit upon the policy. The judgment of the district court in sustaining a motion to dismiss at the close of plaintiff's evidence is

AFFIRMED.

TAYLOR DAIRY PRODUCTS COMPANY, APPELLEE, V. BEN F. OWEN, APPELLANT.

298 N. W. 332

FILED MAY 23, 1941. No. 31043.

1. **Appeal.** The filing of an appeal bond within ten days from the rendition of the judgment in an appeal from the county court is necessary to confer jurisdiction upon the district court.
2. ———. The default of the county judge preventing a timely

appeal cannot be properly established by the filing of affidavits in this court. Any such evidence, to be considered here, must be contained in a bill of exceptions.

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

Ritchie, Swenson & Welpton and *Bernard E. Vinardi,* for appellant.

McGinty, Richling & Nestle, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

CARTER, J.

This is an appeal from a judgment entered against the defendant after he had elected to stand on a special appearance.

The record shows that the action was commenced in the county court for Douglas county and a judgment for defendant entered therein on February 2, 1940. An appeal bond was filed on February 13, 1940, more than ten days from the rendition of the judgment. On March 28, 1940, defendant filed his special appearance, objecting to the jurisdiction of the court over the appeal for the reason that the appeal bond was not filed within the ten days required by statute. Comp. St. 1929, secs. 27-540 and 21-1302. On May 3, 1940, the trial court overruled the special appearance, and on May 22, 1940, the defendant having stood thereon, entered judgment for the plaintiff for the amount prayed for in its petition. Defendant Owen thereupon appealed to this court.

The appeal bond was filed on the eleventh day. The tenth day was Lincoln's birthday, and plaintiff contends that for that reason he had an additional day to file his appeal bond. The legal court holidays fixed by section 27-316, Comp. St. 1929, do not include Lincoln's birthday. In any event, in determining the time within which an appeal bond must be filed in the county court, the first day should be excluded and the last day included, except when the last day is Sunday, in which event it is excluded. Comp. St.

1929, sec. 20-2222. The tenth day not being Sunday, plaintiff did not file the bond in accordance with the provisions of this statute. While it is true that the twelfth day of February known as Lincoln's birthday is, by section 62-1706, Comp. St. 1929, made a holiday for the purposes of the negotiable instruments act, it can have no effect upon court procedure. *Tully v. Grand Island Telephone Co.*, 87 Neb. 822, 128 N. W. 508; *Richter v. Chicago & E. R. Co.*, 273 Ill. 625, 113 N. E. 153.

The record in this court does not include a transcript of the evidence. There is nothing properly before us that could in any manner avoid the statutory requirement that the appeal bond be filed within ten days to give the district court jurisdiction. This court has said many times that the filing of an appeal bond within ten days in an appeal from the county court is necessary to confer jurisdiction upon the district court. *Independent Lubricating Co. v. Good*, 135 Neb. 171, 280 N. W. 460; *Hier v. Anheuser-Busch Brewing Ass'n*, 52 Neb. 144, 71 N. W. 1005.

Plaintiff urges that he attempted to file the bond on February 12, 1940, and that the county judge was gone and the courthouse closed. Even if this situation warranted the filing of the bond on the eleventh day, it is of no avail here because it is not shown by the record. The order of the trial court overruling the special appearance contains no findings of fact that tend to sustain plaintiff's contention. The record is barren of evidence or findings of any default on the part of the county judge which prevented a timely appeal. The record imports absolute verity, and when a party attempts to escape the effect of a plain provision of statute by proof of special circumstances, bringing the matter within a recognized exception, it must appear from the record that such an issue was before the district court. The filing of affidavits in this court is not a proper way to present such an issue here.

The trial court erred in overruling defendant's special appearance. The judgment is therefore reversed and the cause remanded.

REVERSED.

ADDIE MOSES, APPELLEE, V. JACK MITCHELL, APPELLANT.
298 N. W. 338

FILED MAY 23, 1941. No. 31086.

1. **Negligence.** A person is answerable only for the natural and probable consequences of his own acts, and where some new efficient cause intervenes, not set in motion by him nor flowing from any act of his, which causes the injury, it is the proximate cause.
2. **Automobiles.** An automobile driver traveling on his own side of the highway cannot reasonably be charged with the duty of anticipating that another car, awaiting an opportunity to make a left turn across his line of travel, will suddenly be hurled in front of him by the negligence of the driver of a third car in crashing into the rear end of the waiting car.
3. ———. Before the doctrine of the last clear chance can apply, there must be proof of a reasonable opportunity on the part of the defendant to avoid injuring the plaintiff after his danger was discovered, or ought to have been discovered.
4. ———. Where a person driving an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which deliberate judgment might prove to be wrong.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Charles E. O'Brien and *Emmet S. Brumbaugh, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

CARTER, J.

This is an action to recover damages for personal injuries sustained in an automobile accident. The verdict and judgment were for $1,500, and the defendant Mitchell appeals.

The record shows that the plaintiff and her husband, Albert Moses, were driving on the paved highway between Omaha and Fremont on Sunday afternoon, October 1, 1939, the date of the accident involved in this action. The car was being driven by Albert Moses, and Addie Moses, the

plaintiff, occupied the front seat with him. As the Moses car approached the intersection of highway No. 130 with highway No. 275, the highway upon which the Moses car was traveling in a southwesterly direction, Moses indicated an intention to turn to the left onto highway No. 130, by hand signals and by stopping his car. The record further shows that defendant Racine was following the Moses car, and shortly after Moses brought his car to a stop with the intention of making his left turn when traffic permitted, the Racine car collided with the rear of the Moses car, causing it to be shoved across the center line of the highway into the path of oncoming traffic. As Moses approached the intersection there were three cars coming from the opposite direction. The first passed by before the collision, and the second, driven by the defendant Jack Mitchell, crashed into the front of the Moses car after it had been pushed into the path of the Mitchell car by the car driven by Racine.

A judgment was obtained by the plaintiff against Mitchell and Racine. Mitchell appealed to this court. The defendant Racine did not appeal and the judgment has become final as to him.

The evidence of Albert Moses is to the effect that as he approached the intersection he slowed down his car and signaled a left turn with his left arm. Later he signaled that he was about to stop and subsequently did stop to permit oncoming traffic to pass by. His testimony was that the three approaching cars were spaced about 150 to 200 feet apart, the first car being a little farther from the intersection than the Moses car as both approached it. Moses estimated the speed of the Mitchell car at 55 miles an hour as it approached the intersection. It is the testimony of Moses that his car, when he got it stopped after it had been struck by the Racine car, was five feet over the center line and the Mitchell car was then about 25 feet away. The accident happened within two to five seconds thereafter.

The evidence of Mitchell is to the effect that he ap-

proached the intersection at a speed of 40 miles an hour. He saw the signals given by Moses and observed that he stopped before attempting a left turn. He was 50 feet away when the Racine car first struck the Moses car and 25 feet away when the Moses car stopped after being struck by the Racine car. Tire marks were made on the pavement for a distance of 42 feet back from the point of the accident by the Mitchell car. Mitchell testifies that the accident happened very quickly, within a few seconds. He applied his brakes promptly and attempted to turn to the right to avoid a collision, but was unable to do so.

The evidence of other witnesses imports substantially the same story. It is the contention of the defendant Mitchell that the proximate cause of the accident was the negligence of Racine in causing his car to collide with the Moses car, pushing it into the path of his car. He further argues that he used every available means of avoiding the accident and that the doctrine of the last clear chance is therefore inapplicable.

The negligence of the defendant Racine and the want of sufficient contributory negligence on the part of the plaintiff to defeat her recovery are established by the verdict of the jury. The only question to be determined is the sufficiency of the evidence to sustain a judgment against the defendant Mitchell on the theory that he negligently failed to avoid the accident under the last clear chance doctrine.

The evidence in its most favorable interpretation shows that Mitchell approached this intersection at a speed of 55 miles an hour. The day was clear and visibility was good. Certainly, a speed of 55 miles an hour on a state highway in open country on a clear day is not of itself negligence. As Mitchell approached the Moses car, he observed that it had come to a complete stop to permit him to pass. It was only when he was within 50 feet of the Moses car that he saw the Racine car strike it and shove it into his path. He applied his brakes immediately, the undisputed evidence showing that tire marks were burned on the pavement by the application of his brakes for a distance of 42 feet. That

he was faced with a sudden emergency cannot be questioned. All the evidence is to the effect that only two to five seconds elapsed from the time the Moses car was struck until the Mitchell car crashed into it. We do not think that this evidence is sufficient to sustain a finding that Mitchell had a reasonable opportunity to avoid hitting the Moses car.

The case of *Johnson v. City of Omaha,* 108 Neb. 481, 188 N. W. 122, is somewhat similar to the instant case. In that case a fire truck was traveling down an Omaha street at a speed of approximately 18 miles an hour when a car driven by one Moschel hit the deceased's car and threw it into the side of the fire truck. The brakes were immediately applied. The court, in holding that the last clear chance doctrine did not apply said: "Applying the foregoing rules of law to the facts uncontrovertedly established in this case, was the death of deceased the natural, probable, reasonable and proximate consequence, under the circumstances of this accident, of the speed of the city's fire truck? A new and efficient cause, not set in motion by the driver of the fire truck, and not connected with, but independent of, his acts, not flowing therefrom, is shown by the evidence to have intervened. Such intervening cause could not reasonably in the nature of things be contemplated or foreseen by the driver of the fire truck. The casting of Johnson in his automobile directly in the course of, or against, the fire truck by the said Moschel's car was that new and efficient intervening cause. No reasonable mind could arrive at the conclusion that the driver of the fire truck, observing the said approach of said cars, could anticipate or foresee that one car approaching would or might cast the other car into his course so near him that he could not stop and avoid a collision, nor, in fact, that he could foresee or anticipate that it would be cast into his course at any point whatever, nor that he could anticipate or foresee that there would be a collision between the other two cars at the street intersection."

In *Woodworth v. Johnston,* 131 Neb. 113, 267 N. W. 243, the evidence concerning the last clear chance doctrine is

much more similar to the case at bar. In that case a car being driven by a Mrs. Johnston suddenly skidded on some icy pavement into the path of a truck. In upholding the direction of a verdict in favor of the truck driver, this court said:

"From that point he saw the first swerve of the Ford to the northward, then he at once glanced to the east and saw the truck, with wheels already locked, sliding in the intersection of Twenty-fifth avenue and Burt street. This corroborates the testimony of the truck driver as to his immediate response on the first appearance of danger. The truck, before coming to a full stop, struck the right rear of the Ford at a point from 6 to 12 feet west of the west curb line of Twenty-fifth avenue, and at a place wholly on the north half of Burt street. It is true that the impact thus caused occasioned the damages sued for; but, in view of the few seconds that intervened between the first signal of possible danger and the crash, the accident was clearly unavoidable. The cross-examination of witness Kidd, who testified as plaintiff's witness, closed with this statement: 'It was evident to me that the truckman could not do anything other than what he did do.'

"It is uncontrovertible that defendant Stillman was at all times lawfully proceeding along Burt street, both as to speed and his position thereon; that an emergency, created by the skidding of the Ford and the accident occasioned thereby, was due to no act of his; and that he acted promptly and properly, and in no manner contributed to the regrettable results that followed. The action of the trial court in directing a verdict in his behalf is approved. *Johnson v. City of Omaha,* 108 Neb. 481, 188 N. W. 122."

"Before the doctrine of last clear chance can apply, the defendant must have had a chance to have avoided the collision, for the doctrine presupposes time for action." *Diehm v. Dargaczewski,* 135 Neb. 251, 280 N. W. 898.

"In the absence of proof of opportunity to avoid injuring such person after his danger was discovered, or ought to have been discovered, there is no reason for the appli-

cation of the 'last clear chance' doctrine." *Johnston v. Delano*, 100 Neb. 192, 158 N. W. 1034. See, also, *Barrett v. Alamito Dairy Co.*, 105 Neb. 658, 181 N. W. 550.

We think the evidence clearly shows that the negligence of Racine in hitting the Moses car was the proximate cause of this accident. The evidence does not show that Mitchell was driving at a negligent rate of speed under the circumstances. No act of Mitchell contributed to the collision of the Racine and Moses cars and it is not reasonable to believe that the accident could have been foreseen or contemplated by him. The shoving of the Moses car into his line of travel created an emergency in which he had only a very few seconds to act between the first indication of danger and the crash. The evidence shows that he promptly and efficiently applied his brakes. Under these circumstances we think the evidence shows that the accident was unavoidable.

Plaintiff contends that Mitchell could have turned to the right and avoided the collision. In the light of subsequent events this may be true. But under such circumstances an automobile driver is not required to pursue a course which on mature reflection might prove to be wrong. He is only required to demean himself as an ordinary, careful and prudent person would have done under like circumstances, and if he does that he is not held to be negligent, even though he committed an error of judgment. *Belik v. Warsocki*, 126 Neb. 560, 253 N. W. 689; *Oakes v. Gregory*, 133 Neb. 407, 275 N. W. 607. Neither is a person under such circumstances required to exercise the same degree of care that an ordinary prudent person would have exercised in the absence of danger. *Frish v. Swift & Co.*, 97 Neb. 707, 151 N. W. 165. We think the defendant Mitchell was confronted with such an emergency as to bring him within the foregoing rule.

As we view the evidence, the time elapsing between the first indication of danger and the happening of the collision was so brief that the defendant Mitchell had no reasonable opportunity to avoid the accident. While the meas-

ures taken by him to avoid it may not have been the best when viewed in the light of subsequent events, yet they meet all requirements of the law when considered with the circumstances under which he was suddenly called upon to act. After a consideration of all the evidence and circumstances, we are convinced that no liability attaches to the defendant Mitchell as a matter of law.

REVERSED.

MART FENDER, APPELLEE, V. FRED WALLER, SR., ET AL., APPELLANTS.
298 N. W. 349

FILED MAY 23, 1941. No. 31048.

Interest. Where bondholders bring an action to recover additional interest, based on tortious conduct of payers in preventing a trustee from making distribution of money in its possession to such bondholders, and the evidence discloses that the payers assigned to the trustee an agreement of a debtor, wherein the debtor made payments to the trustee of the principal and interest owing by the payers to the trustee for the benefit of the bondholders, and where payments were made thereunder of principal and interest in the full amount and in strict compliance with definite terms of the bonds, without default or fraud, under these circumstances the bondholders cannot maintain such action; the principal subject of the claim having been extinguished, all of its incidents go with it. This is especially true when the evidence further discloses insufficient legal excuse, on the part of the trustee, for withholding funds and failure to make distribution thereof to the beneficiaries of the trust.

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

Max G. Towle and *Sterling F. Mutz*, for appellants.

Stewart, Stewart & Whitworth and *Charles B. Paine, contra.*

Heard before CARTER, MESSMORE and YEAGER, JJ., and KROGER and TEWELL, District Judges.

MESSMORE, J.

This is an action by a bondholder, assignee of other bondholders, brought for the purpose of recovering damages due to and resulting from alleged tortious acts and conduct of defendants in preventing distribution of moneys, in the hands of the successor-trustee, to be made by such trustee to the bondholders. The cause was tried to a jury, and at the conclusion of the case both parties moved for a directed verdict. The court entered judgment in favor of the plaintiff. Motion for a new trial was overruled. Defendants appeal.

The history of the proceedings leading up to the present action, briefly stated, is as follows: In May, 1927, the defendants required money for the prosecution of their business. They negotiated a loan with the Lincoln Safe Deposit Company and the Lincoln Trust Company, wherein the former executed the papers therefor and issued bonds, and the latter acted as agent in selling the bonds to investors and collecting commissions. July 6, 1932, both corporations were adjudged bankrupt. July 21, 1932, the First Trust Company of Lincoln was appointed successor-trustee. To pay this loan, defendants executed an agreement and assignment they had with the Skelly Oil Company, whereby the Skelly Oil Company was to pay the amounts, owing by it to the defendants under the contract, to the successor-trustee in payment of defendants' obligation. A brief review of previous litigation had between the defendants in this action and the successor-trustee is of assistance in determining the issues in the instant case.

In the case of *Waller v. First Trust Co.*, 126 Neb. 403, 255 N. W. 29, the defendants in the instant case were plaintiffs, and the successor-trustee was the defendant. The action was for an accounting. Plaintiffs contended that the commission charged upon the various loans, added to the interest charged under the contract, caused the loans to be usurious. The record disclosed the indebtedness of the plaintiffs had been paid. The court held: "Where a note has been paid, an action cannot be maintained to recover usurious interest."

The case of *First Trust Co. v. Waller,* 132 Neb. 239, 271 N. W. 681, wherein the successor-trustee in the instant case was plaintiff and the defendants in the instant case were defendants, was an action for damages caused by the wrongful acts of the defendants in preventing distribution of the funds in the hands of the successor-trustee to the bondholders, thereby causing the bondholders to lose interest on the investment. Paragraph 3 of the syllabus is in full explanation of the action and reads:

"Where a trustee for bondholders extinguished the trust by receiving for them payments on the bonds and the interest in full, when due, in strict compliance with definite terms of the bonds, without default or fraud on the part of any one, the trustee afterward cannot maintain an action to recover additional interest, on the ground that the makers of the bonds delayed him in distributing the payments to the bondholders, without showing they authorized the litigation."

The plaintiff in the instant case obviously seized upon the language contained in the above paragraph, viz., "without showing they (the bondholders) authorized the litigation." Therefore, in the instant case we have this suit in behalf of certain bondholders who predicate their cause of action on the same alleged wrongful acts and conduct of the defendants as appeared in *First Trust Co. v. Waller, supra.*

We turn our attention to the tortious acts and conduct of the defendants, as charged, in preventing the successor-trustee from distributing the funds to the bondholders.

Exhibit 63, contained in the bill of exceptions at page 175, is self-explanatory and is as follows:

"September 22, 1933.

"First Trust Company, Successor-Trustee,

"First National Bank Bldg., Lincoln, Nebraska.

"Gentlemen:

"We, Fred Waller, Sr., and Fred Waller, Jr., doing business as partners under the firm name of Waller Signs, herewith hand you check of Skelly Oil Company in the

amount of $13,500, representing the last payment on our loan #9413 due October 10, 1933, and we also hand you our check for $405 representing interest on said loan due October 10, 1933. These payments, the same as on prior payments made by us on this loan since December 2, 1932, are made expressly subject to the terms of the notice served upon you on that day to the effect that this money is paid under protest and subject to the final determination of our accounting suit now pending against your company; our notice of December 2, 1932, being hereby restated and continued in force.

"We now having paid to you, under protest and subject to accounting as aforesaid, the entire amount called for under the chattel mortgage dated September 30, 1931, and under the assignments of contracts held by you, we hereby demand that you release this mortgage and assignments within ten days from this date.

"Very truly yours,
"(Signed) Waller Signs
"By Fred Waller, Jr.

"Received the foregoing letter and checks mentioned therein this 22d day of September 1933.

"(Signed) Successor-Trustee."

Exhibit B, attached to plaintiffs' petition in *Waller v. First Trust Co., supra,* notifies defendant of the commencement of the action to enjoin the defendant from using any portion of the moneys paid to it for the purpose of liquidating the bonds, claiming that the agreement to pay the bonds is usurious, and that plaintiffs are entitled to certain credits for interest, service and commission charges, and a notification that the defendant will be held responsible for any moneys disbursed to bondholders in connection with the transaction.

In the case of *Chapman v. Wagner,* 1 Neb. (Unof.) 492, 96 N. W. 412, the court said (p. 496): "The authorities are agreed that where the maker of a note made payable at a particular place has the funds at such place ready to discharge the note at its maturity, he cannot be made re-

sponsible for any future damages either as costs of suit or interest for delay." The trust agreement in the instant case provided that the principal and interest shall be payable at the office of the Lincoln Safe Deposit Company. The successor-trustee having taken over the trust, the amount of the principal and interest would be payable at the office of the successor-trustee. This court in *Waller v. First Trust Co., supra,* and in *First Trust Co. v. Waller, supra,* decided that the full amount of defendants' obligations had been paid by the Skelly Oil Company to the successor-trustee for the benefit of the bondholders.

The plaintiff distinguishes *Chapman v. Wagner, supra,* from the instant case, in that the payer in the former case was not only ready to pay at the time and place appointed, but actually deposited the money and requested the payee to accept it; while in the instant case the payers (defendants) demanded that the trust company should receive the money and not pay it out to the bondholders.

The general rule is stated in *Stewart v. Barnes,* 153 U. S. 456, 14 S. Ct. 849, which was an action to recover interest where the principal had been paid. The United States supreme court said (p. 462): "The right of action is the right to compel the payment of the money which is being retained. When he who has this right commences an action for its enforcement, he at the same time acquires a subordinate right, incident to the relief which he may obtain, to demand and receive interest. If, however, the principal sum has been paid, so that, as to it, an action brought cannot be maintained, the opportunity to acquire a right to damages is lost."

And in the case of *Moore v. Fuller,* 47 N. Car. 205, it was said that, "Where the principal subject of a claim is extinguished by the act of the plaintiff, *or of the parties,* all its incidents go with it." (Italics ours.) The legal definition of the word "incident" is: "Something appertaining to, passing with, or depending on, another, called the principal." Webster's New International Dictionary.

The distinction between the case of *Stewart v. Barnes,*

supra, and the instant case, as contended by the plaintiff, is: In the former case, a liquor dealer sued the commissioner of internal revenue to recover a tax illegally collected and also interest from the time it was paid to the government. The amount of the tax had been repaid by the government to the plaintiff, pursuant to an act of congress, which did not provide for interest. The plaintiff accepted the principal amount in satisfaction of the claim. The plaintiff contends that the rule as announced therein is not applicable to the instant case because the amount received by the trust company was not paid by the defendants to the bondholders; but was paid by the Skelly Oil Company to the trustee; that the trustee did not accept the payment in satisfaction of the liability of defendants, but merely accepted the money received as collateral security.

The plaintiff contends that the case of *Gund v. Ballard*, 80 Neb. 385, 114 N. W. 420, in fact and in law, is analogous to the facts and law that should be applied in the instant case. The *Gund* case involved a voluntary liquidation of a banking institution, of which Gund was an officer and director. An agreement was entered into by the stockholders to declare a dividend, no money to be paid to a shareholder until his indebtedness to the bank was paid. Gund was indebted to the bank and had sufficient money in the bank to pay his indebtedness. He denied the indebtedness, claiming it was usurious. Gund was held liable on the note. He then contended that he should not be required to pay interest on such obligation after the date of the declaration of dividends, because the directors of the bank had, at that time, sufficient money of his to pay the interest. This court held that Gund be required to pay the interest, on the theory that, while the money was in the hands of the managing directors, it was not available for the payment of the note, but, by virtue of the proceedings being prosecuted by Gund, the fund was withheld from distribution, thus damaging the stockholders to the extent of the lawful interest thereon.

The distinction between the case of *Gund v. Ballard*,

supra, and the case at bar is that in the former Gund made no payment on his note; nor did he authorize the directors of the bank, in which the money was deposited, to apply any part thereof on his obligation. In the instant case, the obligation of the defendants was paid in full by the Skelly Oil Company to the successor-trustee, who had the money for distribution to the bondholders, only failing to make distribution because of the note and letter appearing in the record. The defendants would have no way of knowing what the trust company was doing with the money. This was exclusively a subject for consideration by the trustee and the bondholders.

The evidence is insufficient to create a liability against the defendants in preventing the successor-trustee from making distribution of the funds to the beneficiaries of the trust. The terms of the trust agreement are specific as to where the payments were to be made. The logical deduction is: The successor-trustee gave too much credence to the letter and notice and too little credence to the concept of the trust. The assignment of the Skelly Oil Company contract made it possible for the successor-trustee, over whom the defendants had no control, to collect the Skelly checks each month and distribute all future payments to the bondholders. In any event, the only recovery that could have been had by defendants would have been for the usurious interest. No part of the principal was involved. Comp. St. 1929, sec. 45-105.

The defendants brought the action of *Waller v. First Trust Co., supra,* in good faith, believing that they had a *bona fide* case. Obviously, at the time of bringing the action the defendants' full obligation had not been paid. By the time the case was determined by the supreme court, the obligation had been paid.

Litigants are entitled to access to the courts of the land when they have probable cause and reasonable basis for believing an injury has been done to their lands, goods, person or reputation. See section 13, art. I of the Constitution. When defendants brought the action (*Waller v.*

First Trust Co., supra), they had probable cause and reasonable basis for obtaining the accounting and attempting to recover usurious interest which had not yet been paid, but which had been assigned to the trustee, although not yet collected.

The cases of *Chapman v. Wagner, supra,* and *Moore v. Fuller, supra,* announce the legal effect of the payment of an obligation to parties designated to receive payment; that is, if the principal of an obligation has been paid and accepted, full adjudication of the obligation has been had, and interest which is incident thereto may not be collected. Applying this rule to the instant case, when the amounts of defendants' obligation, including interest, were paid by the Skelly Oil Company to the successor-trustee, pursuant to the trust agreement, the defendants' obligation and all of its incidents were extinguished. All that remained was a duty on the part of the trustee to make distribution to the bondholders. The letter in evidence and the notice attached to the petition do not contain sufficient legal significance to warrant the successor-trustee in retaining possession of the money and not making distribution.

We fail to find a legal excuse to protect the trustee for failure to carry out the provisions of the trust and for failure to comprehend its duty in such respect, especially so in the absence of any other legal restraint than that shown by the record.

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

REVERSED AND DISMISSED.

BERT MCCONNELL, APPELLANT, V. JAMES JOHNSTON ET AL., APPELLEES.

298 N. W. 346

FILED MAY 23, 1941. No. 31160.

1. **Workmen's Compensation.** "In the workmen's compensation law the provision that the word 'employee' shall not be construed to

include 'any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer,' means conjunctively both casual employment and usual course of trade." *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645.

2. ———. Record examined and evidence *held* to constitute casual employment, within the contemplation of subdivision 3, sec. 48-115, Comp. St. Supp. 1939, rendering section 48-116, Comp. St. 1929, inapplicable to the instant case.

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

Lloyd W. Kelly, for appellant.

E. J. Patterson and *Walter R. Raecke, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

MESSMORE, J.

This is an action for compensation wherein the appellant seeks to recover benefits under the workmen's compensation act for injuries received by him while operating a buzz saw as an employee of the appellee, James Johnston, and against the appellee, Frank Ashelford, as the employer of James Johnston. The action was originally brought in the compensation court, alleging injuries received by appellant, while in the employ of James Johnston and Frank Ashelford, on December 31, 1937. Ashelford filed an answer containing a general denial, admitting the accident, denying that he employed the appellant, and alleging that appellee Johnston was an independent contractor; further alleged he was engaged in farming. A judge of the compensation court made an award in favor of the appellant as against both appellees. A rehearing was had before the full compensation court, and the award was affirmed. Appeal was taken to the district court, and the award sustained as against appellee Johnston, but reversed as to appellee Ashelford. This appeal affects only the decision of the district court in so far as the judgment therein applies to Ashelford; Johnston not appealing.

The record discloses that Ashelford is engaged in farming a 150-acre farm, four miles east of Central City, Nebraska, upon which he has lived for 33 years, and at the time of the accident was living there with his wife and hired man. He had always been a farmer and had no other occupation. On December 31, 1937, he engaged appellee Johnston to bring his portable buzz saw, powered by a gasoline engine, out to the farm to cut wood, to be used in the furnace and cook-stove in the house. The sawed wood was not to be sold, or delivered elsewhere, but was to be used for home consumption, for fuel and cooking. Johnston was to receive $1.25 an hour and to furnish the saw, fuel and transportation for the saw. No arrangement was made for a helper for Johnston. When Johnston arrived at the farm with the saw he brought with him the appellant as a helper. Johnston paid appellant the sum of 25 cents an hour. With the employment of appellant, or the amount to be paid him by Johnston, Ashelford had no concern. He did not know who, if any one, would help Johnston and made no contact with appellant in the matter of employment.

Johnston's occupation was that of a general laborer. He owned the buzz saw and, on occasions, he was employed to use the saw. Appellant was a laborer and worked when and where he could obtain employment, and on some occasions as an employee of Johnston's during the winters of 1935 and 1936. However, from the record, the employment of sawing wood and using the buzz saw was occasional. While sawing wood on the Ashelford farm the appellant was feeding the saw when a stick of wood was thrown on the table, hit his elbow, and shoved his hand into the saw, injuring him. The foregoing facts are not in dispute.

Appellant contends that the court erred in holding that he was not entitled to recover compensation from appellee Ashelford, and that the decree of the court is contrary to the evidence and law.

The decision of this case turns primarily upon one of two questions presented, viz.: Was the labor casual? In

this connection appellant contends: The record discloses that Johnston was a commercial wood-sawer and the appellant had been employed by him over a period of four or five months in 1937 at 10 or 12 different places. Therefore, the employment was not casual, within the meaning of the workmen's compensation act; nor would a contract between the sawer and a third person make the employment casual.

Section 48-115, Comp. St. Supp. 1939, reads, in part: "The terms 'employee' and 'workman' * * * shall be construed to mean: * * * (3) It shall not be construed to include any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer. The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.'"

The appellant was not employed by Ashelford. The work he was doing at the time of his injury is not work that constitutes an every-day occurrence on a farm, but is occasional work; work that is not in the usual course of the business of farming and that comes at certain times, notably in the winter months, when general farm work, such as planting and harvesting, is at a minimum; work that is done without regularity, in distinction from stated work, such as general farming. While firewood is necessary for cooking and heating purposes on the farm, it is likewise necessary in many other places for the same purpose, and it constitutes no part of general farming as the term is understood, especially so when the sawing of wood is only on an average of three to five hours a year on the farm in question, and then not occurring every year. The evidence is not persuasive, nor is any apparent claim made by appellant that he was regularly engaged by Johnston to saw wood. He was a truck driver, a commercial tractor operator, and worked at almost any job he could obtain. True, he was engaged occasionally by Johnston, but not regularly. Part of the work that he did for Johnston was exchange work, in that Johnston used the saw to cut appel-

lant's wood, and in the event that work was completed and Johnston still owed the appellant he paid him on the basis of 25 cents an hour.

The case of *Guse v. Wessels*, 132 Neb. 41, 270 N. W. 665, is, in principle, analogous to the situation in the instant case. The plaintiff in the cited case was employed by part owners and tenants of a farm, whose sole occupation was farming, having no other trade or profession. He was employed as a carpenter to assist in building a machine shed on the farm, to be paid by the hour. While so engaged, he was injured. The court held that the claimant was engaged in casual employment at the time of receiving his injuries; that is, he was not employed in the usual course of the trade, business, profession or occupation of his employers, within the meaning of the compensation law.

It is clear from a reading of that part of the statute heretofore quoted (Comp. St. Supp. 1939, sec. 48-115, subd. 3) that, where the employment is casual and not within the trade, business, profession or occupation of the employer, there can be no recovery under the act. *Sherlock v. Sherlock*, 112 Neb. 797, 201 N. W. 645.

Appellant further contends that the liability of Ashelford is based on section 48-116, Comp. St. 1929, which reads, in part: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article."

The contention is based on the following analysis: Ashelford entered into a contract with Johnston, an independent contractor and commercial sawer, to saw wood on Ashelford's farm, to be used for domestic purposes. By Ashelford's failure to require Johnston to provide for compensation insurance to protect the appellant as the employee of Johnston, the law considers that Ashelford and John-

ston entered into a scheme, artifice or device to escape liability to the appellant, and because of this Ashelford became responsible to the appellant as an employer.

It will be noted that the owner (Ashelford) cannot become an employer unless there is a scheme, artifice or device, to enable him to execute work without being responsible to the workman for the provisions of the workmen's compensation act. Section 48-115, Comp. St. Supp. 1939, defines employee. See subdivision 3 thereof. The labor performed by the appellant was casual and not in the regular trade or business of Ashelford. If he had hired the appellant direct, the work being casual, within the contemplation of subdivision 3, sec. 48-115, Comp. St. Supp. 1939, there was no liability attaching to Ashelford. We conclude that the foregoing contention is without merit.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

FARLEY D. HARPER, APPELLANT, V. WAYNE YOUNG ET AL., APPELLEES.

298 N. W. 342

FILED MAY 23, 1941. No. 31012.

1. **Damages.** "Where from the undisputed facts the court is able to see that the injury is remote and not the proximate result of defendant's acts, the question is properly decided as one of law." 17 C. J. 1060.
2. **Trial.** "Even though a party fails to object to evidence admitted, he has the right to have the court declare in its instructions the correct rule on the matter to which the evidence relates." 64 C. J. 228.
3. **New Trial.** "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.
4. **Appeal.** When error exists as to only one or more issues and the judgment is in other respects free from error, and it is clear that no injustice will result from so doing, the reviewing

court may, when remanding the cause for a new trial, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from matters involved in other issues and the trial can be had without danger of complication with other matters.

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

Dryden, Dryden & Jensen and *T. M. Hewitt,* for appellant.

Stanley A. Matzke, W. A. Stewart, Jr., Cook & Cook and *Elbert H. Smith, contra.*

Heard before SIMMONS, C. J., ROSE, PAINE, MESSMORE and YEAGER, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

The sole issue for decision is whether a jury verdict of $1,225.66 awarded plaintiff on his first cause of action for personal injuries suffered in an automobile accident is inadequate. Plaintiff appeals, contending for its inadequacy, first, because the trial court took from consideration of the jury the question of his alleged disability because of a coronary occlusion of the heart; second, that, even if such alleged disability was properly taken from the jury, the evidence still would require a reversal.

The petition charges defendants with concurrent negligence in two causes of action. The first cause of action prays damages for personal injuries; the second prays damages for his car. Defendants did not cross-petition, but each answered separately, denying their own negligence and charging the other defendants and plaintiff with concurrent negligence. There is no evidence supporting the charge that plaintiff was guilty of contributory negligence, and there is no complaint that the trial court did not present such an issue to the jury by appropriate instructions. Plaintiff was awarded a verdict on the second cause of action for all damages to his car. The parties all concede its correctness. None of the defendants cross-

appeals or denies liability by reason of the established negligence of defendant drivers, but contend that the damages awarded are adequate, and all ask affirmance.

The accident happened, injuring plaintiff, on August 12, 1938. He returned to his employment as a rural mail carrier out of Lexington, Nebraska, on February 19, 1939. On June 4, 1939, 9 months and 23 days after the accident, he suffered a coronary occlusion of the heart. The medical evidence is that, because of physical strain and worry, the accident might have contributed to it; it was a forerunner of it; probably precipitated it; could have been the cause; the chain of events made it so appear; it is possible; it might not have occurred otherwise; it might happen to any one in those years of life without having been in an accident; and that a coronary occlusion is a blocking of the arterial wall supplying the heart by foreign matter in the blood stream which could not have come from the injured parts of plaintiff's body. The causes of this disease are speculative in the medical field and yet to be certainly found. It is known that it usually occurs in men between the ages of 40 and 65. Plaintiff was then 55 years of age. It appears in infectuous diseases like pneumonia and typhoid or results from operative surgery, fractures where the marrow of the bone is involved, or arteriosclerosis; it is often found in the professional field where men are subjected to stress, strain, and worry, or burn the candle at both ends through the years, and it is often an inherited family weakness. There is evidence that plaintiff's father may have died from it at age 67, and that one brother now has heart trouble.

The rule is that damages which are uncertain, contingent, conjectural, or speculative, cannot be made the basis of a recovery, whether applied to the existence, nature, or proximate cause thereof. 17 C. J. 753; 15 Am. Jur. 409, sec. 19; *Williams v. Hines*, 109 Neb. 11, 189 N. W. 623. The mere fact that a certain disease might consistently arise from the injury is insufficient to show that it was caused thereby. "The evidence should so exclude other causes, and the cir-

cumstances should be such that a reasonable inference arises that the injury caused the disease." 17 C. J. 756. There must be competent evidence, and a preponderance thereof, that plaintiff's heart condition was the probable and reasonable result of the accident and injuries. 15 Am. Jur. 471, sec. 66. Evidence that it was possibly the result is not sufficient. *Omaha & R. V. R. Co. v. Brady,* 39 Neb. 27, 57 N. W. 767; 22 R. C. L. 150, sec. 33.

"Where from the undisputed facts the court is able to see that the injury is remote and not the proximate result of defendant's acts, the question is properly decided as one of law." 17 C. J. 1060. We have carefully read the evidence to determine the question, and conclude that the trial court properly excluded the matter of damages claimed by plaintiff because of the alleged coronary occlusion. In this connection we will not discuss instructions Nos. 5 and 10, given by the trial court, relating to the measure of damages, for the reason that, upon a new trial granted, the matter of coronary occlusion and alleged damages resulting must be excluded from the case by the trial court, and the same questions will not again require judicial solution.

The matter of inadequacy of the award still remains. We will not discuss the circumstances of the accident appearing in the evidence except to say that at the time of the accident plaintiff's car was standing still on the right side of the highway close to a mail box for delivery of United States mail, when, because of the concurrent negligence of defendant drivers, his car was struck from the rear and thrown approximately 100 feet forward and toward the ditch to the right. He thought that his injuries were not serious, although he immediately suffered very severe, sharp pains from the base of his skull to his shoulders. He drove a farmer's car back to Lexington on his mail route, and checked in at the post office. The pain continued, and about 5 p. m., the same day, he went to the hospital where he was examined by two physicians.

Evidence adduced for plaintiff is that X-ray examination

disclosed the first cervical vertebra of his neck thrown out of line by side force, and chip fractures of the fourth, fifth, sixth, and seventh cervical vertebræ of his neck resulting from his head being thrown back suddenly. The muscles and nerves of his neck, shoulders and arms were injured, causing spastic contraction and pain, aggravated by motion. A blood clot was removed from his left ear. He was placed in a bed in the hospital. A Thomas halter was put on his chin and neck, with a sash weight over the end of the bed. He remained in the hospital 15 days. After returning to his home he was in bed a few days. A brace was put on his head and neck, holding it immobile and rigid. He slept in the Thomas halter and wore the brace when up and around. These were so used most of the time until treatments by his physicians were concluded on February 11, 1939. On November 3, 1938, he went by train to the Mayo Clinic at Rochester, Minnesota, and stayed 14 days.

His undisputed hospital, medical and doctor bills were $475.30. On February 19, 1939, he returned to his work, a son driving the car and assisting him for a week or two. He lost 6 months and 7 days from his employment at $200 a month, a total of $1,246.66. There is no evidence controverting evidence adduced for plaintiff that he was totally disabled during this period. The undisputed total hospital, doctor and medical bills, and loss of time, exclusive of the claimed damages for coronary occlusion, are $1,721.96, a sum $496.30 more than the verdict awarded. This fails to take into consideration or allow any recovery for pain and suffering past and future, or his physical injuries and disabilities whether temporary or permanent, and we are not unmindful that there is no issue of contributory negligence.

The evidence is undisputed that, before the accident, plaintiff was a strong, healthy, active man who, for six or seven years, had lost no time from his employment for any reason, and in 22 years of employment had been on sick leave only once, 20 years ago when his ankle was in-

jured in a minor accident. The postmaster, where he was employed, testified that, when plaintiff returned for work, he did not look like the same man; that he was not able to perform his duties as before, and apparently had to drive himself all the time. Evidence adduced for plaintiff is that he suffered serious and permanent injuries and damages to his head, neck, left shoulder, arm and hand; that the tissues are atrophied, and there is a drawing of the cords and ligaments, resulting in stiffness and limitation of movement; that he suffered a loss of hearing in the left ear; and that he has in the past, does now, and will in the future, suffer pain and disability.

Physicians who testified for defendants deny that plaintiff suffered chip fractures of the vertebræ, but admit that plaintiff at the time of the trial, the latter part of March, 1940, had limitation of movement of the head and neck; that he was unable to raise his left arm higher than the level of his shoulder; and when the doctor raised it over plaintiff's head, plaintiff could not hold it up in that position; that he had some injuries to his neck, shoulder and arm from the accident, in the muscles, tendons and strain of ligaments, and there is still some pain and tenderness there. They testify that he had a slight Babinski, indicating something wrong in the central nervous system which might be any place deep in the spinal cord including the first, fourth, fifth, sixth, and seventh cervical vertebræ of the neck; that it was problematical how long it would take plaintiff to recover because there was osteoarthritis present in the vertebræ with inflammation elsewhere and it was not possible to know how much disability was the result of the injury.

We find in the evidence continuous reference to, and inquiry about, the fact that plaintiff in eight years could retire on a pension for life; that, if he had applied to the federal government, he could have obtained compensation from the government for his injuries; that he had earned through the years up to the time of the accident 126 days sick leave at the rate of 10 days a year and 27 days vaca-

tion at the rate of 15 days a year, and, because thereof, was paid his salary of $200 a month by the government from the time of the accident until the expiration thereof. This evidence had no bearing on any fact in issue; was not admissible upon any theory, and clearly prejudicial to plaintiff's rights. 15 Am. Jur. 615, sec. 198; 1 Jones, Evidence (4th ed.) sec. 161. While some of it was received without objection and, ordinarily, any error would be thereby waived, the rule does not apply to evidence having no bearing on any fact in issue, and the jury should be instructed to disregard it. "Where evidence, although admitted without objection, is insufficient to sustain the hypothesis set out in an instruction, the giving of the instruction is error." 64 C. J. 227. "Even though a party fails to object to evidence admitted, he has the right to have the court declare in its instructions the correct rule on the matter to which the evidence relates." 64 C. J. 228. The trial court gave the jury no instruction to disregard the evidence that plaintiff could retire on a pension in eight years or that he could have obtained compensation from the government for his injuries, had he applied therefor. We find in instruction No. 10: "You will disregard the fact that the plaintiff could draw compensation from his employer during such accumulated sick leave and vacation days except that such fact may shed light upon the question of whether or not it was reasonably necessary for plaintiff to remain away from work until February 19, 1939." The introduction of this evidence and the failure of the trial court to instruct the jury to disregard it undoubtedly resulted in a verdict not only grossly inadequate under the undisputed evidence, but a verdict rendered under the influence of passion and prejudice. Under such circumstances the rule is that, "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. See 15 Am. Jur. 664.

When error exists as to only one or more issues and the

judgment is in other respects free from error, and it is clear that no injustice will result from so doing, the reviewing court may, when remanding the cause for a new trial, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from matters involved in other issues and the trial can be had without danger of complication with other matters. The most frequent application of this rule is found in damage actions where the error affects only the assessment of the damages. 3 Am. Jur. 724, sec. 1226. See, also, *Yazoo & M. V. R. Co. v. Scott,* 108 Miss. 871, 67 So. 491, L. R. A. 1915E, 239, and notes. We conclude that the case at bar comes within the rule, and the conclusion is supported by comparable precedent of this court. *Kuhns v. Live Stock Nat. Bank,* 138 Neb. 797, 295 N. W. 818; *Netusil v. Novak,* 120 Neb. 751, 235 N. W. 335; *Porter v. Sherman County Banking Co.,* 40 Neb. 274, 58 N. W. 721.

Therefore, the judgment is reversed and the cause is remanded for a new trial to a jury solely upon the issue of the amount of damages recoverable by plaintiff upon his first cause of action.

REVERSED.

IN RE ESTATE OF HORACE CHRISTIAN DALE.
GEORGE SATTERFIELD DALE, APPELLANT, V. HORACE ALBERT DALE, EXECUTOR, ET AL., APPELLEES.
298 N. W. 414

FILED MAY 29, 1941. No. 31034.

1. Wills. "A trust lapses when the sole beneficiary predeceases the testator and a gift after the death of the beneficiary vests absolutely at the death of the testator." 69 C. J. 808.
2. ———. As a general rule a family settlement may provide for disbursement of the estate of testator in a manner at variance with his will.

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

E. D. Crites and *F. A. Crites*, for appellant.

A. C. Plantz, Frank F. Aplan, John J. Olsson and *R. O. Reddish, contra.*

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and POLK, District Judge.

ROSE, J.

This is a controversy over distribution of the estate of Horace Christian Dale who died January 9, 1929, leaving as his only heirs his four adult sons, George Satterfield Dale, Everett Edwin Dale, James Leland Dale and Horace Albert Dale. The father of these four sons made a will May 25, 1926, in which he named Everett Edwin Dale and Horace Albert Dale executors and directed the disposition of his estate as follows:

"After all my lawful debts are paid, I bequeath and give to my executors, to hold in trust, all of my estate, both real and personal, to invest to the best possible advantage and order them to pay the income therefrom to my wife Lillian Elizabeth Dale so long as she may live. At the death of my wife it is my wish that the residue of my estate be equally divided between my four sons, George Satterfield Dale, *Edward Everett* Dale (Everett Edwin Dale), James Leland Dale and Horace Albert Dale, after first adjusting between them the amounts I have loaned to them for business purposes, with interest at four per cent. per annum, and the amounts I advanced for their college education, so that, including said amounts so advanced, each will have received one-fourth of my estate. The amounts so advanced will be found in my private records, which shall govern said adjustment."

Testator's wife, mother of the four adult sons, died before her husband. The will was probated in the county court of Sheridan county February 9, 1929, and on that date letters testamentary were issued to the two executors named in the will. They qualified and proceeded to settle testator's estate. There was no objection to the will and no appeal from the decree probating it. The estate consisted

of both real estate and personal property. The principal asset or source of income was a controlling interest in the Stockmen's National Bank of Rushville. To retain control of the bank, to make income property and other personalty available for payment of debts, to prevent the filing of claims and to keep as much of the estate as possible together, the four sons met between the date of testator's death, January 9, 1929, and the date on which letters testamentary were issued, February 9, 1929, examined the condition of the estate and devised a method of settlement. Their agreement at that time was supplemented May 16, 1929, by a written instrument in the following form, signed by all of them:

"We, the undersigned, heirs of H. C. Dale, hereby agree in consideration of our mutual promises to each other that the stock of the said H. C. Dale estate shall be handled by us as follows as regards the Stockmen's National Bank stock of Rushville, Nebraska:

"1st. That in case of sale of said stock it shall only be on consent of three of said heirs unless sale is ordered by the probate court to pay debts of the estate and in case of sale the entire holding of the Dale family and of the Dale estate shall be sold as a single unit so as to transfer a controlling interest in the said bank.

"2d. It is further agreed that none of the undersigned shall buy any additional stock of said bank without the consent of the other signers.

"3d. It is also agreed that all earning from stock belonging to the estate, also any funds derived from other assets of the estate, shall go first to pay claims against the estate, then when all claims are paid the revenue to be applied as follows: Whereas the books of the estate show that all of the undersigned are indebted to the estate in various amounts, it is agreed that the one least indebted to the estate shall receive the earnings, after payment of debts, until he has received an amount added to his debt equal to the indebtedness of the one next least indebted to said estate, when the two of them shall divide the revenue until they have received funds sufficient to equalize their total shares with

the third least indebted, and then all three shall divide proceeds till each has received from the estate amounts added to their indebedness equal to the indebtedness of the fourth, after which time they shall share alike."

The two executors joined in an amended final account July 15, 1938. The record of the county court recites:

"That on August 15, 1938, all of the heirs being present and being represented by counsel in county court, all objections to the allowance and approval of the amended final account were withdrawn and the account was approved by the county court with the consent of all heirs and interested parties."

The county court found further that "all debts, claims and demands against said estate have been paid in full and settled, except the costs of administration."

The total assets of the estate, in personal property and in real estate, as shown by the amended final report and as found by the county court were $42,373.51; costs of administration, $1,379.12; balance in hands of the executors for distribution among the four sons, $40,994.39. In ordering distribution the county court disregarded the agreement of the sons and determined the share of each to be as directed by the will. Upon appeal to the district court, distribution was adjudged according to the agreement of the sons. From that judgment George Satterfield Dale appealed to the supreme court and Horace Albert Dale took a cross-appeal. The other sons are appellees.

Appellant and cross-appellant take the position that the will controls the distribution of their father's estate and that the judgment of the district court should be reversed and the judgment of the county court affirmed. The other sons, appellees, insist that the judgment of the district court should be affirmed on the ground that it conforms to the agreement voluntarily made by the four sons of testator. There was no dispute in the evidence on any material issue of fact, but diverse views of the law were discussed at great length on both sides.

Appellant and cross-appellant argue that the will created

a testamentary trust which cannot be destroyed by an agreement at variance with the terms of the bequests. The only beneficiary named in the provision for a trust died before testator. The trust, therefore, lapsed upon the death of the wife, the sole beneficiary, and had no existence when the will was probated. The executors acquired no title to testator's property as trustees. Their possession and control were limited to their powers as executors for the purposes of administration. The title vested in the four sons upon the death of their father. There was no trust to administer. After payment of the debts and the costs and expenses of administration, the rest of testator's estate belonged to the four sons. At the time of their father's death they were adults, capable of making contracts respecting their own property, including that acquired by the will of their father. There was no fraud in the procuring or making of their contract. No one else was injured by it. It did not interfere with any trust. On the undisputed facts the law necessarily is as follows:

"A trust lapses when the sole beneficiary pre-deceases the testator and a gift after the death of the beneficiary vests absolutely at the death of the testator." 69 C. J. 808. See, also, *In re DePuy's Will,* 194 App. Div. 796, 185 N. Y. Supp. 817; *In re Shevlin's Will,* 143 Misc. 213, 256 N. Y. Supp. 513.

In the argument in support of the distribution ordered by the county court in conformity with the will and in disregard of the contract, many cases were cited, among them the Nebraska case announcing the following rule:

"While, as a general rule, a family settlement may provide for disbursement of the estate of testator in a manner at variance with his will, a valid, unexecuted testamentary trust cannot thus be modified or destroyed." *In re Estate of Mowinkel,* 130 Neb. 10, 263 N. W. 488.

The trust upheld in that case was "a valid, unexecuted testamentary trust," the beneficiary still living. The general rule that a family settlement may provide for disbursement in a manner at variance with the will was recognized.

The distribution ordered by the district court in compliance with the agreement of the four sons of testator conforms to the facts and the law and is

AFFIRMED.

JOHN OSCAR LINDER, APPELLANT, V. TERRE HAUTE BREWING COMPANY, APPELLEE.

298 N. W. 545

FILED MAY 29, 1941. No. 31125.

1. Mortgages. An action to recover a money judgment on a promissory note secured by a real estate mortgage is one at law, independent and distinct from a suit in equity to foreclose and satisfy a mortgage.
2. ———. This is so, even if an attachment be issued and levied upon the lands covered by the real estate mortgage in a proceeding ancillary to the action on the note.
3. ———. An acceleration provision in a mortgage securing a note enters into and becomes a part of the note so that the maturity of the note is advanced in like manner with the maturity of the mortgage, not only for the purpose of foreclosure, but for all purposes.
4. ———. The provisions of section 20-2141, Comp. St. Supp. 1939, limiting the power of the court in a foreclosure action to decreeing and compelling the delivery of the possession of the premises to the purchaser thereof, has no application to an action at law to obtain a judgment on a note, even if accompanied by the ancillary remedy of attachment.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Will H. Thompson, for appellant.

Abrahams, McGrath & Frenzer, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

CARTER, J.

This is an appeal from an order of the district court for Douglas county denying a cancelation of a judgment previously obtained in a law action.

The record shows that on May 17, 1938, the appellee, Terre Haute Brewing Company, obtained a judgment in the district court for Douglas county against the appellant, Linder, on a promissory note in the amount of $14,463 and costs. No appeal was taken and this judgment became final.

On July 6, 1940, appellant filed his amended petition in the present suit, asking that the judgment in the former action be satisfied, the judgment declared null and void, the appellee enjoined from issuing execution or bringing any action on the judgment, and that the record of the judgment be canceled in the office of the clerk of the district court for Douglas county. The note sued upon was executed on December 29, 1934, by Linder and his wife in the amount of $15,000 with interest at the rate of 1 per cent. per annum. As security for the note the makers executed and delivered a mortgage upon certain real estate in Douglas county. The note contained no acceleration clause, but the mortgage provided that in case of default the note was to be due and payable in full in 60 days thereafter. On August 26, 1937, appellee commenced an action on the note, alleging a default and pleading the acceleration of the note under the terms of the mortgage. An order of attachment was procured and levied on the real estate covered by the mortgage. The property was sold for $3,500 and was subsequently credited on the judgment. It appears that Linder was a nonresident of Nebraska and that the attachment proceedings were in all respects regular.

Appellee contends that the action on the note was not a law action but was, in fact, a suit to foreclose a mortgage. In this appellant is in error. This point was settled in *Federal Farm Mtg. Corporation v. Thiele,* 137 Neb. 626, 290 N. W. 471, wherein we said: "We hold that a suit on a note, secured by a real estate mortgage, is a suit at law, independent, separate and distinct from a suit in equity to foreclose and satisfy a mortgage."

Appellee contends that the levy of the attachment upon the property covered by the mortgage converts the action in effect into a foreclosure proceeding. An attachment in this

state is an ancillary proceeding. It requires the pendency of an action to support it, but it is in no sense of the word a proceeding for the foreclosure of a mortgage. The fact that the holder of the mortgage may waive his mortgage lien, sue on the note to obtain a money judgment, and levy an attachment on the mortgaged lands cannot change the nature of the proceeding.

It is also contended that the acceleration provision in the mortgage is insufficient to accelerate the note when the lien of the mortgage has been waived. This court has passed on this question in *Munch v. Central West Public Service Co.*, 128 Neb. 645, 259 N. W. 736, as follows: "This court has adopted the same view. In *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, this court said: 'A note and a mortgage securing it, made contemporaneously, are to be construed together. Therefore, where a note is payable on or before a date named and the mortgage contains a provision that in certain contingencies, prior to that date, the mortgagee may elect to declare the whole amount due, *held*, that such provision in the mortgage authorizes the mortgagee upon the happening of such contingencies to proceed not only to foreclose the mortgage but also to enforce the personal liability upon the note.' See, also, *Consterdine v. Moore*, 65 Neb. 296, on rehearing." Other cases sustaining this view are *Durham v. Rasco*, 30 N. M. 16, 227 Pac. 599; *Wilson v. Kirchan*, 143 Wash. 342, 255 Pac. 368.

The argument that section 20-2141, Comp. St. Supp. 1939, requires that appellee must take the attached property as a satisfaction of the whole debt is without foundation. It has no application to an action at law to obtain a money judgment on a promissory note. After appellee obtained a judgment, and caused attached property to be sold, the proceeds of the sale should be applied on the judgment, and the balance of the judgment, if any, remains a valid judgment as to the amount remaining due thereon upon which an execution may issue as in other cases.

We find no error in the record and the judgment is

AFFIRMED.

HENRY L. MCGOWAN, APPELLANT, V. GEORGE NEIMANN ET AL., APPELLEES.

298 N. W. 411

FILED MAY 29, 1941. No. 31066.

1. **Boundaries.** "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." Comp. St. 1929, sec. 20-2124.
2. ———. The legislature, in the adoption of section 34-301, Comp. St. 1929, contemplated the protection or establishment of title and possession to real estate described in pleadings by a determination of boundaries, with the determination of the right to title and possession as the primary purpose and the fixing of boundaries incidental thereto.
3. ———. *Held*, that section 34-301, Comp. St. 1929, is broad enough to, and does, authorize action in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute.
4. ———. *Held*, that section 34-301, Comp. St. 1929, makes available a right of action to determine corners and boundaries to real estate to which the right of title or possession is in dispute, without regard to the question of whether or not the remedy at law in ejectment may at the time be available.

APPEAL from the district court for Morrill county: EARL L. MEYER, JUDGE. *Reversed.*

Torgeson & Halcomb, for appellant.

John H. Kuns and *R. P. Kepler, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

YEAGER, J.

This is an action to determine the correct location of a disputed boundary line between real estate owned by Henry L. McGowan, plaintiff and appellant, on the one hand, and by George Neimann and Freida Neimann, his wife, and A. J.

Heinlein and Nellie Heinlein, his wife, defendants and appellees, on the other.

The plaintiff is the owner of land described in the deed of conveyance as the east one-half (1/2) of section eighteen (18), township seventeen (17) north, range fifty-one (51) west of sixth P. M., in Morrill county, Nebraska. The defendant George Neimann is the owner of the northwest quarter of the section, and the defendant A. J. Heinlein of the southwest quarter. The controversy is over the line running north and south across the section and separating the land of plaintiff from that of defendants.

Plaintiff contends that the true line is not one dividing the section equally in halves, the one contended for by defendants, but that the true line is one arrived at by a metes and bounds description, which description is set forth in the petition and which places it on a line almost parallel with the center line, but a sufficient distance farther west to give plaintiff 20½ acres off the west geographical half of the section to which the defendants claim ownership. Plaintiff claims this is the true line by reason of purchase after examination of boundaries in January, 1925, and peaceful possession for more than ten years before his possession was interfered with.

The petition contains the following allegations:

"That this action is instituted by the plaintiff in order to have the boundaries of the plaintiff's real estate which are in dispute permanently established by this court and that such action is of the same nature as that set forth in section 34-301 of the Compiled Statutes of the state of Nebraska for the year 1929."

"That the possession of the defendants, and each of them, of the plaintiff's land * * * is wrongful and has been taken by force opposed to the plaintiff's peaceful possession thereof for a period of more than ten years immediately preceding the taking of possession by the defendants, and each of them."

The prayer of the petition is in part as follows: "Therefore the plaintiff prays * * * that this court ascertain and

establish permanently that the boundaries of the plaintiff's real estate in section 18, township 17 north, range 51, west of the 6th P. M., in Morrill county, Nebraska, as being * * *." The remaining part of the pertinent portion of the prayer contains the metes and bounds description of the land in section 18 to which plaintiff claims title.

The defendants Heinlein filed answer admitting ownership of the southwest quarter of the section of land involved, but denied all of the other allegations of the petition. They also filed a cross-petition alleging substantially that the true line between their land and that of the plaintiff was a north and south line which divides the section into halves. They alleged that the boundary line was in dispute and that it was necessary to have the same established by the court. In the prayer these defendants asked that the court ascertain and establish the line between the real estate of the defendants and that of the plaintiff.

The defendants Neimann filed answer and cross-petition identical with that of the Heinleins except that they described their real estate as the northwest quarter. No reply was filed to the answers, but on the trial the case was considered as though a general denial had been filed to the answers and cross-petitions.

The case was tried to the court and the finding was generally against the plaintiff and in favor of defendants. The court further found that the action was brought under section 34-301, Comp. St. 1929, and that the pleadings did not raise the issues of recognition and acquiescence of boundaries or adverse possession. The court further found that the true boundary between the land of plaintiff and that of defendants was the one claimed by defendants. Decree was entered accordingly.

We may say here that if the trial court was correct in the finding that the pleadings did not raise the issues of recognition and acquiescence of boundaries or adverse possession and if, in fact, the case was not presented on the theory of adverse possession, and that the only question presented for determination by the pleadings and the theory

on which the case was tried was the geographical location of the dividing line between the eastern and western halves of the section, then the decree is the only proper one which could have been entered. There is no dispute either in the pleadings or evidence about this line being the geographical dividing line.

The plaintiff in his assignments of error urges that the pleadings presented the question of adverse possession, and that the case was presented in its entirety on the theory that title to the land in dispute was claimed by adverse possession.

The portion of the petition necessary to a determination of the question relative to the pleadings has already been set forth herein.

Plaintiff pleaded substantially a declaration of purchase in January, 1925; continuous ownership in fee simple to the line claimed by him as the true one from that date henceforth to the date of the commencement of the action; that he had the peaceful possession of the land for a period of more than ten years immediately preceding the time when his possession was interfered with; that he was entitled to have the boundary line established in accordance with his claim of ownership. He contends that this is sufficient as a pleading to support a claim, and to admit of proof of the essential elements of title to the real estate in question by adverse possession.

In *City of Florence v. White,* 50 Neb. 516, 70 N. W. 50, which was an action in ejectment, it appears from the opinion, although the petition is not quoted, that the plaintiff was permitted to prove title by adverse possession on an allegation alone that she had a legal and equitable estate and had been kept out of possession. Again, in *Fink v. Dawson,* 52 Neb. 647, 72 N. W. 1037, which was an action wherein the controversy was over the location of a boundary line, this court said: "It is argued by counsel for plaintiff below that this defense of adverse possession was not available, because it was not specially pleaded in the answer. This contention is not well founded. The answer denied

title and right of possession in plaintiff, which was sufficient, under section 627 of the Code of Civil Procedure, to entitle the defendant to interpose the defense of adverse possession." In point are *Staley v. Housel*, 35 Neb. 160, 52 N. W. 888; *Wanser v. Lucas*, 44 Neb. 759, 62 N. W. 1108; *Oldig v. Fisk*, 53 Neb. 156, 73 N. W. 661; *McAllister v. Beymer*, 54 Neb. 247, 74 N. W. 586. Section 20-2124, Comp. St. 1929, which is section 626 of the Code of Civil Procedure, provides: "In an action for the recovery of real property, it shall be sufficient, if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." It then becomes clear that, in an action at law in ejectment seeking the same relief as sought in this case, plaintiff's petition would have been sufficient as a basis of proof of title by adverse possession.

The question then arises, does section 34-301 contemplate actions to determine and fix boundaries where title to land is in dispute, or are actions thereunder limited to the fixation of boundaries with reference to corners or boundaries at one time known but lost, and without regard to ownership of land affected at the time of the action? In other words, does the statute contemplate alone actions to redefine geographical lines and corners and earlier surveys?

The purpose of this statute has never been interpreted except to the extent that it is defined in the statute itself. The portion of the statute applicable here is: "When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. * * * The action shall be a special one, and the only necessary

pleading therein shall be the petition of plaintiff describing the land involved, and, so far as may be, the interest of the respective parties, and asking that certain corners and boundaries therein described, as accurately as may be, shall be established, and either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years * * *."

The legislature, in passing this statute, must have had in mind the well-recognized proposition, which requires no citations of authority for its support, that no remedy is available to a person who has not a right. Hence, it must have had in mind an action, the purpose of which was to protect or establish a right. The only substantial right it could have had in mind was the protection or establishment of title and possession to real estate described in the pleadings by a determination of its boundaries, with the determination of the right to title and possession as the primary purpose and the fixing of boundaries incidental thereto. The language of the statute appears to point directly to this conclusion. It sets forth that either party may put in issue the fact that alleged boundaries have been acquiesced in and recognized for a period of ten consecutive years. This language would be meaningless if it had reference alone to geographical lines and corners having no relation to title and possession of real estate. Also, the term "ten consecutive years" has a peculiar significance in the real estate law of this state. It is the minimum period necessary to proof of acquisition of title to real estate by adverse possession or of acquiescence in peaceable possession.

We hold that section 34-301, Comp. St. 1929, is broad enough to, and does, authorize action in equity to determine boundaries of real estate, the ownership of which is in whole or in part in dispute.

We hold further that this section makes available a right of action to determine corners and boundaries to real estate to which the right of title or possession is in dispute, without

regard to the question of whether or not the remedy at law in ejectment may at the time be available.

In this view it follows that the trial court was in error in finding that the pleadings did not raise the issues of recognition and acquiescence of boundaries or adverse possession.

For the reasons herein set forth, the decree of the district court is reversed and cause remanded for a new trial on the issues presented by the pleadings.

REVERSED.

UNITED STATES NATIONAL BANK OF OMAHA ET AL., TRUSTEES, APPELLANTS, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLEE.

298 N. W. 529

FILED MAY 29, 1941. No. 31063.

1. **Eminent Domain.** Where condemnor in a condemnation proceeding appeals from an award of damages, and later decides not to prosecute such appeal, the proper procedure is a motion to affirm the award with interest and costs.
2. ———. In the absence of fraud or undue advantage, such disposition of the appeal is a matter of right.
3. ———. Where, on such appeal, the only issue is the amount of damages, no pleadings are necessary.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Morsman & Maxwell and *George Doane Keller*, for appellants.

William P. Kelley, August Wagner and *C. N. McElfresh, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

KROGER, District Judge.

Loup River Public Power District, a corporation, hereinafter referred to as condemnor, commenced condemnation proceedings in the county court of Douglas county against

the United States National Bank of Omaha, Nebraska, and George Doane Keller, as trustees of the trust estate created by the last will and testament of Charles B. Keller, deceased, hereinafter referred to as condemnee, to condemn a right of way across the premises of condemnee in Douglas county for the construction and maintenance of transmission lines.

No complaint is made of the regularity of the condemnation proceedings up to and including the award of the appraisers. The condemnor, not being satisfied with the award, gave notice of appeal and within 30 days filed an appeal bond and within 60 days filed a transcript of the proceedings in the district court for Douglas county. Condemnee took no action and so far as the record discloses was satisfied with the award of the appraisers. After the appeal had been docketed, the condemnee filed a lengthy petition in the district court, but no matter excepting the amount of damages was raised in the petition. Some time later the condemnor filed a motion asking that the district court affirm the award of the appraisers, together with interest and costs incurred to date. This motion was resisted by condemnee and from an order and judgment of the trial court sustaining the motion, condemnee appeals to this court.

It is somewhat difficult to determine just what the theory of condemnee is, but apparently the contention is that the proceedings in the county court were not legal proceedings in the sense that they constituted an action at law, and when the appeal was docketed in the district court, by statute, the condemnee became plaintiff and the condemnor defendant, and that this was, in reality, the beginning of a law action and that, as condemnee was plaintiff in that action and had filed a petition, the same could not be dismissed or disposed of without the consent of the condemnee.

While it is true that the proceedings for condemnation in the beginning are not in the nature of an action at law, yet it does not follow that, when an appeal is taken from such proceedings to the district court and the case is there dock-

eted, such action constitutes the beginning of an action in the generally accepted sense. But for the appeal, the award of the appraisers would be final and there never would be any proceedings in the district court. Consequently, it is the appellant who is responsible for instituting the action in the district court, even though by statute the parties in a condemnation action are designated in the reverse order from what they appear to be in the proceedings in the county court.

While our statute does not make express provision for the disposition of the appeal after it is docketed in the district court, this court has held that, where an appeal from an award of damages has been taken by the condemnor and thereafter the condemnor becomes satisfied with the correctness of the award and does not desire to prosecute such appeal, the proper procedure is a motion to affirm the award with interest and costs; and it is further held that only upon a showing of fraud or undue advantage would such a motion be denied. *Berggren v. Fremont, E. & M. V. R. Co.*, 23 Neb. 620, 37 N. W. 470; *Robbins v. Omaha & N. P. R. Co.*, 27 Neb. 73, 42 N. W. 905.

The condemnee argues that the condemnation statute has been amended several times since the above cited cases were decided and that such amendments have changed the act and the procedure thereunder. An examination of the amendments made indicates that they were not such as to materially change the procedure, the only material amendment being the one requiring the appellant to give a bond. This amendment would not in any manner affect the rule as to disposition of the appeal after it is docketed in the district court.

The fact that a petition was filed in the district court by condemnee cannot change the rule, because the filing of that petition was not essential or necessary. This court has, in a number of cases, held that, where on appeal the only question is the amount of damages, no pleadings are necessary. *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94, 44 N. W. 79; *Trester v. Missouri P. R. Co.*, 33 Neb. 171, 49

N. W. 1110. Since no petition was necessary, plaintiff could not acquire any additional rights by the filing of same.

In principle, there is no reason why appeals in condemnation matters should not be governed by the same rules which apply to appeals from justice courts. In the latter class of cases our court is committed to the rule that appellant may dismiss such appeal without consent of appellee. *Eden Musee Co. v. Yohe,* 37 Neb. 452, 55 N. W. 866.

In this case condemnee, not having filed a cross-appeal, had no right to object to the motion of condemnor to affirm the award, as the result of that motion was to ratify the award made by the appraisers with which condemnee was apparently satisfied.

The ruling of the trial court was correct and is

AFFIRMED.

OHIO NATIONAL LIFE INSURANCE COMPANY, APPELLEE, V. JOHN A. BAXTER, APPELLANT: EMILY E. BAXTER, APPELLEE.
298 N. W. 530

FILED MAY 29, 1941. No. 31097.

1. **Judgment.** Where payment is made with the intention of complying with bid made at foreclosure sale, and not to satisfy personal liability, such payment does not operate as satisfaction of decree.
2. **Mortgages.** "The taking of a stay of the order of sale under a decree of foreclosure is a waiver of all errors in the proceedings in the case prior to the obtaining of such stay." *Ecklund v. Willis,* 42 Neb. 737, 60 N. W. 1026.
3. ———. Where evidence as to value is conflicting and there has been a previous sale for approximately the same amount, and no showing is made that a subsequent sale would realize a greater amount, the trial court did not err in confirming sale.

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

Mothersead & York, for appellant.

Jack E. Lyman, Floyd E. Wright and *William Morrow, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

KROGER, District Judge.

This is an appeal from an order confirming sale in a foreclosure action.

From the record it appears that on July 1, 1936, John A. Baxter and Emily E. Baxter, husband and wife, executed notes to the Ohio National Life Insurance Company, a corporation, in the total principal sum of $5,000, and secured the same by a real estate mortgage on lands in Scotts Bluff county. On September 28, 1938, Emily E. Baxter obtained a divorce from John A. Baxter and by the divorce decree John A. Baxter was required to pay alimony to Emily E. Baxter in the sum of $8,386.25, payable in yearly instalments, commencing with December 15, 1938, and ending December 15, 1947, with interest at 6 per cent. from date of decree.

On the 15th day of April, 1939, the Ohio National Life Insurance Company commenced foreclosure of the mortgage hereinbefore referred to, making as defendants John A. Baxter and Emily E. Baxter and John Doe, real name unknown. Summons was issued and served on the defendants, the answer day in said summons being the 15th day of May, 1939. On April 20, 1939, plaintiff filed an amendment to its petition in which it is alleged that defendant John A. Baxter had remarried on April 3, 1939, and his wife, Ethel Marie Baxter, was made a party defendant and summons served on her on the 21st day of April, answer day on this summons being May 22, 1939.

On May 10, 1939, defendant John A. Baxter filed a demurrer to plaintiff's petition, which demurrer was overruled on May 12, and he was granted until June 1, 1939, to answer.

On the 22d day of May, 1939, Emily E. Baxter filed her answer and cross-petition, and in her cross-petition set up her alimony judgment as a lien on the premises being foreclosed upon.

John A. Baxter and Ethel Marie Baxter defaulted and on June 2, 1939, a decree of foreclosure was entered, in which the amount due the Ohio National Life Insurance Company was found to be a first lien, and in which there was found to be due Emily E. Baxter on the judgment set forth in her cross-petition the sum of $8,259.42 with interest at 6 per cent. from that date, which was decreed to be a second lien on the premises in suit.

On June 20, 1939, defendant John A. Baxter filed a request for a stay, and thereafter on April 6, 1940, the property was sold at public auction to Emily E. Baxter for the sum of $14,000. On the day of said sale Emily E. Baxter paid to the sheriff of Scotts Bluff county the sum of $400 and some days later paid to the clerk of the district court for Scotts Bluff county the difference between the $400 and the amount due on the first lien, with interest and costs of the action. On the 16th day of April, 1940, John A. Baxter filed objections to the confirmation of said sale, which objections were, on April 16, 1940, sustained and a new sale ordered, and the clerk was ordered to return to the purchaser the money paid on her bid.

On the 27th day of May, 1940, a second sale was had and the premises in controversy were sold to Emily E. Baxter for the sum of $13,900, on which bid she again paid a sum sufficient to pay the first lien in full, together with costs of the action, and no more. Objections to the confirmation of this sale were again filed and upon hearing had the sale was confirmed. From this order this appeal is prosecuted.

Appellant first argues that Emily E. Baxter was personally liable for the amount due the Ohio National Life Insurance Company and that, when she paid to the clerk of the district court the amount due that company, such payment constituted a satisfaction of the decree and that thereafter the judgment was no longer in force.

This position is not tenable. It is clear from the record that, when Emily E. Baxter attempted to pay the sheriff the balance of her bid, she was informed by the sheriff that he had made return to the order of sale and that the papers

were in the office of the clerk of the district court and directed her to make payment there. So, if it were material, the clerk of the district court, at most, was agent for the sheriff in accepting such payment. We do not, however, consider it material where the payment was made, as it is clear from the record that there was no intention of satisfying the judgment of the Ohio National Life Insurance Company as an obligation of Emily E. Baxter, but the intention was to pay the amount necessary to cover the prior lien and costs under her bid at the foreclosure sale, and when the sale was set aside the entire amount paid by Emily E. Baxter was returned to her. The cases cited by appellant on this proposition have been examined and none of them is in point.

The next contention of appellant is that the decree in favor of the cross-petitioner is void, for the reason that the cross-petition was not filed within the time fixed by law, and that no summons was served upon the codefendants and that consequently the court had no jurisdiction to enter decree on the cross-petition. Appellee meets this contention by calling attention to section 20-849, Comp. St. 1929, which provides that, where plaintiff amends his petition at any time before answer is filed, notice of such amendment shall be served upon defendant or his attorney and the defendant shall have the same time to answer or demur thereto as to the original petition, and argues that by reason of the amendment to plaintiff's petition the answer day was May 22, 1939, and not May 15 as fixed in the original summons.

We deem it unnecessary to pass upon the effect of this provision of the statute, as the record shows that defendant, on June 20, 1939, filed a request for stay of the order of sale, which action on his part was a general appearance in the action, and under the provisions of section 20-1509, Comp. St. 1929, and under the decisions of this court, was a waiver of any prior error in the proceedings. See *Lackey v. Yekel*, 113 Neb. 382, 203 N. W. 542; *Bowman v. Caldwell*, 135 Neb. 554, 283 N. W. 194; *Ecklund v. Willis*, 42 Neb. 737, 60 N. W. 1026.

Another contention of appellant is that the sale should not have been confirmed because the purchaser paid only the amount due on the first lien and costs, which amounted to less than one-half of her bid. Apparently the position here is that Emily E. Baxter could not apply the amount of her alimony judgment because the entire sum was not then due and payable.

The answer to this is that the decree entered June 2, 1939, found that there was then due and payable the sum of $8,259.42, and defendant took no exception to that finding and by his request for stay is deemed to have waived any error that may have been committed when the decree was entered.

The final contention of appellant is that the price at which the property sold did not represent its fair and reasonable value. It may be said that on this question the evidence was conflicting. In addition to evidence of value, the court had before it the fact that at a previous sale the property had been purchased by the same party for substantially the same amount. There was no showing that a greater amount could be realized from another sale. We are satisfied from an examination of the record that the price at which the property was sold was not so inadequate as to require the court to set the sale aside. See *Lincoln Joint Stock Land Bank v. Fuller,* 132 Neb. 677, 273 N. W. 14.

Finding no error in the record, the order appealed from is

AFFIRMED.

MAX BIXBY ET AL., ADMINISTRATORS, APPELLANTS, V. MAYMIE F. AYERS ET AL., APPELLEES.
298 N. W. 533

FILED JUNE 6, 1941. No. 30861

1. **Evidence.** "The competent relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences

from circumstantial evidence, unless these circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true." *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689, 131 N. W. 1027.

2. **Automobiles.** Evidence in the record examined, and *held* to sustain the action of the trial court in directing the jury to find generally for defendants and against plaintiffs, thereupon rendering judgment upon such verdict, and dismissing the action at cost of plaintiffs.

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

Davis & Stubbs, for appellants.

Chambers, Holland & Locke and *T. J. Kiesselbach, contra.*

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

EBERLY, J.

This is an action at law under our Lord Campbell's Act, in which Maymie F. Ayers and Loyd Ayers, wife and husband, are named as defendants, to recover damages for the suffering and death of Albert Hansen who died from injuries received in an accident which occurred on June 22, 1939, on state highway No. 3 south, at a point about one-half mile east of the village of Hardy, Nebraska. The automobile involved was owned by defendant Maymie F. Ayres, and at the time of the accident was being driven as a family car by defendant Loyd Ayers, he being hereinafter referred to as the defendant.

The petition alleges, in substance, that the defendant at the time and place stated, while traveling westward, carelessly and negligently drove his automobile "into, against, upon and over the said Albert Hansen and the bicycle" upon which the deceased was then riding westward along the north and right side of such highway, thereby inflicting injuries which caused his death. This pleading charged negligence of defendant in the following particulars, viz.: (1) Defendant's automobile was driven at a dangerous and

reckless rate of speed without regard to the condition of the highway or the safety of others upon the same; (2) failure of defendant to keep proper lookout; (3) failure of defendant to turn to the left and south side of the highway in order to pass said Albert Hansen; (4) failure of defendant to apply his brakes so as to stop his said car or reduce its speed so that he could control the same in approaching and passing the deceased. To this pleading defendants, by answer, denied generally the allegations thereof, and joined issue by specially pleading the facts as subsequently testified to by the defendant, including the allegation that the plaintiffs' decedent from a position on the left side of the highway, taken by him after knowledge of defendant's approach and due warning thereof, as defendant's automobile was overtaking and passing him, suddenly turned his bicycle to the right and negligently suddenly drove the same in front of defendant's automobile without giving any warning of his intention so to do, and so close to defendant's automobile as to afford defendant no opportunity to avoid the accident by stopping his car. Further, that this act of plaintiffs' decedent constituted gross negligence, was the sole and proximate cause of the accident which ensued, and that defendants were without blame. Plaintiffs joined issue by a reply, in substance a general denial. The cause was tried to a jury duly impaneled and sworn, and at the close of all the evidence the trial court sustained a motion on behalf of the defendants for an instructed verdict in their favor. From the order of the trial court overruling their motion for a new trial, plaintiffs appeal.

The following constitutes a résumé of the evidence introduced by plaintiffs.

Addis Jensen, a witness called by them, testifies that on June 22, 1939, "about 3 o'clock or a little after," he was assisting in the operation of a binder, harvesting wheat one-half mile north of the highway on which the accident in suit occurred. As the binder was going south he saw an automobile on this highway, traveling westward, sweep over a hill on the highway to the eastward, then down over a

bridge and then up very nearly a half mile of gradual incline, at an estimated speed of 60 to 70 miles an hour. It came to a sudden stop about half way up the hill. The day was bright and clear and the sun was shining. The gravel on this highway was dry. This witness never noted the presence on this highway of Albert Hansen, the deceased, or his bicycle; does not testify to the passing or stopping of other cars at the scene of the accident, and in fact is wholly unconscious of the fact that an accident has occurred. Between 7 and 8 o'clock in the evening of the day of the accident, having been advised of the happening of the same, this witness "went down where he had seen that car;" there he saw tracks made by the sliding wheels of an automobile situated on the north side of the road about 90 to 100 feet in length. The right track was about four feet from the ridge of gravel on the north side of the road at its east end and about three feet therefrom at the west end. This witness mentions no other tracks or marks save the two tracks made by the sliding wheels of the automobile.

Leslie Jensby, a witness of plaintiffs, testifies that he was on the afternoon of June 22, 1939, "running the tractor with a go-dig behind it." He was then about 120 rods north from state highway No. 3. A little after 3 o'clock he saw the Ayers car come over the hill south of his field at a rate of speed estimated by the witness to be "about 60 or 65 miles an hour." It went down the hill and over the bridge and on, and there was no slow up of the speed until the car was suddenly stopped. This witness wholly failed to note the presence of the deceased and his bicycle on this day at or near the time of the accident, and we are likewise wholly in darkness as to the means by which he identified the car he refers to as the "Ayers car."

Elmer Perry, plaintiffs' witness, testified that he had occasion to pass the scene of the accident, going east, a little after 3 o'clock p. m. on June 22, 1939. He noticed the skid marks and what afterwards he discovered to be a bicycle lay north of the road. He continued in the truck on to the bridge where he turned around and came back to

where another car had stopped and there he saw the other man and the bicycle and certain tracks. He says the bicycle "was lying kind of in the edge of the weeds there; they had taken it and put it out there (on the north side of the road) I imagine. * * * The only tracks you could see was where the tires had been sliding, and they had slid, Oh, possibly 80 to 100 feet, that is, as to my judgment. * * * The tracks was just about as straight as you could get 'em; they was a little bit maybe angled, but they wasn't wavy." The north track of the skidding car was about three or four feet from the north side of the highway. "Q. Did you see any other marks on the road besides these tire marks, skid marks? A. Where—I could see where it looked like the bicycle had been struck. (This answer was stricken by the court as not responsive.) Q. Tell what you saw there, Elmer. What marks were there in the road? A. Well, there was a kind of—right from the north track there was for a small distance there was a brushed place in the gravel where it looked like something had just raked the gravel just a little. Q. Did that run up the road? A. Yes; it did. Q. How far? A. Oh, I would say 15 to 20 feet. Q. Where, with reference to the length of these tracks was this track, where was it with reference to the—A. (Interrupting) Well, on the north track, the mark that I noticed was possibly, Oh, that far, six, eight, ten inches from the inside of the track there. * * * Q. Where, from the place where this inside mark in between the other two tire marks started, where did the bicycle lie, to the west or east? A. To the west. Q. And about how far? A. Well, to where the mark ended, why it—from the start to the end of the mark, why it was about 15 to 20 feet, and then from the start of the mark on to where the bicycle was I would imagine it was a little further than that. The bicycle had already been picked up and moved over."

Guy E. Scott, the undertaker at Hardy who prepared the body of Albert Hansen for burial, as plaintiffs' witness, testified as follows: "Q. Will you just tell the jury, in connection with your work in the preparation of his body,

what if any marks or breaks or other evidences of physical injury were apparent on the body? A. Well, on the back across the shoulders he was what you would call burned with the passing over the—possibly the gravel, or coming in contact with some object, and the right shoulder was broken, as well as—seemingly the left was out of place and was through the chest where he had been crushed by it."

Dr. C. G. McMahon, the physician who attended the deceased after the accident and until his death, testified as plaintiffs' witness that Albert Hansen was conscious when he received him. And further, "Q. Where did you take him? A. Took him first to the X-ray room and made an X-ray picture of his chest, and then took him upstairs immediately and put him to bed, made him as comfortable as we could. Q. Will you describe his injuries as far as you observed them, Doctor? A. He had a severe contusion of the chest, was the principal injury, the worst on the left side, with a fracture of the left collar bone, and the X-ray of his chest showed two broken ribs on the left side."

Three pictures of highway No. 3 south, at and near the place of the accident, taken the day previous to the trial in the district court in October, 1939 (four months after the occurrence of the accident), and the bicycle ridden by the deceased at the time of the accident were also placed in evidence by plaintiffs.

The width of the driving surface of this road is 28 feet, 6 inches.

From the evidence as an entirety, it may be said that the deceased, at the time of the fatal accident, was 14 years of age, and, had he lived, he would have become 15 years of age during the month of October following. He was a strong, tall, well-built boy. He was in the eighth grade of the public school he attended, and played school football. He was very industrious and capable of performing farm work of all kinds. One of the plaintiffs' witnesses stated: "His father wasn't so well, and I seen the boy always was first to grab hold when he had to crank the old car." The first of this year (1939) the boy was really able

to do a man's work on the farm and actually performed all kinds of farm work. Witness Jensen, who testified for plaintiffs, valued the boy's services as an employee on his father's farm at from $700 to $1,000 per annum.

The defendants, as their case, introduced, in addition to the testimony of defendant Loyd Ayers, the evidence of Edwin Achterberg. Achterberg lives in Deshler, Nebraska, and is employed by the Rosmiller Oil Company. On the afternoon of June 22, 1939, he was driving home to Deshler. A little after 3 o'clock p. m. he came to the scene of the accident. A car was stopped in the road; the defendant was standing toward the back of his car waving the witness to stop. He says: "At the time I stopped, why I just glanced to the back of the car and seen a boy with him there. Of course, I got out of the car right away and looked at the boy to see whether he was alive or whether he was dead, and Mr. Ayers says to me, 'Help me put him in the car so we can take him to a doctor,' and so that's what I did; and as we had him lying in the back seat of the car I asked the boy what his name was and he says his name was Albert Hansen. * * * I went and notified his parents then." As to skid marks witness testified in part, in reply to a question as to how long those skid marks were and where they extended on the highway, "A. Well, I can't say for certain. I didn't take measures or anything like that, and the way it was we were both so excited I just took a rough glance at the skid marks, and it looked to me like it was approximately between eight and ten foot, that's my judgment it was at that time, see; now whether it's right or not, I couldn't say." Further, "Q. Well, you believe you know approximately how long eight to ten feet is? A. Yes; that's what my glance was at that time. Q. Were they deep skid marks in the gravel? A. Well, they looked rather broad, the gravel was practically all rubbed off, the space you could see it had been brushed was very hard. Q. Did those skid marks lead up to the back wheels of the car as it sat there? A. Yes, they did. Q. Where was the car setting with reference to the north or south side of the highway?

A. It was setting on the north side of the gravel. Q. Do you know how far out from the gravel ridge? A. I should judge, Oh, aproximately two or three feet, something like that. Q. Were they setting straight east and west? A. They was facing straight east and west, yes. Q. You might tell the jury this, as I understand it this hill went up toward the east, did it? A. Towards the west. Q. On toward the west? A. Yes. Q. Is it a fairly long hill? A. Yes; it is. Q. Can you tell the jury about how long it is and what type hill it is? A. Well, this hill—there's a bridge at the bottom of the draw and from the bridge on it slopes up toward the west, and after you get up the hill a ways, why it takes another turn and goes up a little higher, it's a little steeper hill; in other words there's a low, seems to be a kind of low place in the middle of the hill. Q. Kind of a double hill? A. Yes; it's a double hill, what you might call it. Q. Where on this hill was this car standing when you got there? A. It was standing upon the second—on the second raise, about, Oh, I don't know, I should judge probably one-fourth the way between the start of the hill and the top of the hill. * * * Q. You say these skid marks were pretty evident for a distance behind the car on up to where the back wheels stopped, is that right? A. Umhum (yes). Q. And the road at that point as a matter of fact was pretty hard, wasn't it? A. Well—Q. (Interrupting) There is a well-packed gravel highway? A. Yes. Q. There hadn't been any rain or anything? A. No. Q. So as you saw it the first time, those skid marks just cleaned the gravel clean? A. Yes; it is a wide, plain wide mark. Q. That went clear up to the back wheels, is that right? A. Yes. Q. Where was the body of this boy, was it lying across this skid mark? A. Well, that I don't recall either, it must have, though, because he was lying right in back of the—his hips was just about even with the back of the wheel. Q. Under the back wheel? A. Not under, in back of the back wheel. Q. Right back of the back wheel? A. Umhum (Yes). Q. Did the marks show that this back wheel had gone over the boy? A. No; it didn't, I couldn't say that it did."

The bicycle of the deceased, involved in this collision, is in evidence. The evidential foundation was limited to its condition after the accident. Its condition previous thereto is not shown. It clearly appears that it is not a new machine, and has been in use for a considerable period of time. Its model is that of a lady's bicycle. Looking at this machine from rear to front, it appears that the front wheel, steering post, handle-bars, and a 10 by 15 inch wire carrier basket attached in front are apparently not seriously damaged. Small particles of paint, however, appear to have been abraded therefrom, as well as from other parts of the machine, and the wire carrier basket is slightly bent up in places. The two rods leading from the front wheel-post to the sprocket wheel are slightly out of line. The rod leading from the sprocket wheel to, and supporting, the seat is bent downward and backward, and slightly to the left at a point equally distant from the sprocket wheel and the seat. The two rods which connect the axle of the rear wheel to and with the seat rod are both badly bent to the right. The bend in the right rod appears to be about six inches below the seat and the bend in the corresponding left rod occurs some nine inches below the seat. The bend in the left rod is so abrupt as to force that rod through the spokes of the rear wheel. The arm of the seat post is turned to the right. The sprocket wheel and right pedal are in normal condition; the right pedal bar is badly bent. The left pedal bar appears slightly bent to the right; but the entire rear wheel frame appears to be bent to the left slightly. The u-shaped frame from the rear wheel axle to the bottom center of the frame is bent to the left, the condition of this part and of the left pedal being such as to prevent the left pedal bar from clearing the frame. The "u" frame from the rear axle to the seat, as already described, is bent down and to the right, and the left arm of the "u" is bent sharply to touch the right arm of this "u." This necessarily shortens the distance between the seat and rear axle, and pulls the seat and its supporting rod backward and downward. The rear wheel rim is broken into

four parts. Apparently one-half of the rim is locked in position by the bent "u" frame leading from the rear axle to the rear post. The remaining three parts hang from the spokes.

The only eyewitness who saw what occurred at the time of the accident was the defendant Loyd Ayers. He states that he first saw the boy when he came over the top of a hill some distance east of where the accident occurred. The defendant was then traveling 50 to 60 miles an hour. The boy was then proceeding on the right or north side of the highway. As defendant approached the boy he reduced to a speed of 20 to 25 miles an hour and sounded his horn. The boy turned around, looked back at the defendant and then rode his bicycle to his left over part of the center of the highway. Thereafter when the defendant came close, traveling on the right side of the highway and was about to pass the boy, he again sounded his horn. At this alarm the bicycle rider suddenly and without warning, when defendant's car was about 15 feet to his right rear, turned his wheel sharply to the right and "scooted" across the road directly in front of defendant's oncoming automobile. The defendant immediately applied his brakes, so hard that the engine of the automobile was killed, but he was unable to avoid the accident. There was an impact; the automobile was stopped within a car length. After the accident the boy lay about three feet "in back" of the automobile right rear wheel with his hips about even with it. So far as advised by the record, the boy had received no head injuries, and was conscious. There is no evidence of any injuries to his lower extremeties. The bicycle lay a few feet west of the boy and opposite the right rear door of the car. The defendant got out of his car immediately, and, aided by a passing motorist, placed the injured boy in his automobile and moved him to the hospital.

The controlling question here presented is one of fact. The evidence relating thereto by which the rights of the parties will be determined must be considered in the light of the following principles, viz.: The issues as made up by

the pleadings impose on the plaintiffs the burden of proof, and to recover they must establish by a preponderance of the evidence that the defendant was guilty of actionable negligence which was the proximate cause of the injuries received by the deceased.

"Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened." *Anderson v. Byrd*, 133 Neb. 483, 275 N. W. 825.

Negligence is never presumed, and cannot be inferred from the mere fact that an accident happened. *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445; *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673; *Engel v. Chicago, B. & Q. R. Co.*, 111 Neb. 21, 195 N. W. 523; *Thompson v. Young Men's Christian Ass'n*, 122 Neb. 843, 241 N. W. 565; *Meyers v. Neeld*, 137 Neb. 428, 289 N. W. 797.

In the instant case the evidence upon which the plaintiffs rely to establish the cause of action and overcome the direct evidence of the defendants is almost wholly circumstantial. This court is committed to the view, viz.:

" 'Circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom. *Asbach v. Chicago, B. & Q. R. Co.*, 74 Ia. 248; *Lopez v. Campbell*, 163 N. Y. 340; *American Freehold Land Mortgage Co. v. Whaley*, 63 Fed. 743.' *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689." *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445.

Assuming that a bicycle is a "vehicle," as that term is used in our statutes, and as such upon public highways equal in right to that enjoyed by motor vehicles, it would seem that they are equally subject to the law of the road.

Bicyclists while traveling on the highway are controlled by the rules of the road as recognized at common law. They have the same right as automobile drivers to use the streets

and roads, and are chargeable only with such ordinary care for their own safety as prudent persons of like age and experience would exercise. 4 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 2736.

The rule of the road in Nebraska is: "Except when overtaking and passing on the right is permitted; the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal," etc. Comp. St. Supp. 1939, sec. 39-11,102; Laws 1935, ch. 134, sec. 5.

The undisputed evidence in the instant case is that the deceased heard the audible signal given by the defendant as the latter was approaching from the rear, looked back and deliberately turned his bicycle to the left, and occupied the track the law intended to reserve for the passing vehicle.

The governing statute is apparently declaratory of the common law in the United States, and in harmony with the general custom that here obtains.

In passing on similar situations, very respectable courts have seen fit to declare that in taking the wrong side of the road the driver of the overtaken car assumes the risk of his experiment, and it is for him to use greater care than would have been required of him if he had kept on his right side. When a collision occurs in such circumstances, the presumption is against him, and especially so when the collision occurs in the dark. *Angell v. Lewis,* 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881. And persons who pass him have a right to presume that he will comply with the law of the road, and that no greater caution or skill will be required on their part than would be necessary if he was on his own (right) side of the road. *Borden's Condensed Milk Co. v. Mosby,* 250 Fed. 839, 163 C. C. A. 153.

"If, however, the driver of the forward car sees fit to give way so as to allow the rear car the use of the entire track, the driver of the latter vehicle may properly take it." 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 939. See, also, *Zellmer v. McTaigue,* 170 Ia. 534, 153 N. W. 77.

The attempt of the rear vehicle to pass to the right side

of the road does not relieve the driver in front of the duty of exercising the degree of care and caution an ordinarily skilful driver would use under like circumstances. Passing a bicycle on the right side is not necessarily negligence in a given case. It is not negligence if not the proximate cause of the accident or injury to the injured party. *Johnson v. Kinnan*, 195 Ia. 720, 192 N. W. 863; *Herdman v. Zwart*, 167 Ia. 500, 149 N. W. 631.

"Conceding a driver's right to use any portion of the highway open to him, and which circumstances, or his desires, may prompt him to use, his rights are necessarily subject to equal rights on the part of other users of the highway, and, in passing from one side to the other, he is bound to do so with proper regard to the rights and safety of others overtaking him on the highway." 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 934. See, also, *Piper v. Adams Express Co.*, 270 Pa. St. 54, 113 Atl. 562.

"Thus, if the driver of the forward vehicle has turned to the left, giving clear indication that he intends the rear vehicle to pass to his right, and then, when the driver of the latter vehicle has started to do so and has reached a position where it cannot stop or change its course without a collision, the driver of the forward vehicle suddenly turns in front of the rear vehicle by going to the right, the driver of the latter vehicle cannot be said to be responsible for an ensuing collision." 2 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 941. See, also, *Manceaux v. Hunter Canal Co.*, 148 La. 93, 86 So. 665.

It would appear that undisputed evidence clearly establishes that the defendant is not chargeable with actionable negligence. But, in addition to this, the principle of law has been repeatedly announced by this tribunal that, where the evidence establishes that the plaintiff's decedent was guilty of more than slight negligence, the question becomes one of law for the court, and it is the duty of the court to direct a verdict. *Eaton v. Merritt*, 135 Neb. 363, 281 N. W. 620; *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673;

Ritter v. Hering, 135 Neb. 1, 280 N. W. 231; *Kudrna v. Sarpy County,* 125 Neb. 83, 249 N. W. 87; *Johnson v. City of Omaha,* 108 Neb. 481, 188 N. W. 122; *Nelson v. Plautz,* 130 Neb. 641, 265 N. W. 885; *Anderson v. Altschuler,* 125 Neb. 853, 252 N. W. 310.

In the instant case, the deceased had turned his bicycle to his left and was traveling west in a zone of perfect safety. No danger whatever then threatened him. Under these circumstances this court is committed to the rule, viz.:

"When one, being in a place of safety, sees and is aware of the approach of a moving vehicle in close proximity to him, suddenly moves from the place of safety into the path of such vehicle and is struck, his own conduct constitutes contributory negligence more than slight in degree, as a matter of law, and precludes recovery." *Travinsky v. Omaha & C. B. Street R. Co.,* 137 Neb. 168, 288 N. W. 512. See, also, *Troup v. Porter,* 126 Neb. 93, 252 N. W. 611; *McDonald v. Omaha & C. B. Street R. Co.,* 128 Neb. 17, 257 N. W. 489.

Nor do the facts and circumstances disclosed by the record, including the physical condition of the deceased, the marks upon the highway at the scene of the accident, and the positions and conditions of the automobile and the bicycle, militate against this conclusion. In determining a somewhat similar question, in *Kroell v. Lutz,* 210 S. W. (Mo. App.) 926, the court of appeals stated its conclusion in the following language, viz.:

"Where there was a collision of automobiles at a street intersection, it cannot be said as a matter of law that the accident did not happen as stated by either party, solely from the respective positions of the automobiles after the accident; there being such a complexity of forces and resultants as to afford no idea where the two automobiles would go or what they would do."

In *Corcoran v. Ward,* 115 Cal. App. 180, 1 Pac. (2d) 455, we find the following announced as the view of that court, viz.:

"The complexity of forces operating on two rapidly mov-

ing vehicles in collision with one another often makes it exceedingly difficult to reconstruct the manner of the happening of the accident from testimony concerning the marks found upon the highway and the positions and condition of the cars after the accident."

As has been heretofore observed, "Negligence cannot be inferred from the mere fact that an accident happened. See *Omaha & R. V. R. Co. v. Clarke*, 39 Neb. 65; *Vansyoc v. Freewater Cemetery Ass'n*, 63 Neb. 143." *Anderson v. Interstate Transit Lines*, 129 Neb. 612, 262 N. W. 445.

We have seen that the accident occurred on state highway No. 3 south, one of the principal highways in the southern part of the state. Three pictures of this highway (which we have hereinbefore referred to) taken four months after the occurrence of the accident appear in the record, but the record is silent as to the appearance of this highway and the marks thereon immediately prior to the accident. After the accident the defendant's automobile carried but one new mark, and that upon the right front fender, but it in no manner contradicts defendant's evidence as to the movements of the deceased immediately preceding the moment of impact. The evidence as to the marks upon, and injuries to, the bicycle have already been detailed. But they are shown only as they appeared after this mishap was complete and all movement had ceased. It would seem quite certain that the first impact occurred when the deceased was still mounted on his machine and still seated in the saddle. As the lower extremities of the deceased carried no bruises, so far as we are advised by the proof, we may doubtless infer from the condition of the rear wheel of the bicycle that the first impact occurred there, and that the injuries received by the deceased were inflicted subsequent thereto. But in the accident the boy was separated from his bicycle. At least he passed to the rear of the automobile in some manner, and was found some three feet in the rear of the right rear wheel. His bicycle was then laying about even with the right rear door, some six feet west of him. There is no evidence as to the position of the boy after the first im-

pact between his bicycle and the automobile. There is absolutely a void in the evidence as to whether the injuries from which he suffered were inflicted by the bumper of the car, by the axles, by other parts of the automobile, or by its wheels passing over him. Much the same is true of the bicycle. The testimony as to the bicycle and its condition has already been detailed. But this is only shown as it was after the accident was completed and all movement ended. The bicycle, accepting the testimony of plaintiffs' witness Elmer Perry, had been, by the force of the collision, forced west along the face of the highway some 15 or 18 feet. The attachment of, or connection between, the bicycle and the automobile during this journey is not in any manner shown. Whether it was again struck by the bumper after the first impact, whether a lesser clearance brought it in contact with the axles or other parts of the car, or whether the front wheel passed over a part of it, and what its position on the ground may have been while damages thereto were being inflicted, the record and the machine furnish no basis for a conclusion.

As the theory of both plaintiffs and defendants is that deceased was "run down" while riding his bicycle at the instant of the first impact, his lower extremities naturally would be first exposed to injury, and the injuries to the upper chest could occur only after the first impact and would be occasioned by colliding with bumper, axles, or other parts of the automobile, or by the passing of its wheels over the prostrate body. The appearance of the back of deceased indicated that he was dragged across the graveled road-bed for some distance. But nothing in the evidence affords us any light upon the position of the body with reference to the automobile during the interval of time that ensued after the first impact, and as to when, where, and how the fatal injuries were thereafter inflicted. In short, we have here presented a case where evidence of controlling circumstances in no manner conflicts with the evidence of the defendant, who appears as a witness, and who is wholly unimpeached.

The applicable rule invoked by this record, this court has heretofore stated as follows, viz.:

"The competent relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless these circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true." *Blid v. Chicago & N. W. R. Co.*, 89 Neb. 689, 131 N. W. 1027.

It follows, therefore, that the action of the trial court in instructing a verdict for the defendants is sustained by the record, and the judgment is

AFFIRMED.

SIMMONS, C. J., dissenting.

This is an action to recover damages for the suffering and death of 14-year-old Albert Hansen which resulted from a collision between an automobile and a bicycle. Plaintiff contends that the accident was caused by the negligence of the defendant Loyd Ayers. Defendants contend that the accident was caused solely by the negligence of plaintiffs' decedent.

After both parties had rested, defendants moved that a verdict be directed in their favor against the plaintiffs, for the reason that the evidence was insufficient to sustain a cause of action against them and in favor of the plaintiffs, and that the evidence, as a matter of law, showed plaintiffs' decedent to have been guilty of more than slight negligence which was the proximate cause of the accident.

The trial court sustained the motion. Plaintiffs appeal.

There is no dispute as to the following facts. The afternoon of June 22, 1939, was clear, and the road was dry. About 3 p. m. the deceased was riding a bicycle and the defendant Loyd Ayers (hereinafter called the defendant) was driving a Chrysler Royal automobile westward along a state two-lane highway, which at the point of the collision was 28 feet 6 inches wide on the traveled portion. A ridge of loose gravel was along the top of the north side of, and parallel with, the highway. Approaching the point of

collision from the east, the highway comes for some distance down a hill, crosses a bridge in the valley, and goes up another incline. The accident occurred near the top of the hill to the west of the bridge. The collision occurred while the deceased and the defendant were both on the north side of the road. Defendant saw the deceased about 200 yards ahead. He continued to overtake the deceased without turning to the left or to the center of the road. His car collided with deceased's bicycle, which threw the deceased therefrom and caused injuries which resulted in death some eight hours later. The skin of deceased's shoulder was burned as though it was caused by sliding on the gravel. He suffered a contusion of the chest, which was worse on the left side, a fracture of the left collar bone, and two broken ribs on the left side. After the collision, the defendant's car was stopped headed west about three feet north of the ridge of gravel. The deceased's bicycle was on or beyond the ridge of gravel and about opposite the right rear door of defendant's car. The deceased was lying, head to the east, north of defendant's car, and his feet were about three feet east of the rear end. The only mark on defendant's car was a dent on the right front fender.

There is a dispute as to the speed of defendant's car. Two witnesses for plaintiffs, who were working in separate fields a third and a half mile away, testify to having seen a car about 3 p. m., traveling at a rate of from 60 to 70 miles an hour, come over the hill from the east, going west, and that it came down the incline across the bridge and up the hill without slackening speed and stopped abruptly near the crest of the hill to the west of the bridge. Neither of the witnesses saw the deceased, or the collision, or knew at the time the cause of the sudden stop. Later that evening after hearing of the accident, one of the witnesses went to the point of the sudden stop and identified skid marks found on the highway at the point of the collision. Defendant testified that his speed was not over 60 miles an hour as he came over the hill to the east. His testimony as to his speed thereafter will be related later herein.

Two witnesses for plaintiffs testified that there were skid marks at the point of the accident 80 to 100 feet long. One witness was referred to above. The other saw the marks shortly after the accident, after defendant's car had left, but before the bicycle had been removed. This witness says these skid marks were the "only tracks you could see." This witness also testified to marks (a brushed place) about 15 to 20 feet long just inside the right or north skid marks of the car. A witness for defendant testified that he "glanced" at the skid marks, and that they were 9 to 10 feet long behind defendant's car where the gravel was brushed very hard and practically rubbed off. However, after he assisted in putting the deceased in defendant's car he left immediately, made no further examination of the tracks, and admitted that they might have been longer. Defendant did not investigate the skid marks. All witnesses put the skid marks at the same point, running east and west, two to three feet from the ridge of gravel and turning slightly toward the south at the west end.

The bicycle in the condition in which it was found after the accident is in evidence. Its frame construction is that of a lady's bicycle. The front wheel, steering post, and handle bars are in normal condition. The frame leading from the sprocket wheel axle to the front post is bent in and directly down. The frame leading from the sprocket wheel axle to the seat post is bent directly forward. The arm of the seat post is turned to the right. The sprocket wheel, pedals, and pedal bars are in normal position. The entire rear wheel frame is bent to the left. The U-shaped frame leading from the sprocket wheel axle to the rear axle is bent to the left so that it prevents the left pedal bar from clearing the frame. The U-frame from the rear wheel axle to the seat is bent up and to the right, and the left arm of the U bent sufficiently to touch the right arm of the U. The rear wheel rim is broken into four parts. Approximately one-half of the rim is locked in position by the bent U frame leading from the rear axle to the seat post. The remaining three parts hang from the spokes, the larger segment being

the part nearest the bottom. The other two smaller parts are those immediately to the rear.

Defendant was the only eyewitness. He testified that, as he was approaching the bridge, he slowed down; that when the deceased was about at the middle of the hill and he was about 20 to 25 yards behind him, he "honked" his horn; that, at that time, his speed was about 20 miles an hour; that deceased turned around, looked, rode across the road to the south "probably 15 to 20 feet," and then started west, sitting on the seat and pedaling; that when he was 15 to 20 feet (later changed to 10 to 15) from the deceased, he honked his horn again, picked up speed to go past the deceased and was going faster than deceased when the deceased "scooted in front" of him "awful near" at a right angle to his car and into the path of his car; that he put on his brakes hard, pulled a little bit to the center of the road to miss him, the impact followed, and he stopped in a car's length; that, at the time the deceased crossed into his path, he (defendant) was going 15 to 20 miles an hour. Defendant was not sure, but he figured his fender hit the pedal of the bicycle. The deceased's body was in front of a point between the center of the hood and the right fender at the time of the impact.

Plaintiffs' contention is that the defendant ran down the deceased from the rear and that negligence has been established. Defendant's contention is that the deceased was in a place of safety, moved therefrom into a place of danger, and that his act in so doing was the sole and proximate cause of the accident, citing *Travinsky v. Omaha & C. B. Street R. Co.*, 137 Neb. 168, 288 N. W. 512.

The question then is directly presented. How did the accident happen?

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every in-

ference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.

Where the motion for a directed verdict is made at the close of all evidence and after all parties have rested, the evidence to be considered under the above rule includes that offered both by the plaintiff and the defendant and is not limited to the evidence offered by the party against whom the motion is directed. 64 C. J. 443.

"The cause of an accident, like any other factor, may be proved by circumstantial evidence. * * * In the case of *Tonkovitch v. Indiana Mining Co.*, 153 N. W. 811 (187 Mich. 186), it was held: 'A plaintiff is not bound to exclude the possibility that the accident might have happened in some other way, but is only required to satisfy the jury, by a fair preponderance of the evidence, that the injury occurred in the manner claimed.' And in *Markussen v. Mengedoht*, 132 Neb. 472, 272 N. W. 241, it was held: 'Where facts and circumstances are established from which the manner of sustaining injuries can be logically inferred, an issue is presented for the jury.'" *Fonda v. Northwestern Public Service Co.*, 138 Neb. 262, 292 N. W. 712.

What then are the facts which must be resolved in favor of the plaintiffs and what are the inferences that can reasonably be deducted from the facts in evidence from which a jury might logically infer and determine that the injury occurred in the manner claimed?

They are that the deceased was traveling west on the north side of the highway, where he had a lawful right to be. The defendant approached deceased from the rear, driving his car at a speed in excess of 60 miles an hour, saw deceased at a distance of at least 600 feet ahead, proceeded to overtake him without slackening his speed until too late to avoid hitting him; that his speed was greater than was reasonable and proper having regard for the traffic, use, and condition of the road, and obviously at a rate of speed such as to endanger the life and limb of persons lawfully on the highway (Comp. St. Supp. 1939, sec.

39-1193); did not at any time turn to the left to a safe distance to pass the deceased, as he was required by law to do (Comp. St. Supp. 1939, sec. 39-11,102); that he struck deceased's bicycle in the rear while deceased was on the extreme north side of the highway, knocked deceased to the ground, causing his injuries and death. (The violation of section 39-1193, *supra,* is evidence of negligence. *Troup v. Porter,* 126 Neb. 93, 252 N. W. 611.)

If the jury determined the facts to be as above outlined, they could also have determined that the defendant failed to do what a reasonable and prudent person "would ordinarily have done under the circumstances and situation," or that he did what a reasonable and prudent person "under the existing circumstances would not have done," and that his acts were therefore negligent (*Eaton v. Merritt,* 135 Neb. 363, 281 N. W. 620), and evidenced a reckless disregard for the safety of the deceased.

Where, from the evidence before the jury, different minds might reasonably draw different conclusions as to defendant's liability, it is error to direct a verdict for defendant. *Sgroi v. Yellow Cab & Baggage Co.,* 124 Neb. 525, 247 N. W. 355; *Plotkin v. Checker Cab Co.,* 133 Neb. 1, 274 N. W. 198.

Defendant cites and the majority relies upon the first paragraph of the syllabus from *Blid v. Chicago & N. W. R. Co.,* 89 Neb. 689, 131 N. W. 1027, which is:

"The competent, relevant testimony of unimpeached witnesses should not be held to be contradicted by inferences from circumstantial evidence, unless those circumstances and the natural inferences to be deduced therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true."

Defendant argues that, if the testimony of the defendant and his witness "is worthy of any belief, it constitutes the only explanation for the accident and in the absence of evidence to the contrary there was nothing to go to the jury." The majority accept this theory. The credibility of a witness, including the defendant, is a matter for the jury to determine. Was there "evidence to the contrary?" Was

the defendant's testimony impeached? Was it contradicted by direct testimony? Was it contradicted by "circumstances and the natural inferences to be deducted therefrom which cannot in reason be reconciled with the conclusion that the direct evidence is true?" The answer to all these questions must be in the affirmative.

The defendant's testimony as to the speed of his car is definitely contradicted both by the eyewitnesses and by the skid marks. Common knowledge of automobiles is enough to tell us that an automobile going at 20 miles an hour, which has brakes applied sufficiently hard to kill the engine, would not skid for 80 to 100 feet. His testimony that he stopped in a car's length is contradicted by the mark on the gravel, inside the right skid mark that was 15 to 20 feet in length, and likewise by the position of deceased's body and bicycle after the accident. His testimony that the bicycle was lengthwise to and at almost right angles with the front of his car at the time of the impact is contradicted by the condition of the bicycle. His testimony that the deceased was upright on the bicycle and his body in front of a point between the center of the hood and right fender at the time of the impact is contradicted both by defendant's car and the bicycle. Had the bicycle and the deceased been in the position in which the defendant puts them by his testimony, the front wheel, steering post, and handle bars of the bicycle would have been in front of the right fender of defendant's car. The only mark on the car was a dent in the right fender. A blow of some force was necessary to make the dent. The front wheel, steering post, and handle bars of the bicycle show no evidence of an impact. The severe injuries to deceased's body were on the left side.

The jury could have properly found that the impact came directly from the rear. Most certainly there are no marks on the bicycle that indicate the truth of defendant's contention that the impact came when the bicycle was at almost right angles to the car and its right side nearest thereto.

The majority state "it would seem quite certain that the first impact occurred when the deceased was still mounted on his machine and still seated in the saddle," and that "We may doubtless infer from the condition of the *rear wheel* of the bicycle that the first impact occurred there." I concur in those two conclusions. To me it is obvious that the conclusions of the majority cannot be reconciled with the defendant's testimony that the bicycle was almost at right angles with the car. Had it been in the position defendant said it was, the first impact would have been from the side and not the rear and the side of the bicycle would have received the impact and not the "rear wheel." If the majority are correct in their finding just above quoted, and I agree that they are, then the direct evidence of defendant cannot be true.

According to the defendant, deceased was proceeding west along the north side of the highway, and at the first honk of the horn, he looked around, turned south, went across the road a distance of 15 to 20 feet, then proceeded west, then (at the sound of the second honk when the defendant was 10 to 20 feet from him) turned abruptly north, proceeding almost at right angles to the course of defendant's car. The story might test the credulity of a jury in the light of the speed of the car, the distances fixed by the defendant, the instinct of a person for safety and self-preservation, and the lack of probability that the deceased would have turned at a right angle, deliberately crossing into the path of a car that he knew was closely approaching. The evidence presents a jury question.

The judgment should be reversed and the cause remanded for further proceedings.

ROSE, J., joins in the dissent.

PAINE, J., dissenting.

I join with Judge Rose in concurring in the dissent filed by the chief justice.

This is a very close case, as shown by the fact that it was argued to our court the first time on May 22, 1940, the second time on October 9, 1940, and the third time on May

19, 1941, with the present opinion supported by only four members of the court.

Aside from the testimony of the witnesses, a vital piece of evidence is the condition of the bicycle. If the defendant's story is true, the boy, Albert, turned directly at right-angles and started to cross, and was directly in front of defendant's automobile, and was struck with his right side toward the car. If the bumper had struck the bicycle lengthwise, the rear wheel could not have been the only part of the bicycle damaged. That evidence of the defendant is not supported by the physical facts, for the rear wheel of the bicycle was crushed in by the bumper or fender striking it a blow directly from behind. The front part of the bicycle was not damaged in any way. This proves that the boy was going down the road in a place where he had a right to be, and was overhauled from behind by the fast-moving automobile, which did not turn out far enough, and crashed into him.

The testimony of Dr. C. G. McMahon, who treated Albert for the few hours before his death in the Superior hospital, is to the effect that they immediately took him to the X-ray room, and his principal injuries were on the left side, with a fracture of his left collar bone and two broken ribs on the left side, and a crushed chest. This would convince any jury that he was struck from the rear and left side, while, on the other hand, if he had been crossing directly in front of the car, and his bicycle had been struck by the bumper or fender, it would have been damaged lengthwise, and Albert would have been thrown onto the hood, and his broken ribs and broken collar bone would doubtless have been on his right side, and not on his left side.

FAIRMONT CREAMERY COMPANY, APPELLANT, V. CHARLES M. THOMPSON, TRUSTEE, APPELLEE.

298 N. W. 551

FILED JUNE 6, 1941. No. 31094.

1. Carriers. Under the Carmack Amendment to the Interstate Commerce Act, 49 U. S. C. A. sec. 20 (11), an action for damages for breach of the terms of a bill of lading may properly be brought against the initial carrier.
2. ———. An unprecedented flood which submerged the railroad yards of the carrier and which was clearly and wholly attributable to causes beyond the control of human agencies was an act of God within the provision of a bill of lading excluding liability on the part of the carrier for damages caused by an act of God.
3. ———. An act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected.
4. ———. When damage to goods in the course of transit is shown to have resulted from an immediate act of God, such as an extraordinary and unprecedented flood, the carrier is exempt from liability where liability is excluded in the bill of lading, unless the plaintiff proves that the carrier was guilty of some negligence in not providing for the safety of the goods.
5. ———. The test in determining a railroad's liability on the theory of the negligence of the carrier in providing for the safety of the goods is whether the carrier's agents and employees failed to exercise the care and diligence of reasonable persons similarly situated in anticipating the danger, in taking adequate measures to prevent the water damage to the goods, and whether such failure was the proximate cause of the damage.
6. Trial. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.
7. ———. Evidence of negligence of railroad company and its employees alleged to have resulted in the loss of a car of produce in a flood *held* insufficient to raise a question for the jury.

APPEAL from the district court for Douglas county: MARK J. RYAN, JUDGE. *Affirmed.*

Leonard A. Flansburg, M. S. Hartman, Edith Sanders and *McKenzie & Dugan,* for appellant.

Wymer Dressler, Robert D. Neely, Hugo J. Lutz and *W. L. Barnett, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

CARTER, J.

This is an action upon a bill of lading to recover for loss caused by a breach of contract to safely transport a carload of dressed poultry, butter and eggs from Omaha, Nebraska, to Hartford, Connecticut. The trial court directed a verdict in favor of the defendant railroad company, and plaintiff appeals.

The record discloses that on March 13, 1936, plaintiff shipped the produce to Hartford by way of New Haven. A part was unloaded in transit at New Haven and the balance transported to Hartford, the agreed value of the produce shipped on to Hartford being $2,403.69. The car arrived in the yards of the New York, New Haven & Hartford Railroad Company on March 19, 1936. Shortly after the arrival of the car of produce, an unprecedented flood of the Connecticut river swept through the railroad yards, totally destroying the produce. The railroad company contends that there is no liability on its part under the terms of the contract, providing that "No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God." Plaintiff contends that the loss was due to negligence of the defendant and its connecting carriers and was not the result of an act of God as it is known to the law.

It is not disputed that plaintiff may properly maintain this action against the defendant as the initial carrier of an interstate shipment under the provisions of the Carmack Amendment to the Interstate Commerce Act. 49 U. S. C. A.

sec. 20 (11); *McGinley v. Union P. R. Co.*, 129 Neb. 855, 263 N. W. 393.

The record shows that the car of produce arrived in the railroad yards at Hartford on March 19, 1936. Trains running into Hartford bring in an average of 350 to 400 cars daily. The evidence is that at the time of the arrival of the car herein involved there were about 300 cars in the classification yard and approximately 900 cars in the flooded area. The classification of cars is accomplished by the use of a switch engine which pushes them over an incline or hump. The force of gravity propels them onto the different classification tracks. Road engines cannot be used for this work for the reason that they cannot negotiate the cross-over tracks. At the time in question, one switch engine and crew were handling the work in the classification yard. The railroad yards here involved were about a mile from the Connecticut river and protected by dikes constructed to prevent flooding during high water seasons.

The evidence shows that flood data has been kept on the Connecticut river for approximately 300 years. The flood during March of 1936 exceeded all previous floods in the height to which it arose. The maximum height of this flood as determined by the United States weather bureau was 37.6 feet. The next highest flood was in May of 1854 when the river reached a height of 29.8 feet. The third highest flood occurred in November of 1927 when it reached a height of 29 feet. It will be observed that the 1936 flood was 7.8 feet higher than it had ever been in the recorded history of the Connecticut river. The evidence shows that the 1929 flood did not enter the classification yards at Hartford. The testimony of the men working in the classification yards is that the 1936 flood waters started coming in where they were working and that in a comparatively short time they were unable to work there because of the high water. The evidence shows that they had difficulty in removing their switch engine and three cars which they had to take out to clear the track. The records show that on March 19 at 8 a. m. the flood was at a height of 29 feet; at 6 p. m.

it reached 33 feet, and at midnight it had attained a height of 34.8 feet. At 8 a. m. on March 20, it had attained a height of 35.8 feet; at 6 p. m. it was 37.1 feet, and at midnight it was 37.4 feet. The flood reached its crest on March 21 at 8 a. m., when it reached a height of 37.6 feet. The protecting dikes built to withstand a flood of approximately 35 feet were topped on March 19. Without detailing the evidence unduly, we are convinced that the only logical conclusion which can be drawn is that the flood was of such an unprecedented and catastrophic nature that it falls within the legal definition of an act of God.

It has been correctly defined, we think, in the following language: "'An act of God,' as the term is known to the law, is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected." *Southern R. Co. v. Cohen Weenen & Co.*, 156 Va. 313, 157 S. E. 563. That the flood waters rose to such a height that the contents of the car were destroyed is not disputed. The question remaining for determination is whether the act of God was the immediate, direct and efficient cause of the loss, or whether the loss resulted from a failure of the railroad company to reasonably anticipate that damage would have been caused by the act of God.

"When damage is shown to have resulted from an immediate Act of God, such as a sudden and extraordinary flood, the carrier is exempt from liability unless the plaintiff proves that the defendant was guilty of some negligence in not providing for the safety of the goods. That he could do so must be proved by the plaintiff or must appear in the facts of the case." *Farr Co. v. Union P. R. Co.*, 106 Fed. (2d) 437; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909. The test to be applied is not whether, in the light of subsequent events, the railroad company should have anticipated that the flood would cause damage to plaintiff's property, but whether the railroad acted as a reasonable and prudent man would have acted under all the circumstances existing at the time. *Standard Brands*

v. Boston & M. R. R., 29 Fed. Supp. 593; *Louisville & N. R. Co. v. Finlay*, 237 Ala. 116, 185 So. 904.

The contention is advanced by the plaintiff that the railroad company was warned of the danger of the flood and that the failure of the railroad company to remove the goods to a place of safety constitutes actionable negligence. It is true that the United States weather bureau had issued many warnings concerning the progress of the flood and the implications to be drawn therefrom. On March 19, the date of the arrival of the car in question, the weather bureau bulletin issued at 10:30 a. m. indicated a leveling off of the flood with the crest at approximately 32 feet, a height below the point of danger to the classification yard. At 3:30 p. m. of the same day, a weather bureau bulletin was issued showing the height of the flood to be 32 feet and indicating a rise of five inches an hour for the next six to ten hours. It is quite evident from the record that, after the flood had once reached a leveling off stage, additional rains in the river's watershed added a huge volume of water to the already existing flood. But the rapidly increasing volume of water was reaching Hartford at the time the warning was released. The evidence shows that water started coming into the yards about 9:30 a. m. on March 19, and that approximately two feet of water came in within 30 minutes. It is evident that the 10:30 a. m. bulletin was too late to be of any value. The evidence is that the water carried in much trash and débris which made it very difficult to move the switch engine out of the flooded area. We fail to find any evidence that employees of the railroad company had any reason to suppose that the river would rise to a point almost 8 feet above any previous peak point in its history, until it was too late to act. Even if the flood exceeded all previous levels by three or four feet, it still would not enter the car in which plaintiff's produce was being transported. The number of cars in the yards and the amount of classification work to be done required that operations be continued as long as conditions appeared safe. At the first manifestation of immediate danger, engine

facilities were not available to move the cars out, and in any event it could not be reasonably contemplated that the flood would reach such a stage as to rise above the level of the box car floors. It is apparent that the railroad company and its employees acted on the belief that the contents of the cars in the classification yards were in no danger and there was much to justify this belief. The contention that the railroad was negligent in failing to anticipate the unprecedented rise of the river is to apply a standard of required action and diligence beyond that which the law implies. Assuming that the railroad company was negligent in not anticipating the danger, such negligence was not a contributing factor if there was no reasonable means available to avoid the consequences. The railroad company owed no greater duty to the plaintiff's shipment than it did to other shipments liable to be injured by contact with water. It is obvious from the record that, when danger to the contents of the cars was imminent, no means was available to avoid it. It is true that the cars might have been moved to higher tracks and the damage prevented. A subsequent view of the situation indicates that such a movement of the cars would have accomplished the desired results. But it did not appear necessary to do this at any time when it could have been done. The failure to move the cars to higher ground under such circumstances does not constitute negligence.

Plaintiff alleges that it was negligence for Walter L. Halliday, assistant superintendent of the New York, New Haven & Hartford Railroad, in charge of the railroad's properties at Hartford, to be away from his office during the night and early morning of March 19. The evidence shows that Halliday had been on duty for 58 consecutive hours because of the flood and that it was absolutely necessary that he obtain rest. On the other hand, it is not shown by the record that anything could have been done that could reasonably have been required if he had been in his office. The evidence on this subject is not sufficient to establish negligence on the part of the railroad company.

The record discloses that the flood was unprecedented and catastrophic in its nature. The high water levels of the river had never, in all of its previous recorded history, reached within approximately eight feet of the height of the 1936 flood. It was a disaster clearly and wholly attributable to causes beyond the control of human agencies. It clearly was an act of God which would exonerate the railroad company, unless the plaintiff has sustained the burden of proving that the negligence of the railroad company and its employees intervened to such an extent as to be the proximate and direct cause of the loss. After a full examination of the record, we agree with the trial court that the evidence of the plaintiff is insufficient to go to the jury on the question as to whether the railroad failed to exercise the care and diligence of reasonable persons similarly situated, in not anticipating the impending danger and resulting damage, in not taking measures to prevent the water damage to the produce, and as to whether such failures were the direct and proximate cause of the loss. *Standard Brands v. Boston & M. R. R.*, 29 Fed. Supp. 593.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The rule is well stated in *Farr Co. v. Union P. R. Co.*, 106 Fed. (2d) 437, as follows: "The rule is that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

It is the duty of a trial court to direct a verdict at the close of the evidence where the evidence is undisputed, or where evidence, though conflicting, is so conclusive that it is insufficient to sustain a verdict and judgment. We think the trial court was correct in directing a verdict for the defendant in this case.

AFFIRMED.

CHARLES WRIGHT V. STATE OF NEBRASKA.
298 N. W. 685

FILED JUNE 6, 1941. No. 31176.

1. **Criminal Law.** Where an information charges two separate and distinct crimes, the court, after conviction, may properly impose a sentence for each of the crimes of which he stands convicted.
2. ———. Where a defendant is convicted of two separate and distinct offenses, the trial court may properly impose a penitentiary sentence in one and suspend sentence and grant a parole in the other.
3. ———. After a violation of a parole, the defendant may be brought before the court and, after the violation be established, the court may impose any penalty which might have been imposed before placing the defendant on probation.

ERROR to the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed: sentence reduced.*

John M. Berger, for plaintiff in error.

Walter R. Johnson, Attorney General, and *Clarence S. Beck, contra.*

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

CARTER, J.

Defendant was convicted of the crime of leaving the scene of an accident contrary to section 39-1159, Comp. St. Supp. 1939, and sentenced to serve five years in the state penitentiary. From this conviction and sentence defendant brings the case to this court for review.

The record shows that on January 12, 1939, defendant was convicted for manslaughter in causing the death of one Norman Putman in an automobile accident, and of the further crime of leaving the scene of the accident contrary to the provisions of section 39-1159, Comp. St. Supp. 1939. Defendant was sentenced to the penitentiary for one year on the manslaughter charge and paroled for five years on the other. Defendant served the one-year sentence for

manslaughter. Thereafter he violated his parole and was brought before the court and sentenced to five years in the penitentiary.

Defendant contends that the two charges constitute but one offense and that one sentence only could be imposed therefor. Defendant's argument is untenable. The crime of manslaughter as defined by section 28-403, Comp. St. 1929, is a distinct offense from that of leaving the scene of an accident as defined by section 39-1159, Comp. St. Supp. 1939. Each requires different evidence to prove the offense, and a defendant might be guilty of either of the offenses charged without being guilty of the other. We think it is clear that defendant was convicted of two separate and distinct offenses for which two sentences could properly be imposed.

It is next contended that when defendant was sentenced for manslaughter he could not properly be paroled on the other charge. Our probation statute, section 29-2214, Comp. St. 1929, is not limited to first offenders, and we see no reason why the parole of the defendant on the second offense was not in all respects proper. But even if this were not so, the defendant would find himself subject to sentence on the original conviction. *Moore v. State,* 125 Neb. 565, 251 N. W. 117.

The record shows that on October 4, 1940, while defendant was still on probation, he drove his automobile into a parked car. The evidence showed that defendant was at the time in an intoxicated condition. For this offense defendant was charged in the municipal court with driving a motor vehicle while under the influence of intoxicating liquor and sentenced to serve 90 days in jail. Thereafter he was brought into district court as a parole violator, his parole was revoked and a sentence of five years in the penitentiary imposed. While this defendant has indicated a complete want of consideration of the rights of others by persisting in driving his automobile while under the influence of intoxicating liquor, we do not believe that the evidence warrants the imposition of so severe a penalty

as five years in the penitentiary. After a consideration of all the evidence we think the sentence should be reduced to two years. In all other respects the judgment of the trial court is correct.

AFFIRMED: SENTENCE REDUCED.

T. J. COYNE, APPELLANT, V. CITY OF O'NEILL ET AL., APPELLEES.
298 N. W. 547

FILED JUNE 6, 1941. No. 31201.

1. **Municipal Corporations.** The transportation of the public to and from trains by a chief of police of a city of the second class is no part of his duties under the general law of this state.
2. **Workmen's Compensation.** To render a municipal corporation liable for the payment of benefits to its agents and employees under the the provision of the workmen's compensation law, the injury must have resulted from an act done in the exercise of some power conferred upon the municipality by its legislative charter or other positive enactment.
3. ———. The transportation of persons generally to and from trains is not ordinarily a municipal function, and, consequently, a person engaged in so doing is not performing an act within the regular trade, business, profession or vocation of a city of the second class as reguired by section 48-106, Comp. St. 1929.

APPEAL from the district court for Holt county: CHARLES H. STEWART and ROBERT R. DICKSON, JUDGES. *Affirmed.*

J. J. Harrington, for appellant.

Julius D. Cronin, Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem, contra.*

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

CARTER, J.

This is a suit for the recovery of benefits claimed to be due under the workmen's compensation law. The trial court entered an order dismissing plaintiff's petition, and plaintiff appeals.

On May 2, 1939, plaintiff was appointed chief of police of the city of O'Neill, Nebraska. On May 10, 1939, plaintiff went to the home of Mrs. S. J. Weekes in O'Neill in response to a call to take her to an early morning train. In going from his car to her residence he tripped and fell, causing the injuries for which he claims he is entitled to an award. Plaintiff testified that he was looking for a prowler or burglar at the time of his injury, and that the injury therefore arose out of and in the course of his employment as chief of police.

The record shows that satisfactory taxi service did not exist in O'Neill, and that it had become customary to call upon the chief of police to obtain transportation to and from the night trains operating to and from the city. To obtain this service it was customary to call the Golden Hotel and inform the clerk that transportation was desired. The clerk would then call the police by turning on a red light located on the front of the hotel building and convey the message to the policeman when he appeared in answer to this signal. The evidence shows that Mrs. Weekes made arrangements for transportation late in the afternoon of the day in question. At about 10:30 p. m., she again called the clerk at the hotel and requested that plaintiff be notified of her desire for transportation to the 1:09 a. m. train. According to the evidence of Mrs Weekes, plaintiff did not respond to this call, and about 12:55 p. m. she again called the hotel clerk. The clerk turned on the police signal, then waited at the curb until plaintiff drove up in his car and told him that Mrs. Weekes wanted him to come to her residence at once. Plaintiff hurried away without having gotten out of his car. Plaintiff contends that it was only 12:45 p. m., and as ample time remained for Mrs. Weekes to catch her train, he assumed that her last call was for protection against a prowler or burglar. An examination of the record will not sustain such a finding. It is clear to us that plaintiff went to the Weekes home in response to her previous calls for the purpose of transporting her to the train, and that no reason existed for the assumption testified to

by the plaintiff that burglars or prowlers were lurking in the vicinity of Mrs. Weekes' home. The evidence sustains the conclusion arrived at by the trial court that plaintiff went to the Weekes residence for the purpose of taking Mrs. Weekes to the 1:09 a. m. train.

Plaintiff contends that it was one of his duties as chief of police to convey persons to and from trains arriving in O'Neill late at night or early in the morning. There is no ordinance in evidence to sustain any such contention. Neither are there any minutes of the city council in evidence that indicate that any such duties were lawfully assigned to him. There is evidence that his predecessor as chief of police had engaged in transporting persons, for hire, to and from trains. Various city officials, including the mayor and a city councilman, testified that they understood the chief of police was to perform this service and that they had no knowledge that fare was to be collected therefor.

A muncipality in this state is without power to engage in the taxi business. It seems clear to us, therefore, that plaintiff stepped outside the scope of his employment when he undertook to take Mrs. Weekes to the train, and was at the time engaged in a mission of his own for the accommodation of Mrs. Weekes and not one lawfully imposed upon him as an employee of the city. The mere fact that taxi service was lacking in O'Neill is insufficient to authorize the use of powers not otherwise granted by law. For the city to be liable for the payment of benefits under the compensation law, the plaintiff must have sustained an accident in the regular trade, business, profession or vocation of the employer city. Comp. St. 1929, sec. 48-106. Plaintiff was from a legal standpoint engaged in an errand of his own not arising out of or in the course of his employment. This view is sustained by the following cases: *Hammond v. Keim,* 128 Neb. 310, 258 N. W. 478; *Babcock v. School District,* 123 Neb. 491, 243 N. W. 831; *Hall v. Village of Montague,* 228 Mich. 484, 200 N. W. 133; *Norman v. City of Chariton,* 206 Ia. 790, 221 N. W. 481.

Plaintiff contends that a raise in salary of $5 a month

was given to the chief of police on May 8, 1935, for "gas and oil" and that this is evidence that the duty of transporting persons to and from trains was lawfully imposed upon the chief of police. It appears to us that the use of gas and oil is just as consistent with the use of an automobile in performing the ordinary functions of a chief of police as with the purposes which plaintiff claims that it evidences. Assuming *arguendo* that the city could in this manner add to the duties of the chief of police, we cannot say that this evidence is sufficient to accomplish that result.

After a consideration of all the evidence, we conclude that plaintiff at the time of his injury was not engaged in the performance of any act arising out of or in the course of his employment. The transportation of persons to and from trains not being any part of the regular trade, business, profession or vocation of the city of O'Neill under the law of this state, the plaintiff in so doing could not be an employee within the meaning of the workmen's compensation act. The trial court was correct in so holding.

AFFIRMED.

LOLA GROAT, SPECIAL ADMINISTRATRIX, APPELLANT, V. ARTHUR CLAUSEN, APPELLEE.
298 N. W. 563

FILED JUNE 6, 1941. No. 31138.

1. **Master and Servant.** A farming and stock-feeding business is not a plant, within the meaning of section 48-409, Comp. St. 1929.
2. ———. Rules of the department of labor, adopted pursuant to the provisions of section 48-412, Comp. St. 1929, are not applicable to a farming and stock-raising business, as disclosed by the facts in the instant case.
3. **Negligence.** "Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury

complained of as a proximate cause." *Klement v. Lindell, ante*, p. 540, 298 N. W. 137.

4. ———. "Where the evidence establishes that the plaintiff was guilty of negligence more than slight, it becomes a question for the court, and it is the duty of the court to direct a verdict for the defendant." *Klement v. Lindell, ante*, p. 540, 298 N. W. 137.
5. **Master and Servant.** "An employee 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 presumed to know them and to appreciate the danger." *Corley v. Hubbard*, 129 Neb. 38, 260 N. W. 551.
6. **Negligence.** Where a person fails to use ordinary care for his own safety and knowingly and of his own volition exposes himself to obvious danger, he is guilty of contributory negligence.
7. ———. Record examined, and *held* insufficient to sustain burden placed on plaintiff to prove that the servant was induced, by a master's promise to repair, to begin or continue to work with defective appliances and using such appliances, without being guilty of contributory negligence, and without assuming the risk of injury from such defects.

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

R. B. Hasselquist, for appellant.

A. C. Debel and *Chatt & Ellenberger, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

MESSMORE, J.

The personal representative of the deceased brought this action, in behalf of the widow and next of kin, for the wrongful death caused by the alleged negligence of the defendant. The plaintiff's amended petition alleged negligence on defendant's part in failing to provide and maintain a guard over a revolving shaft on which oil cups and connections protruded, used in operating a silo cutter from the power take-off of a tractor, and in failing to provide and install a guard furnished by the manufacturer. Other allegations of the petition referred to section 48-412, Comp. St. 1929,

and to rules and regulations furnished by the department of labor, all of which will be discussed in the opinion as occasion requires. The petition further alleges common-law negligence on defendant's part in failing to properly guard dangerous machinery. Defendant's answer alleged contributory negligence, on the part of the decedent, more than slight and assumption of the risk. At the conclusion of all the evidence, defendant moved for a directed verdict, which was sustained by the trial court. Motion for a new trial was overruled. Plaintiff appeals.

The record discloses: The defendant is engaged in general farming and stock-raising in Washington county, Nebraska. His farm consists of 380 acres of land, all but 80 acres under cultivation, and all in one piece, with the exception of 80 acres near Nashville, Nebraska. The defendant had about 200 head of cattle, 25 to 30 hogs, and some horses. The deceased, Richard Groat, 34 years of age, started to work for the defendant about two years prior to December 14, 1938, the date of the accident, as a general farm hand, to do all kinds of work necessary and incident to feeding stock, repairing fences and buildings, etc. He lived, with his family, in a house furnished by defendant which was opposite defendant's home. In September or October of 1937 the defendant purchased a Ronning feed cutter harvester. It came equipped with a guard, to be used to cover the shafting which connected the cutter with the tractor. This guard, weighing from 10 to 15 pounds, is half-moon in shape, about three feet long, with a place on the cutter to bolt it on. The deceased on one occasion had attempted to attach the guard, but it would not fit. This occurred in 1937 when the machine was being put together. The deceased told Gordon Clausen, son of the defendant, that "he could probably use it (the shield) if he took the other shield off (referring to the funnel-shaped shield where the cutter is attached to the tractor) but it would be more dangerous without the other shield," referring to the tractor shield. When the cutter was hooked up to the Oliver tractor, owned by defendant, the deceased made a

new hitch, had the shaft sawed off by a blacksmith, as the hitch with which the cutter was equipped would not pull the shaft high enough to run a true line.

Before his employment by the defendant, the deceased had been a truck driver, and for a short period of time was engaged, with his brother, in the garage business in Charter Oak, Iowa, as a salesman and helper. He possessed mechanical ability and at odd times had been employed in farm work by various persons, and, before he obtained steady employment with the defendant, had been employed by him at times. In the spring of 1933 he was employed by a neighbor of defendant to cut wood. He drove trucks and tractors and repaired trucks, tore down the motors, put in new pistons, ground the valves and completely overhauled them. While working for the defendant he overhauled a 1932 model Lincoln automobile and a tractor. He possessed several tools for repair purposes and was considered a good handy man with machinery.

One evening before the accident, while the deceased was sharpening knives used in the cutting machine, he complained to the defendant that such machine did not have a proper guard on it and was therefore dangerous. The defendant is purported to have said that he would see that the machine was repaired, but that he needed feed badly, and for deceased to go ahead and work with it in its present condition, and the repairs would be taken care of later. The deceased's wife claims to have heard this conversation. All of this testimony is denied by the defendant, and the record supports the denial by a preponderance thereof. The machine was not at the place mentioned when the above conversation is alleged to have occurred, had not been there for a period of 30 days, and no apparent reason is advanced as to why it should be there, in view of where it was being operated. There was no immediate necessity for feed, for the two silos were filled with fodder.

On December 14, 1938, between 9 and 9:15 in the morning the accident occurred. At the time, the machine was at the Nashville farm. Several men were employed by the

defendant to feed the machine fodder from the shocks. The machine was being operated by the deceased, whose work was to keep the machine operating properly.

When the cutter is used for cutting feed, it is connected with a power take-off on the tractor by means of a long shaft, with several universal joints and oil cups, which protrude above the surface of the shaft and are not guarded. The tractor has a power take-off under the operator's seat, which guard extended out for a distance of 10 inches, but does not cover the shaft when connected with the cutter. The shaft extends over for a distance of about 10 feet, and it is for this shaft that the manufacturer provides a guard or shield, which the defendant had not placed upon it. When the cutter is in motion, the exposed part thereof revolves very fast. The only shield is the funnel-shaped one on the tractor. The morning of the accident, evidently too large a bundle went into the machine and clogged it. The motor of the tractor stopped. The deceased mounted the tractor, started it, engaged the clutch and, as he stepped down to resume the cutting, his clothing caught in the protruding oil cups in the rapidly revolving shaft, causing him to be drawn into the machinery and resulting in his death. The motor was immediately shut off, the tractor taken out of gear, and the deceased removed to a place of safety and subsequently to a hospital.

On the morning in question deceased was wearing a new blanket-lined overall jacket, about hip length, and lined like any common suit coat. This jacket was unbuttoned and was worn outside of the deceased's overalls. It had been suggested to him by another workman that he should wear the jacket inside of his overalls, for fear an accident might happen if worn outside. The deceased had on many occasions worn his jacket unbuttoned and outside of his overalls. The day was calm, a trifle chilly, and not much wind blowing.

Conversations are related as to deceased's version of the accident. One of the workmen testified that after the accident, when he first saw the deceased, he was 15 or 20

feet from the shaft. Witness said to him: "Well, Dick, how did it happen?" To which deceased replied: "Well, I just got in too much of a hurry." One witness testified that when he came back with an armful of fodder he noticed that the machine had slowed down, and he heard something flopping like clothing, and shouted to a workman to shut off the machine. Immediately after the accident this witness helped to remove the deceased to a place of safety. Deceased was conscious at the time, asked for a cigarette, and said: "I was just in too big a hurry." Defendant testified that nothing was said at the hospital about the accident except the statement of the deceased: "Oh, I just got in too big a hurry." A sister of the deceased was present and also heard the statement. The foregoing constitutes the evidence upon which the court directed a verdict for the defendant.

Plaintiff contends that the court erred in sustaining defendant's motion to strike paragraph 6 of the amended petition, thus eliminating from the case the application of the rules of the department of labor, adopted pursuant to section 48-412, Comp. St. 1929; that likewise the court erred in sustaining defendant's objection to the admission of exhibit 10, a certified copy of the safety code adopted by the department of labor pursuant to statute.

Many cases are cited by plaintiff to support her theory of this assignment of error, that, in conformity to the statutes and at common law, a master is required to furnish a servant with a reasonably safe place in which to work and reasonably safe machinery and appliances, including proper guards for dangerous machinery. Among the most important cases announcing the rule contended for by plaintiff are: *Beard v. Chicago, M. & St. P. R. Co.*, 134 Minn. 162, 158 N. W. 815, wherein it was said: "A master is at common law required to exercise reasonable care to guard machinery that may be dangerous to operatives;" and *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153, 33 N. W. 551, in which the court held: "Although it be negligence on the part of the master to leave dangerous machinery uncovered, yet the

servant is not necessarily guilty of contributory negligence because he works in the vicinity of it, knowing its condition; the measure of the duty of the two in that regard not being the same." The *Wuotilla* case did hold, however, that an employee must, or in the exercise of ordinary prudence should, understand the risk to which these defects expose him. Other cases have been cited principally to show the adaptability of the facts to the rule as above stated, and as contended for by the plaintiff, but a careful reading of the cases is convincing that they present an entirely different picture than that apparent in the case at bar. The case most in point is *Tiemann v. May*, 235 Wis. 100, 292 N. W. 612, wherein the Wisconsin court, in interpreting the "safe-place statute," applied it to places where persons are employed in agricultural pursuits where activities there involve the use of mechanical power, and to a farmer who carries on agricultural pursuits with the assistance of devices involving the use of mechanical power. Wis. St. 1939, secs. 101.01 (1,11), 101.06. In the opinion it was said: "The farmer who carries on his agricultural pursuits with the assistance of devices involving the use of mechanical power is plainly covered by the act. *Dugenske v. Wyse*, 194 Wis. 159, 215 N. W. 829."

Section 101.06 of the Wisconsin statute, cited above, provides in part: "Every employer shall furnish employment which shall be safe for the employees * * * ." And section 101.01 (1) defines the phrase "place of employment" as meaning and including "every place, whether indoors or out or underground * * * or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is directly or indirectly, employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power." Thus it will be observed that the above section of the statute applies to agricultural pursuits which involve the use of mechanical power.

Article 4, ch. 48, Compiled Statutes of Nebraska for 1929, referring to health and safety regulations, comprises sections 48-401 to and including 48-431. Section 48-409, Comp. St. 1929, in part, reads: "Every person operating a plant where machinery is used, shall * * * ." Section 48-412, Comp. St. 1929, relates to safety appliances prescribed, subject to the approval of the department of labor, and provides a penalty. Section 48-418, Comp. St. 1929, reads, in part: "Every person operating a plant where machinery is used who shall violate any of the provisions of this article, shall be liable in damages to any person injured * * * ." Section 48-419, Comp. St. 1929, provides: "The continuance by any person in the employ of any such operator shall not be deemed an assumption of the risk of such employment."

The distinction between the statutes of Wisconsin and those of Nebraska, governing the same subject-matter, is immediately apparent. The Wisconsin statutes are specific in reference to farming pursuits wherein machines are used, and are further supported by judicial opinion to such effect. We shall not recite the facts in the case of *Tiemann v. May, supra.* They are similar to the facts in the case at bar in the nature of the machine used, but distinctively different in that the employee in the Wisconsin case was injured in the usual and ordinary course of his labor and without negligence on his part. This brings us to the meaning of the word "plant," as used in section 48-409, Comp. St. 1929. Many definitions of the word are set out in the respective briefs and are of such a nature that some of them include any enterprise or business.

Plant means the fixtures, tools, apparatus, appliances, etc., necessary to carry on any trade, mechanical operation or process. 6 Words and Phrases (1st ser.) 5400; 3 Bouvier's Law Dictionary (3d rev.) 2597. The word "plant" is variously defined. Webster's New International Dictionary (2d ed.) defines it as: "4. a The machinery, apparatus, fixtures, etc., employed in carrying on a trade or a mechanical or other industrial business; as, an electric light *plant* * * * b A factory, workshop or apparatus complete; * * * as, a

bicycle *plant.*" The word "trade" signifies some business or money-making occupation, as distinguished from the professions, the arts or agriculture. *People v. Kelly,* 255 N. Y. 396, 175 N. E. 108.

The foregoing definitions clearly denote that the defendant's business does not fall within the category of a plant or trade, within the concept of the provisions of the Nebraska statute above referred to. Other provisions of the statute, which will not be herein set out, but which refer to inspection of premises of plants and meetings to be held for the purpose of adopting rules and regulations promulgated by the department of labor, have never been applied to a business such as the defendant's. The cases cited by the plaintiff refer, in the main, to industrial plants, but, in any event, the workman is obligated to use the degree of care that a reasonable and prudent person would use, where he knows of the defect of an unguarded machine. We hold that the foregoing assignment of error is not well taken.

The plaintiff contends that the cases of *Dieter v. Doolittle Produce Co.,* 103 Neb. 152, 170 N. W. 833, *Sapp v. Christie Bros.,* 79 Neb. 705, 115 N. W. 319, and *Shick v. Johnson,* 101 Neb. 328, 163 N. W. 300, apply to the case at bar. The syllabus in *Sapp v. Christie Bros., supra,* sets forth the plaintiff's contention as follows: "A servant, who has been induced by a master's promise of repair to begin or continue to work with defective appliances, may use such defective appliances without being guilty of contributory negligence and without assuming the risk of injury from such defects, so long as he may reasonably expect the master's promise of repair to be kept, unless the danger from using such defective appliances is so obviously imminent and immediate that no reasonably prudent person would begin or continue to work with them." In the body of the opinion we find a well-established rule of law: "Where the servant has knowledge that the tools and appliances furnished him are defective and unsafe and he continues to use the same without objection or protest, he then assumes the risk."

The only protest appearing in the record in the instant

case is the alleged conversation had between the deceased and the defendant in the presence of deceased's wife, as heretofore related and analyzed. Suffice it to say that the plaintiff has failed in carrying the burden of proof in this respect by a preponderance of the evidence. All cases cited by her reflect a definite and certain promise to repair and definite and certain instructions given by the employer to the employee to use the defective machinery. This is not true in the instant case, and further discussion of this contention is unwarranted.

Plaintiff further contends that the court erred in not submitting her case to the jury.

We are cognizant of the effect of a peremptory instruction in favor of the defendant, and that plaintiff is entitled to have every controverted fact resolved in her favor and receive the benefit of every inference that may be reasonably deduced from the facts in evidence. *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163. We consider the evidence in conformity with this rule.

Without repeating the evidence, a brief summary warrants the conclusion that the deceased possessed good mechanical ability, had charge of and, in fact, operated the machine in question for two seasons and knew more about the machinery and any of its defects than any other person who testified. He attended to the connecting of the cutter to the Oliver tractor and endeavored to place the guard, furnished by the manufacturer, on the cutter and found that it did not fit. He made no other effort to attach the guard to the cutter. The evidence of the complaint made by deceased in a conversation with the defendant at the deceased's home, when the deceased was sharpening the knives on the machine, is not persuasive and is doubtful. The preponderance of the evidence discloses that the machine was at the Nashville farm, had been in that vicinity for a period of at least 30 days prior to the accident, and had been seen there by one of the witnesses who had passed it every day. There would be no reason for the machine being at deceased's home at the time of the alleged conversation. The evidence is undisputed

that at the time of the accident the deceased was wearing a loose, unbuttoned blanket jacket outside of his overalls and had been admonished by a fellow workman to place the jacket inside of his overalls to avoid possibility of an accident. This admonishment deceased did not heed. The accident did occur, obviously by deceased's clothing catching in the machinery, drawing him into the machine and wrapping his clothes around the shaft. While in a conscious condition and immediately after the accident, he stated that he was in "too big a hurry."

The foregoing analysis of the evidence leads us to the conclusion that the deceased was not using ordinary care for his own safety and knowingly and of his own volition exposed himself to obvious danger. Had he used reasonable care, he would, in all probability, have avoided the accident. We conclude that the contributory negligence of the deceased, under the circumstances, was more than slight, and the following rule of law applies:

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause.

"Where the evidence establishes that the plaintiff was guilty of negligence more than slight, it becomes a question for the court, and it is the duty of the court to direct a verdict for the defendant." *Klement v. Lindell, ante,* p. 540, 298 N. W. 137. See, also, *Ritter v. Hering,* 135 Neb. 1, 280 N. W. 231; *Eaton v. Merritt,* 135 Neb. 363, 281 N. W. 620; *McDonald v. Omaha & C. B. Street R. Co.,* 128 Neb. 17, 257 N. W. 489.

In *Campbell v. Chicago, R. I. & P. R. Co.,* 120 Neb. 499, 234 N. W. 395, this court held: " 'An employee 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 presumed to know them and to appreciate the danger.' *Atchison, T. &*

S. F. R. Co. v. Wyer, 8 Fed. (2d) 30." Reaffirmed in *Corley v. Hubbard,* 129 Neb. 38, 260 N. W. 551.

The above rule is pertinent to assumption of risk, under the facts in the instant case. The deceased knew and appreciated the danger that existed in the operation of the machine in question. The trial court did not err in directing a verdict for the defendant.

Defendant filed a motion to quash the bill of exceptions which would dispose of the case. Having determined the case on its merits, we refrain from a discussion of defendant's motion.

AFFIRMED.

RUTH STITZEL, APPELLEE, V. HITCHCOCK COUNTY, APPELLANT: HAYES COUNTY, APPELLEE.
298 N. W. 555

FILED JUNE 6, 1941. No. 31053.

1. **Appeal.** On appeal without a bill of exceptions, the pleadings must be sufficient to support the judgment; otherwise, it will be reversed.
2. **Pleading.** A defendant, having answered over after an adverse ruling on a general demurrer, is not precluded from raising the question that the petition does not state facts sufficient to constitute a cause of action.
3. **Counties and County Officers.** A county, being a political subdivision of the state, having subordinate powers of sovereignty, was not liable at common law for negligence in maintaining a public road or bridge.
4. ———. Counties are not liable to individuals for damages on account of the negligent or tortious acts of their officers or servants unless made so by statute.
5. **Highways.** One of the essential elements of the right of recovery against a county for negligence in maintaining a highway is that the highway is one which the county is liable to keep in repair.
6. ———. In an action for negligence in maintaining a highway, the petition must sufficiently allege that the highway is one which the county or counties are liable to maintain.

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

J. F. Ratcliff, for appellant.

Gerald G. Lefler, Butler, James & McCarl and *Cordeal, Colfer & Russell, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

YEAGER, J.

This is an action for damages in two causes instituted by plaintiff, appellee herein, against Hitchcock county, defendant and appellant herein, and Hayes county, also a defendant, and denominated herein, cross-appellant.

For her first cause of action, plaintiff, a married woman and the wife of John Stitzel, states that she was, on September 10, 1938, at about 8:30 p. m., a passenger in an automobile being operated at the time by one Floyd Hall in a westerly direction on the county line between Hayes county and Hitchcock county. She charges that the automobile in which she was riding was driven into a hole or washout, and that as a result she sustained personal injuries. As ground of liability on the part of the defendants, she charges the following:

"There is a certain public road on the line between Hitchcock and Hayes counties, Nebraska, which runs east and west between township four (4), range thirty-one (31), of Hitchcock county, and township five (5), range thirty-one (31), of Hayes county, which road was maintained by each of said counties. * * * That the view of said washed out road was obstructed by reason of the hill hereinbefore mentioned and said hole was not visible until within a few feet of the same; that said automobile went into said hole in the road and as a result thereof the plaintiff was injured in the following particulars: * * * The defendants, through its agents, servants and employees, had notice and knowledge of the existence of said washout and hole and wilfully and negligently did neglect to repair the same but left said excavation open for an unreasonable length of time and

did thereby, through omission of its servants, agents and employees, wilfully and negligently permit said highway to remain in such a condition to render it unsafe for travelers using said highway and negligently omitted to provide barricades or any form or kind of warning to apprise travelers on said highway of the existence of said hole."

The second cause of action was that of the husband for loss of services, which cause had been duly assigned to the plaintiff.

To the petition on which the case was tried the defendants demurred separately, which demurrers were overruled. Following the ruling on the demurrers, the defendants filed answers. In their answers the defendants, after admitting certain allegations of the petition not necessary to be set forth here, denied generally the remaining allegations of the petition, and pleaded that plaintiff and Floyd Hall were guilty of contributory negligence. To the answers of defendants, the plaintiff filed a reply in which she denied the allegations of new matter contained in the answers.

The jury returned a verdict in favor of plaintiff for $1,300 on her first cause of action, and $497 on the second. Judgment was rendered accordingly.

For the first assignment of error, the defendants urge that the general demurrer to the petition on which the case was tried should have been sustained for the reason that the petition does not state facts sufficient to constitute a cause of action.

The case is presented on appeal to this court without a bill of exceptions.

In a case coming to this court on appeal without a bill of exceptions, the pleadings must be sufficient to support the judgment; otherwise, it will be reversed. *Kerr v. Adams County*, 96 Neb. 178, 147 N. W. 683; *Doon v. Adcock*, 127 Neb. 335, 255 N. W. 548; *Plantz v. Peony Park*, 129 Neb. 338, 261 N. W. 826; *Slosburg v. Hunter*, 132 Neb. 529, 272 N. W. 571; *Federal Farm Mtg. Corporation v. Hughes*, 137 Neb. 820, 291 N. W. 475. It may be stated here that the defendants, having answered over after an adverse ruling on a

general demurrer, are not precluded from raising the question that the petition does not state facts sufficient to constitute a cause of action. Comp. St. 1929, sec. 20-808; *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 200 N. W. 344; *Martindale v. Panter*, 137 Neb. 522, 289 N. W. 869.

The particular complaint on the proposition that the petition does not state a cause of action is that, while plaintiff charges that the accident wherein she sustained damages was on a "public road," it is not alleged that the accident occurred on a highway which these counties, or either of them, erected and maintained, or were liable to keep in repair. The applicable statute is section 39-832, Comp. St. 1929, and is as follows: "If special damage happens to any person, his team, carriage or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the persons sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same; and damages and costs shall be paid by the counties in proportion as they are liable for the repairs * * *."

In this connection it may be well to state that a county, being a political subdivision of the state, having subordinate powers of sovereignty, was not liable at common law for negligence in maintaining a public road or bridge. *Woods v. Colfax County*, 10 Neb. 552, 7 N. W. 269; *Franek v. Butler County*, 127 Neb. 852, 257 N. W. 235. Also, that counties are not liable to individuals for damages on account of the negligent or tortious acts of their officers or servants unless made so by statute. *Wehn v. Commissioners of Gage County*, 5 Neb. 494; *Woods v. Colfax County, supra; Hollingsworth v. Saunders County*, 36 Neb. 141, 54 N. W. 79; *Stocker v. Nemaha County*, 4 Neb. (Unof.) 230, 93 N. W. 721; *Hopper v. Douglas County*, 75 Neb. 329, 106 N. W. 330; *Davie v. Douglas County*, 98 Neb. 479, 153 N. W. 509; *Dawson*

County Irrigation Co. v. Dawson County, 106 Neb. 367, 183 N. W. 655; *Franek v. Butler County, supra.*

The defendants urge that to set forth a cause of action the petition must, in specific terms or in substance and effect, allege that the road on which the accident occurred was one which the county or counties *are liable to keep in repair.* They urge that the descriptive words "a certain *public road* on the line between Hitchcock and Hayes counties," coupled with the qualifying words "which was maintained by each of said counties," fall short of such an allegation.

There is no doubt that one of the essential elements of the right of recovery by plaintiff against the defendants is that the road in question was a highway *which the counties were liable to keep in repair. Beebe v. Scotts Bluff County*, 92 Neb. 501, 138 N. W. 737; *Bethel v. Pawnee County*, 95 Neb. 203, 145 N. W. 363; *Ewh v. Otoe County*, 98 Neb. 469, 153 N. W. 509; *Higgins v. Garfield County*, 107 Neb. 482, 186 N. W. 347; *Cromwell v. Fillmore County*, 122 Neb. 114, 239 N. W. 735; *Franek v. Butler County, supra.* Does then the language quoted sufficiently charge that the road in question was one which the counties were liable to keep in repair?

In support of her petition, plaintiff insists that it is the duty of counties not under township organization to repair and maintain all public roads within their borders in a reasonably safe condition for travel, and thus the allegation of a "public road" in the sense used sufficiently alleges or implies an allegation that duty of maintenance by the counties is required. She cites in support *Beebe v. Scotts Bluff County, supra; Bethel v. Pawnee County, supra; Ewh v. Otoe County, supra; Higgins v. Garfield County, supra; Cromwell v. Fillmore County, supra.*

An examination of these cases, however, discloses that the discussions were limited to questions of liability on the part of counties for negligence where there was no question about the fact that the highways or bridges in question were a part of the county highway system established properly as such by the counties. In all of these cases the

question raised was as to whether or not the counties would be relieved from liability for accidents occurring on roads and bridges admittedly a part of the highway system, on account of the peculiar circumstances disclosed by the evidence in the particular cases.

It cannot be seriously questioned that one of the burdens of plaintiff in this case was proof that the highway in question was a road *erected* and *maintained* by Hitchcock and Hayes counties. *State v. Steffen*, 121 Neb. 39, 236 N. W. 141; *Porter v. Lancaster County*, 130 Neb. 705, 266 N. W. 584. Maintenance is alleged in the petition but erection is not. Proof of the fact of erection or establishment was vital to a cause of action, and it was clearly so recognized by the trial court in the giving of instruction No. 11. The instruction told the jury in substance that the evidence was not sufficient to show the establishment of a road by any statutory proceeding or by prescription. It then proceeded to tell them that a road might be established by implied dedication, and informed them that the burden of proving implied dedication was upon the plaintiff.

The appellee argues that maintenance of a public road is a standing invitation to the public to travel over it, and hence the allegation of maintenance, coupled with the other allegations, is sufficient as a charge of liability against the defendants to maintain. The authorities cited on this proposition, when analyzed, fail to give it support. They hold only that where construction and maintenance have taken place under legal duty it becomes the duty to maintain in the light of changing conditions. *Bethel v. Pawnee County, supra; Ewh v. Otoe County, supra; Higgins v. Garfield County, supra.* The only maintenance discussed is negligent maintenance of a highway or bridge admittedly established.

Erection or establishment being one of the essential elements or ultimate facts upon which a right of recovery is dependent in this kind of case, may we say that a petition which lacks an allegation of such essential element or ultimate fact sufficiently states a cause of action? The answer to this question must be in the negative.

Since there is no bill of exceptions, we must assume that the case was presented to the trial court on the theory contained in the pleadings; therefore, it becomes necessary to reverse the judgment of the district court and remand the cause for further proceedings in accordance with this opinion.

REVERSED.

VIOLET HALL, APPELLEE, V. HITCHCOCK COUNTY, APPELLANT: HAYES COUNTY, APPELLEE.
298 N. W. 558

FILED JUNE 6, 1941. No. 31054.

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

J. F. Ratcliff, for appellant.

Gerald G. Lefler, Butler, James & McCarl and *Cordeal, Colfer & Russell, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

YEAGER, J.

This is an action for damages which presents issues exactly the same as those presented in *Stitzel v. Hitchcock County, ante,* p. 700, 298 N. W. 555, and likewise this case was presented here without bill of exceptions.

The two cases were briefed and submitted together. The opinion in that case is controlling here.

REVERSED.

IN RE ESTATE OF ROBERT L. ROBINSON.
BETTY DELL BARNHART, APPELLANT, V. MARTIN J. HEDELUND ET AL., EXECUTORS, APPELLEES.
298 N. W. 559

FILED JUNE 6, 1941. No. 31072.

1. Wills. In an appeal from a decree of the county court, entered in a probate proceeding, where the basis of the appeal and the complaint is that the probate court erred in its construction of a will, the petition of the appellant in the district court may be challenged by demurrer in the same way as though the action was an original one in the district court for construction of a will.
2. ———. Where a petition for construction of a will sets forth the provision of the will in issue, with collateral facts developing since the death bearing upon said provision, and the combined allegations do not support petitioner's contention and prayer, it is subject to demurrer.
3. ———. Where the language of a will is clear and unambiguous, the intention of the testator must be determined from the language thereof and extrinsic evidence is not admissible.
4. ———. Petition examined. *Held* that demurrer thereto was properly sustained.

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

Charles E. Foster and *Harry C. DeLamatre,* for appellant.

Charles Battelle, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and KROGER and ELLIS, District Judges.

ELLIS, District Judge.

This is an appeal from the action of the district court sustaining a demurrer to petition of appellant, Betty Dell Barnhart, and subsequent dismissal of appellant's action. The action in the district court was on an appeal from the county court.

The appellant's petition in the district court alleged the death of the testator, the allowance and admission of his will to probate, and that appellant was a legatee and devisee by virtue of the following provisions of said will: "I hereby

give, will and bequeath to Betty Dell Barnhart, to whom I owe a debt of much value as well as gratitude, and make this bequest to her in payment for all the care and attention she has given to me. She has cared for me and my house for no other consideration than an act of mercy and a desire to help one who was not physically able to help himself. She has shown great interest in my house and has advanced several hundred dollars of her own funds for repairing and fixing the house for comfort and beauty and therefore it is my wish and desire that Betty Dell Barnhart shall be paid for her services and care of me, and the money she has advanced shall be refunded to her; and I do hereby will and bequeath to her, the home at 912 South 38th Avenue in Omaha, Douglas county, Nebraska, free of all encumbrance, and if the heirs of my estate object to her receiving the house, then, it is my desire and wish that the executors and trustees of my will be commanded to deliver to Betty Dell Barnhart, the full sum of Fifteen Thousand Dollars ($15,000) in any stocks, bonds or securities I may possess at the time of my death, instead of giving the home to her."

The petition further alleged that the widow of the testator elected to take under the statute, and that the real estate referred to in the quoted part of the will was found to be a homestead and the rights of homestead therein assigned to the widow.

The petition further alleged that certain of the residuary legatees, being sons and a daughter of the testator, named in the will filed an instrument reciting that they "do hereby object to the will of said Robert L. Robinson, whereby, under the terms and provisions of the same, the property located at 912 So. 38th Ave. is devised and bequeathed to Betty Barnhart and we elect to take under the statute."

The petition further alleged that the executors and heirs at law had ignored the provisions of the will providing for the disposition of the real estate, had demanded and took possession thereof by an action in forcible entry and detention, and had failed and refused to set aside and turn over to appellant stocks and bonds in the sum of $15,000.

The petition further alleged as follows: "Your petitioner further shows the court that said estate appears to be insolvent, and that it was necessary to sell all of said capital stock to pay debts, and it is now impossible to deliver any stocks, bonds or securities to the petitioner, and that by reason thereof, the real estate known as 912 So. 38th Ave., must be set over to the petitioner and possession thereof be given to her at once, and in connection therewith your petitioner alleges that the fair market value of the same does not exceed the sum of $2,000. That your petitioner as the devisee of the homestead of Robert L. Robinson, deceased, is entitled to the homestead exemption in said property against the claims of all creditors to the extent of the $2,000 allowed by the Nebraska Homestead Law, to the devisee of an owner of a homestead."

The petition further alleged that upon the filing of the final report and petition for final settlement in the county court the appellant filed objections thereto, prayed for a finding that appellant was a devisee under the will and entitled to immediate possession of the homestead as the owner thereof and for an accounting by the executors of rents collected from said property; objecting to any final decree other than one assigning the homestead property to appellant; and an adverse ruling and decree by the county court.

In her petition in the district court the appellant prayed for a construction of paragraph 3 of the will, assignment of the real estate to her, and an accounting of rents therefrom, and that in the event the court found that there was an ambiguity in said paragraph the court permit introduction of extrinsic evidence to aid in the interpretation of said will.

There are other allegations in appellant's petition which it is not considered necessary to set forth here.

To the petition the defendants interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action, with the resulting rulings by the court as indicated at the outset.

The only pertinent errors assigned are that the judgment is contrary to law and that the court erred in dismissing the case on demurrer for the reason, as appellant contends, that the petition does state a cause of action for the interpretation of the will.

While the case came to the district court on appeal from the judgment and decree of the probate court, since the basis of the appeal and the appellant's complaint of the probate court's judgment was error in construction of the will, and the prayer for relief hinges on construction of the will by the district court, we see no reason why the petition may not be challenged in the district court by demurrer and considered in all respects as though the action was an original one for construction of a will. That a petition for construction of a will in an action instituted in the district court is subject to demurrer was held by this court in *Pitts v. Burdick*, 91 Neb. 123, 135 N. W. 372.

From the partial synopsis of the petition, as set forth herein, it will be observed that the petition was rather involved. However, when reduced to the essential allegations, it sets forth *in haec verba* the provision of the will under which appellant claims, election by the widow to take under statute, objections by heirs, insolvency of the estate and appellant's claim to the real estate. The essence of the prayer is for construction of the will and an accounting of the rents from the real estate. It is obvious that the latter relief could only be ancillary to and is dependent upon a construction which would establish plaintiff's right to the real estate.

The allegations of the petition are not sufficient to create any issue of appellant's right under the alternative provision in the will to have securities assigned to her in lieu of the real estate, but are limited to a statement of the basis of appellant's claim to the real estate.

The demurrer, admitting, as it did, the facts pleaded but not the legal conclusions, challenged the appellant's claim of right to a trial and the relief prayed for. Does the petition successfully meet this challenge? The answer to

this question depends upon (1) whether the petition, its allegations of facts being admitted, sets forth sufficient facts to enable the court to construe the will and thereby test the construction alleged to have been given it by the probate court, as a matter of law; (2) does the petition by its allegations negative the need and admissibility of extrinsic evidence as an aid to construction? (3) was the construction alleged to have been given it the only one allowable under the facts pleaded?

We think the answer to these questions must be in the affirmative. We think the petition does set forth sufficient facts to enable the court to determine the intention of the testator and the ultimate disposition of the real estate in issue and that the appellant's claim thereto (and the rents therefrom) is not supported by the facts alleged in her petition.

Against this conclusion the appellant urges two propositions. The first is based on the following statement from 19 Am. Jur. 545, sec. 82: "Impossibility of performance of a condition subsequent which is not attributable to the grantee results in the vesting of the estate freed from the condition. The same result follows where the condition possible at the time of its creation subsequently becomes incapable of performance by reason of circumstances attributable to the grantor, to acts of the third persons to whom the services constituting the condition are to be rendered, to acts of a condonee, such as a cograntee, colegatee, or codevisee, or to an act of God."

We think the rule cited is not applicable. The expressed desire of the testator that appellant should have the real estate is not a devise subject to a condition subsequent, but clearly seems to be one of two alternative provisions for her benefit, with the power to determine between them left to the testator's heirs. The paragraph of the will which is in question is replete with expressions of the reasons for and the desire of the testator that she should have the real estate, but immediately following the actual words of devise the testator says "*and if* the heirs of my estate object to her

receiving the house, *then* * * * to Betty Dell Barnhart, the full sum of * * * $15,000 in any stocks, bonds or securities I may possess at the time of my death, *instead of giving the home to her.*" (Italics ours.)

It seems clear that the testator recognized the possibility and perhaps even the probability of dissatisfaction on the part of his heirs and by equally clear implication accorded to them the power to defeat his purpose and desire. Otherwise there would have been no purpose in the alternative provision. That this alternative bounty was defeated by the simple circumstance of insolvency cannot reverse the provision of the will so as to give to the appellant that which the testator contemplated might be diverted from her by the contemplated action of his heirs.

It may be worth while to note that the objection (here the practical equivalent of an election) contemplated by the testator is not the election by a spouse to take under the statute, but was an election in his heirs to *completely* nullify the devise of the real estate. The widow was doubtless an heir within the language of the will (see *In re Estate of Hanson,* 118 Neb. 208, 224 N. W. 2), and while the petition alleges an election by her to take under that statute, it also alleges that sons and a daughter filed objections to the provision in the will giving the real estate to appellant. It thus appears that the devise was completely nullified (a result clearly contemplated by the testator) and the alternative provided by the testator to meet that event became operative.

We are therefore not dealing with the consequences of an ordinary election by a spouse to take under the statute. Neither is this a case of ademption or abatement, and hence rules of law both as to construction and the admission of extrinsic evidence in those situations have no application.

We conclude that from an examination of the will itself it is clear that the testator contemplated that the contingent devise of the real estate might be wholly defeated by objections of his heirs and that upon the happening of that event it was his intention that the appellant should be limited

to securities in his estate for the satisfaction of her claim upon his bounty. The event having happened, the appellant has no rights in the real estate, and this result is not changed by her disappointment in the bequest due to insolvency.

The second proposition urged by appellant is that she was entitled to an opportunity to introduce extrinsic evidence in aid of construction, and that had she been given an opportunity to do so a different construction would result.

The same contention was made in *Lincoln Nat. Bank & Trust Co. v. Grainger,* 129 Neb. 451, 262 N. W. 11, and this court said: "The rule in this and most other jurisdictions is well established that, in construing a will, the whole thereof will be considered by the court, and from its four corners the court will determine the intent of the testator and give effect thereto if lawful. * * * Parol evidence is not admissible to determine the intent of a testator as expressed in his will, unless there is a latent ambiguity."

"Where words in a will are unambiguous, no evidence, however strong, should be considered to prove an unexpressed intention varying from that which the words taken in their primary sense indicate." *Woelk v. Luckhardt,* 134 Neb. 55, 277 N. W. 836.

The appellant argues that extrinsic evidence should be admitted for the reason that, unless this is done, "how can the court know what evidence can be introduced by the plaintiff?" In the view that we take of the will in question, the only purpose to be served by extrinsic evidence would be to change the will or to aid in the making of a new one, one which the testator might have or did intend, but did not in fact make. It is fundamental that extrinsic evidence is never admissible for such a purpose.

The will was dated May 29, 1935, and the testator's death did not occur until November 14, 1938. He must have known during the intervening period to what extent the net value of his estate would satisfy his alternative provision for the appellant. Having failed to change his will to meet his changed circumstances, the courts are powerless to do so.

We conclude that extrinsic evidence was not admissible

and that the construction of the will by the county court, as disclosed by appellant's petition, was right. The action of the district court was therefore right and it is

AFFIRMED.

JOHN E. HARMS, DOING BUSINESS AS HARMS LUMBER COMPANY, APPELLANT, V. SCHOOL DISTRICT NUMBER 2, GAGE COUNTY, APPELLEE.
298 N. W. 549

FILED JUNE 6, 1941. No. 31134.

1. **Schools and School Districts.** A contract of a school district is *ultra vires* only when it has no power under existing legislation under any circumstances to enter into such contract.
2. ———. Power exercised illegally or without proper authority, same being not *ultra vires*, does not preclude action for the reasonable value of materials and services furnished.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

I. D. Beynon and *John R. Dudgeon*, for appellant.

Jack & Vette, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

SPEAR, District Judge.

The plaintiff, appellant in this court, seeks to recover for materials and services furnished to the defendant school district, appellee here, for partially erecting a school building.

Prior to June 8, 1936, notice had been duly made and posted for the requisite length of time that there would be submitted at that meeting the question of changing the school site and levying a tax for building a new schoolhouse on a new site. The old site had been used since 1873 and is less than three-quarters of a mile from the geographical center of the district by direct length about 20 rods. The

meeting was duly held, a vote was taken, the question of changing the location passed 25 to 19 and the question of levying the tax passed 24 to 20, neither vote being two-thirds of the number of electors present. Pursuant to that vote the electors appointed a building committee and, together with two members of the school board, this committee, on August 6, 1936, entered into a contract with the plaintiff for the materials to be used in the erection of the new schoolhouse on the new site. This material was delivered to the new school site and part of the material was used by the school district in constructing the basement. There seems to have been a controversy among the electors of the school district all the way through, and on August 12, 1936, the Harms Lumber Company received a notice from Mr. Fulton Jack, attorney for one faction, directing the company not to deliver any more material. No more material was delivered except some minor items necessary for the preservation of the walls of the basement which were practically completed at that time. Before this, the school authorities consulted Mr. Sackett, also an attorney, and he advised them to go ahead with the building until they were stopped, stating that it was their duty to carry out the wishes of the electorate as voted in the school election.. As we understand it, nothing further has been done on the building to this day.

In addition to the material furnished by Harms, a little material was bought from the Farmers Elevator Company of Adams and a contract was made with Walter Barmore to construct the building. Both of these claims have been assigned to the Harms Lumber Company and are included in this action, under the same theory.

The appellee contends that the schoolhouse is being built in contravention of two sections of the statutes which are as follows:

"The qualified voters in the school district, when lawfully assembled, shall have power to adjourn from time to time, as may be necessary, to designate a site for a schoolhouse by a vote of two-thirds of those present, and to change the

same by a similar vote at any annual meeting: Provided, in any school district where the schoolhouse is located three-fourths of one mile or more from the center of such district, such schoolhouse site may be changed to a point nearer the center of the district by a majority vote of those present at any such school meeting." Comp. St. 1929, sec. 79-208.

"The legal voters may also, at any annual or special meeting, determine the number of mills, not exceeding ten mills on the dollar of the assessed valuation, which shall be expended for the building or building an addition thereto, purchase, or lease of a schoolhouse, in said district, when there are no bonds voted for such purpose, which amount shall be reported, levied and collected as in the preceding section: Provided, upon petition of one-fourth of the legal voters of such district to the trustees at least twenty days before time of annual or special meeting, praying that the question of voting a tax to create a special fund for the erection of a schoolhouse in said district be submitted to the qualified voters at such annual or special meeting, the trustees shall include such question in the posted notices of business to be considered at such annual or special meeting." Comp. St. 1929, sec. 79-216.

This action is not brought upon the contract, but for the value of materials and services. The appellee contends that the acts of the school board and the building committee are *ultra vires* and that plaintiff therefore can recover neither on the contract nor *quantum meruit* because of the lack of a two-thirds vote, under section 79-208, and because of technical defects, under section 79-216. The district court found for defendant.

We have examined all Nebraska authorities cited by appellee. Most of the cases cited are not applicable here because they are not cases involving either the question of contract or *quantum meruit,* but are cases involving injunctions, mandamus actions and other forms of action to which the rules which are involved in this case do not apply. We find six cases cited by appellee which in some measure touch upon the question which is now before us. These

cases are: *Townsend v. Holt county*, 40 Neb. 852, 59 N. W. 381; *Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, 59 N. W. 513; *Tullock v. Webster County*, 46 Neb. 211, 64 N. W. 705; *Rogers v. City of Omaha*, 76 Neb. 187, 107 N. W. 214; *Miles v. Holt County*, 86 Neb. 238, 125 N. W. 527. The *Townsend* case was a case arising out of a contract, but from a reading of the opinion it is impossible to ascertain whether the suit was brought upon the contract or for the value of the materials furnished. The *Ogalalla* case was a suit upon a contract and the court specifically points out the difference between such an action and an action for the value of goods delivered. The appellee relies largely upon the *Tullock* case, but the *Tullock* case discusses only the question of the enforcement or ratification of a contract, as is pointed out by Judge Sullivan in the final paragraph of *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349. The case of *Rogers v. City of Omaha, supra*, was a case brought upon a contract, but the *quantum meruit* theory was discussed and approved by this court, as it was in the case of *Miles v. Holt County, supra*.

The appellant contends that the school district has general authority to build a schoolhouse, and the district retaining the materials, there may be a recovery for the reasonable value of materials furnished, even though the statutory requirements have not been carried out in making the contract. In support of this proposition appellant cites *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349; *Western Chemical Co. v. Board of County Commissioners*, 130 Neb. 550, 264 N. W. 699; *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N. W. 919; *Stickel Lumber Co. v. City of Kearney*, 103 Neb. 636, 173 N. W. 595; *Sorensen v. Chimney Rock Public Power District*, 138 Neb. 350, 293 N. W. 121.

We find no unequivocal statement in any of the Nebraska cases cited by appellee to sustain its position. On the other hand, it seems to us that the cases cited by both sides support the position of the appellant. There are several sections of the statutes giving general power to school districts to

build schoolhouses. Having general power, the action of the school authorities was not *ultra vires*. It may have been illegal or without authority, but under the doctrine announced in the cases cited by appellant, we think that it no doubt was within the power granted to the school district by the legislature. It is stated in the *Stickel Lumber Company* case, quoting from another case, that, "properly speaking, *ultra vires* contracts of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose. A contract of a municipal corporation is *ultra vires* in its proper sense when it has no power under the existing legislation under any circumstances to enter into such contract." Applying this rule to the case at bar, we believe that the contract entered into by the school authorities is not *ultra vires*.

REVERSED.

MESSMORE, J., not participating.

THOMAS GORMAN, APPELLANT, V. JOHN BRATKA, APPELLEE.
298 N. W. 691

FILED JUNE 13, 1941. No. 31062.

1. **Evidence.** A written statement signed by a party to an action, which is against his own interest, and which tends to establish or disprove a material fact, is competent to be received in evidence, when the proper foundation has been laid.
2. **Negligence.** Under certain circumstances and conditions, the owner of an automobile may be a guest of the bailee driver and the driver's negligence not imputed to the owner.

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

David O. Mathews, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

PAINE, J.

This is an action for personal injuries suffered in an automobile accident. The jury returned a verdict for the defendant for $10 on his cross-petition, from which plaintiff, Thomas Gorman, appeals. A companion case, growing out of this same accident, is entitled *Gorman v. Bratka, ante*, p. 84, 296 N. W. 456, in which Mary Gorman, the wife of plaintiff in the case at bar, secured a verdict for $2,500, which was affirmed by this court in an opinion written by Judge Rose.

The plaintiff, Thomas Gorman, was 78 years of age, and had bought the 1937 Ford sedan for Marie Gorman Neiman, his married daughter, who lived at 5832 William street, with her husband, Clark Neiman, and their two children, some seven miles away from her parents, but the parents had never lived at their daughter's home.

Neither the plaintiff nor his wife had a driver's license. They had never driven this car, or any other, and it had always been kept at the home of the daughter, who was not a member of plaintiff's household, and the daughter and her husband supplied the oil, gas, and repairs for the car. At the time of the accident Mrs. Neiman, who had invited her father and mother to spend the day with her, was taking them from their home at Twenty-fourth and M streets out to her home.

The accident occurred about 9:30 a. m., November 28, 1938. The plaintiff was riding in the rear seat, and his wife, now deceased, was riding in the front seat with their daughter, Marie Neiman, who was driving the car.

It is charged that the defendant, while driving his 1935 Ford sedan in an easterly direction on Pine street in Omaha, entered the intersection at Sixtieth street in a grossly negligent and careless manner, and struck the car in which plaintiff was riding, inflicting serious personal injuries upon the plaintiff.

The specific negligence charged was in operating his car in excess of 40 miles an hour, failing to give the right of way to the car which had entered the intersection first,

and in failing to have his car under proper control, and other items of negligence were charged.

The defendant admitted the collision, but charged it was the result of negligence of plaintiff and the driver of his car.

In the motion for a new trial, three prejudicial errors of the trial court are set out, as follows:

"44. That the court erred in refusing to receive, and so ruling, in evidence, as an admission against interest and as a part of the plaintiff's case, exhibit No. 15, being a written statement of the defendant, John Bratka, dated November 28, 1938, and duly identified, proved and offered in evidence.

"45. That the court erred in refusing to receive, and so ruling, in evidence, as an admission against interest and as a part of the plaintiff's case, such parts of said exhibit No. 15, mentioned in the next preceding paragraph, as were not controverted or denied by the defendant, said exhibit having been duly identified, proved and offered in evidence.

"46. That the court erred in refusing to receive in evidence, and so ruling, as an admission against interest and as impeachment evidence, said exhibit No. 15, being the written statement of the defendant, John Bratka, dated November 28, 1938, when offered as a part of the cross-examination of the defendant Bratka, said exhibit having been identified, proved and offered in evidence; and in refusing the offer of proof made with respect thereto by the plaintiff as a part of the cross-examination of the said defendant, John Bratka."

The evidence discloses that Al Hummel, an insurance agent, whose home was in Boise, Idaho, at the time of the trial, called the defendant to his office in Omaha, some four hours after the accident, and asked him to give a statement of just what happened at the time of the accident. The defendant sat in a chair next to Mr. Hummel, who took down the statement on a typewriter, making one, and possibly two, copies. The statement reads as follows:

"Omaha, Nebraska (Ex. 15)
November 28th, 1938.

"Report of John Bratka

"My name is John A. Bratka, I am 34 years old, married and I reside with my wife and one child at Tecumseh, Nebraska. I am in the grocery and meat business. On the 28th of November 1938 about 9 A. M. I had an accident while driving jy (my) 1935 Ford tudor. The accident happened at the intersection of 60th and Pine Streets in Omaha, Nebraska. The facts are as follows:

"I was driving the car and my wife and son, John D. age 3, were in the front seat with me. My sister-in-law, Mrs. Fred Sampson of Weeping Water, Nebraska was riding in the rear seat. We had spent the nite at Valley, Nebraska and we were just coming into Omaha when this accident occurred. We traveled off of our course and that is how the accident happened to happen where it did. We did not make any stop before this accident occurred.

"As I was going east on Pine Street I was going up a steep hill and I had my car in second gear. I was going about 15 or 20 miles per hour as I was going up the hill. I hesitated before crossing 60th street but I did not bring my car to a stop. There are no stop or slow signs at this intersection.

"All of a sudden I collided with a car which was going north on 60th Street. I did not see this car until we collided. I could not say how fast this car was going since I did not see it until we collided.

"The right front fender of my car collided with some part of the other car but I do not know what part. After the first impact the other car rolled over and landed on its wheels.

"After the accident the other car was about two or three feet to the north of the north curb of Pine Street and it was headed to the west. My car was up over the curb on the northeast corner of the intersection just southeast of the fire hydrant; just the front wheels of my car were up over the curb.

"A Mrs. C. W. Neiman was driving the other car and her mother and father, Mr. and Mrs. Thomas Gorman were in the car with her. Mr. and Mrs. Gorman were injured but they were conscious. We took Mrs. Gorman into a grocery store and she complained of her heart bothering her. Mr. Gorman was cut on the forehead.

"I was the only one in my car who received any injury at all. I have a bump on my left knee but I have not consulted a doctor. I am able to go about. My knee is not cut. Neither my wife, son or sister-in-law were injured in any way in this accident. Mr. and Mrs. Gorman were taken to the St. Joseph Hospital in an ambulance.

"When the two cars came together they were in the northeast quarter of the intersection. There was dirt in the northeast quarter of the intersection which was probably knocked off my car.

"This is a clear intersection and there is nothing on the southwest corner which obstructed my view.

"Before I started across the intersection I looked and the way appeared to be clear. I do not know where this car came from.

"The weather was clear and the pavement was dry at the time of the accident.

"I have read the above report and it is true and correct.

"Correction: My son was riding in the rear seat with my sister-in-law instead of the front seat as mentioned above.

"I have read the above report and it is true and correct.

"(Signed) John A Bratka"

The defendant, John Bratka, in direct evidence testified that he looked down Sixtieth street and could see Mrs. Neiman's car coming, and that it was going 35 or 40 miles an hour, and he put on his brakes and swerved to avoid hitting it.

Now, in this exhibit No. 15, which was offered on cross-examination, he made this statement: "I could not say how fast this car was going since I did not see it until we collided." And again: "Before I started across the intersection I looked and the way appeared to be clear. I do not

know where this car came from." Exhibit No. 15 was made and signed by defendant Bratka on the day of the accident, November 28, 1938, when the incident was fresh in his mind, while his testimony was given in the trial beginning January 19, 1940. They differed vitally on an important point in the controversy.

In laying the foundation for the introduction of this exhibit No. 15, defendant admitted the fact that he was called to Mr. Hummel's office, and admitted he gave him a statement of what happened, and said that Mr. Hummel sat at the typewriter and typed it, and read it to him, and he identified his signature at the bottom of the exhibit; then the plaintiff offered exhibit No. 15 in evidence, signed by Bratka, as a part of his cross-examination.

This exhibit was properly identified and offered, and the refusal of the trial judge to receive it in evidence is charged as prejudicial error. "Any statement made by a party to an action which is against his own interest and which, in its nature, tends to establish or disprove any material fact, or alleged material fact, in the case is competent to be put in evidence against him in the trial of that action." 20 Am. Jur. 460, sec. 544.

In *Mason v. Reynolds,* 135 Neb. 773, 284 N. W. 257, this court said: "Plaintiff then laid a foundation for the introduction of exhibit No. 1, being a typewritten statement, signed by this witness. He admitted making a statement in attorney Deakins' office a few days after the accident, and admitted it was his signature at the bottom of exhibit No. 1, just above the line reading 'I have read the above and it is true.' " This court held that refusing to admit this exhibit was prejudicial error which required a reversal of the case. 4 Wigmore, Evidence (2d ed.) 553; 22 C. J. 303; *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854; *Young v. Avery Co.,* 141 Minn. 483, 170 N. W. 693; *Burgess v. Burgess,* 44 Neb. 16, 62 N. W. 242; *Fremont Butter & Egg Co. v. Peters,* 45 Neb. 356, 63 N. W. 791; *Falkinburg v. Inter-State Business Men's Accident Co.,* 132 Neb. 670, 272 N. W. 924.

Complaint is made by plaintiff of instruction No. 12

given by the court, and reading as follows: "You are instructed that Marie Neiman, in driving the plaintiff's automobile, was his agent, and that any negligence or contributory negligence upon her part is directly chargeable to the plaintiff in this action."

May we examine the evidence in regard to the question whether Mrs. Marie Neiman was the agent of her father, the owner of the car at the time of the accident, as charged by the court in this instruction?

The plaintiff herein was about 78 years of age when the accident happened in 1938. His vision was not good in excess of 30 feet. He had never driven a car in his life, but for some 20 years he had been in the habit of buying one automobile after another and giving them to his daughter, Mrs. Neiman. She and her husband used them exclusively. They had bought all necessary gas, oil, tires, and repairs for this car. From the day this last car was purchased, it was kept in their garage at the family home of Mrs. Neiman and her husband. The court refused to permit it to be shown in evidence that they paid the taxes and purchased the license under which the car was operated.

The plaintiff had no garage at his apartment, and had never had possession of the car from the day it was bought. For the past 14 years Mrs. Neiman and her husband had lived in one apartment and plaintiff and his wife in another, some seven miles away. She was not a member of the plaintiff's household.

In *Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832, the court said: "The owner of an automobile, who loans it to another to use for purposes personal to the borrower, is neither master nor principal, but merely a bailor, and in law is not chargeable with the consequences of the borrower's negligence while pursuing his own ends in his own way." See, also, *Ebers v. Whitmore*, 122 Neb. 653, 241 N. W. 126; *Hogg v. MacDonald*, 128 Neb. 6, 257 N. W. 274. The *Hogg* case gave three elements required to make the family doctrine apply, none of which exists in the case at bar:

"Rules for determining the existence of the family relation, as contemplated by law, were adopted by the supreme court of Texas as follows:

" '1. It is one of social status, not of mere contract.

" '2. Legal or moral obligation on the head to support the other members.

" '3. Corresponding state of dependence on the part of other members for their support.' *Roco v. Green,* 50 Tex. 483."

This trip was suggested by the daughter to her parents. Plaintiff was a rear seat passenger in response to a specific invitation. In 5-6 Huddy, Cyclopedia of Automobile Law, 280, it is said: "Even the owner of the vehicle may in some cases be considered a guest of the driver so that the driver's negligence will not be imputed to him." See, also, *Rodgers v. Saxton,* 305 Pa. St. 479, 158 Atl. 166, 80 A. L. R. 280; *Williamson v. Fitzgerald,* 116 Cal. App. 19, 2 Pac. (2d) 201; *Hartley v. Miller,* 165 Mich. 115, 130 N. W. 336; *Hathaway v. Mathews,* 85 Cal. App. 31, 258 Pac. 712; *Loso v. Lancaster County,* 77 Neb. 466, 109 N. W. 752.

"A man may, however, be a guest in his own automobile, and an owner, who, although present in his car while it is being driven by another not his agent, is present merely as a guest, and has no control of the machine, which is not being used in the furtherance of his business or undertaking, is not liable, in absence of any statute imposing liability for the negligence of such person in operating it." 5 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) sec. 2930.

Many cases are cited in defendant's brief where sons or daughters who live with the parent, and have driven the parent in his own car, are held to be the agent or servant of the father, but so far as we have examined these cases, not one of them presents a similar situation between father and daughter as existed in the case at bar.

In our opinion, Mrs. Neiman was not the agent of the plaintiff at the time of the accident, and it was error for the court to so instruct the jury in instruction No. 12, for under the circumstances she was a mere bailee.

For the errors set out herein, the judgment is set aside, and cause remanded for a new trial.

REVERSED.

GEORGE E. PARISH, APPELLANT, V. COUNTY FIRE INSURANCE COMPANY, APPELLEE.
298 N. W. 702

FILED JUNE 13, 1941. No. 31095.

Trial. Where, upon a jury trial, at the close of the plaintiff's evidence, defendant moves the court for a directed verdict in his favor, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff, and all reasonable and proper inferences to be drawn therefrom, and if the evidence is sufficient, if believed by the jury, to sustain the allegations of the petition, and the petition states a cause of action, the motion should be overruled.

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

George Evens, for appellant.

Ritchie, Swenson & Welpton and *Bernard E. Vinardi, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

PAINE, J.

This is an action by George E. Parish against County Fire Insurance Company to recover damages to a dwelling-house, which it is alleged was caused by tornado, windstorm and hail. At the conclusion of the plaintiff's evidence, the court sustained a motion of the defendant to dismiss the jury or direct a verdict for the defendant. Plaintiff appeals.

The petition as amended alleges that the plaintiff was the owner of a dwelling-house located at 3465 Ames avenue, Omaha; that on May 5, 1934, he paid a premium of $18 to secure insurance in the sum of $2,000 on said property

against loss by fire, cyclone, tornado, windstorm, and hail for a period of three years.

Plaintiff further alleges that on May 17, 1936, a terrific windstorm, cyclone, and tornado, accompanied by hail, struck and completely wrecked the dwelling-house aforesaid, damaging it to the extent that it has been condemned as unsafe by the city officials of the city of Omaha; that on the day after the storm plaintiff gave notice to the defendant, in writing and orally, and furnished proof of loss, and later gave additional notices of the damages sustained, no part of which has been paid.

The second amended answer admits that the policy of insurance was issued, and that notice of loss was given. Defendant further alleges generally that it is provided in said insurance policy that the company shall not be liable for any high water, overflow, cloudburst, or for any loss caused by water or rain, whether driven by the wind or not, unless the property insured shall first sustain an actual damage to the roof or walls by the direct force of the wind, and shall then be liable only for such damage to the interior of the building as may be caused by water or rain entering the building through openings in the roof or walls made by the direct action of the wind.

The defendant therefore charges that the loss or damage occurring to said dwelling on May 17, 1936, was caused by high water, overflow, or cloudburst, or by water or rain which did not enter the building through openings in the roof or walls made by the direct action of the wind, and that accordingly said loss or damage was not covered or insured by the policy sued upon. The reply was a general denial.

On May 13, 1940, a jury was impaneled and opening statements made. Plaintiff introduced evidence on May 14 and 15, and on the morning of the 16th plaintiff rested, and upon motion of defendant the court instructed the jury to return a verdict in favor of the defendant, and the jury were discharged, and judgment was entered.

In the motion for new trial, in addition to the customary

grounds therefor, it is charged that the court excluded competent, material, and relevant evidence sought to be introduced by the plaintiff, and upon which the plaintiff made offer to prove, and the objection to the offer was sustained by a large amount of testimony.

This is the third appearance of this case in this court. The first opinion may be found in *Parish v. County Fire Ins. Co.*, 134 Neb. 563, 279 N. W. 170, 126 A. L. R. 709, in which it appears that on the first trial in the district court the jury returned a verdict for $2,000 for the plaintiff by a vote of ten to two, and the defendant appealed. In its opinion, after a full discussion of the evidence and facts, this court found that there was damage to the composition roof which might have been caused by hail, and that a wind, which may have caused slight damage, preceded the rainstorm, which wrecked the property, but as the evidence did not support a verdict for $2,000 the judgment of the trial court was reversed.

The second appearance of this case is found in 137 Neb. 385, 289 N. W. 765. It appears from the record that, upon being called for trial, the trial judge entered a judgment on the mandate in the amount of $125 on an offer to confess judgment, found in one of the several answers filed by the defendant, and plaintiff appealed. Upon the second appeal to this court by the plaintiff, it was held by this court that, when the case was reversed and sent back, the plaintiff was entitled to his constitutional right of a trial by jury, which he did not waive, and the judgment was reversed and the cause remanded to the trial court, with the right to introduce further competent evidence. On retrial, the plaintiff introduced much of the same testimony received at the first trial, together with additional testimony.

This court, in its opinion upon the first appearance of this case, made several statements from the evidence then before it, such as testimony of an Omaha building contractor that the damage to the roof by hail would not exceed $25, and also stated that there was a lack of evidence in that bill of exceptions that the wind was very strong or destructive at the

house in question, and that the greater part of the damage was because of water following a cloudburst, and that such water damage was not covered by the policy.

This house was ruined by the storm of May 17, 1936, and this damage was all caused by the hail, the wind, and the water, and it is necessarily a jury question as to how much damage was caused by the hail and wind, which this policy insures against, and how much was caused by the rain and flood, which damage would not be covered by this policy.

There appears to be new evidence that the roof of the house was seriously injured by the hail and the wind, and there was testimony in this last bill of exceptions by Walter Peterson, who was the contractor who was employed to wreck the house, showing that the roof was fastened to the walls with long bolts, and therefore the statement in the first opinion that the paint was not broken between the roof and the sides may be of little value under this new evidence. Mr. Peterson also testified that the chimney was not firmly attached to the roof, and the roof might have been raised by the wind without disturbing the chimney. These points indicate that additional evidence tending to support the plaintiff's claim that serious damage was caused by the wind has more merit than appeared from a reading of the first bill of exceptions.

The present bill of exceptions discloses an exceedingly large number of offers to prove certain evidence and their rejection by the court. Some 40 of such cases are set out and discussed in the briefs. Many of these exclude evidence of witnesses who suffered damage by the wind which preceded the rain and who lived in the vicinity of this house. One of these witnesses whose testimony was excluded lived perhaps half a mile from the damaged dwelling. All such offers of evidence from witnesses who lived a half-mile or upwards were excluded, and our attention is called to the case of *Jordan v. Iowa Mutual Tornado Ins. Co.*, 151 Ia. 73, 130 N. W. 177, in which the court allowed evidence to be introduced about windmills being destroyed and other damage done by the same windstorm two and three miles away from the farm buildings for which recovery was sought.

We all recognize that in a violent windstorm it does not beat with the same force upon all objects, such as buildings in its course, but that in a miraculous way some strong structures are razed to the earth and structures a short distance away seem to escape the force of the blast; yet this knowledge of the varying force of a windstorm is doubtless known to the ordinary juror, as it is to the court, and it would seem proper to allow evidence of destruction by the same windstorm, which occurred in the exact line of its course, to be presented to the jury, who could judge of its applicability to the questions in issue.

In our opinion, without taking up seriatim each of these innumerable offers to prove, there are several of them in which the trial court was in error in not permitting the evidence to go to the jury.

This case is now brought to this court for the third time. It has been the intention of this court, on each of the two former reversals, to state that there appeared to be sufficient evidence of damage by hail and wind to submit the question of the amount of such damage to the jury. We are still of the same opinion, and we find that the trial court was in error in sustaining the motion of the defendant for a directed verdict at the close of the plaintiff's evidence. The judgment of the trial court is reversed, and this cause is again remanded to the trial court for further proceedings in accordance herewith.

REVERSED.

CHARLES DAVIS, APPELLEE, V. SECURITY INSURANCE COMPANY, APPELLANT: CITY NATIONAL BANK OF HASTINGS, APPELLEE.

298 N. W. 687

FILED JUNE 13, 1941. No. 31089.

1. **Appeal.** Where the record clearly discloses that material testimony has been disregarded by the jury which, if considered and given due weight, would require a different verdict than that returned, a new trial will be granted.

2. New Trial. "A verdict so clearly wrong 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." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923.

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

Stiner, Boslaugh & Stiner, for appellant.

William M. Whelan, Sr., James E. Addie and *Roscoe S. Hewitt, contra.*

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

MESSMORE, J.

This is an action to recover upon a fire insurance policy for loss occurring by fire. The policy covered the contents, consisting of fixtures, furniture and equipment, located in plaintiff's place of business in Hastings, Nebraska. The cause was submitted to a jury, resulting in a verdict in favor of the plaintiff, fixing the total amount of recovery in the sum of $3,000, and the amount of recovery on the policy sued on in the amount of $600. The total amount of fire insurance carried by the plaintiff on fixtures, furniture and equipment was $7,500. The policy in suit was for $1,500. The other policies are set forth in the pleadings, but do not constitute the basis of this action. Motion for a new trial was overruled. Defendant Security Insurance Company (hereinafter referred to as the defendant) appeals.

The pleadings, so far as necessary to a decision in this case, may be briefly summarized as follows: The petition states a proper cause of action. The principal defense is: The fire was caused by the wilful and intentional act of the plaintiff for the purpose of burning and destroying the personal property described in and covered by the policy of insurance, and for the purpose of defrauding this defendant and other insurance companies which had policies in force, covering the property, at the time of the fire. The

reply was a specific denial that the plaintiff, directly or indirectly, had anything to do with the fire which destroyed his property, or had any knowledge as to how the fire originated.

Defendant predicates error in that verdict and judgment are contrary to and not sustained by the evidence. This assignment of error calls for a resumé of the pertinent facts contained in the record, briefly stated as follows:

The plaintiff was engaged in operating a bakery, confectionery and restaurant business, known as the Davis Bakery, or DeLux Grill. The business had full restaurant equipment for the accommodation of 125 persons, and its usual hours of business were from 6 a. m. to 12 midnight. Plaintiff placed the value of his equipment at $14,000. Since 1928 the business was conducted on premises consisting of an ordinary brick building of two stories and a basement, plaintiff occupying the three floors. The fire occurred on the morning of July 5, 1938, between 2:30 and 3 o'clock a. m. The alarm was turned in at 2:57 a. m.

The plaintiff had been at his place of business most of the day and at least from 5 p. m. until he left at approximately 2:30 a. m., with the exception of a period of about 10 minutes, when he went to a hotel, looking for a cook, and going to a small grocery store to obtain some lettuce, about 8:30 p. m. He did not know the name of the store or who operated it, and he did not buy the lettuce. He employed several persons, and his wife assisted him in the store. One girl remained to help in the work until midnight. No other person was in or about the premises from that hour, only the plaintiff. He worked around the premises and finally, when checking the fountain, discovered some difficulty in getting carbonated water properly through the fountain. He went to the basement to check the carbonator, located in the south end of the basement below the fountain, and, after working some time with the valves, he discovered a crack in the gauge, so he gave up fixing the carbonator. He was in the basement approximately an hour and a half. He had locked the front door and left by the rear door,

slamming it behind him. It had a spring lock and, when closed, would lock. Plaintiff's automobile was parked in the alley adjacent to his place of business. He got into his car and tried to start it, but it was hard to start and he used five to ten minutes in the attempt. All of a sudden he heard something like a boom, or explosion. He then ran from his car down toward Wheeler's taxi office, some 40 feet distant, and called to Wheeler, who was outside the door, to call the fire department; that his place of business was burning. Wheeler told plaintiff to move his car so that the fire truck could come in, and plaintiff then drove his car one block west, where he parked it, returned to the store and stayed in the alley. Soon the fire truck came and he saw flames go through the building. The back part of it was dense with smoke. He requested Wheeler to get a taxi for him, and he went home, awakened his wife, and they came back to the burning building.

Exhibit 13 discloses the interior of the first floor of the building. The entrance faces south. Along the left, or west, wall are booths which extend the full length of the room. In the south, or front, part are a counter and fountain along the east wall. Directly north of the fountain are swinging doors leading into the kitchen. To the left, or west, of a partition marking the west wall of the kitchen is a phonograph, and north of the phonograph to the end of the building are booths along the partition. There is an aisle between the booths on the west and those next to the dividing partition of the kitchen. At the south, or front, part of the room is a false ceiling, made of composition board, put in during a remodeling process in 1937. This is held in place by two-by-fours running crossways of the room, from east to west, fastened to the walls on each side and dropped a distance of about three feet from the original metal ceiling. To the north and even with the entrance to the kitchen and for some distance north, the false ceiling is dropped for a distance of about five feet. The length of the ceiling north from this point is not given, but from the exhibit it appears to be about one-third the length of the room. There is a

stairway leading from the kitchen down to the basement, 25 feet south of the door leading to the alley, and another stairway from the kitchen to the second floor along the west wall of the kitchen to the south and to a landing. From there the stairway turns to the east and ascends to the second floor. These stairways are not visible in the exhibit mentioned. There are two doors, permitting access to the building. The front door to the south, constituting the main entrance, is equipped with a lock and key and locks from the inside, and the single door at the rear, or north, leads into the space just south of the alley. This space, between the alley and the north side of the building, is large enough to accommodate an automobile, and there the plaintiff's automobile was standing, with the front facing west, at the time he left and got into his car.

In the basement there were some Frigidaire equipment, a candy machine and utensils for manufacturing candy. On the second floor there was a variety of discarded articles stored, mostly ice cream containers of gallon size, some old clothes, a commode and a mattress. There was a small room on the second floor used for storage purposes. Near the northwest corner of the second floor a hole, 20 by 40 inches in dimension, had been cut in the floor and through the ceiling, which had been there for a considerable time, probably eight or ten years. It permitted access from the second floor through the space between the original and the false ceiling. Ordinarily, a grill, made of wood, was placed over this hole and screwed or nailed to the floor. The testimony is not clear as to whether the grill was there on the night of the fire.

When the plaintiff left his place of business, he was quite sure that a light was left burning in one of the booths as a night light, which was customary. This fact is in dispute. A member of the police force, on his beat in the vicinity of the store at the time the fire broke out, heard a crash and a noise of shattered glass. He hurried to the store, looked through the front window, and saw that the place was full of smoke and that fire was dropping from the ceiling to the

floor, which appeared to be toward the back end of the dining-room, about the center of the building. The heat was so intense that it broke a window in the south end at an approximate distance of 35 to 50 feet from the fire, producing considerable smoke. A fireman who examined the premises testified the fire was a "flash fire," especially so in the neighborhood of the hole near the north end of the second floor. Immediately after the fire was extinguished and upon investigation of the premises, containers of gasoline-saturated material were found in different parts of the building, and there was evident considerable odor of gasoline. To the north of the room and to the west where the booths are located there was a strong odor of gasoline, and farther north, to the rear of the building, this odor was stronger. In the first booth from the north of the room there was a wicker basket under the seat, right-side up and containing shreds of paper, saturated with gasoline, partly burned and charred. Four or five composition ice cream containers, of gallon size, containing shredded paper and gasoline in liquid form, were located in the ceiling just above the third booth from the north end of the room, not far distant from where the wicker basket was found. Other containers were located to the east, directly over the partition running north and south in the kitchen part of the room. These containers were supported by burned boards of different widths. Some of them had fallen from a spot above the false ceiling to the floor. The liquid contents of these containers were poured into a glass jar, analyzed by an expert chemist, and found to be gasoline of the regular grade. The investigation further disclosed that the firemen had noticed drops of gasoline coming from the ceiling at the location of the containers; that there were two or more separate and distinct fires. This is shown by the testimony of the chief of the fire department, who stated: "As we got in the kitchen there was fire east of the kitchen door running through the north partition to the floor; the kitchen ceiling was on fire; the west wall of the kitchen was burned out and there was fire to the west which would be

the north end of the booths." This testimony was corroborated by the assistant chief, who testified to fire at two places; the northwest corner of the kitchen and the rear end of the booths. These locations correspond to those of the gasoline and the shredded paper.

When the plaintiff checked the cash register before closing his place of business on the night of the fire, he left $6 in change in the register. His wife was absent from the store most of the time. On two occasions she borrowed the car to go to the park, and when she returned to the store she parked it in the space in the alley, and went home. At about 4 o'clock a. m., when the fire was extinguished, plaintiff and his wife went into the building, and she took from a drawer $20 or $30, a check, a diamond ring, and a social security book. The plaintiff had not paid taxes on his personal property since 1933. The bookkeeping was done by plaintiff's wife; no complete set of books was kept, and none of them are in evidence.

The plaintiff testified that he had money in both the banks in Hastings in the name of the firm or business; that the only place he had to keep money, other than by deposit, would be in an old safe on the second floor of the premises which was not used. After laying foundation to show that plaintiff had deposits in only one bank, the defendant offered to prove the amount of deposits each month covering a period from July 19, 1937, to July 20, 1938, to show the trend of the business and its decline, as evidenced by the deposits. The record shows that the plaintiff quit the manufacture of candy about a year prior to the fire and had stored his candy and cigar cases; that he was indebted to his mother-in-law in the amount of $2,000, dated March 21, 1934, and renewed January 30, 1937, secured by a chattel mortgage on the contents of the plaintiff's place of business, released on July 15, 1939,—after the fire. There was no consideration for these advancements. Other indebtedness is disclosed by the record which need not be mentioned. The admission in evidence of the bank accounts was objected to, and the objection sustained. Even in the absence of this

evidence, which, under the circumstances, was admissible, it is obvious that the plaintiff's business was not progressing, but, rather, was declining.

The only evidence to support the plaintiff's case is his denial that he set the fire, or knew how the fire started or originated, and that the taxi driver and others had testified that immediately after the fire plaintiff did not have the odor of gasoline on his clothing or person, or appear to have handled inflammable matter; also that he bore a good reputation in the community.

The foregoing evidence is not in dispute. Suffice it to say that, under the circumstances, the plaintiff is the only one who could have set the fire. He was alone for at least two hours previous to the fire, and access to the premises could be gained only through the two doors, or through a chute into the basement which was covered by boards. Plaintiff testified that no other person was there. The containers of gasoline-saturated material were found in the part of the building where they would do the most damage, and, obviously, placed by one who was familiar with the premises and would know where to put such containers to obtain the best possible results. Prior to the remodeling, the amount of insurance, if any, carried by the plaintiff was negligible. After the remodeling, he was solicited for insurance and carried $7,500 on the fixtures and appliances of his business. The remodeling was done in July, 1937; the fire occurred July 5, 1938. Under the circumstances, the amount of insurance carried at the time of the fire is significant. The circumstances are strong and convincing, when weighed against the mere denial of the plaintiff that he did not set the fire.

In proving arson, it is rare that eyewitnesses can be produced who saw the hand which struck the match that started a fire. Consequently, cases of this nature consist almost wholly of circumstantial evidence. The evidence in this case is convincing that the defendant has proved the affirmative defense as pleaded. Literally, every fact concerning this case, except plaintiff's denial, points irresistibly to his guilt.

"When it is clear that material testimony has been disregarded by the jury, and which if considered and given due weight, would require a different verdict from that returned, a new trial will be granted." *Dunbier v. Day*, 12 Neb. 596, 12 N. W. 109; *Exchange Bank v. Gifford*, 102 Neb. 324, 167 N. W. 69.

"A verdict so clearly wrong 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." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923. The above cases were followed and quoted from in *Cuva v. Glens Falls Ins. Co.*, 136 Neb. 359, 285 N. W. 917.

It follows that the judgment of the district court should be and is reversed.

REVERSED.

VIOLET MCCOWN, APPELLEE, V. ALVIN L. SCHRAM, ADMINISTRATOR, APPELLANT.
298 N. W. 681

FILED JUNE 13, 1941. No. 31119.

1. **Automobiles.** "That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle." Gen. St. Kan. 1935, sec. 8-122b.
2. ———. The Kansas supreme court in generally defining the word "guest" has adopted the common-law definition as found in Restatement of Torts, section 490, *Comment a*, as follows: "The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except such slight benefits as is customary to extend as part of the ordinary courtesies of the road." *Elliott v. Behner*, 146 Kan. 827, 73 Pac. (2d) 1116.
3. ———. Under the laws of Kansas "gross and wanton" negligence is defined substantially as conduct of a host auto-

mobile driver that evinces a willingness that harm might result therefrom, or reckless unconcern as to whether or not a guest passenger might be injured.

4. **Trial.** The question of the credibility of the witnesses and the testimony given by them is exclusively a question for the jury.
5. **Appeal.** "A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795; *Spangler v. Brown*, 137 Neb. 510, 289 N. W. 839.
6. **Trial.** "Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County*, 123 Neb. 194, 242 N. W. 452; *Spangler v. Brown, supra.*
7. **Affirmance.** *Held*, that the case was one of disputed fact proper to be submitted for determination by a jury, and that the verdict is supported by the evidence.

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

Baylor, Tou Velle & Healey and *Rinaker, Delehant & Hevelone*, for appellant.

Hubka & Hubka and *R. M. Anderson, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and TEWELL and KROGER, District Judges.

YEAGER, J.

This is an action for damages by Violet McCown, plaintiff and appellee herein, against Alvin L. Schram, administrator of the estate of Arnold L. Schram, deceased.

On the evening of June 25, 1937, plaintiff became a guest passenger, with two others, at Beatrice, Nebraska, in an automobile being operated at the time by defendant's decedent, Arnold L. Schram. Schram drove with his guests through Wymore, Nebraska, and then to Marysville, Kansas. About midnight the parties started on the return trip on a road leading from Marysville, Kansas, to Beatrice, Nebraska. While yet in Kansas, the automobile in which

the parties were riding collided with an automobile which was going in a southerly direction. The collision resulted in the death of Schram and injuries to plaintiff. The plaintiff claimed that the accident was caused by the gross and wanton negligence, as defined by the laws of Kansas, of Arnold L. Schram in the operation of the automobile in question. The action is against Alvin L. Schram in his representative capacity.

The plaintiff has pleaded the statutes of Kansas relating to the liability of drivers for negligence in the operation of automobiles as they pertain to guests, and also in respect to certain unlawful acts in the operation of automobiles not directly related to guests or passengers. She also pleaded the decisions of the supreme court of Kansas, interpreting and construing that portion of the statutes relating to the liability for negligence as to guests. She further pleaded that this action is brought with reference to and is controlled by the laws of Kansas. In the position so taken by the plaintiff the defendant concurs.

The portion of the statutes relating to liability to guests in automobiles is section 8-122b, Gen. St. Kan. 1935, and is as follows: "That no person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle."

In definition of the word "guest" the Kansas supreme court adopted generally the common-law definition as found in Restatement of Torts, section 490, *Comment a*, as follows: "The word 'guest' is used to denote one whom the owner or possessor of a motor car or other vehicle invites or permits to ride with him as a gratuity, that is, without any financial return except such slight benefits as is customary to extend as a part of the ordinary courtesies of the road." *Elliott v. Behner*, 146 Kan. 827, 73 Pac. (2d) 1116.

In varying terminology, but in the same substance, the

Kansas supreme court, in defining "gross and wanton" negligence, has said that the conduct of a host automobile driver in Kansas that evinces a willingness that harm might result therefrom, or a reckless unconcern as to whether or not a guest passenger might be injured, constitutes wantonness so as to permit recovery under section 8-122b, Gen. St. Kan. 1935. *Donelan v. Wright,* 148 Kan. 287, 81 Pac. (2d) 50; *McCown v. Schram,* 137 Neb. 498, 289 N. W. 890. (Other cases are collected in *McCown v. Schram.*)

In his answer the defendant denied that Arnold L. Schram had been guilty of negligence, and alleged affirmatively that plaintiff assumed the risk of entering the car of, and riding with, Schram.

Issue being joined, the case was tried to a jury, and verdict was returned in favor of plaintiff for $2,750. Judgment was entered on the verdict. A motion for new trial was duly filed and in due course overruled. Assigning several grounds of error, the defendant has appealed.

Appellant insists that the evidence of plaintiff fails to support a charge of gross and wanton negligence under the laws of Kansas, and for that reason the judgment of the district court is erroneous and should be reversed. He insists that there is no evidence of such speed as would evince a willingness that harm might result therefrom or a reckless unconcern regarding plaintiff's safety, and further, if negligence has been shown, the evidence discloses that such negligence was not the proximate cause of the accident.

A determination of these questions has required a careful examination of the bill of exceptions. From this examination we find that there is little, if any, dispute as to the rate of speed the automobile was traveling before, and at the time of, the accident. The witnesses who were occupants of the Schram car estimate variously the speed at the time of the accident at 60 to 70 miles an hour, and before from 55 to 65 miles an hour. No other witnesses testified as to speed. There is no direct evidence in opposition to these

estimates. The only thing that appears in opposition is a deduction made by appellant in his brief from which he argues that the automobile could not have been traveling at such rate of speed. Under the circumstances the question of speed was one of fact for the jury.

On the question of the characterization of the acts and conduct of Schram with reference to the operation of the automobile and his attitude toward the plaintiff, the witnesses testified that from 8:00 p. m. up to the time he left Marysville to return to Beatrice he had drunk ten bottles of beer and one bottle of coca cola "spiked" with whisky; that he either did, or stated that he was going to, disconnect the speedometer so that the girls in the automobile could not tell at what speed he was driving; that he drove on a rough gravel road at speeds variously estimated at from 55 to 70 miles an hour; that his driving was protested on more than one occasion by plaintiff without effect; that he drove down the middle of the road; that he "side swiped" another automobile going in the opposite direction on its right side of the road, bringing death to himself and injury to the plaintiff. This testimony, if believed, certainly was sufficient upon which to base a finding that Schram was guilty of gross and wanton negligence, within the meaning of the laws of Kansas.

Appellant insists that this evidence was not properly submissible to a jury, first, because of its complete refutation by evidence of physical facts; and, second, because of written statements given by the same witnesses soon after the accident, which statements appear in the bill of exceptions and contain a version of the happenings of the trip indicating that Schram was guilty of no negligence in the operation of the automobile.

The physical facts referred to are the location of débris on the highway; location of wheel tracks claimed to lead to the Schram automobile after it came to rest after the accident; lack of roughness in the road in the vicinity of the collision; and speed as deduced from the testimony of one of the passengers in the Schram automobile, wherein he

gave the location of the Schram automobile when he saw the automobile which collided with it. None of these enumerated physical facts were fixed objects or indications except the débris and the tracks. The débris was on the east side of the highway as were also the tracks described. Obviously there is no certainty as to how the débris was placed where it was found, and the tracks did not lead up to the Schram car. These things then were not physical facts from which a certain conclusion was inescapable, but only circumstances to be considered by the jury in determining the ultimate fact, the cause of the accident.

Plaintiff and two of her witnesses, who were passengers in the automobile, gave their testimony in which they told of the incidents leading up to and the happening of the accident. On cross-examination each was confronted with a written statement in which was contained, in several material particulars, an entirely different version. Each admitted giving the statement, but denied its truth. As to the statements as received, those of the witnesses, other than plaintiff, had no probative value whatever on the triable issues in the case. The statements are in the record for the purpose of impeachment. As to the statement of plaintiff, it is in, of course, for purposes of impeachment, and also as an admission against interest. The reason given for the making of the statements claimed by them to be false was for the protection of the good name of Schram who was then dead. Considering these statements for their proper purpose, they raise only questions of interest and credibility of witnesses which are questions to be passed upon by the jury. The question of the credibility of these witnesses, and the testimony given by them, was exclusively for the jury and was submitted under proper instructions. *Howell Lumber Co. v. Campbell,* 38 Neb. 567, 57 N. W. 383.

The next proposition urged is that plaintiff assumed the risk of riding with Schram and therefore cannot be permitted to recover. If "assumption of risk" is a legal defense to an action by a guest in an automobile sufficient to defeat a recovery where gross and wanton negligence is

proved under the laws of Kansas, a question not necessary to be decided here, then all that need be said is that on that question a disputed question of fact was presented by the evidence in this case with the burden of proof on the defendant. The claimed assumption here is based on claimed knowledge of plaintiff of the alleged intoxicated condition of Schram. Plaintiff denied such knowledge and she was corroborated by circumstances. On the other hand, circumstances were related in the evidence from which a conclusion could have been drawn that she did have such knowledge. The jury were free to accept either view.

The verdict in this case was one based on conflicting evidence. The rule as announced by this court and applicable here is: "A verdict of a jury in a law action based upon conflicting evidence will not be disturbed on appeal unless clearly wrong." *Potach v. Hrauda*, 132 Neb. 288, 271 N. W. 795; *Spangler v. Brown*, 137 Neb. 510, 289 N. W. 839.

Complaint is made of certain instructions given by the court. The first is instruction No. 5. This instruction contains a statement of the issues tendered by the plaintiff and an outline of her burden of proof in relation thereto. The complaint is not that it is incorrect in these particulars, but that it is insufficient in the light of the defense of "assumption of risk" pleaded by the defendant in his answer. Referring to the issues tendered the instruction reads: "If you find that the plaintiff has established each and all of the above three propositions by a preponderance of the evidence, then your verdict will be in favor of the plaintiff and against the defendant." Defendant urges that the instruction to be complete and so as not to be confusing should have contained language calling attention to the defense of "assumption of risk" and should have been in substance the following: "Unless you also find under subsequent instructions that the plaintiff assumed the risk of travel in said automobile."

On the defense of assumption of risk the court gave instruction No. 16, which is in part as follows: "If you find from a consideration of all the evidence and from a pre-

ponderance thereof that she had adequate opportunity to warn the driver and protest against dangers, which were apparent to her, or to have asked him to stop and allow her to leave the automobile, and that she failed in any of the above respects, then you would be justified in finding that she did assume such risks and thereby is barred from recovery in this case." The particular complaint is that, while it is a correct statement of the law applicable after starting on the return trip from Marysville, it does not take into account her remaining in the automobile at the beginning of the trip if she knew the condition of Schram at that time. This contention is without merit since it fails to take into consideration instruction No. 7, which submits the defense of "assumption of risk" at all points and places and under all circumstances from the beginning at Beatrice to the point of the accident in the following language: "* * * that she knew and appreciated the fact of his proficiency, ability and condition and the danger which arose therefrom and from the conditions at all places in the highway upon which said automobile was being driven on June 25, 1937; and that said Violet McCown assumed the risk of travel in said automobile and of the omissions, if any, and the acts of said Arnold L. Schram in the driving, managing and controlling of the same."

The only question now to be determined as to the instructions is whether or not it was reversible error for the trial court to fail to instruct specifically in connection with instruction No. 5, that plaintiff's right of recovery set forth therein was limited by the finding on the question of "assumption of risk."

On the question of objections to instructions this court has said: "Where an objection is made in behalf of appellant in respect to an instruction given by the trial court, the judgment will not be reversed, when the instructions, considered in their entirety, are not prejudicial to the lawful rights of appellant." *Lowell v. Buffalo County,* 123 Neb. 194, 242 N. W. 452; *Spangler v. Brown, supra.*

In instruction No. 5, the burden and conditional right

of recovery of plaintiff were set forth. In instruction No. 7, conditions which would defeat a recovery were specifically set forth. These conditions were specifically repeated at least in instruction No. 16. We think that the rule announced in *Lowell v. Buffalo County, supra,* is applicable in this case, and that no error resulted from the giving of instructions in this case. It is difficult to see how, under the circumstance, the jury could have been mislead to the disadvantage of the defendant.

On the submission of the case to the jury the defendant secured the submission of three interrogatories. The interrogatories with the answers returned by the jury are:

"1.—Do you find from the preponderance of the evidence that Arnold Schram was guilty of gross and wanton negligence which was the proximate cause of the plaintiff's injuries, if any? Answer: Yes.

"2.—If your answer to the foregoing question is 'Yes,' then answer the following question: What conduct of Arnold Schram as shown by a preponderance of the evidence amounted to gross and wanton negligence? Answer: Excess speed and liquor.

"3.—If your answer to question Number one is 'Yes,' then answer the following question: Does the preponderance of the evidence show that the conduct of Arnold Schram in the driving and management of the automobile in which he was riding was such reckless disregard of consequences as to show a willingness that the plaintiff should be injured or harmed? Anwer: Yes."

Appellant urges that these special findings are against the clear weight of the evidence. As has already been indicated, the determination of the factual situation on which answers to these questions depended was a question for the jury, unless it could be said as a matter of law that Schram was not guilty of gross and wanton negligence. Having held that it cannot be so said, no error is found in these special findings.

The only remaining question necessary to be discussed is the size of the verdict. Excessiveness of the verdict is

assigned as error but not discussed. In the light of the evidence as to injuries sustained, we cannot say that the verdict is excessive.

For the reasons herein set out, we conclude that the case was one of disputed fact proper to submit for determination by a jury, that it was submitted under proper instructions, that the verdict is supported by the evidence and that the judgment of the trial court should be and it is

AFFIRMED.

HAVELOCK NATIONAL BANK, APPELLEE, V. NORTHPORT IRRIGATION DISTRICT, APPELLANT.
298 N. W. 695

FILED JUNE 13, 1941. No. 31101.

1. **Municipal Corporations.** It is the duty of a treasurer of a municipal corporation to give notice to the holder of warrants when sufficient money is in the treasury to pay such warrants.
2. ———. Money collected by municipal corporations for a special fund against which warrants have already been issued becomes a trust fund.
3. **Limitation of Actions.** The statute of limitations does not run against a trust fund until it is converted into an adverse holding and knowledge of such conversion is brought to the beneficiary of such trust.

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

F. E. Williams and *Wright & Wright*, for appellant.

R. O. Johnson and *Bern R. Coulter, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

FALLOON, District Judge.

This is a law action brought by the appellee, Havelock National Bank, against the appellant, Northport Irrigation District, upon ten warrants dated December 10, 1930, for $500 each, with interest at 7 per cent. from date. Jury

was waived and appellee recovered judgment in sum of $8,211.30.

The pleadings admit that the appellee is a corporation under the federal banking statute and that appellant is a municipal corporation duly organized under the laws of this state.

The amended petition alleges that warrants were purchased and delivered on December 10, 1930, and registered the same day, and that demand for payment had been made and refused on July 6, 1937, and that the officers had failed to collect the funds for payment of same, had failed to take steps to collect taxes for that purpose, that the officers further failed to make a levy sufficient to create such a fund, and that the money collected on such levy had been used to pay other warrants not drawn against said levy. There is a separate cause of action on each warrant.

The answer, aside from admitting the corporate existence of the parties, was a general denial, and pleaded the statute of limitations against each cause of action.

The reply denies all allegations except that of corporate existence of the parties, and further alleges failure of the appellant to perform affirmative acts required by statute in creating a fund to pay said warrants, that the appellant received the benefits and is estopped from pleading the statute of limitations, and that the appellant should not be permitted to interpose its failure to act as the law required.

These presented the issues which were decided by the lower court on February 13, 1940. The judgment found generally for the appellee on each of the ten causes of action, that the district sold and delivered the warrants to appellee, who is the owner and holder thereof, that no part thereof has been paid, that they were duly registered for payment, that the amount collected thereon had been used for other purposes, that the district has neglected and refused to create a fund for the payment of the warrants, and that the appellee bank is entitled to a judgment on each cause of action in the sum of $821.13 with interest at 7 per cent. from date of judgment.

The appellant contends that the findings and judgment are not sustained by sufficient evidence and are contrary to law.

The evidence conclusively shows that the appellee bank purchased said warrants at their face value, that it is the holder thereof, and that they are unpaid. The evidence also shows that they were drawn against the 1930 levy, and that said levy is sufficiently exhausted so that these warrants cannot be paid from it, and that $14,239.70 out of the 1930 levy was paid out on 1929 warrants.

The evidence also shows that the appellee bank was never notified that sufficient money was collected on the 1930 levy to pay these warrants, that it was used for other purposes, but it does show one of the officers of the appellant did imply that they had not yet been collected and promised to notify the appellee bank as soon as they were. The evidence also shows that the appellee did not learn that some of the 1930 levy had been collected and applied on other indebtedness until 1938 about the time this action was commenced and then learned it from its attorney.

The correspondence between the appellant and the appellee, while not as specific as it might have been, undoubtedly conveyed to the appellee that the levy had not been collected because of bad conditions, but repeatedly held out hope that it would be collected and warrants paid at least in part within the near future, and this correspondence covered several years and as late as March 11, 1937. The evidence shows various dates, which are not necessary to specify, that part of the 1930 levy was collected so as to pay these warrants one or two at a time, had the money been properly paid out.

The appellant contends that the statute of limitations should apply in this case. We have no reason to question its contention that such a statute applies to municipal corporations as well as individuals. This is not the real question in this case. Nor can we follow its contention that the statute of limitations begins to run when sufficient money was collected on the 1930 levy. The fact is, this

money was not paid on these warrants. To infer that it would have been paid had it been presented would require that the holder of a warrant would have to remain in the treasurer's office to insure that the warrant was paid and not applied on other warrants. That is the reason for the statute which provides that the money collected on a levy shall be applied to warrants drawn against that levy and for no other purpose until such warrants are retired.

It is the duty of the treasurer of a municipal corporation to give notice to the holder of warrants when sufficient money is in the treasury to pay said warrants. See Comp. St. 1929, sec. 77-2404. Likewise it is his duty to pay registered warrants in the order of their registration.

There is moreover a more important reason why the statute of limitations should not apply in this case. When the warrants were sold to provide ready money against the 1930 levy, the collection of that tax money created a special fund. The appellant became a trustee for that money and the money should have been paid on these warrants and not for other purposes. In this case some $14,000 of the money collected was used to pay 1929 warrants. This was prohibited by statute. The statute of limitations does not run against a trust fund until it is converted into an adverse holding and knowledge of such conversion is brought to the *cestui que trust.* See *New York Security & Trust Co. v. City of Tacoma,* 30 Wash. 661, 71 Pac. 194.

There seems no doubt that the appellant wilfully deceived the appellee bank by the correspondence in such manner as to act as an estoppel to the pleading of the statute of limitations. Since the proper pleading of that phase of estoppel was not made, this court finds it unnecessary to discuss that question.

There is no merit to the contention that a larger judgment was recovered than was asked. The computations are correct.

There is no doubt that the failure of the treasurer to give to appellee bank notice that there was sufficient money to pay its warrants acted as a bar to the statute of limitations

where the statute made that an affirmative duty. Moreover, the failure to apply a special fund to the purpose for which created acted likewise as a bar to the same statute, since no notice of such conversion was given nor did the warrant holder have such knowledge.

The judgment of the lower court is therefore

AFFIRMED.

WESLEY MCLEAN, APPELLEE, V. FIDELITY LIFE ASSOCIATION: J. BERNARD MCDERMOTT ET AL., APPELLANTS.
298 N. W. 700

FILED JUNE 13, 1941. No. 31052.

Insurance. Section 44-1237, Comp. St. Supp. 1939, does not preclude the court, under the circumstances in this case, from exercising its equity power to direct the equitable distribution of the proceeds of a benefit certificate which have been deposited in court pending litigation between claimed beneficiaries.

APPEAL from the district court for Douglas county: JOHN A. RINE, JUDGE. *Affirmed.*

Amos Thomas and *Harold A. Moore,* for appellants.

Rosewater, Mecham, Shackelford & Stoehr and *Charles E. O'Brien, contra.*

Rainey T. Wells, amicus curiæ.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

SPEAR, District Judge.

In 1931 Wesley McLean, appellee, was married to Kathryn McDermott. He was 56 years old and she was about 52 or 53. Shortly after the marriage Mrs. McLean brought up the question of life insurance. At that time he had a certificate in the Maccabees and she had a certificate in the Fidelity Life Association, defendant in this case. A mutual agreement was entered into by which Mr. McLean agreed

to make her the beneficiary of $1,000 under his certificate and she agreed to make him the beneficiary to the amount of $1,000 under her certificate. This agreement necessitated changes in beneficiaries, which both duly made in accordance with the requirements of their respective societies, so that Mr. McLean was a beneficiary for $1,000 under her certificate and she was a beneficiary for $1,000 under his certificate. Times grew hard and business poor. The McLeans moved from one place to another trying new businesses until eventually Mr. McLean had to take a job selling from house to house in Omaha and Mrs. McLean went to live with a daughter in Omaha, Mr. McLean occupying a room at another location with his step-son. Shortly thereafter Mrs. McLean died. At the time of her death she remained the beneficiary under his certificate in the Maccabees, but after her death he discovered that she, a few months before her death, had substituted her son, by a former marriage, J. Bernard McDermott, her daughter, by a former marriage, Winifred Bradley, and her grandchild, June Walden, as beneficiaries. McLean demanded the proceeds of the certificate, and the Fidelity Life Association, defendant, interpleaded in the district court asking the court to decide to whom the money should be paid, and deposited the money in court. The issues were then made up and the case proceeded to trial. The district court found in favor of appellee. In this court the appellants do not dispute that the equities are in favor of the appellee, but, together with Woodmen of the World Life Insurance Society, *amicus curiæ,* contend that the case is governed by part of section 44-1237, Comp. St. Supp. 1939, which reads as follows:

"Each member shall have the right to designate the beneficiaries and from time to time have the same changed in accordance with the laws, rules, or regulations of the society and no beneficiary shall have or obtain any vested interest in such benefit until the same has become due and payable upon the death of such member."

It is contended that McLean, under this statute, has no right to the proceeds of the certificate which belonged to

his wife. On the other hand, appellee contends that, in equity, McLean having retained Mrs. McLean as beneficiary in his certificate and having paid the dues thereon until the time of her death, is entitled to the proceeds of her certificate. Learned and forceful arguments were made on both sides of this question, but we think that perhaps the respective arguments can be epitomized in two cases: The arguments of the appellant and of *amicus curiæ* in the case of *Sovereign Camp, W. O. W., v. Russell,* 214 Ia. 39, 241 N. W. 395, and the contention of the appellee in the case of *McCleery v. Woodmen of the World,* 136 Or. 407, 297 Pac. 345. The Iowa case holds that no equitable rule can be applied in dealing with the statutes covering a fraternal beneficiary society. The Oregon court holds that, if sound equities exist in favor of the original beneficiary of an insurance certificate, the insured is estopped to substitute a second beneficiary, whose status is purely that of a volunteer. Iowa and Oregon have statutes identical with the Nebraska statute quoted above. We are called upon to interpret the Nebraska statute. The Iowa court seems to assume that the word "vested" includes all interests, both legal and equitable. The Oregon court does not concede this to be true and makes some distinctions between "vested" interests and an interest such as is now before us, but, on a rehearing of the case, refused to base its decision entirely upon those interpretations, choosing to place its decision upon equitable grounds. We do not care to attempt to make a technical distinction between "vested" rights and rights such as have accrued in this case. It seems to us that the philosophy expressed in the Oregon case is the correct view. The equities are overwhelmingly in favor of appellee. The appellants are mere volunteers. The defendant Fidelity Life Association makes no contest. The contract before us is not prohibited by statute, nor the rules of the society. We do not hold that McLean acquired a vested right, but we do hold that under the circumstances Mrs. McLean, in equity, parted with a right which she might otherwise have exercised. This is not to say that McLean had a vested

right either by contract or in equity which precluded Mrs. McLean from making a change in beneficiaries during her lifetime. She had this right under the statutes, but in equity she should have notified McLean, so that he, too, could have changed beneficiaries, had he so chosen. She accepted the benefits under his policy and clandestinely deprived him of the benefits of hers. The money is in the hands of a court of equity. Appellants would have this court read into the statute a provision that under no conditions in law or in equity shall the proceeds of a certificate be paid to any person other than the named beneficiary. This view seems to seek to extend the provisions of the statute. Regardless of speculation as to what the legislature meant by the statute quoted above, we think that it surely did not intend to require an equity court to make an inequitable distribution of funds in the hands of the court. We believe that, in this case, there being no superior equities, the judgment of the district court in awarding the proceeds of the policy to appellee is right.

AFFIRMED.

OTTO HEIDEN, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

298 N. W. 736

FILED JUNE 13, 1941. No. 30999.

1. **Appeal.** Unless an abuse of discretion is shown, this court will not disturb the ruling of the trial court upon a motion for a change of venue.
2. **Waters.** Evidence as to the nature and productivity of the soil and crop yields measured in tons or bushels, or in net income from cash or crop rentals, when shown with reasonable certainty, may be admitted as elements to be considered in fixing the value of the leasehold.
3. **Appeal.** When there is no evidence on which to base an instruction given, although correct as a legal proposition, it is ground for reversal if it has a tendency to mislead the jury.
4. **Waters.** One whose land is permanently damaged by seepage water may recover the difference between the reasonable

market value of his property before and after injury and also for damages to crops injured in the field at the time of the seepage, but under the circumstances herein set out cannot recover in addition thereto for loss of use of said real estate for subsequent years caused by the same seepage.

5. New Trial. "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.

APPEAL from the district court for Platte county: FREDERICK L. SPEAR, JUDGE. *Reversed.*

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

Walter, Flory & Schmid, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ., and MEYER, District Judge.

MEYER, District Judge.

This is a suit for permanent damages to plaintiff's farm caused by seepage from the defendant's reservoir. The plaintiff had judgment for $13,000, and defendant appealed.

The defendant is a public power district organized under chapter 86, Laws 1933, and amendments thereto. Plaintiff's farm is located two miles north from the city of Columbus. Fifty acres thereof are pasture and farm land lying on the side of a hill. Upon this hill are also located plaintiff's farm buildings and dwelling-house, a modern home built in 1933. The remaining portion of said farm, consisting of 61½ acres hay meadow and 47 acres cultivated ground, is level bottom land lying southward from the base of the hill. About one mile north of plaintiff's farm defendant constructed a reservoir known as Lake Babcock. In the summer of 1937 it impounded a large body of water in said lake, and plaintiff alleges that in the fall of that year his bottom land was inundated and flooded with waters seeping from said lake and that said seepage condition is permanent. After seepage reached plaintiff's farm,

the defendant constructed a drainage ditch through the plaintiff's lower ground, condemning six acres thereof for that purpose, reducing plaintiff's farm to 152½ acres.

It is urged that the court erred in overruling the defendant's motion for a change of venue. The motion was supported by affidavits stating that, in addition to Lake Babcock, defendant constructed a canal and transmission lines within the county; that numerous disputes arose between the district and landowners during the construction of said projects; that many claims were presented against the defendant for right of way and damages resulting, and that numerous condemnations were prosecuted therefor and for easements for said lines, and that claims for removal of and injury to trees arose and reached the courts; that seepage from Lake Babcock damaged approximately 2,000 acres of land; that numerous suits were brought for such damage, and that suits were then pending against the defendant in the county in which a total of over $156,000 in damages was sought; from all of which affiants stated bias and prejudice existed against the defendant to such an extent that a fair and impartial jury trial could not be had in said county. In opposition to the motion, affidavits were presented to the effect that the seepage area was limited to about 1,000 acres; that the number of persons affected was comparatively few, that there had been little, if any, discussion about the seepage conditions, and that no bias or prejudice existed against the defendant.

"Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue." *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N. W. 431. While the verdict lends support to the showing made, considering only the affidavits submitted to the trial court, we are unable to detect any abuse of discretion in overruling the motion.

The plaintiff testified to the annual net income he had received from the rental of a portion of his farm over a period of years. The defendant urges that the admission of this evidence was erroneous. We do not agree. Evidence as to

the nature and productivity of the soil and crop yields measured in tons and bushels, or in net income from cash or crop rentals, when shown with reasonable certainty, may be admitted as elements to be considered in fixing the value of the leasehold. See *James Poultry Co. v. City of Nebraska City,* 136 Neb. 456, 286 N. W. 337.

It is also urged that there is a serious conflict between the evidence and the instructions on the question of damages. The court instructed the jury that if they found for the plaintiff they should allow him the difference, if any, between the reasonable market value of the whole farm, including improvements thereon, before the damage from seepage, if any occurred, and the reasonable market value of the farm, including improvements thereon, after the damage from seepage, if any occurred. The instruction is in harmony with the rule announced by this court in *Asche v. Loup River Public Power District,* 138 Neb. 890, 296 N. W. 439, when permanent damages are sought. Actually, however, there was no evidence on which to base the comparison required by the instruction, unless it be considered that the plaintiff's damages did not accrue until the time of suit.

Plaintiff's cause is based on the theory that there was a virtual taking of his bottom land by seepage water in the fall of 1937 and that this condition will continue without probable or prospective change. His testimony and that of his witnesses was to the effect that since said time this land has been too wet for the planting and harvesting of crops, and the whole evidence fairly shows, we think, that seepage reached its height, or nearly so, during that late fall, and continuously thereafter, except perhaps for a slight decrease and minor fluctuations, the general condition with respect thereto and its effect upon farming operations have remained practically constant.

In this state of the record, while it was proper in determining plaintiff's loss to present evidence as to the condition of the soil proximately caused by said seepage and all effects present and prospective that will necessarily result therefrom, it is our opinion that his damages, while perhaps not

all then perceptible, and his cause of action therefor accrued in the late fall of 1937, after which time he says he was unable to make a beneficial use of the seeped acreage. See *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237, 73 N. W. 540; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 70 N. W. 263; *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563, 104 N. W. 1144; *Meister v. Krotter*, 134 Neb. 293, 278 N. W. 483; *Irvine v. City of Oelwein*, 170 Ia. 653, 150 N. W. 674. In the latter case the court said: "The general rule is that where the nuisance is permanent, and the damages are to the land itself, and all parties intend that the nuisance shall be permanent, the cause of action arises when the land is first flooded."

The witnesses all testified to the value of the whole farm in the summer of 1937 immediately before the seepage and the value of the farm at the time of trial, which was more than two years later. Nowhere in the record do we find any evidence as to the value of the farm immediately after it was damaged from seepage. If, then, the jury based their verdict upon the evidence as to the difference in the value of said farm before seepage and at the time of trial, they did so in contravention of the instruction given. On the other hand, if they attempted to follow the instruction in making the comparison as to value, their verdict is without foundation in the evidence. This court has frequently held that an instruction not based upon the evidence, although correct as a legal proposition, is ground for reversal if it has a tendency to mislead the jury. *Esterly Harvesting Machine Co. v. Frolkey*, 34 Neb. 110, 51 N. W. 594.

Defendant in his answer alleged that plaintiff elected to treat the damages he sustained from seepage as temporary and settled with the defendant for the annual crops for the year 1937 for the sum of $1,558.07 and for 1938 for the sum of $1,005.90, and asked that the plaintiff's recovery be reduced accordingly. The trial court sustained a motion striking these allegations from the answer. Section 70-707, Comp. St. Supp. 1937, provides that any district organized under the provisions of the act shall be liable for all seepage

damage. The loss of crops growing upon the land in the summer of 1937 at the time said land was taken over by seepage was a part of plaintiff's damage for which he was entitled to be compensated, as well as for permanent damage to his land. *Fremont, E. & M. V. R. Co. v. Harlin, supra.* The court's action in sustaining plaintiff's motion to strike from the answer the allegations with reference to the settlement for crops destroyed in the field in 1937 was therefore proper. The action in sustaining the motion as to the allegations of settlement for crop loss for 1938 was, in our opinion, erroneous. Under the circumstances of this case, to permit the plaintiff to recover permanent damages to his land on the theory it had been taken over by seepage in the fall of 1937 and at the same time permit him to recover for the loss of the use of said land for subsequent years, or, in other words, for the loss of crops that the land would have produced but for the injury caused by the same seepage, would be to permit the recovery of double damages. The value of the use is an element to be considered in fixing the general damages and is included therein. The plaintiff having first treated his damages as temporary, collecting for the loss of use of said land, and later suing for permanent damages to his real estate basing his action therefor on the same acts and circumstances which caused the loss of crops for which he has collected, we think he should be called upon to account for the amount received for crop loss for 1938 and that the same should be credited on the recovery which he now seeks.

Plaintiff relies upon *Applegate v. Platte Valley Public Power and Irrigation District,* 136 Neb. 280, 285 N. W. 585, in support of the motion. The case is not in point. In that case the damages to crops accrued on leased land and the crop loss for the second year was also occasioned by a major break in the canal leading to the reservoir.

The defendant also attacks the verdict as being so excessive as to lead to the conclusion that it was the result of mistake, prejudice, or passion.

Plaintiff's brother-in-law testified that the value of the

farm before seepage was $180 an acre and that the value at the time of trial was $2,500. Four other witnesses, neighboring farmers, all of whom have claims against the district, fixed the value at $160 to $185 an acre before seepage and $1,000 to $2,500 at the time of trial. Other farmers from the county called as witnesses for the defendant placed the value before seepage at $100 an acre and one placed the value at the time of trial at $5,000, one at $60 an acre and one at $50 an acre. A real estate broker also fixed the value at $100 an acre before seepage, and another placed the value of the lower ground before seepage at $125 to $135 an acre and the upland at $75 an acre. The latter witness fixed the value of the entire farm at the time of trial at $85 an acre. Approximately one-third of the acreage of plaintiff's land was not affected by seepage and some of the witnesses thought the damage could be reduced by the construction of side laterals.

Ordinarily, 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. Nevertheless, "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 appearing in the record, will be set aside and a new trial awarded." *Collins v. Hughes & Riddle*, 134 Neb. 380, 278 N. W. 888. What basis for computation of damages the jury used we do not know. Whether they were confused by the difference in the instructions and the evidence as to the time when the comparison of value should be made or whether their verdict was the result of mistake, passion, or prejudice, or some means not appearing in the record, we are unable to determine. But after considering the record fully we are bound to conclude that in no event will the evidence fairly sustain the verdict returned. For the reasons set out in this opinion, the judgment is reversed and the cause remanded for new trial.

REVERSED.

IN RE ESTATE OF WILLIAM A. LINCH.
PERRY, VAN PELT & MARTI, APPELLEE, V. WILLIAM R. LINCH, SUCCESSOR-TRUSTEE, APPELLANT.

298 N. W. 697

FILED JUNE 13, 1941. No. 31110.

1. **Trusts.** "Where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration, the court of equity in which the suit was brought may order the successful litigant to be reimbursed his costs and expenses, including counsel fees, from the property of the trust or order those benefited to contribute proportionately toward that expense." *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N. W. 836.
2. ———. "Allowances for attorney's fees and expenses in such cases can only be made after the services have been rendered and a determination made that they were of direct and substantial benefit to other members of the class who are alleged to have benefited therefrom." *Blacker v. Kitchen Bros. Hotel Co., supra.*
3. **Appeal.** Where an appeal is taken from the rulings on objections to the final account of a trustee of a testamentary trust from the county to the district court and then to the supreme court, where the findings of the district court are approved and a final determination made of the debits and credits of the trust, with direction to the district court to remand the case to the county court for distribution of the funds as provided by law, the county court has jurisdiction thereof for the settlement of subsequent costs and expenses, including, upon application, the allowance of attorney's fees for the preservation of the assets of said trust.
4. **Attorney and Client.** "An attorney has a lien * * * upon money * * * in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Comp. St. 1929, sec. 7-108.
5. ———. The allowance of attorney's fees is sustained by the evidence.

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

C. Russell Mattson and *J. J. Thomas*, for appellant.

Perry, Van Pelt & Marti and *Arthur E. Perry, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from a decree of the district court for Lancaster county allowing appellees, the law firm of Perry, Van Pelt & Marti, the sum of $800 as a fee for their services in preserving the assets of the trust estate of William A. Linch, deceased, the same being entered against appellant William R. Linch, successor-trustee, and upon payment to be deducted from the amount owing by the trustee to the trust.

The facts in this case had their origin in objections filed by Clarence A. Linch, one of the beneficiaries of a trust created by William A. Linch, deceased, to the final report of William R. Linch, successor-trustee, filed therein in the county court of Lancaster county. This litigation was finally determined by this court in the case of *In re Estate of Linch,* 136 Neb. 705, 287 N. W. 88, wherein the facts are fully set forth, and by reason whereof $3,926.71 was restored and preserved to the assets of said trust. Mandate was issued therein on October 16, 1939, and on October 21, 1939, the appellees herein filed their notice of attorneys' lien in the county court, together with motion for the allowance thereof, being based upon the successful termination of the litigation *In re Estate of Linch, supra.* The county court disallowed the motion, and on appeal to the district court for Lancaster county a fee of $800 was allowed against the successor-trustee, and, upon payment, to be deducted from the amount owing to the trust by the trustee. Appellant contends the judgment of the district court is in error for the following reasons: (1) That the application for attorney's fees was not made in time; (2) that attorney's fees were not properly allowable; and (3) that the evidence does not sustain the amount of the allowance.

The appellant's first contention is that, since the appellees made no application for attorney's fee in either the district

court or supreme court in the original action, reported in *In re Estate of Linch, supra,* the application now made in the county court subsequent to the issuance of the mandate comes too late, and that the county court was therefore without jurisdiction for the purpose of making such allowance. Under sections 30-1801 to 30-1805, inclusive, Comp. St. Supp. 1939, the county court is vested with jurisdiction over trust estates, and as held in the case of *In re Estate of McLean,* 136 Neb. 353, 285 N. W. 915, "A county court * * * has full and complete equity powers as to all subjects within its exclusive original jurisdiction." Our court has stated in *Blacker v. Kitchen Bros. Hotel Co.,* 133 Neb. 66, 273 N. W. 836: "Allowances for attorney's fees and expenses in such cases can only be made after the services have been rendered and a determination made that they were of direct and substantial benefit to other members of the class who are alleged to have benefited therefrom," and, further, "The court of equity in which the suit was brought may order the successful litigant to be reimbursed his costs and expenses, including counsel fees." And as stated by this court in *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316: "When the county court has made a finding and order as to the heirs and the proportion of the estate to which each is entitled, and afterward there is an appeal to the district court from an order correcting the accounts of the administrator, the district court, after determining the debits and credits of the administrator, should remand the cause to the county court for settlement of subsequent costs and expenses and for final distribution."

Where, therefore, as in this case, an appeal is taken from rulings on objections to the final report of the trustee from the county court to the district court and then to the supreme court, where the findings of the district court are approved and a determination made of the debits and credits of the trustee, with directions to the district court to remand the cause to the county court for distribution of the funds as provided by law, the county court, in which the action was originally started, would thereupon have jurisdiction

for the settlement of subsequent costs and expenses, including, upon application, the allowance of attorney's fees for the preservation of the assets of said trust estate, and, in this case, where such application was made within five days after the issuance of said mandate, it was properly and timely made.

With reference to appellant's second contention: It is true that the general rule in this state is: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N. W. 1037. But no statute has been cited authorizing the allowance made in this case. However, this court has held: "Where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration, the court of equity in which the suit was brought may order the successful litigant to be reimbursed his costs and expenses, including counsel fees, from the property of the trust or order those benefited to contribute proportionately toward that expense." *Blacker v. Kitchen Bros. Hotel Co., supra.*

It appears from the evidence in this case that Clarence A. Linch, on objection to the final report of his successor-trustee, caused to be restored and preserved to the trust estate $3,926.71, of which $2,250.78 was to relieve the real property of said trust from a lien of the trustee for services, attorney's fees and other items of expense, and the balance, by order of this court, to be distributed as provided by law, thereby inuring to the benefit of all the beneficiaries, none of whom made any objection to the procedure, and all of whom received the benefit by reason of such litigation. Under these facts this case comes under the rule announced in *Blacker v. Kitchen Bros. Hotel Co., supra,*

and the court properly allowed the appellees an attorney's fee.

It is further contended by appellant that certain releases filed by the beneficiaries as of October 27, 1939, and October 31, 1939, in the county court of Lancaster county, released the right of appellees to any claim on their share of the trust estate, for the reason that they made no further claim thereto; however, it appears that such releases were filed subsequent to the attorneys' lien, and under our statute, section 7-108, Comp. St. 1929, "An attorney has a lien * * * upon money * * * in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Since such releases were filed subsequent to the notice of lien, they were of no effect as to such attorneys' lien.

With reference to appellant's contention that the evidence does not sustain the amount of the allowance: It appears that the original litigation was tried in the county court, district court and supreme court, and that as a result thereof $3,926.71 of the trust assets were restored and preserved for the trust. Under all of the facts disclosed by the record, the evidence amply sustains the amount of the allowance as fixed by the district court, and we find the same to be reasonable compensation for the services rendered.

In accordance with these findings, the judgment of the district court is

AFFIRMED.

PERRY B. DUNN, APPELLEE, V. OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, APPELLANT.
298 N. W. 741

FILED JUNE 20, 1941. No. 30957.

1. **Appeal.** Where it is claimed that an attorney is guilty of misconduct in arguing a case to the jury, and it is desired to raise that point for decision in the supreme court, it is necessary that objection be made to the trial court at the time, and an ad-

verse ruling had thereon, and the same be made a part of the record.

2. ———. One may not complain of misconduct of adverse counsel if, with knowledge of such misconduct, he does not object thereto and ask for a mistrial, but consents to take the chances of a favorable verdict.
3. Trial. The court is not required to give a proffered instruction upon a subordinate issue, or which unduly emphasizes a part of the evidence in the case.
4. ———. If an instruction is tendered which is not relevant to the issues, it should be refused, and it is immaterial that it states a correct principle of law.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Wear, Boland & Nye, contra.

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

PAINE, J.

In an action for personal injuries growing out of a collision between an automobile driven by the plaintiff and a street car operated by the defendant in the city of Omaha, a verdict of $5,000 was rendered for the plaintiff. Motion for new trial being overruled, defendant appealed.

In plaintiff's petition it is alleged that at 7:25 a. m., March 29, 1939, he was driving his automobile north on Thirty-second avenue in Omaha in a careful manner. He alleges that the entire east side of said avenue was torn up, being repaired by the Works Progress Administration, and was not open to traffic, so that the avenue was narrowed from its usual width; that snow had fallen and ice had frozen on the streets; that there were two street railway tracks in this avenue. He further alleges that he was going north on the east side of the traveled portion of the street, and that a street car and another automobile were going south; that, his progress being impeded, he stopped his automobile, but the motorman continued without slackening his speed, and without keeping a proper lookout; that when

the motorman saw, or in the exercise of ordinary care should have seen, the position of peril of the plaintiff, he did nothing to stop the car, but collided with plaintiff's automobile, damaging the same and causing the plaintiff to suffer serious injuries; that as a result plaintiff suffered a compound comminuted fracture of his left leg through the knee joint, and a wrenching and tearing of the ligaments and nerves in the right knee, severe laceration of his right forearm, and bruises and abrasions over his entire body, from which he lost a large amount of blood; that he was confined in Nicholas Senn Hospital for some days, and has been under the constant care and attention of physicians and surgeons since the date of the accident; that his automobile was completely demolished.

Defendant in its answer admits that it was running a south-bound Benson-Grover street car; that it had made a safety stop, and started across Creighton avenue, and was going south when the collision occurred; that the collision was the direct and proximate result of negligence of plaintiff, which was more than slight, in that he put on his brakes, so as to cause his car to skid directly into the street car, and in driving his car at a careless, negligent, and excessive rate of speed under the circumstances, causing it to move into the pathway of the street car, which was in plain view, and alleges that its motorman was not guilty of any negligence contributing to the cause of the accident.

In the motion for a new trial, the defendant sets out 58 errors which occurred in the trial, exception being taken to each of the 17 instructions given to the jury by the court on its own motion, and alleging that the court erred in rejecting each of the 32 instructions tendered by the defendant. It is also alleged as error that the verdict returned by the jury is grossly excessive and not sustained by sufficient evidence. All of these allegedly prejudicial errors set out by the defendant are presented under seven propositions of law in its brief.

Plaintiff testified that he was 35 years old, and ran the barber shop in the Wellington Hotel, having two men work-

ing for him; that on the morning of the accident he was driving to work in his Ford sedan, which had only been driven 17,000 miles; that while driving north on Thirty-second avenue, at about 25 miles an hour, with wet snow and slush on the pavement, he saw the street car coming towards him; that his car skidded on the street car rails, and went out of control, angling northwest, and finally came to a stop in this angling position, with about a foot and a half of the front end of it over the east rail of the south-bound track, in the path of the approaching street car, which was then 60 or 75 feet away. His motor was dead. The street car kept coming, and plaintiff honked his horn half a dozen times, but the street car did not slow up, and crashed into him while his car was standing still. The evidence further shows that the motorman did not sound his gong; that the street car did not stop before the collision.

The motorman testified that he could have stopped his car in three or four feet at that speed, and the left side of the front bumper on the street car struck the right front side of the Ford, crushing in the front of the Ford. Several witnesses testified in support of plaintiff's explanation of how the collision occurred.

On the other hand, the defendant's theory is that the plaintiff was driving his car north on the north-bound tracks, intending to pass the south-bound street car on the east side, and driving at 25 miles an hour, and in some manner got his right rear wheel over the east rail of the north-bound track down onto the concrete base, where the paving bricks had been removed, when he was within 25 feet of the street car, and in an effort to pull that wheel back his car skidded, and he got the front end of his car over into the south-bound track, and the impact occurred when both were in motion. Certain witnesses of the defendant company support this explanation of how the collision occurred.

If one of these explanations of the collision was true, the other must be false, as the evidence cannot be reconciled in any way whatever. The evidence of all these witnesses, and the arguments in support of each theory, were sub-

mitted to the jury, and the jury, being the judge of the credibility of all of the witnesses, must have accepted practically *in toto* the plaintiff's explanation of how the accident happened.

The jury would be warranted in reaching this conclusion if they believed the evidence given by the plaintiff and his witnesses. To arrive at this conclusion, the jury must have entirely rejected the theory of the defense that the automobile was moving at a good rate of speed and crashed into the street car while it was moving at an average speed.

The jury were clearly instructed by the court in instruction No. 2 that "The defendant alleges that the collision in question was the direct and proximate result of the negligence of the plaintiff which was more than slight in the following particulars:

"(a) That the plaintiff carelessly and negligently put on his brakes so as to cause his car to skid around and to skid directly into the defendant's street car.

"(b) In carelessly and negligently operating its car so as to turn it towards the north and west, and bring it into contact with defendant's car.

"(c) In carelessly and negligently driving said automobile at an excessive rate of speed under the circumstances.

"(d) In carelessly and negligently failing to avoid a collision.

"(e) In carelessly and negligently driving his (automobile) so as to cause it to move into the pathway of defendant's oncoming car, which was in plain view."

The jury, having these various acts of negligence charged against the plaintiff set before them in detail and at length, must have rejected the defendant's theory of the case.

The first proposition of law set out by the defendant is that, where the verdict of the jury is clearly against the weight of the evidence, this court must find that it was arrived at through passion, prejudice, or mistake, and grant a new trial. In our opinion, the verdict is not against the weight or reasonableness of the evidence viewed as a whole.

"In a law action, a verdict of a jury based on conflicting

evidence will not be disturbed unless clearly wrong." *Porterfield v. Buffalo County Public Power District*, 138 Neb. 720, 295 N. W. 379. See, also, *Parkert v. Department of Public Works*, 131 Neb. 346, 267 N. W. 925; *Tidd v. Stull*, 128 Neb. 506, 259 N. W. 369; *Kraemer v. New York Life Ins. Co.*, 134 Neb. 445, 278 N. W. 886.

"Disputed questions of fact, as well as the credibility of witnesses, are for the determination of the jury; and a verdict will not be disturbed on the ground that it is not supported by the evidence, where there is sufficient competent evidence to sustain it." *Utilities Ins. Co. v. Stuart*, 134 Neb. 413, 278 N. W. 827.

The defendant, for its second proposition of law, claims that its street car was in motion, and that when the oncoming automobile was 25 feet away from the street car it slipped or skidded so as to come in contact with the moving street car, the automobile at all times being in motion, and insists that the defendant was entitled to an instruction that, if the evidence disclosed that the plaintiff's automobile was in motion at the time of the collision, the verdict should be for the defendant. A sufficient answer to this is found in instruction No. 12, as given by the court, which reads as follows: "You are instructed that if you believe from the evidence that the plaintiff's automobile slid from the pavement onto the concrete base to the east of the east rail and that plaintiff either swerved back towards the west or his wheels caught, forcing his car back towards the west, and that immediately thereafter the automobile ran into the street car, the automobile at all times being in motion without affording the operator of defendant's street car a sufficient opportunity, in the exercise of ordinary care, to avoid a collision, then your verdict should be for the defendant."

The third proposition of law of the defendant is that a party to an action is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory, and it is supported by competent evidence. It is our conclusion that the court very clearly and

repeatedly, in various forms, presented the defendant's theory of the case, and instructed the jury, in instructions Nos. 4, 5, 6 and 12, that if the evidence supported that theory their verdict should be for the defendant.

The fourth proposition of law, relating to plaintiff's automobile being in motion, has already been covered.

The fifth proposition of law charges that it is highly improper for counsel in a trial to make remarks within the hearing of the jury, either in the argument or in the trial of the case, which tend to create a prejudice against the other party. From reading the bill of exceptions and the remarks of counsel found therein, both in making objections and otherwise, it is our opinion that two experienced trial lawyers did everything allowed in the trial of a case to win a verdict for their clients, and that one was deserving of rebuke no more than the other.

Another assignment of error charges that the rights of the defendant were prejudiced by misconduct of counsel for plaintiff in reference to the witness Herbert F. Johnson.

Exhibit No. 18, attached to the bill of exceptions, is the affidavit of G. L. DeLacy, attorney for the defendant, the street railway company. A portion of this affidavit reads as follows: "Affiant further says that during the progress of the trial, after a certain witness for the defendant had testified, and after he had left the stand, Mr. Porter, of the Claim Department of the Street Railway Company, who sat with your affiant during the trial, stepped out into the hall and paid the witness a witness fee, plus lost time, or a total of $6. That said witness was called late in the afternoon, and that he had been available all day and had been required to be away from his employment, for which he was paid the sum of $4.12 per day. That plaintiff's attorney sent his associate, Mr. McCormack, out into the hall, and brought the witness back, whereupon Mr. Boland asked leave to interrupt the testimony of the witness then on the stand, and placed the first mentioned witness on the stand and asked him if Mr. Porter gave him some money out in the hall. The witness stated that he did. Mr. Boland

then asked him the amount, and the witness stated $6. * * * That the effect of such statements and the effect of Mr. Boland recalling to the witness-stand the witness who had been paid the $6, was prejudicial to the rights of the defendant and prejudiced the defendant in the verdict of the jury, and that it was done for that purpose and that it accomplished its purpose."

Turning to the bill of exceptions, we find that Herbert F. Johnson, a W. P. A. laborer, was a passenger on the street car, and was excused, and recalled for further cross-examination. "By Mr. Boland: Q. Mr. Porter has just given you some money, hasn't he, that man that followed you out into the hall? A. Yes, he did. Q. How much did he give you? A. $6. By Mr. DeLacy: Q. That's the time you lost, isn't it? A. That's right. Q. And he told you when you came over here that he would pay your witness fee and the time you lost? A. Yes, he did. Q. And you came to my office this morning and you have lost the whole day? A. Yes; I lost eight hours today coming down here. Q. And you told him that was what your time was? A. That's right. By Mr. Boland: Q. How much do you get a day? A. $.53 an hour, $4.24. The witness excused."

Not a single objection was made by attorney for defendant, and the jury had all the facts presented to them, and we see no prejudicial error in this examination.

In the same affidavit of Mr. DeLacy, filed with the court during the argument on the motion for a new trial: "Affiant further states that when Mr. Boland was making his closing argument to the jury, he stated that he had been watching Mr. Porter do this and stated that he was going to put a stop to this practice." The bill of exceptions discloses no objection made at the time.

"Where it is claimed that an attorney is guilty of misconduct in arguing a case to a jury, and it is desired to raise a question on that point for decision in the supreme court, it is necessary that objection be made to the trial court *at the time*, and an adverse ruling had thereon, and that the same be made a part of the record by a proper bill of

exceptions." *Thornton v. Davis,* 113 Neb. 529, 204 N. W. 69.

" 'One may not complain of misconduct of adverse counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict.' *Triplett v. Lundeen,* 132 Neb. 434, 272 N. W. 307." Long v. Crystal Refrigerator Co., 134 Neb. 44, 277 N. W. 830.

In this case it is clear that the first objection made to this remark is made in an affidavit filed at the time of the argument on the motion for new trial. No opportunity was given to the court to rule thereon, or to caution the jury, if necessary. In our opinion this objection comes too late.

The same matter is presented to the court in instruction No. 6, requested by counsel for defendant, and refused by the court, which instruction reads as follows: "You are instructed that during the course of the trial when a defendant's witness left the stand, he was recalled and testified that he was paid the sum of Six Dollars and testified that this covered his witness fee and loss of time. Now you are instructed that it was perfectly proper for the defendant when calling a witness to agree to pay or to pay a witness fee and any time lost by the witness or expense incurred by the witness."

This court said in *Rising v. Nash,* 48 Neb. 597, 67 N. W. 460: "An instruction which gives undue prominence to subordinate elements of the issues and is calculated to mislead the jury, is erroneous and its giving may call for a reversal of the judgment."

It has been held that, if an instruction directs attention to, and unduly emphasizes, a part of the evidence in the case, it is properly refused. *City of South Omaha v. Wrzesinski,* 66 Neb. 790, 92 N. W. 1045; 13 Standard Ency. of Procedure, 792.

"It is no part of the duty or province of the court to give instructions which are in the nature of argument rather than declarations of established rules of law, or which are arguments for or against a theory rather than submissions

of questions of fact." 13 Standard Ency. of Procedure, 797.

"It is a general rule that the instructions should not broaden the issues made by the pleadings or present issues not raised thereby, and if a charge is requested which is not relevant to an issue in the case, it should be refused, and it is immaterial that it states a correct principle of law." 1 Blashfield, Instructions to Juries (2d ed.) 177, sec. 79.

In our opinion, it was not prejudicial error for the trial court to refuse to give the instruction relating to the payment of a witness fee.

The sixth proposition of law assigned for reversal is that the verdict was so excessive as to indicate passion and prejudice on the part of the jury.

Taking the plaintiff's evidence as to injuries, it is proved that the collision resulted in a laceration of plaintiff's right arm, which was properly sutured, and which has caused no permanent disability. He also suffered a plateau fracture of both the tibia and fibula in the knee joint. He was completely immobilized and kept in a cast for more than two months, then walked on crutches and used a cane for some seven weeks.

The testimony of Drs. Sucha and Iverson established without contradiction that, while a good result had been obtained, the leg would cause disability and pain for a period of approximately 15 months from the date of the accident. The plaintiff is a barber, and he necessarily must stand on his feet in order to earn his living. The pain and suffering were intense.

The plaintiff testified that his own earnings and those of his two men—for he ran a three-man barber shop in the Wellington Hotel—were between $50 and $55 a week, and that in the five and a half months he only received $90, which would make an actual loss of around $1,000. His car was worth $575 before it was wrecked, and he traded it in for $185, a loss of $390. His hospital bill was $68.05. The combined bill of Dr. Sucha and Dr. Iverson is $300, which makes his money loss some $1,758.05.

The plaintiff will require several months further convalescence, was the testimony at the trial, and the leg muscles one inch above and one inch below the knee have shriveled, probably from lack of use. For these damages the jury returned a verdict against the defendant street car company in the amount of $5,000.

In conclusion, it is the opinion of this court that the verdict of the jury in the case at bar was not excessive in view of the evidence, and does not appear to have been influenced by passion or prejudice. The judgment will be affirmed as rendered.

AFFIRMED.

JEPPE J. REFSHAUGE, SUCCESSOR-TRUSTEE, APPELLANT, V. SESOSTRIS TEMPLE ANCIENT ARABIC ORDER NOBLES OF THE MYSTIC SHRINE: FIRST TRUST COMPANY OF LINCOLN, APPELLEE.

298 N. W. 755

FILED JUNE 20, 1941. No. 31091.

1. **Mortgages.** Trustee's powers are such as "(a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." Restatement, Trusts, 475, sec. 186.
2. ———. Where a written agreement, first mortgage and bonds contain all of the terms of a trust and define duties of the trustee therein, the rights of the mortgagor and of the bondholders in specific, clear and unmistakable language, the duties and rights of the trustee are not defined by a fiduciary relationship, but exclusively by the trust agreement.
3. ———. Where a trust agreement provides that the mortgagor shall have the right to have and to use all moneys and income of the mortgaged property in such manner as the mortgagor may deem best, and the mortgagor, in exercising the right, pays certain moneys to the trustee, specifying the allocation of the moneys on the first mortgage and on a second, or commission, mortgage, held by the trustee, and there is no default in the trust agreement at the time; *held* the trustee did not violate the trust agreement by accepting such money and applying it on the second mortgage under the direction of the mortgagor.

4. ———. Where bonds are issued, secured by a first mortgage on all the property of the mortgagor, and prospective investors are apprised thereof, but are not apprised of a second mortgage, constituting a commission mortgage, on the same property; *held* not to constitute a concealment, evasion or misrepresentation on the part of the trustee, depriving the *cestui que trust* of material information relative to the subject-matter of the trust, to his injury, the bondholders having obtained a prior right in the trust *res* to the exclusion of the second mortgage.

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

T. F. A. Williams, for appellant.

Hall, Cline & Williams, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and ELLIS, District Judges.

MESSMORE, J.

This is an action by a successor-trustee to foreclose a real estate mortgage and to require an accounting by the original trustee. This appeal involves only the accounting. The trial court found against the successor-trustee, who appeals to this court.

In February, 1938, the successor-trustee filed an action to foreclose a first mortgage in the sum of $200,000. The First Trust Company, a party defendant, answered and cross-petitioned, praying foreclosure of a second mortgage in the amount of $18,437.50, and to recover for certain advancements made for insurance premiums, in compliance with the terms of the first mortgage, and for fixing drainage. The second mortgage was given as security for a commission note, payable in instalments, with the provision that in case of redemption of any of the first mortgage bonds the instalments in the commission note would be reduced proportionately. The instalments represented an annual charge of 1 per cent. of the bonds to be outstanding. The first and second mortgages were filed of record on the same day, October 2, 1928. The reply was a general denial, and set forth the terms of the first mortgage agreement, the execu-

tion and terms of the second mortgage as a commission mortgage, and the maturity dates of the mortgages; also the history of the transaction, which will be covered in the opinion as occasion requires. A decree of foreclosure was entered on the first mortgage, sale had and confirmed. The First Trust Company realized nothing on the second mortgage. The record discloses:

Ancient Arabic Order Nobles of the Mystic Shrine, referred to as Sesostris Temple, a corporation, designated as the parent organization of the Shrine Building Association, was incorporated February 28, 1927, for the purpose of receiving, investing and expending donations, contributions and subscriptions of money and other property of every kind, securing real estate, improving the same for the use of the Nobles of Sesostris Temple, and for the purpose of owning, constructing and furnishing a club house and recreation grounds. Pursuant to such purposes, the Shrine Building Association purchased and received title to 320 acres of land, recording the deed thereto March 2, 1927. On October 1, 1928, in furtherance of the purposes for which it had been created and incorporated, the Shrine Building Association borrowed $200,000 from the First Trust Company, executed and delivered to it, as trustee, 218 first mortgage bonds of the Shrine Building Association, and further conveyed by mortgage to the First Trust Company the real estate heretofore referred to.

The first mortgage or trust deed, by its terms, named the First Trust Company as trustee. The trust company, as such, sold bonds to various investors. To accelerate the sale, a prospectus was sent out to prospective purchasers, setting forth the bond issue, secured by a closed first mortgage on land owned by the Shrine Building Association and constituting a direct obligation of such corporation. The prospectus further contained a description of the buildings and improvements under construction, and represented the value of the entire project in the amount of $400,000. The prospectus further showed the Shrine Building Association as the holding company for Sesostris Temple, stating: "It

is supported by the initiation fees and annual dues of 2,500 members of this Temple." In the capacity of trustee, the First Trust Company received from the Shrine Building Association the following amounts: $4,000 applied on the principal of the bonds; $2,000 paid December 20, 1930; $2,000 paid April 30, 1931. In addition, the trustee collected from the Shrine Building Association a further aggregate sum of $6,000—$1,000 on each of the following dates: April 1, 1929, October 3, 1929, April 1, 1930, October 9, 1930, May 23, 1931, and April 1, 1932,—all applied on the principal of the second mortgage.

The record further shows that one Charles Stuart was president of the Shrine Building Association at the time of the giving of the first and second mortgages, and was also a director in the First Trust Company, and one of a board vested with the control of the business affairs of such trust corporation in which he owned 10 per cent. of the total stock. He most frequently specified the allocation payments made and was the principal contact man of the building association and the trust corporation during the period of the trusteeship. By reason of his offices, he formulated the entire transaction as between the Shrine Building Association and the First Trust Company. December 28, 1937, the First Trust Company resigned as trustee, and the successor-trustee was appointed.

The district court on July 5, 1940, entered a decree finding in favor of the cross-petitioner, the First Trust Company, and against the successor-trustee; that the moneys paid to the First Trust Company to be applied, and which were applied, on the second mortgage held by the trust company "were not paid from the income or profit from, or from the property mortgaged to secure the bondholders represented by the plaintiff; that said sums so paid were applied as directed by the persons paying the same; and that neither the plaintiff nor any of the bondholders had any right or lien thereon; and the claim of plaintiff against the First Trust Company of Lincoln, Nebraska, should be and hereby is dismissed." The court likewise found in favor of the

First Trust Company on the advancements made by it for insurance premiums and for fixing drainage. From this finding and judgment no *bona fide* contest exists. The trust agreement specifically provides for payment of such items and their priority.

The principal assignment of error relied on is that the findings and judgment of the trial court are contrary to the evidence and the law. The appellee, therefore, presents the question of whether or not the First Trust Company, as trustee, is required to account to the successor-trustee for $5,970, collected by it during the period of its trusteeship and credited to the part of its own second note and mortgage owing it from the Shrine Building Association and secured by the same property which secures the first mortgage.

This brings us to a consideration of the trust agreement between the Shrine Building Association and the First Trust Company, trustee, which agreement sets forth the first mortgage deed and the bonds, all of which constitute the trust agreement, reading in part as follows:

The First Trust Company "To have and to hold the premises, property, rights, interests, estates, easements, franchises and appurtenances hereby conveyed * * * together with all net revenues, incomes, issues, and profits arising therefrom or appertaining thereto unto the First Trust Company of Lincoln, Nebraska, its successors and assigns forever, but in trust, nevertheless, for the equal *pro rata* benefit and security of each and every one of the persons who may be or become the holders of the herein described bonds and coupons, issued under and secured by this agreement. * * *

"This agreement is made to secure payment of the sum of Two Hundred Thousand Dollars ($200,000) and interest, as evidenced by and payable according to the terms of the negotiable coupon bonds." The form of the bond is set out and constitutes a part of the trust.

The bonds are in specified denominations and contain, in brief, the following: A promise to pay at the office of the Lincoln Trust Company or the First Trust Company the

amount of the particular bond and interest, when payable; that the bond is equally secured by a first mortgage; and, in default, the manner in which the bond may become due; the right of the maker to redeem, and that the trustee has the right to receive the money and determine by lots the bonds to be redeemed. The instrument further pledges the Shrine Building Association to promptly pay the bond and interest when the same shall become due. The Shrine Building Association covenants that it will warrant and defend the property of said bond under the trust estate, its successors and assigns, and the association agrees to pay, during the existence of the agreement, all taxes and assessments levied, and to reimburse the trustee for taxes and insurance premiums paid by the trustee. The instrument provides for repairs to be made and the trustee's duty with reference to applying insurance moneys for rentals and repairs; provides that the Shrine Building Association may redeem any bond before maturity, and specifies the requirements in such respect; provides: "Until default shall be made by first party (Shrine Building Association) in the payment of principal or interest upon the bonds issued thereunder, or any of them, or some part thereof, or until default shall be made by them in respect to some other act or thing herein set forth to be done or to be performed by it, first party shall be entitled to possess, manage, operate, use and enjoy their property herebefore described (the property evidencing the real estate and improvements) and to receive, take, and use the rents, income and profits thereof."

The instrument further states: The trustee accepts the trust and agrees to execute the same under the terms as set out under the agreement. "The trustee shall be reimbursed for all moneys which may be advanced for taxes or insurance, together with interest thereon," and shall have a lien on the trust estate prior to the rights of the bondholders for such moneys advanced. "The trustee shall be reimbursed for all proper outlays of every sort or nature by it incurred in the acceptance and discharge of the trust hereunder, and shall receive a reasonable compensation for any duties that it

may at any time perform in the discharge of the same." The trustee is not "responsible for the execution or validity of the lien hereof, nor for the payment of the bonds issued hereunder," and may, itself, become owner of bonds, with the same rights and privileges that it would have if it were not the trustee.

The contention of the appellant is that the First Trust Company, as trustee, had, at all times, an interest adverse to the bondholders and in conflict therewith; that the commission mortgage, held by the First Trust Company, was concealed from prospective purchasers of the bonds and was not set forth in the prospectus; citing in support of his contention *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333, wherein it was held: "Where it appears that a trustee has practiced concealment, evasion or misrepresentation, thereby depriving the *cestui que trust* of material information relative to the suject-matter of the trust to his injury, the trustee, together with the persons participating in the wrong, may be required to respond in damages." Several supporting authorities are likewise cited.

Appellant further contends: In the case at bar all of the duties and obligations imposed by law and the courts upon fiduciaries are imported into and become vital parts of the contract here involved, under which the trust arises. Appellant's position is best reflected by the following:

"(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

"(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know." Restatement, Trusts, 431, sec. 170.

Commenting on the foregoing, it is said on page 406, sec. 164, under "h": "Many of the duties of the trustee to the beneficiary are imposed by the terms of the trust, either in words or by other manifestations of the settlor's intent. Some of the duties of the trustee, however, may not be imposed by the terms of the trust, but may arise from the

nature of the relationship. Thus, the existence and extent of the trustee's duty of loyalty to the beneficiary (see sec. 170)."

And, in keeping with such contention, the case of *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 139 N. W. 839, is cited, wherein the court said (p. 77): "Courts of equity do not set bounds to the principles which control the conduct and fix the accountability of trustees. The elasticity of these rules extends their applicability to all of the devices invented by unfaithful fiduciaries to evade their obligations or to defeat the imperative demands of business integrity and sound public policy."

The soundness of the above authority is unquestioned under proper circumstances, but it is not applicable to the situation here presented. The written instrument constituting the trust, in the instant case, specifically set forth the duties of the trustee, the rights of the bondholders, and the rights of the mortgagor, the Shrine Building Association, in clear and unmistakable language. Under such circumstances, the following rules of law apply:

Trustee's powers are such as "(a) are conferred upon him in specific words by the terms of the trust, or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust." Restatement, Trusts, 475, sec. 186.

The court in *Hazzard v. Chase Nat. Bank*, 159 Misc. 57, 287 N. Y. Supp. 541, said (p. 84): "The trustee under a corporate indenture, on the other hand, has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His status is more that of a stakeholder than one of a trustee." The nature and extent of the duties of the trustee are to be ascertained primarily from the mortgage, rather than from the general law governing trust relationships. So long as the trustee does not step beyond the provisions of the instrument creating the trust and expressly setting forth the duties of the trustee thereunder, and where the terms of the trust agreement are clear, as in the instant case, the agreement,—the first mort-

gage and the bonds,—no obligation or duties in conflict with the express provisions thereof will be implied. See *Hazzard v. Chase Nat. Bank, supra.*

In *Green v. Title Guarantee & Trust Co.*, 227 N. Y. Supp. 252 (223 App. Div. 12) the court held: "Duties which trustee owed to bondholders were fixed by the mortgage provisions, and trustee could not be held liable to bondholders for failure to perform a duty, unless it had agreed to perform it."

The First Trust Company had no interest in the mortgage pledged to the payment of the first mortgage bonds, no interest in the trust *res*, but merely a fiduciary interest against the common debtor.

In *Donnelly v. Consolidated Investment Trust*, 99 Fed. (2d) 185, the court held: "The disability of a trustee against holding an interest in conflict with a trust which he has undertaken is against profiting personally at the expense of his trust."

The trustee's duties and obligations in the case at bar were defined in the contract,—the first mortgage and the bonds. The payments made by the Shrine Building Association were made when no outstanding amounts were due under the first mortgage. There was no default, on the part of the Shrine Building Association, of any of the provisions of the first mortgage agreement or the bonds, at the time the payments were made. The association, under the first mortgage agreement, had the right to the income of the mortgaged property from every source, and the further right to use such income in any manner that it deemed best. In the exercise of such right, the Shrine Building Association made the payments as shown in the opinion.

The written instrument, creating the trust and setting forth the respective rights and duties of the trustee, the mortgagor and the bondholders, is specific and in express and unmistakable language, and admits of the interpretation placed upon it by the trial court.

Other questions raised need not be determined.

AFFIRMED.

IN RE ESTATE OF LEWIS A. PFOST.
HUGH PFOST, APPELLEE, V. LOTTIE PFOST ET AL., APPELLEES: LEE FOSS ET AL., APPELLANTS.

298 N. W. 739

FILED JUNE 20, 1941. No. 31123.

1. Wills. "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." *Martens v. Sachs*, 138 Neb. 678, 294 N. W. 426.
2. ———. "'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." *Martens v. Sachs, supra.*
3. ———. Where in a will there is a patent ambiguity resulting from the use of words, and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning.

APPEAL from the district court for HAMILTON county: HARRY D. LANDIS, JUDGE. *Affirmed.*

Craft, Edgerton & Fraizer, Dallas S. Gibson and *Charles F. Adams*, for appellants.

Dryden, Dryden & Jensen, J. F. McCarthy and *William F. Spikes, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

YEAGER, J.

This action is by the executor for the construction of a certain provision of the last will and testament of Lewis A. Pfost, deceased. The provision in question is as follows:

"I give and devise to my Executors and their successors in trust the sum of Twelve Thousand ($12,000) Dollars, to be paid out of the personal property belonging to my estate, to be invested and kept invested by said Executor or his successor in trust in some safe investment during the lifetime of my said wife Lottie Pfost, all the interest or income

from said Twelve Thousand ($12,000) Dollar trust fund to be collected by my Executor or his successor in trust and turned over to my said wife Lottie Pfost, as long as she shall live for her care, support and maintenance or to do with as she may see fit and upon the death of my wife Lottie Pfost, said trust fund of Twelve Thousand ($12,000) Dollars shall pass and go to and by said Executor or his successor in trust be divided equally, in equal shares, share and share alike between my son Hugh Pfost, and my twelve (12) grandchildren, said grandchildren being the eight (8) children of my daughter Iva L. Foss, and the four (4) children of my son Hugh Pfost."

The sole question here is to determine whether the testator intended that on the distribution of the trust fund set up in the will it should be divided into thirteen equal parts, or if he intended that it should be divided into two equal parts with one going to Hugh Pfost and the other going, share and share alike, to the twelve grandchildren. The trial court concluded that the latter represented the intention of the testator and entered its judgment accordingly. From this judgment the action comes to this court for review.

In our approach to a determination of this question, we have in mind the following rules applicable in the construction of wills:

"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." *Martens v. Sachs,* 138 Neb. 678, 294 N. W. 426.

" '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." *Martens v. Sachs, supra.*

The controversy centers around the interpretation to be placed upon the preposition "between" used in the quoted portion of the will. It is the contention of the appellants that when "between" is weighed and considered with the

preceding words, "be divided equally, in equal shares, share and share alike" it becomes clear that the testator intended a division into thirteen equal parts, or that the division should be "among" the son and the twelve grandchildren. Appellee contends that "between" must be accepted in its literal grammatical sense, and that this was the interpretation intended by the testator. He contends that the testator intended a division between an individual and a class.

The determination here must be made to depend upon what is found within the four corners of the will itself. That there is an ambiguity can hardly be questioned, but it is patent and not latent. This being true, parol evidence is not admissible to determine the intent of the testator.

There is but one thing observable in the will, independent of the language employed, which has a possibility of throwing light directly or inferentially on the purpose or intent of the testator. It is that Hugh Pfost appears to have been favored by the testator, since his only other child, Iva L. Foss, a daughter, was to receive but $5, while Hugh Pfost was to receive the residuary of the estate in addition to a division of the $12,000 trust. The entire estate was of the approximate value of $42,000. It was stated in the will that Iva L. Foss had previously been given or advanced $14,000. From this it is apparent that substantial equality in the ultimate division of the estate between the two children of the testator was not intended.

Many authorities are cited in the briefs on the question of the use of "between" when in fact "among" was intended, but from none of them do we obtain any benefit or enlightenment in the present situation. There is nothing in law or in fact from which we can determine, without question, the intention of the testator.

The only resort then is to examine what is found in the will and construe it according to its tenor and give to the word "between" its generally accepted literal and grammatical meaning. In doing so it becomes necessary to hold that the testator intended that Hugh Pfost should have, on distribution, one-half of the trust fund in question, and

that the twelve grandchildren should participate equally in the other half.

The construction of the last will and testament of Lewis A. Pfost, deceased, made by the district court is correct and its judgment is

AFFIRMED.

DONALD D. PRICE, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
298 N. W. 746

FILED JUNE 20, 1941. No. 31150.

1. **Master and Servant.** Under a contract for hire terminated by mutual agreement, where such contract is superseded by another between the same parties, payment of salary under the first contract becomes immediately due and payable.
2. **Contracts.** A contract complete in itself will be presumed to supersede another one made prior thereto in relation to the same subject-matter and between the same parties.
3. **Limitation of Actions.** Voluntary part payment of an existing debt arising upon contract will toll the statute of limitations.
4. ———. *Held*, that the payment by voucher dated March 30, 1935, was a voluntary payment of salary earned by plaintiff under oral contract of November 8, 1933; that this payment tolled the statute of limitations, and that plaintiff had four years from March 30, 1935, within which to institute his action for recovery of the balance of salary.

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

Beeler, Crosby & Baskins, for appellant.

E. H. Evans and *Urban Simon, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

YEAGER, J.

This is an action by Donald D. Price, plaintiff and appellee, against the Platte Valley Public Power and Irrigation

District, a corporation, defendant and appellant, instituted for the purpose of recovering salary in the amount of $1,506.97, claimed to be owing plaintiff by the defendant under an oral contract entered into on November 8, 1933. The defense is the statute of limitations.

The case was tried to a jury. At the conclusion of plaintiff's testimony the defendant moved the court to direct the jury to return a verdict in its favor, or to discharge the jury and dismiss the action. The motion was overruled. The defendant thereupon rested its case and renewed its motion. This motion was likewise overruled. The plaintiff then moved for directed verdict in his favor. The court then discharged the jury and required argument and submission of the case to the court. On November 14, 1940, judgment was rendered in favor of plaintiff as prayed for in the amount of $1,506.97 and interest in the sum of $237.31. From this judgment the defendant has appealed.

Although the assignments of error are numerous, the only question for determination is as to whether or not, as against the defense of the statute of limitations, the plaintiff has by his evidence shown a right of recovery.

There is no substantial dispute as to the facts. On November 8, 1933, the plaintiff and defendant corporation entered into an oral contract pursuant to authority of the board of directors of the defendant, whereby plaintiff was employed as chief engineer of the defendant corporation at a salary of $9,000 per annum. Plaintiff immediately entered upon his employment and so continued to April 27, 1934, when the oral contract was rescinded and mutually abandoned by the parties, and a written contract entered into whereby plaintiff became chief engineer and general manager for defendant at a salary of $12,000 a year, payable monthly. On May 11, 1934, another written contract was entered into wherein the annual salary was reduced to $10,000 per annum. This last contract was approved by the board of directors on June 9, 1934, and since its consummation was dependent on Public Works Administration funds, it was approved by that administration on June 12,

1934. During all of this time plaintiff performed the duties required of him under his contract or contracts.

Funds did not become available for payment of salary until July, 1934. On July 17, 1934, the defendant sent three salary vouchers for salary of plaintiff to the Public Works Administration for approval. The first was for $1,506.97 for the period from November 8, 1933, to January 8, 1934, at the oral contract rate of $9,000 a year. The second was for $3,055.53 for the period from January 9, 1934, to May 10, 1934, also at the oral contract rate of $9,000 a year. The third was for $1,388.88 for the period from May 11, 1934, to June 30, 1934, at the written contract rate of $10,000 a year. The third voucher was approved, returned, delivered to plaintiff and paid. The first was never approved. Whether or not it was immediately returned to the defendant by the Public Works Administration is not certain. It is certain that the voucher was never delivered to plaintiff. The second voucher was never paid. However, a new one for $3,364.19, covering the same period, and apparently at the rate of $10,000 a year, was issued on March 30, 1935, which was paid. On November 1, 1937, the Public Works Administration specifically refused to allow the first one, or the one for $1,506.97, and on March 12, 1938, the board of directors of the defendant canceled the item as a salary claim on its records, where it had been carried since its issuance, and ordered a transfer of the amount to the construction funds. At no time up to the date of the commencement of this action was there ever a promise, either oral or in writing, to pay the plaintiff, except as outlined in the contracts and indicated by the instruments of payment as set out herein. This action was begun by the filing of petition on September 28, 1938, with due service of process on the same day.

Clearly under the pleadings and the evidence the action here is controlled by the limitations contained in section 20-206, Comp. St. 1929, as follows: "Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty."

If plaintiff is entitled to recover at all, it is by virtue of his oral contract entered into on November 8, 1933.

As has already been pointed out, the defense is the statute of limitations, and exhaustive argument is found in the briefs on the question of when the statute began to run against the claim of the plaintiff. In the view we take of the record, the major portion of it has no bearing on the questions presented. In the light of the record, it appears that the oral contract at a salary simply of $9,000 a year was entire, and without provision for monthly payments as contended by plaintiff. It was terminated by mutual action of the parties at least tentatively on April 27, 1934, when the first written contract was entered into, and finally on June 9, 1934, when the second written contract was approved by the board of directors of the defendant and without any contention then or now that plaintiff was not entitled to pay *pro tanto* on the first contract. Since the oral contract was not dependent upon any contingencies pertaining to work or payment of salaries, when the contract was terminated in the manner it was terminated plaintiff became entitled to payment of salary earned. The applicable rule in such circumstances is that a contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter. *Housekeeper Publishing Co. v. Swift,* 97 Fed. 290. Numerous other cases are collected in 17 C. J. S. 886, sec. 395, note 7.

The statute of limitations began to run against the claim at the earliest on April 27, 1934, and at the latest on June 9, 1934. In the light of subsequent events, it does not become necessary to select either the one or the other date, although one or the other must be settled upon unless something occurred to toll the statute. The statute clearly was tolled by part payment made by the voucher issued on March 30, 1935. This payment was clearly voluntary on the part of the defendant, and without question voluntary part payment of an existing debt arising upon contract will toll the statute of limitations. Comp. St. 1929, sec. 20-216; *Rolfe v. Pilloud,* 16 Neb. 21, 19 N. W. 615, 970; *Nelson v. Becker,*

32 Neb. 99, 48 N. W. 962; *Ebersole v. Omaha Nat. Bank*, 71 Neb. 778, 99 N. W. 664; *Blair v. Estate of Willman*, 105 Neb. 735, 181 N. W. 615; *Kienke v. Hudson*, 126 Neb. 551, 253 N. W. 687.

It is urged that this cannot be considered as part payment on the total salary earned under the oral contract, since, first, the amount of this voucher was computed on the basis of $10,000 a year, and second, because a monthly rate was established, from which defendant argues that, while the oral contract was for $9,000 annually, it was contemplated that it was to be paid monthly, thereby making of each monthly instalment a claim separate from each and every other instalment.

As to the first, the position of defendant is untenable. There is nothing in the evidence to indicate the reason for adopting the basis of $10,000 a year for payment from January 9 to May 10, 1934, except that the Public Works Administration director had approved this basis. Also there is no question that this voucher covered the period of employment of plaintiff under the oral contract from January 9, 1934, to either April 27, or June 9, 1934. Further, the defendant, so far as the record discloses, has never contended, and does not now contend, that it was not obligated to pay plaintiff for his service under the oral contract. The sole and only contention of defendant in this connection is that the only funds for payment were those which were under control of the Public Works Administration, and that this authority refused to allow payment of the salary in question, and that the parties contracted with reference to these funds; that when allowance of payment was refused the statute of limitations began to run. This contention probably would be valid if made with reference to either or both of the written contracts, but it has no application to the oral contract.

There is no evidence in the record to the effect that the oral contract had any dependence on Public Works Administration approval. In fact, the resolution of the board of directors authorizing the oral contract, by fair implication,

negatives any such dependence. The resolution is as follows: "It was moved by Maloney, seconded by Fisher, that Donald D. Price of Lincoln, Nebraska, be elected Chief Engineer at a salary of $9,000 per annum, said salary to start when actual engineering of the project in preparation to let contracts shall start. Motion carried."

Fairly summarized, we conclude, the evidence discloses that on November 8, 1933, the plaintiff and defendant entered into an oral contract whereby plaintiff was employed at an annual salary of $9,000 a year, which contract was abandoned on either April 27 or June 9, 1934, by mutual consent, but without plaintiff being paid for his service under the contract. Payment for this service was paid in part by voucher dated March 30, 1935, leaving unpaid the amount of $1,506.97, under the evidence unquestionably an obligation of the defendant.

The part payment of March 30, 1935, tolled the statute of limitations, so therefore the statute of limitations was not a valid defense to the action of the plaintiff.

These views are not in strict accord with the findings of the district court. However, the ultimate finding that the action is not barred by the statute of limitations is the same. Under our conclusion the plaintiff would be entitled to interest from June 9, 1934, whereas under the finding and judgment of the district court he is allowed interest from March 14, 1938. Plaintiff not having cross-appealed, this judgment must stand. In all other respects it is correct.

For the reasons herein set forth, we conclude that the judgment of the district court should be, and it is accordingly

AFFIRMED.

JOHN MANSFIELD, APPELLANT, V. ANDREW MURPHY & SON ET AL., APPELLEES.
298 N. W. 749

FILED JUNE 20, 1941. No. 31088.

1. **Master and Servant.** The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts.
2. ———. The right of control, or want of it, determines if the relation of master and servant, at the particular time in question, existed between the employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another person.
3. ———. In such case, whether the right of control, or want of it, existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court.

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

Reed, Ramacciotti, Robinson & Hruska and *Ephraim L. Marks*, for appellant.

Fred N. Hellner, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This action was brought by John Mansfield to recover damages for personal injuries sustained as a result of alleged negligence on the part of the defendant Andrew Murphy & Son, Inc. Plaintiff at time injured was an employee of Ford Bros. Van & Storage Company; but no negligence is charged as against that defendant, it being made a party defendant for the reason that it is obligated to make payments to plaintiff under the workmen's compensation act of Nebraska.

The defendant Andrew Murphy & Son, Inc., conducts an automobile and truck sales service and garage business in the city of Omaha, and owns, among other equipment, a four-ton truck equipped with a special power hoist, capable of hoisting 20,000 pounds or more; the services of which hoisting truck with an operator were offered to the public for hire. On the 13th day of January, 1939, plaintiff's employer, Ford Bros. Van & Storage Company, had contract with Sanford Direct Mailing Company to deliver to its plant on the second floor in the Baum building at Thirteenth & Farnam streets in Omaha a printing press weighing approximately 3,000 pounds. In connection with said delivery it was necessary to hoist the press from a truck of the Ford Bros. Company located in the alley at the rear of said building to the Sanford Company's plant on the second floor thereof, a distance of about 30 feet. Defendant Ford Bros. Company was not equipped with a power hoist necessary to perform the job, and it is alleged in plaintiff's amended petition that Ford Bros. Company therefore contracted orally with the defendant Andrew Murphy & Son, Inc., to hoist the said press from the defendant Ford Bros. Company's truck to the second floor of said Baum building. The said defendant Andrew Murphy & Son, Inc., sent its hoisting truck and operator, one H. E. Genandt, to said Baum building. When the said H. E. Genandt arrived at the scene of the accident with the "hoisting truck," the defendant Ford Bros. Company had already installed its own block and tackle to the "I" beam at the top of the Baum building. Said block and tackle hung down to about the second landing of said building above the street; said Ford Bros. Company had also affixed chains around the press preparatory to having it hoisted. It is further alleged in petition that the said Genandt, "without making a proper inspection of the equipment or apparatus theretofore set up, placed and arranged his hoisting truck in position, supervised and directed the matter of hooking his block and tackle to that of the defendant Ford Bros. Company, and when this had been done took a position in the cab of the

'hoisting truck' to await a signal to turn on the power and commence the hoisting operation." It is further alleged in petition that, "Thereafter, upon a signal given by one of the agents of defendant Ford Bros. Company, the said Genandt applied the power and commenced hoisting. After the press had been raised or lifted a distance of six inches to a foot, upon signal, the hoisting ceased and the Ford Bros. Company truck was removed from underneath the press. Thereafter, the hoisting was again twice or three times commenced and stopped. After a signal was given to commence hoisting the last time, the hoisting was accompanied by pronounced jerking, jolting and chattering, whereupon the equipment collapsed and gave way, the press crashed to the ground, and the plaintiff, who was in the act of pushing against the press, was caused to fall a distance of approximately 50 feet on top of the press;" that as a result of such fall he received injuries for which he is seeking to recover herein. Plaintiff further alleges that the accident was due to the defendant Andrew Murphy & Son, Inc., failing to make a proper inspection of the equipment installed at the scene of the accident before connecting Murphy's apparatus thereto; in operating the hoisting apparatus in such a manner as to cause it to jerk and chatter, thereby placing undue strain and stress upon the block and tackle, pulleys and other hoisting equipment; and in attaching and hooking up said hoisting equipment to the equipment furnished by the defendant Ford Bros. Company, in a careless negligent, unskilful, and unsafe manner.

The answer of Andrew Murphy & Son, Inc., alleges that its said hoisting truck and operator were hired by and rented to said Ford Bros. Van & Storage Company at an hourly rate; that they were placed under the charge, control and supervision of Ford Bros. Company, and became and were during the time they were being used by said Ford Bros. Company, the special employee and equipment of said Ford Bros. Company; that the answering defendant did not exercise any authority or control over said operator and truck during said time; that operator of said truck

was a fellow servant and fellow employee of the plaintiff; and was, in fact, acting under the orders, direction and supervision of said Ford Bros. Company; that plaintiff and his fellow employees prepared the cables, rope, blocks and tackle with which said printing press was to be hoisted, and assisted and directed the manner in which the said hoisting truck and operator lifted the same; that said printing press fell as a result of the hook pulling out of the block which had been hooked to the "I" beam at the top of the Baum building; that said hook and block were owned by the said Ford Bros. Company and were part of the equipment used and installed by the plaintiff and his fellow employees.

On trial before court and jury after the plaintiff had offered his evidence and rested, motion of the defendant Andrew Murphy & Son, Inc., to dismiss case or instruct jury to return a verdict for said defendant was sustained; case was dismissed, and plaintiff has appealed.

By numbers 1 and 2 of appellant's assignment of error, question as to sufficiency of evidence to require submission of the case to the jury is presented.

The crucial question in this case is: What was the contract or agreement under which the services of the hoisting truck and operator of Andrew Murphy & Son, Inc., were furnished to the Ford Bros. Company?

As to the contract, the only evidence is the testimony of the witness Ray A. Ford, who testified that he is the president and general manager of the Ford Bros. Van & Storage Company, a corporation. On January 13, 1939, he had a conversation with Gus Saunders, foreman down at Murphy & Son's shop; did not know whether he was an officer or not, called him by phone some time before noon. "Q. Just as nearly as possible, tell what he said and what you said in that conversation. A. Well, first I said to Gus, 'Can I get your wrecker to help me hoist a machine in the Baum building, and how much will you charge an hour?,' and he said, 'We will charge $5 an hour.' I said, 'Well, will it be available this afternoon some time, say about 1:30 or 2:00 o'clock?,' and he said 'Yes'. I said, 'I will call you later and

tell you exactly the time I want you to come.' " Called him that afternoon, probably around 1:00 o'clock from my office. "Q. Will you tell us what conversation you had with Mr. Saunders at that time? A. Well, I asked him if he could have the truck at the Baum building about 1:30 or 1:35, something like that, and he said he could. * * * That was about all there was to it." The truck responded to that call. Mr. Genandt came to the scene of the accident with his truck as a truck driver; I have known him for quite a while. "Q. You have known those were his duties, just as a truck driver? A. No, he run this hoist himself, and was a driver."

The foregoing embraces the entire testimony as to the agreement between the parties.

The evidence shows that, before H. E. Genandt, the driver of the hoisting truck of Andrew Murphy & Son, Inc., arrived at the Baum building with the hoisting truck, the Ford Bros. Company and its employees had installed the equipment of that company which was to be used in the hoisting of the press, ready for the equipment of Andrew Murphy & Son, Inc., to be hooked on. A part of the Ford Bros. Company's equipment consisted of a heavy block and tackle. A four-pulley block, which equipment included a goose-neck hook with the swivel, was attached to an "I" beam extending out from the top of the Baum building, and a triple pulley block was at the bottom; the end of the rope extending through the block was fastened to some stationary object; this arrangement did not function as a block and tackle, but merely hung there in suspension as a chain would. When Genandt arrived with the Murphy hoisting truck, Mr. Ford and Mr. Genandt connected up the Murphy cable to the Ford equipment. They got out two single pulleys that were in the Murphy truck; the lower pulley of the Murphy equipment was attached to a chain at the rear end of the Murphy truck, and the other pulley was hooked into the lower pulley of the Ford equipment. The Murphy steel cable was passed from the winch on the hoisting truck and threaded through the single pulley attached to the chain

near rear end of hoisting truck up to the single pulley directly beneath the Ford equipment, and from there went down and was attached to chains that were around the press. After the Murphy cable was thus attached, the Ford equipment was raised so that the lower block or pulley of the Ford equipment was about on a level with the third floor of the Baum building, and the Murphy driver, Genandt, took his place in the cab of the hoisting truck of Murphy's and operated the winch on signal from Ray A. Ford. During the process of raising the press by the use of the equipment so installed, the swivel connecting the goose-neck hook with the pulley block attached to the "I" beam, and a part of the equipment of Ford Bros. Company, broke and permitted all of the equipment and the printing press to fall to the ground, and plaintiff, who was at the time standing on a fire escape at the window of the second floor pushing out upon the press, fell from said fire escape onto the press sustaining injuries, for which he is seeking to recover in this case. Nothing broke about the Murphy truck or any of the equipment of the Murphy company that day.

Ray A. Ford, the president and general manager of the Ford Bros. Van & Storage Company, was the "boss on the job" and directed the activities of every one who was there, and gave signals to Genandt, in the cab of the Murphy company truck, for the operation of the hoisting winch. There is no evidence that Genandt, or any one connected with Andrew Murphy & Son, Inc., had or exercised any authority there, or that he supervised or in any manner directed such operations.

The plaintiff contends that, under the facts shown by the evidence, Genandt, the operator of Andrew Murphy & Son, Inc., hoisting truck, remained the employee of said company and did not become a loaned or special employee of the Ford Bros. Van & Storage Company during the time of said transaction. While on the part of the defendant Andrew Murphy & Son, Inc., it is contended that during said time said truck and operator were hired by and rented to the said Ford Bros. Company at an hourly rate; that they

were placed under the charge, control and supervision of Ford Bros. Company and became and were, during the time they were being used by the Ford Bros. Company, the special employee and equipment of the said Ford Bros. Van & Storage Company.

The allegations of the petition that the Ford Bros. Company therefore "contracted orally with the defendant Andrew Murphy & Son, Inc., to hoist the said press from the defendant Ford Bros. Company's truck to the second floor of said Baum building" were not established by the evidence. The terms of the contract, while oral, are not in dispute. Only one witness, Ray A. Ford, testified thereto. The terms of the contract as testified to by him have been heretofore set out verbatim. From his testimony the agreement would appear to have been that the Murphy company should loan or hire its "wrecker" (hoisting truck) to the Ford Bros. Company for its use to help in the hoisting of a press into the Baum building for the agreed consideration of $5 an hour; that the "wrecker" should be available that afternoon.

Not only are the facts as to the terms of the contract undisputed, but what the parties did in the carrying out of the contract is likewise not controverted. It clearly appears that Ray A. Ford, the president and general manager of the Ford Bros. Company, had the supervision and directed the activities of all persons helping; that he was the "boss on the job," and exercised the right of control there at that time. No other logical inference can be drawn from the evidence. There is nothing in the evidence from which it might be reasonably inferred that Andrew Murphy & Son, Inc., reserved or had or exercised any control of the hoisting truck or operator after it arrived at the Baum building and was hooked onto the equipment of Ford Bros. Company, other than the operation of the winch on the truck which was operated by Genandt, on signal from Ford.

Appellant cites *Curry v. Bruns,* 136 Neb. 74, 285 N. W. 88, but in our view that case does not support his contention under the undisputed facts in the instant case. In the opinion in *Curry v. Bruns, supra,* it is said:

"The right of control, or the want of it, is determinative of the relationship; for one who has no right of control over another ought not be required to answer for his acts, and, on the other hand, if one has such right of control he should be answerable."

Appellant also cites *Standard Oil Co. v. Anderson,* 212 U.S. 215, 29 S. Ct. 252, as a leading case on the proposition under discussion, and quotes in full in his brief the syllabus of that case without further comment. Had the evidence established the facts as alleged in the petition, that is, that the Ford Bros. Company contracted orally with the defendant Andrew Murphy & Son, Inc., "to hoist the said printing press from defendant Ford Bros. Company's truck to the second floor of said Baum building," the case cited would have had greater application. But, according to the evidence, the agreement, in effect, was that the Murphy company would loan or hire its "wrecker" or hoisting truck to the Ford Bros. Company to be used to help it, Ford Bros. Company, hoist a machine into the Baum building. Ford Bros. Company appears to have been an independent contractor, to have had the contract to place the press in the Baum building, and had and exercised supervision and control over all employees working on that undertaking. The Ford Bros. Company merely employed the Murphy "wrecker" to assist in doing that work at so much an hour. The Murphy company did not reserve the right to direct or in any manner supervise the work of the hoisting truck or of Genandt, and, so far as the record shows, it did not. The work was thus the work of the Ford Bros. Company, and not the work or undertaking of the Murphy company. In the case of *Standard Oil Co. v. Anderson, supra,* the court in opinion, while recognizing the rule contended for by the appellees herein, held it was not applicable under the facts in that case, and in the opinion make the following clear distinguishing statement as to such contracts and liability of parties:

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his

employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work and they are for the time his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

The soundness of the holding in that case, under the facts there involved, will not be questioned, but it is not controlling under the facts with which we are now dealing. There it appears that the defendant was doing the work of hoisting itself, and received an agreed compensation for it of $1.50 a thousand for the hoisting. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore; and the court found that the work was done by the defendant, for a price, as its own work, and by and through its own instrumentalities and servant, under its own control. Under such circumstance, the defendant was held liable for negligence of its winchman.

The cases of *Driscoll v. Towle,* 181 Mass. 416, 63 N. E. 922, and *Hartford Accident & Indemnity Co. v. Addison,*

93 Fed. (2d) 627, also cited by appellant, both recognize the rule announced by this court in *Curry v. Bruns, supra,* and are both subject to similar distinction as to the facts as the *Standard Oil Co. v. Anderson, supra.*

Appellant further cites in his brief Restatement, Law of Agency, sec. 227, wherein "Servant Lent to Another Master" is discussed, but the rules there announced are in harmony with the views heretofore expressed by this court. In the annotations under this section it is said, "This section states the Nebraska law," and the following, among other Nebraska cases, are there cited: *Hitte v. Republican V. R. Co.,* 19 Neb. 620, 28 N. W. 284; *Westover v. Hoover,* 88 Neb. 201, 129 N. W. 285; *Forsha v. Nebraska Moline Plow Co.,* 89 Neb. 770, 132 N. W. 384; the facts in which cases are analogous to instant case, and sustain the contention of the appellees herein.

The facts in the instant case materially differ in principle from the facts in the cases relied upon by the appellant. This is a case where one party, the defendant Andrew Murphy & Son, Inc., put its hoisting truck with the operator thereof at the disposal of another, Ford Bros. Van & Storage Company, to assist in a particular service under the exclusive control of the latter, during the performance of which the employee, Genandt, from the time of his arrival at the Baum building, stepped aside from the business and control of Andrew Murphy & Son, Inc., his first employer, and became, for the time being, the special servant of Ford Bros. Company, his substituted employer.

Had there been a dispute in the testimony as to the terms of the agreement or as to the pertinent facts relating to the right to the control of the "wrecker" or hoisting truck and driver after the truck arrived at the Baum building, and they had been such that more than one reasonable inference could have been drawn therefrom, then it would have been a question of fact for the jury; but, there having been no dispute as to such contract or pertinent facts, it became a question of law. The trial court was right in so holding.

The other errors assigned and discussed by appellant in his brief relate to rulings of the trial court on admission of evidence, none of which would have had a bearing upon the question of liability heretofore considered; and as the conclusion herein reached on question of the liability of appellee Andrew Murphy & Son, Inc., requires the affirmance of the judgment of the trial court, it becomes unnecessary for the court to consider such other assignments of error. The judgment of the district court is

AFFIRMED.

JOSEPH R. BASKINS V. STATE OF NEBRASKA.
299 N. W. 188

FILED JUNE 27, 1941. No. 31120.

1. Criminal Law. "The granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion." *Lee v. State*, 124 Neb. 165, 245 N. W. 445.
2. ———. A motion for a new trial for newly discovered evidence will not be granted where the other evidence is sufficient to sustain the verdict.
3. ———. "A new trial will not be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial." 23 C. J. S. 1248, sec. 1460.
4. ———. A new trial will not be granted for newly discovered evidence, in the absence of a showing of due diligence by the accused to ascertain and produce such evidence at his trial, or where a sufficient excuse for lack of due diligence is not shown.

ERROR to the district court for McPherson county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

Hoagland, Carr & Hoagland and *Beeler, Crosby & Baskins*, for plaintiff in error.

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

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

MESSMORE, J.

On April 10, 1938, plaintiff in error was convicted in the district court for McPherson county, Nebraska, on the charge of assault with intent to do great bodily harm, and sentenced to serve two years in the state penitentiary. He prosecuted error to this court, where the record of his trial and conviction was reviewed, resulting in an affirmance of the judgment. *Baskins v. State,* 138 Neb. 334, 293 N. W. 270.

The proceedings incident to the question to be determined need not be stated. Motion for a new trial was overruled and notice of proceedings in error filed. The only issue involved in this appeal is whether there was sufficient evidence to sustain the motion for a new trial on the ground of newly discovered evidence.

Two cases, decided by this court, contain the same transaction as appears in the instant case. *Macomber v. State,* 137 Neb. 882, 291 N. W. 674; *Hastings v. State,* 138 Neb. 365, 293 N. W. 236. The newly discovered evidence upon which plaintiff in error bases his contention for a new trial and its relation to evidence previously adduced at the former trial of *Baskins v. State, supra, Macomber v. State, supra,* and *Hastings v. State, supra,* and likewise its relation to statements taken in the county attorney's office, is hereinafter set out.

In June, 1940, by affidavit, one Claud Dailey swore, in substance, that he had contacted Albert A. Hastings at the request of Woodford E. Oliver, who testified in the original case as a witness for the state, and who was a roommate of the affiant; that Oliver wanted the sum of $125 from Hastings so that he could leave the country and not testify, and that Oliver had testified falsely at the previous trial; that Hastings refused to give any amount and asserted that Oliver had sworn to lies in the trial of the three different cases. Affiant then went to see Oliver and asked him what he had meant on Monday, November 22, 1937, when he had told him "that all he heard was a noise, such as putting a drunk to bed or putting a drunk out; that he had heard

none of the talk" occurring on the night of November 21, 1937, in a room near his own, where the offense was committed. Oliver also said that the victim of the assault, Sam I. Pappas, and Otto Dudschus, an investigator for the state, had induced him to testify to falsehoods by furnishing him with liquor and making promises to him.

In addition to the foregoing there is an affidavit by Oliver, who swore, in substance, that he testified in the three cases, hereinbefore mentioned, and had sworn to a state of facts that were not true; that he was coached by Sam I. Pappas and Otto Dudschus, was furnished liquor by them, and did not realize that he was testifying to an untruth that might result in men going to the penitentiary, and wished to correct the statement; that on Monday, November 22, 1937, he had talked with Claud Dailey, when Dailey asked him if there had been a fight there, and whether he had heard the fight and knew anything about it; that he told Dailey he did not know anything about a fight and had only heard a racket on the night of November 21, 1937, when the offense was committed, and at that time "did not know whether they were putting a drunk to bed or throwing a drunk out." He further stated that he was a cripple, in bad health, and that the testimony given by him in the three cases was untrue; he never heard any of the talk about which he testified; all he heard "was just a noise."

A statement by Oliver, taken by a stenographer in the county attorney's office on the afternoon of November 29, 1937, reflects the following: "Q. (31) Just go ahead and tell us in your own words what you heard from the time the door closed on the last persons going into the room. A. I heard a commotion and it sounded like they were scuffling or fighting and then somebody rushed to the door and got out the door, and the way it sounded to me, somebody pulled him back and he said: 'Sit down, you * * * I'm running this, not you—I'm boss around here.'" "Q. (41) What else did you hear? A. Well, it seems to me like I heard whoever this was say, 'Don't Curly, don't do that.' Q. More than once? A. Yes; he repeated it. Q. Did the party saying

'Don't Curly' seem to be in pain? A. It seemed to be in a pleading voice." "Q. (57) Was there any reference made to hitting there in the room? A. I heard 'Don't Curly, don't do that, don't hit me again.'"

The following is from the testimony of Sam I. Pappas: "Q. (109) Did you have any conversation with Woodford E. Oliver, or Woody Oliver, regarding any of the testimony which he was to give in any of the three cases growing out of that alleged crime? A. Never."

Oliver testified, in substance, as follows: "Q. (319) Now, I will ask you if Sam I. Pappas ever, in any way, instructed or coached or drilled or discussed with you, your testimony that you were going to give in any of these cases? A. He never did; no." "Q. (325) I will ask you if, at the time, you told (the county attorney) and myself the same story that you gave a written statement to (the county attorney) and the stenographer a few days later? A. Yes." We have heretofore set out the substance of such statement. "Q. (328) Do you know Otto Dudschus? A. Yes, sir. Q. I will ask you if you ever, at any time, told him what you were going to testify to in any of these three cases? A. I never did." "Q. (334) Now, I was going to ask you, generally, if the facts which you stated in your testimony in the case of State against Baskins, and in the other two cases here, those which you testified to under oath, during those trials are the truth? A. Yes, sir. * * * Q. This affidavit exhibit 5 (heretofore referred to in substance) is a falsehood? A. Yes." "Q. (341) And what are the facts as (to) whether or not Sam I. Pappas or Otto Dudschus or anybody else connected with the State's side of the case furnished you with liquor? A. No; they never did." Oliver denied he had the conversation with Dailey as sworn to by Dailey; what Oliver said, in substance, was: "Claud came home that night about one o'clock—Q. (345) The same night of the fight? A. Yes, the same night it happened, and said: 'Who rooms across the hall.' I said, 'I don't know.' I said to him, 'Well, they had a battle of some kind over there, it sounded like George (the night clerk) was putting some drunks to bed and he

might have took the worst of it.'" "Q. (349) The talk about 'Don't hold me Curly or hit me, Curly,' did you hear that or not? A. Yes. * * * Q. So, when you say in this affidavit that you never heard it, you lie, don't you? A. Yes." Witness then testified as to the affidavit, exhibit 5, how it was obtained from him, saying that he was under the influence of liquor; that the affidavit had been prepared and read to him, and that when he signed it he was paid the sum of $100 by one Charley Pierce; that Pierce said Oliver should give him a note, so it would look as if the money had been borrowed. On cross-examination he testified in question 492 substantially as he testified in question 31, *supra.*

In the case of *Hastings v. State, supra,* the record reflects that the witness Oliver testified, in substance: "Q. Did you hear any other talk or words there after that time? A. Yes; after this commotion, why, he said, 'Sit down, you * * * I am running this, not you,' and he set down, and then he said, something about 'Don't hit me again, Curley, don't hit me again.' Q. Did you hear any more conversation after that time? A. No; I don't believe that I did. Q. Was anything there said about holding him— * * * A. Not that I remember of." Cross-examination: "Q. Then the next thing you heard was, 'Don't hit me Curley, don't hit me again?' A. Don't hit me again." (*State v. Hastings,* B. of Ex. pp. 778, 779, 786.)

In the case of *Macomber v. State, supra,* the witness Oliver testified, in substance: "Q. Did you hear any other voices say anything to that? A. He said, 'Don't hold me Curley, don't hit me again.' Q. 'Don't hold me Curley, don't hit me again?' A. Yes." Defense counsel on cross-examination: "I am asking you whether or not when they questioned you here and asked you and you testified on the former trial of this case—let me ask you whether or not at the time of the Hastings' trial you didn't testify that the conversation was, 'Don't hit me Curley, don't hit me again?' * * * A. He said, 'Don't hold me Curley, don't hold me again.'" (*State v. Macomber,* B. of Ex. pp. 661, 664.)

In the trial of the case of *State v. Baskins* the witness

Oliver testified: "Q. What was done—what was the tone of the voice that said, 'Don't hold me Curley, don't hit me again?' A. It was kind of a pleading tone." (*State v. Baskins*, B. of Ex., p. 849.)

"The granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed unless there has been a clear abuse of such discretion. And, also, in the exercise of this discretion the courts have always listened distrustfully to the claim of newly discovered evidence, and as a ground for a new trial it is not favored." *Lee v. State*, 124 Neb. 165, 245 N. W. 445. See 23 C. J. S. 1224, sec. 1453.

The plaintiff in error refers to the cases of *Macomber v. State, supra*, and *Hastings v. State, supra*. A review of the decisions clearly discloses that the cases were reversed and remanded on an entirely different legal proposition than that contended for by plaintiff in error in the case of *Baskins v. State, supra*. In the latter case, it was contended and argued that defendant Baskins did not strike Pappas and did not intend to inflict great bodily injury, and that these elements of the felony charged were not proved.

As a member of the city council and chairman of the police committee, Baskins was the superior of Macomber, a patrolman, saw the assault from the beginning to the end, and did not stop it. There is evidence that Baskins and Hastings held Pappas while Macomber made the assault and thus aided in the commission of it. The law is: "Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender." Comp. St. 1929, sec. 28-201.

In the opinion in *Baskins v. State, supra*, the court said: "Every element of the felony charged was clearly proved and the jury were justified by the evidence in finding Baskins guilty beyond a reasonable doubt." The record in *Baskins v. State*, as well as the opinion, discloses that, even in the absence of the testimony of Oliver, the other evidence was sufficient to sustain the verdict.

A motion for a new trial for newly discovered evidence

will not be granted where the other evidence is sufficient to sustain the verdict. The newly discovered evidence offered in the instant case is of an impeaching character, to discredit the witness who testified at the trial. In 23 C. J. S. 1248, sec. 1460, it is said: "Generally, a new trial will not be granted for newly discovered evidence which, when produced, will merely impeach or discredit a witness who testified at the trial." See, also, *Ogden v. State*, 13 Neb. 436, 14 N. W. 165; *Kenyon v. State*, 111 Neb. 175, 196 N. W. 143. The affiant Dailey, who heard Oliver's story on the morning of November 22, 1938, could have given the same impeaching testimony at the trial. This discloses a lack of due or reasonable diligence on the part of the accused. See 23 C. J. S. 1250, sec. 1460.

Obviously, the witness Oliver recanted. In *People v. Shilitano*, 218 N. Y. 161, 112 N. E. 733, it was said in the opinion (p. 170): "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character."

The question for our determination is whether recantation by a witness, who testified on behalf of the state, necessarily requires the court to grant the defendant a new trial, and, as said in *Blass v. People*, 79 Colo. 555, 247 Pac. 177: "We must answer the question in the negative. Such a rule would imperil the proper administration of justice. (Citing *People v. Shilitano, supra.*) The power to grant a new trial to a convicted felon would no longer rest in the sound discretion of the court, but with the witness who testified against him upon the trial."

The plaintiff in error refers in his brief to the second trial in the district court of *State v. Macomber* and *State v. Hastings*, tried subsequently to the overruling of the motion for a new trial for newly discovered evidence in the instant case, perhaps in the thought that we should take judicial notice of the result of such cases under the circumstances. If this be true, the contention is definitely without merit.

AFFIRMED.

LYLE KNAPP V. STATE OF NEBRASKA.
299 N. W. 223

FILED JUNE 27, 1941. No. 31168.

1. **Chattel Mortgages.** In a prosecution for the unlawful sale of mortgaged property without the written consent of the mortgagee, oral consent of such mortgagee to the sale of the mortgaged chattels, coupled with payment of the value of the property, is a defense.
2. **Criminal Law.** A question propounded to be the foundation for an offer should be specific and definite, and should put the adverse party on notice of the testimony sought to be elicited.
3. ———. A question which, by its terms, fairly puts the adverse party on notice of material testimony sought to be elicited furnishes a sufficient foundation for an offer.

ERROR to the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Leon A. Sprague, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action instituted in the name of the state of Nebraska, hereinafter called the state, wherein Lyle Knapp, plaintiff in error, hereinafter referred to as defendant, was prosecuted in the district court for Nuckolls county, Nebraska, for the crime of unlawfully selling mortgaged personal property.

The information charges that the defendant, on the 12th day of June, 1940, in the county of Nuckolls and state of Nebraska, being the owner of a 1939 Ford coupé automobile, mortgaged the same to the Farmers State Bank, Superior, Nebraska, for the sum of $300; and that thereafter, on or about July 1, 1940, during the existence of the lien of the mortgage, he unlawfully and feloniously, and without having first procured the consent in writing of the Farmers State Bank, sold the automobile.

The case was tried to a jury with the result that the defendant was convicted of the charge filed against him. A motion for new trial and an amended and supplemental motion for new trial were filed, both of which were overruled, whereupon defendant has brought the case here on petition in error for review.

There are several assignments of error. However, after careful examination of the bill of exceptions, we conclude that but one of them requires discussion in this opinion. In this assignment it is urged that the court erred in sustaining the state's objections to the defendant's offer of testimony to be given by the witnesses Minor Baird, Mildred Miller and Lyle Knapp.

The material testimony admitted by the court is, for the most part, not in dispute. The evidence shows, without contradiction, that the defendant executed and delivered the chattel mortgage as charged, and that he sold the automobile during the existence of the lien of the mortgage.

As defenses to the charge, the defendant sought to prove (1) that the bank permitted the defendant to sell cars without its written consent, and had permitted such practice for a period of more than a year, and (2) that the bank gave oral permission to sell the particular automobile, that the proceeds of the sale had been turned over to it, and it had been paid in full. The first of these defenses may be disregarded here since no authority of this court has been cited, and none found, holding that mere business custom short of oral permission to sell the mortgaged chattel, coupled with payment to the mortgagee, is a defense to a charge of unlawful sale of mortgaged chattel property.

As to the second proposition, this court has held that oral consent by the mortgagee to the sale of mortgaged chattels, coupled with payment to the mortgagee of the value of the property, is a defense. *State v. Butcher,* 104 Neb. 380, 177 N. W. 184; *Fiehn v. State,* 124 Neb. 16, 245 N. W. 6.

The defendant insists that he was prevented from adducing on the trial the evidence in support of this defense. He urges that he was restricted in the cross-examination of wit-

nesses for the state, and was not permitted to introduce the evidence of the defendant on this proposition.

Minor Baird was called as a witness for the state, and with reference to the note secured by the chattel mortgage in question the bill of exceptions contains the following questions and answers: "Q. Was there anything paid to your bank on this note, Mr. Baird, prior to July 1, 1940? A. No. Q. Or prior to July 5, 1940? A. No. Q. Has anything been paid on it? A. Not by Knapp. * * * Q. What if anything has the defendant, Lyle Knapp, paid on this note? A. Nothing." On cross-examination the witness was asked: "Q. There was money paid to you after July 1, 1940, by Knapp on his indebtedness in that bank, wasn't there?" The following objection was made and sustained: "Plaintiff objects as immaterial in the state of the evidence." Following the ruling the defendant offered to prove by the witness that the defendant paid to the bank, after the date of the sale and before the inception of the criminal action, the balance due on the note. As such, the offer was unnecessary since it was cross-examination, but it did serve to acquaint the court with the purpose of the inquiry. Objection was made to the offer on the ground that it was incompetent, irrelevant and immaterial and not proper cross-examination. The objection was sustained. Certainly this was proper cross-examination and it was material to the defense made by the defendant.

Coming now to the testimony of the defendant wherein he sought to testify with relation to the claimed oral permission to sell the car in question, the defendant was asked: "Q. I will ask you whether or not you had the oral permission of the Farmers State Bank of Superior, Nebraska, to sell that car at that time?" The state made the following objection which was sustained: "Plaintiff objects as incompetent, irrelevant and immaterial, not constituting a defense." The defendant then made the following offer of proof: "Comes now the defendant and offers to prove by the witness on the stand that he had the oral permission of the Farmers State Bank of Superior, Nebraska, to sell the car in question, and

which the state claims is the mortgaged property the defendant sold, and that the proceeds from sale were turned over to the Farmers State Bank and they were paid in full for said note and mortgage." The following objection was made to the offer: "Plaintiff objects as incompetent, irrelevant and immaterial, not constituting any defense." It will be noted that there was no objection that the offer was broader than the question.

The state urges, on the authority of *Young v. State*, 127 Neb. 719, 256 N. W. 908, that the question involved here is so lacking in relevancy and competency as not to become a foundation for an offer of testimony. In the opinion in that case it was stated: "The general rule is that the question asked should be specific, and not so indefinite as to fail to put the adverse party on notice of the testimony sought to be elicited." Measured by the pattern thus presented, the court and the state were, by the question, unaided by the offer, given unmistakable notice that the defendant was seeking to prove one of the components of the defense of oral permission and payment of the debt secured by the mortgage. In the brief it is urged that the question represented a conclusion of the defendant. This, as has already been indicated, is not the objection which was made on the trial of the case.

Clearly, by this ruling, the defendant was deprived of the right to make a defense to the charge upon which he was being tried, and which defense is recognizable under the law of this state.

The verdict and sentence of the district court are vacated and set aside and the cause is remanded for a new trial.

REVERSED.

WILLIAM H. PLATNER, APPELLANT, V. W. J. MCMARTIN ET AL., APPELLEES.
299 N. W. 182

FILED JUNE 27, 1941. No. 31118.

Deeds. Under circumstances surrounding transfer, deed to residence property standing alone outside city limits, grantor owning no other real estate in vicinity and making no reservation in deed, *held* to convey, by clause in deed, "together with all * * * appurtenances to the same belonging," title to sewer leading from grantor's residence under county road for three blocks and connecting with city sewer.

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

Ziegler, Dunn & Becker and *D. L. Manoli,* for appellant.

Baird & Baird and *Fred N. Hellner, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

SPEAR, District Judge.

William H. Platner, appellant, for some years owned and occupied a fine home west of the city limits of Omaha. The house had no sewer connections. In 1925 Mr. Platner asked and received permission from Douglas county to construct a sewer under a county road, which would be Farnam street extended, for a distance of three blocks where connection could be made with a city sewer. He constructed the sewer at a cost of about $2,700 connecting same with his house and with the city sewer, using ten-inch tile. In front of each lot in the three blocks he made provision to attach a lateral, should a lot owner desire to connect with his sewer. In 1928 he conveyed the premises to Fred J. Ruedy and wife, Bertha, appellee, who is the present owner, for $32,000 and another house. The deed conveyed the real estate, together with "all * * * appurtenances to the same belonging." At that time Mr. Platner owned no other property along the line of the sewer or in the vicinity, although before the deal was finally consummated he bought another lot across the

street north of Ruedy. At the time Platner sold to Ruedy there were no other houses connected with the sewer, and, as far as the record indicates, no other houses had been built on any of the lots along the line of the sewer. In 1929 Mr. Platner constructed a house on the lot north of Ruedy and connected with the sewer. Mr. Ruedy contends that he knew nothing about Platner connecting with the sewer. In any case, no disagreement was had concerning the sewer until the year 1938, when Dr. W. J. McMartin, also appellee, who owns a house south of Ruedy, obtained permission from Ruedy to connect with the sewer through his (Ruedy's) lateral in Ruedy's yard, paying Ruedy $125 therefor. At that time Mr. Platner became engaged in a controversy with Dr. McMartin over McMartin's right to hook onto the sewer. The dispute culminated in this action. Throughout this opinion the name Ruedy and Mrs. Ruedy are used interchangeably for the sake of brevity.

Platner claims that the sewer belongs to him and sues McMartin and Ruedy for $325 for the alleged unauthorized use of his sewer by McMartin, claiming that Ruedy is liable with McMartin because Ruedy permitted McMartin to connect with his lateral and thereby emptied McMartin's sewage into the main sewer in the street. Ruedy counterclaims asking judgment against Platner for connecting with the street sewer which Ruedy contends was transferred to him by the deed. McMartin answers alleging, first, that the sewer is in a public road and that therefore plaintiff can claim no ownership of the sewer, and, second, that plaintiff conveyed all his rights in the sewer to Ruedy by the deed. A jury was waived and trial had to the court. The district court found for Ruedy and McMartin and awarded Ruedy a judgment against Platner in the sum of $296. Mr. Platner appeals.

Plaintiff's counsel asked plaintiff to detail any conversations had with Ruedy about the sewer before the deed was given. The defendant Ruedy objected to this, and the court stated that he thought it was inadmissible, but upon the insistence of plaintiff's counsel that this was a proper

method of proving the meaning of the word "appurtenances" in the deed, the court permitted Mr. Platner to testify as to these conversations. The net result of Mr. Platner's testimony is that he told Ruedy he could have the use of the sewer only. Ruedy flatly contradicts this and claims that Platner told him, as an inducement in selling him the property, that the sewer cost $2,700 and also that Ruedy might possibly get $2,000 selling rights to other persons desiring to connect with the sewer. Plaintiff also testifies that he made a written memorandum on the day the deed was delivered, which he says he gave to Ruedy, but kept no copy thereof. He then attempted to testify as to the contents of the written memorandum, but the court sustained an objection to the same. Plaintiff complains of this ruling, having made an offer to show that the instrument if produced would show that Ruedy was to have the use of the sewer in connection with the home, but that the title would remain in Platner. Mr. Ruedy denies that there was ever any such memorandum. Even if it were to be conceded that this memorandum would be competent evidence, we do not believe that the exclusion of Platner's testimony as to what the alleged instrument contained is error. Mr. Platner was permitted to testify as to the conversations, and these conversations were the conversations which he says he incorporated in a memorandum. In other words, Mr. Platner's testimony as to the conversations between himself and Ruedy are in the record, so the testimony of Mr. Platner as to an alleged memorandum would throw no further light upon the meaning of the deed. We do not think, after reading the record, that, even had this evidence been admitted, the district court would have made any decision other than the one it did make.

Plaintiff, over the objection of defendant, having given oral testimony as to the meaning of the deed, cannot, and does not, contend in this court that the same is inadmissible. Defendant does not object here, the trial court having found in his favor. Consequently, we do not consider that this proposition of law is now before us. The trial court found

generally for the defendants. Under the well-known rule in this court, the trial judge, when a jury is waived, steps into the shoes of the jury and his decision has the same effect as a verdict. This decision will not be disturbed under ordinary circumstances, the trial court having had the opportunity to observe the witnesses and thus being in a better position than this court in passing upon their credibility. We doubt that we need go further.

But in addition to finding generally for the defendant Ruedy, the trial court made a specific finding that the plaintiff did intend to, and did, by the terms of the deed convey the legal title to the sewer. It thus appears that the court considered not only the testimony, but the legal effect of the deed itself in making its decision. For that reason, we go to the proposition of law as to whether the deed standing alone, regardless of parol evidence, transferred the title to the sewer as an appurtenance. We find no Nebraska authority on this question, and, in fact, no authority directly in point has been cited by counsel. In the first brief filed in this court by appellant, the position was taken that the county had no title to this sewer. In appellant's reply brief he seems to agree with McMartin that the county does own the sewer. Douglas county is not a party to this suit. It makes no claim to the sewer in so far as this action is concerned, so we do not comment on this feature of the case. Trial was had July 15, 1940. August 7, 1940, judgment was entered. August 8, 1940, plaintiff filed motion for new trial. August 27, 1940, plaintiff asked leave to file an amended petition alleging that plaintiff, as against the defendant, had acquired an easement in the sewer and also that defendant's counterclaim was barred by the statute of limitations. This motion was denied. Plaintiff specifies this ruling as error. We think that the trial court used proper discretion in overruling the motion. We think his principal contention is, however, that Ruedy is entitled only to the use of the sewer, and in support of that theory he cites the case of *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. 1019, which case we think more nearly sets out plaintiff's

position than any other case cited. In that case a company platted a subdivision adjoining the city of St. Louis. A water supply pipe was placed in a public road and connected with the water-works of the city. In selling its lots the company reserved strips of land as alleyways and in these alleys it laid service water pipes. The company gave a deed to a house and lot which conveyed also the appurtenances. The company finally wound up its affairs and sold the water pipes in the alleys, together with the connection to the city water supply to Obear. Obear purchased water from the city and attempted to collect for the same from the grantee. The grantee refused to pay and Obear threatened to disconnect his water supply. The grantee then brought an injunction action to prevent this. The Missouri court held that the pipe in the alley did not pass as an appurtenance, but that the pipes leading into the grantee's premises were appurtenances, and held that the grantee did not own the water pipe in the alley, but had a right under the deed to use the same.

We believe that the meaning of the word "appurtenances" must be determined by the circumstances attending this transfer. It would seem that the sewer in question should be deemed an appurtenance. The city of Omaha has steadily grown westward, and it is difficult in retrospect to visualize the situation in 1928. The evidence shows that Mr. Platner's residence at that time was a country home. It stood in an isolated position and was a living unit in itself. The sewer was built primarily for the use of this house. Mr. Platner owned no other real estate in the vicinity and no other real estate was served by this sewer. Except for the fact that it connected with the city sewer, the situation differed little from a house situated on a farm out of which a sewer might lead under a public road. If Mr. Platner had not purchased a lot in the vicinity at a later date, the sewer surely would have been considered by the parties an appurtenance. We think that under the terms of the deed Platner could well, as between himself and Ruedy, refuse to repair or keep the sewer in condition. No reservation of the sewer was made

in the deed as would have been the natural thing to do. We think that this indicates that Mr. Platner did not intend to keep the title to the sewer in himself. Under these circumstances we do not think that the *Obear* case is analogous to the case at bar. We believe that the judgment of the district court is right.

AFFIRMED.

ALVIN A. BINGAMAN, APPELLEE, V. V. L. HUNTLEY, APPELLANT.
299 N. W. 180

FILED JUNE 27, 1941. No. 31061.

1. **Account Stated.** An account stated consists of an agreement between parties, who have theretofore had transactions of a monetary character, by which a balance due one or more of such parties from such transactions is either struck or made a matter of mere computation, and by which the party or parties owing such balance agree to pay it.
2. ———. In creating an account stated, as in making any other agreement, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each upon the other is being made.

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

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

Brown, Fitch & West, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun upon an alleged account stated in the municipal court of the city of Omaha. From a judgment in favor of plaintiff in such court an appeal was taken to the district court for Douglas county. Trial to a jury in such district court resulted in a verdict and a judgment in

favor of the plaintiff. The defendant perfected an appeal to this court.

In his petition the plaintiff alleges that prior to November 1, 1926, the plaintiff, upon open account, furnished labor and materials in repairing automobiles belonging to the defendant, and that on November 1, 1926, an account was stated between the plaintiff and the defendant whereby the parties agreed that there was due and owing to the plaintiff from the defendant upon such account the sum of $130.10. The petition further states the items of an open account between the plaintiff and the defendant between the dates of December 16, 1932, and September 10, 1938. This account is alleged to have consisted of items furnished to the defendant by the plaintiff, for which a total charge of $18.13 is alleged to have been made. The petition then alleges seven payments by the defendant in the total sum of $24.50, the last of which is alleged to have been made on September 10, 1938, and to have been in the sum of $7.50. The petition further alleges that at the request of the defendant said payments, in the total sum of $24.50, were first applied to payment for the items furnished between the dates of December 16, 1932, and September 10, 1938, in the sum of $18.13, and the balance of $6.37 credited, at the defendant's request, upon said account stated, thus leaving a balance due upon such alleged account stated of $123.73. The plaintiff prays for judgment for such sum of $123.73, costs and attorney's fees. The defendant's answer denies the allegations of the plaintiff's petition, and alleges that action upon any debt owed to the plaintiff by the defendant was barred by the statute of limitations.

The evidence is sufficient to sustain a finding to the effect that, since several years prior to November 1, 1926, the plaintiff has operated a garage, in which automobiles were repaired, and that just prior to November 1, 1926, some kind of an open account with the defendant in favor of the plaintiff existed. It is also sufficient to sustain a finding to the effect that the plaintiff furnished the defendant the items on open account that his petition alleges were fur-

nished between the dates of December 16, 1932, and September 10, 1938, and that the defendant made the seven payments thereon that are alleged in the plaintiff's petition. The defendant himself, who was the only witness produced on behalf of the defendant, in his testimony denied having had any conversation with any one relative to his account on or near November 1, 1926, and denied having made one payment of $8.25 to the plaintiff that is alleged in plaintiff's petition as one of the seven payments, and that is alleged to have been made by the defendant on August 4, 1937. The cause was submitted to the jury solely upon the issue of whether or not an account was stated between the parties on or about November 1, 1926, and upon the issue of whether or not the defendant had made a payment upon such account stated within four years next before the date of the commencement of this action. This cause is submitted to this court solely upon the question of whether or not the evidence will sustain a finding to the effect that an account was stated between the parties as to the open account existing prior to November 1, 1926.

The space appropriately allotted to this opinion will not permit setting forth the evidence in detail. The only evidence relating directly to the making of an account stated is the testimony of the plaintiff himself. The plaintiff testified that about November 1, 1926, he saw the defendant, either in the post office or the city hall, at a time when the plaintiff was out collecting and had statements of various customers in his pocket; that at such time and place the plaintiff told the defendant the amount of money that was due on the account, and that the plaintiff would like to get it settled up; that the defendant said he did not have any money, and that when he got some money he would pay the account; that there had never been any argument over any item in the account, and that the defendant had never at any time denied any item in the account. The evidence does not show of what items the account prior to this conversation consisted, and does not show that any itemized statement of the account was ever furnished to or made

known to the defendant, or that such items were ever discussed between the parties. The plaintiff did testify to the mere conclusion that the plaintiff and defendant in the conversation last above mentioned had an agreement on the amount of the account. He did not state any parts of the conversation that he claims made such an agreement, although several times pressed so to do.

An account stated consists of an agreement between parties, who have theretofore had transactions of a monetary character, by which a balance due one or more of such parties from such transactions is either struck or made a matter of mere computation, and by which the party or parties owing such balance agree to pay it. *Luikart v. Continental Nat. Bank,* 126 Neb. 598, 253 N. W. 905. The evidence discloses that the open account existing between the parties prior to the date of the alleged account stated had existed continuously from about the year 1917 up to about the middle of the year 1926. The evidence indicates that the items of this account were quite numerous. During the time the account was run, the defendant was doing trucking and hauling, and had at least more than one truck. The nature of the materials furnished and services performed in repairing automobiles was such that the defendant probably would not have any knowledge of the charges made for many items in the account. The evidence does not disclose that he did have any such knowledge. In creating an account stated, as in making any other agreement, the minds of the parties involved must meet and understand that a final adjustment of the respective demands of each upon the other is being made. *Haish v. Dillon,* 71 Neb. 290, 98 N. W. 818; *Loy v. Storz Electric Refrigeration Co.,* 122 Neb. 357, 240 N. W. 423. We are not unmindful of the rule of law that requires evidence to be given that construction that is most favorable to its sufficiency to give rise to disputed facts upon material issues, but we are unable to see how the evidence in this case is sufficient to establish the making of an account stated. Without mere speculation and conjecture, no reasonable mind could find from the evi-

dence that either the plaintiff or the defendant ever understood that they were engaged in the business of making an agreement as to the correctness of the account involved. A contrary holding would work toward the destruction of that public policy that supposedly is fostered by the statute that limits the time within which an action on an account must be begun.

For reasons above stated, the judgment of the trial court is reversed, with instructions to dismiss the plaintiff's action upon the alleged account stated, without prejudice to such rights as the plaintiff may have upon his open account.

REVERSED.

GERTRUDE MAJERUS ET AL., APPELLEES, V. SCHOOL DISTRICT NO. 52, RICHARDSON COUNTY, ET AL., APPELLANTS.

299 N. W. 178

FILED JUNE 27, 1941. No. 31102

1. **Schools and School Districts.** The presumption as to the regularity of the organization of a school district, provided by section 79-308, Comp. St. 1929, does not extend to the question of what land is included within such district.
2. ———. In an action to enjoin the levy and collection of taxes for school district purposes upon lands alleged to lie outside a school district, the burden of proving that such lands lie outside such school district is upon the plaintiff.
3. **Evidence.** The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly, and with authority, in the absence of evidence to the contrary, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Reversed, with directions.*

Jean B. Cain and *Rush C. Clarke*, for appellants.

Frank A. Hebenstreit and *John C. Mullen, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun in the district court for Richardson county. Its object is to enjoin the levy and collection of taxes for School District No. 52 in said county, for the year 1940 and subsequent years, upon the north half of section 19, township 1 north, range 18, east of the 6th P. M., in said county of Richardson. The plaintiffs, four in number, are the owners of said half section of land. The defendants are School District No. 52 of Richardson county, R. W. Daggett, county clerk and county assessor of said county, V. H. Shier, county treasurer of said county, and Emmett Gleason, precinct assessor of Rulo precinct in said county. From a decree granting to plaintiffs the relief prayed, the defendants have perfected an appeal to this court.

The petition of the plaintiffs alleges the official capacities of the various defendants, and alleges that the defendant School District No. 52 and School District No. 91 in said county were both organized in the year 1877. The petition further alleges the ownership of said half section of land in the plaintiffs, and that said land was included in said School District No. 91 at the time of its organization in the year 1877, and has never been removed therefrom. It is further alleged that in the year 1889 the defendants, and their predecessors in office, wrongfully placed said real estate upon the assessment roll of the defendant School District No. 52, and that from such year 1889 to the present time such real estate has been wrongfully and continuously so placed upon the assessment roll of the defendant School District No. 52 for tax purposes. The answer of the defendant school district admits the official capacity of the defendants, respectively, denies that said real estate is in said School District No. 91, alleges that said real estate is in the defendant school district, and pleads that, on account of the action of the plaintiffs, and their predecessors in title, in accepting the benefits of the defendant school district for so long a number of years, the plaintiffs are estopped to deny that said real estate is within the defendant school district.

The evidence discloses that said School District No. 91 and the defendant School District No. 52 have both exercised the franchises and privileges of a school district continuously since the year 1877. The tax records in evidence disclose that from the year 1880 to the year 1888, both inclusive, the half section of land involved was taxed in said district No. 91, and that from the year 1889 to the present time said real estate was taxed in the defendant School District No. 52. All of the records in the office of the county superintendent, with the possible exception of a school district map, were years ago destroyed in a fire. There are no records in the office of the county clerk that show in what school district such half section of land was ever located. Continuously since about the year 1880 the plaintiffs, or some of their ancestors, have lived upon the half section involved. The school attendance records for the defendant district show that at least since the year 1894 various children of the occupants of such land have been quite generally enrolled as attendants at the school held by the defendant district. Occupants of this land are shown to have voted in various elections held in the defendant district, on various occasions, throughout the past thirty to forty years. A school district map in the office of the county superintendent, required by statute to be kept, is in evidence, and shows the land involved in the defendant district. School District No. 91 lies south of, and adjacent to, the defendant school district. This map shows the division line between the two districts to be the half section line running from the west edge of section 19 eastward in a straight line through sections 19, 20 and 21.

Section 79-308, Comp. St. 1929, provides as follows:

"Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year."

The position taken by the plaintiffs is, first, that the land involved was once a part of School District 91, second, that under the section of the statute above quoted such District

91 is presumed to have remained unchanged, and, third, the defendants are unable to prove that such land has ever been legally transferred to the defendant District No. 52.

The presumption of regular organization raised by the section of our statute above quoted does not extend to the territorial boundaries of a school district. *Chicago, B. & Q. R. Co. v. Cass County,* 51 Neb. 369, 70 N. W. 955. The question of whether or not either of the two school districts involved herein was regularly organized is not involved in this case.

The plaintiffs are the ones who allege that their half section of land is not included within the boundaries of the defendant school district. The question of whether or not this land is within the defendant district is a question of fact. The burden of proof as to such issue of fact in this collateral proceeding is upon the plaintiffs. *Chicago, B. & Q. R. Co. v. Cass County, supra;* 56 C. J. 252.

Under the pleadings and the evidence in this case, the rule to the effect that, in the absence of evidence to the contrary, the law presumes official acts of public officers in a collateral attack thereon to have been done rightly, and with authority, and that in such collateral attack acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter, has special applicability. Such rule will be found discussed in the following cases: *Tierney v. Cornell,* 3 Neb. 267; *Bissell v. Fletcher,* 27 Neb. 582, 43 N. W. 350; 22 C. J. 130; *Bank of the United States v. Dandridge,* 12 Wheat. 64, 6 L. Ed. 552. From the presumption raised by this rule, it may be said that the plaintiffs' land was in School District No. 91 prior to the year 1889, in the absence of evidence to the contrary. The same rule of presumption, however, presumes a regular and lawful transfer to defendant district prior to the tax levy in the year 1889, as well as that such land has been kept in the defendant district from the time of such transfer to the present date. There is no evidence to refute this presumption. The plaintiffs have failed to maintain their burden of proof. The position taken by the plaintiffs is untenable.

Having taken the position of making disposition of this case upon the rules relating to burden of proof, and to presumptions relating to official acts of officers, it becomes unnecessary to discuss the issue of estoppel raised by the answer of the defendant school district. It also becomes unnecessary to discuss the question of whether or not the evidence is sufficient, after proof of the destruction of the best evidence in the form of official records, to show that the plaintiffs' land is legally within the defendant district, as would, perhaps, be necessary were the burden of proof upon the defendants.

For reasons above stated, the decree of the trial court is reversed, with instructions to dismiss the plaintiffs' petition.

REVERSED.

THOMAS J. MEADE ET AL., APPELLEES, V. ALOIS VANDE VOORDE, APPELLANT.

299 N. W. 175

FILED JUNE 27, 1941. No. 31136.

1. **Trusts.** Timely action in equity by heirs to declare a trust on personal property still in possession of the administrator, who at grossly inadequate price sold same to himself at his own sale without notice to heirs, is properly brought though administrator's final account was approved by county court and no appeal taken.
2. **Executors and Administrators.** A sale by the administrator of estate property to himself is voidable. Delay by heirs in questioning such sale may amount to ratification, but *held* that seven months is not an unreasonable delay by heirs who had no prior notice or knowledge of the sale.
3. ———. Failure to notify heirs, either personally or constructively, of sale of estate's personal property to administrator, coupled with purchase of such by him at grossly inadequate price, *held* to be decisive evidence of fraud.

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

Beeler, Crosby & Baskins, Robert B. Crosby, Horace E. Crosby and *L. A. DeVoe*, for appellant.

Beatty, Maupin, Murphy & Derry, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

THOMSEN, District Judge.

The defendant, as administrator of his wife's estate, sold all the assets of the estate to himself for sufficient to pay the debts. The sale was made on his application and by order of the county court. The administrator reported the sale and disposition of the money in his final account. The final account was approved and his discharge ordered upon filing vouchers.

The assets of the estate consisted of a school land lease on 640 acres in Keith county, Nebraska, valued with improvements, according to testimony, at approximately $13,000. For administration purposes its appraised value was $5,000. No debts were formally filed against the estate, but the administrator reported a total of $1,235.20, including cost of administration, and it was for this amount that the land lease was sold. The heirs received nothing.

The heirs, aside from the husband, are brothers, sisters, and one nephew of the deceased, and for the most part nonresidents of the state. Service of the three statutory notices —hearing on petition for appointment of administrator, notice to creditors, and hearing on petition for final settlement—was by publication. No personal service was had, nor did any of these heirs appear at a hearing.

An administrator is forbidden by statute to be the buyer at his own sale. Comp. St. 1929, sec. 30-1118. However, if he becomes the purchaser, the sale is voidable. *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982; *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670; Annotations, 1 A. L. R. 747, 111 A. L. R. 1362. The result is the same, even though he pays full value. Restatement, Restitution, sec. 192; *Johnson v. Erickson, supra.*

The present suit was brought in the district court by the heirs against the husband administrator. Plaintiffs' petition claims the defendant acted as trustee for the heirs, alleges

fraud, and asks for equitable relief. No evidence of actual fraud was shown, unless the disproportionate values and the circumstances can be said constructively to produce such result. The district court found the action to be one to impress a trust upon the title to the leasehold estate; that the defendant held in trust the distributive share of each heir except one who had conveyed to defendant; determined such distributive share after setting off to defendant his homestead right to one quarter; held the defendant to have a lien on the plaintiffs' respective interests for the proportionate share of each in the indebtedness of $1,235.20 paid by defendant in the administration of the estate and ordered disposition of such interests in the event of the failure of any plaintiff to pay. The court further ordered a subsequent accounting to be made of rents and profits accumulating since the administration. The plaintiffs object to no part of the decree. The defendant appeals.

Defendant, conceding the voidability of the sale, contends that the plaintiffs' failure to object and to appeal from the order approving the administrator's final account is a ratification of the sale. 24 C. J. 638; *Shelby v. Creighton*, 65 Neb. 485, 91 N. W. 369. Ratification with knowledge is a complete defense. But the failure to appear is merely evidence of ratification. Long continued acquiescence in the order approving the final account may evidence conclusive ratification. *Shelby v. Creighton, supra,* upon which defendant places sole reliance, demonstrates the effect of both knowledge and delay. Facts in that case distinguish it from the instant one. Estate property in Wyoming was sold there at public auction to John A. Creighton who was the Nebraska administrator. The property belonged to a partnership in Wyoming of which deceased was a member. The sale was conducted, under Wyoming law, by a surviving partner and approved by the Wyoming court. Hearing in Nebraska on the final account in the parent estate was six years later. Plaintiff, derivatively, had personal service of notice of such hearing. Ten years later and sixteen years after the sale she made a final written settlement, receiving

proceeds of estate of her father, releasing and discharging the administrators, and acknowledging the amount received to be in full satisfaction of inheritance from the Edward Creighton estate. Some question having arisen about the validity of the Wyoming sale, an action was brought in the district court (one and one-half years after the release) to confirm the accounting made to the plaintiff and to confirm the Wyoming sale. Plaintiff (defendant in that case) defaulted, and a decree was entered in accord with the prayer. Four years later her suit was brought. The sale had stood unquestioned for more than twenty years.

The instant case was brought within seven months of the sale and within three weeks of the entry of a supplementary decree. The heirs have received nothing. It is significant that in the *Creighton* case the court did not find that the purchaser "stood in relation of trustee to the property in question." That postulate, the court said, was *"a point we do not decide."*

Recognizing the proceedings in the county court as now binding on them, but denying any ratification by inaction, the plaintiffs assert the right to implant a trust upon the defendant's purchase of the property. 11 R. C. L. 369, sec. 440. In this we believe them to be right. Speedily asserting their claim, they are not guilty of laches. Lacking consent of the *cestui que trust,* courts have often held as a continued trust purchases of trust property by a trustee made at his own sale.

Restatement, Restitution, sec. 192; Restatement, Trusts, secs. 170, 205, 206, Comment b; 11 R. C. L. 361, sec. 427; L. R. A. 1918B, 35; *Kazebeer v. Nunemaker,* 82 Neb. 732, 118 N. W. 646; 24 C. J. 674.

Again, an heir may be said reasonably to expect customary events to follow in a probate proceeding. Service by publication advises heirs of the beginning and close of the administration of an estate, and of the ordinary events which proceed in between these notices in the routine of probate an heir may thus constructively be expected to be apprised. But extraordinary events, such as the sale of

personal property by the administrator to himself for much less than its true value, especially since forbidden by statute, strain the knowledge constructively to be acquired from these statutory notices. It has been held that such sales are void for want of jurisdiction. The failure to notify heirs, though not required by statute, prevents the court from authorizing or approving a sale to the administrator. The administrator is the trustee for the heirs. 23 C. J. 1170. In selling to others he acts for the heirs, but in selling to himself no one acts for them; thus notice to them is required, so says this authority. *Dugger v. Tayloe,* 60 Ala. 504; *Ligon v. Ligon,* 84 Ala. 555, 4 So. 405; *Bolling v. Smith,* 108 Ala. 411, 19 So. 370; *Bogart v. Bell,* 112 Ala. 412, 20 So. 511; *Allison v. Allison,* 114 Ala. 393, 21 So. 1008; *Washington v. Bogart,* 119 Ala. 377, 24 So. 245. Here we need not go so far as to hold the sale to be void on jurisdictional grounds; but when an administrator expects to become the purchaser at his own sale of personal property, to prevent a charge of fraud, fair respect for his obligation as agent for the heirs should prompt him to give notice. The failure to give such notice under the circumstances and the purchase of the property by himself for less than one-tenth of its real value and at one-fourth of the appraised value, unaccompanied by competitive bidding, furnish decisive evidence of fraud. In the sale of land for the payment of debts the heirs are amply protected by notice, a public auction, and, under certain circumstances, a special bond. Comp. St. 1929, sec. 30-1101 *et seq.* But no such statutory protection is afforded in the sale of personal property, and thus a special duty rests upon the administrator to dispose of personal property for the best interests of all those whom he is commissioned to represent.

The fact that the deceased was the defendant's second wife who came to him without dowry, that the property was his gift to her, that she bore him no children, and that the heirs are all her kin, not his, may to him rationalize the justice of his acts, but affords no protection against a method of proceeding that must be condemned. The precaution of a will by the wife would have avoided any difficulty.

No fact is here in serious dispute, and though in analyzing the facts and circumstances we have reached an independent conclusion (Comp. St. 1929, sec. 20-1925) we find the decree of the district court in all respects correct and in conformity with a rule which best will subserve justice.

AFFIRMED.

ANTONIO GULIZIA, APPELLEE, V. ROYAL INDEMNITY COMPANY, APPELLANT.
299 N. W. 220

FILED JUNE 27, 1941. No. 31113.

1. **Judgment.** "Judgment is not *res judicata* as to any fact at issue in subsequent action where neither issues nor parties are the same." *Plattsmouth Bridge Co. v. Turner*, 260 N. W. 562 (128 Neb. 738).
2. **Insurance.** "Insurance contract which is not uncertain as to meaning and is legal and not against public policy will be enforced as made." *Omar Baking Co. v. Employers Liability Assurance Corporation*, 264 N. W. 873 (130 Neb. 365).
3. ———. Where an insurance policy contains a provision that the insurer shall not be liable in respect of injuries while the insured automobile is being operated or manipulated by any person in violation of law as to age, and during the life of the policy a person is injured by the operation of the car while being driven by a son fifteen years of age for purposes other than to and from his home to the public school he attends, located more than a mile and a half distance by the nearest street or highway, there can be no recovery under such policy.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Reversed.*

Dressler & Neely and *H. J. Lutz*, for appellant.

R. B. Hasselquist, Donald Krause and *Rudolph Tesar, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from an action by the plaintiff, Antonio Gulizia, appellee herein, in the district court for Douglas county, upon an insurance policy of the defendant, Royal Indemnity Company, appellant herein, issued on appellee's automobile, wherein judgment was entered by the district court awarding appellee a judgment for $440 for attorney's fees and expenses had in defense of an action against him and his son by Henry Paulsen.

The facts, as stipulated to by the parties, are: That on February 4, 1933, Antonio Gulizia, hereinafter called the insured, purchased an insurance policy, No. MD 858235, from the defendant, Royal Indemnity Company, hereinafter referred to as the insurer, for a period of one year, which policy covered insured's 1932 Plymouth sedan, against liability and property damage. Mrs. Antonio Gulizia, the wife of the insured, purchased the policy for her husband through the firm of Tesar & Tesar, of Omaha, and she and her son, Joe Gulizia, appeared personally, and before purchasing the policy the mother stated to Lad Tesar, a member of said firm, that the only person to drive said car was Joe Gulizia and that the other members of the family could not operate an automobile. On November 29, 1933, while the policy was in force, Joe Gulizia, the son, who was then fifteen years of age, left the Gulizia home at 1415 William street, Omaha, in said car and drove to his school, a distance of more than one and one-half miles, located at Twenty-third and J streets, Omaha, to get his report card, and on his return, in company with his school friend, Louis Santi, drove directly toward home by going north on Twentieth street from Vinton street, until he reached Twentieth and Poppleton streets, where he drove the car west at the intersection for the purpose of going to Twenty-second and Poppleton that his friend might inquire as to a wagon for handling newspapers, thereafter intending to go to Sixteenth and Leavenworth streets with his friend, and that on turning west into Poppleton street the accident occurred wherein Henry Paulsen was injured. As a result of this accident

Henry Paulsen sued Antonio Gulizia and Joe Gulizia and recovered judgment against them in the sum of $1,200 and costs. That before and after being sued the insured notified the appellant thereof and demanded that it provide counsel and defend said action, but insurer refused to provide counsel or pay the expenses of said litigation, for the reason that the driver of the car was operating the same in violation of law as to age; that at the time of said accident, and subsequent to March 18, 1933, Joe Gulizia had obtained a regular driver's license from the county treasurer of Douglas county upon the affidavit of his father which set forth that the said Joe Gulizia was past sixteen years of age. Subsequent to the recovery of the judgment of $1,200 by Henry Paulsen against Antonio and Joe Gulizia, said Henry Paulsen sought to recover thereon against appellant herein on said policy, but recovery thereon was denied and no appeal taken therefrom.

The appellant contends that the court erred in entering judgment against it for the following reasons: (1) That the suit by Henry Paulsen against the appellant was *res judicata* of the rights of appellee herein; and (2) that the allowance of attorney's fees and costs was contrary to the provisions of the policy.

It is appellant's contention that the action of Henry Paulsen against it on the policy, based on the judgment obtained against Antonio and Joe Gulizia, is *res judicata* of all rights of appellee herein. As was stated in the case of *Plattsmouth Bridge Co. v. Turner*, 260 N. W. 562 (128 Neb. 738): "Judgment is not *res judicata* as to any fact at issue in subsequent action where neither issues nor parties are the same." In the action of Henry Paulsen against the appellant, the appellee herein was not a party nor privy thereto, nor was the question of the liability of the insurer as to the claim of appellee herein for attorney's fees and expenses in defending that action involved. Such judgment would not be *res judicata* in this action.

It is appellant's further contention that, under the express provisions of the policy, when the accident occurred in which

Henry Paulsen was injured the car was being operated by Joe Gulizia, the son, fifteen years of age, in violation of law as to age, and there was no liability upon the insurer, relying upon that part of the contract which is as follows: "Provided always that the insurance hereby made is and shall be subject to the conditions hereinafter set forth and to the memoranda, if any, indorsed hereon in like manner as if the same were respectively repeated and incorporated herein, and compliance with such conditions and memoranda, and each of them, shall be a condition precedent to the right of recovery hereunder. Conditions * * * Risks not Covered. 3. This policy does not cover any liability: * * * (e) In respect of injuries caused in whole or in part by any automobile insured hereunder while being operated or manipulated; * * * (i) By any person in violation of law as to age, or, under the age of 14 years in any event." No memoranda affecting these provisions are indorsed on the policy. Under the Nebraska statutes in force at the time of the accident, section 39-1101, Comp. St. Supp. 1931, no person under sixteen years of age was authorized to drive a motor vehicle, except that a limited permit might be issued to persons between the ages of fourteen and sixteen, under section 60-405, Comp. St. Supp. 1931, to drive a motor vehicle to and from the school building by the nearest highway or street from his place of residence, provided such person lives a distance of one and one-half miles or more from school, and for the sole purpose of transporting such minor to attend school. Although he had by false affidavit of his father obtained a general driver's license, the son would be subject to the provisions of our statutes as to age while driving a motor vehicle, and under the facts herein was at the time of the accident fifteen years of age, and upon returning from his school, where he had gone to get his report card, followed the nearest route from his school to his residence until he came to Twentieth and Poppleton streets where, for the purpose of permitting his friend, Louis Santi, to inquire as to a wagon for handling newspapers, he turned west to go to Twenty-second and Poppleton, then intending

to drive to Sixteenth and Leavenworth, thereby leaving the nearest route from school to his residence when he turned west on Twentieth and Poppleton, and attending to matters other than attending school, and clearly beyond the provisions provided by statute for permitting a boy of fifteen to drive a motor vehicle. While our court has never passed directly upon the language involved in this policy, it has, in the case of *Borsky v. National Fire Ins. Co.*, 119 Neb. 178, 227 N. W. 821, laid down the principle of law applicable to the policy here involved. The provisions of the policy involved in the *Borsky* case were as follows: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage to any property insured hereunder * * * (b) while the automobile described herein is * * * being rented under contract or lease." The court, in holding the insurer not liable while the car insured was leased to the driver, held as follows: "In each of the cases cited above it is apparent that the stipulation provided for in the policy amounted to a suspension of the policy during the time of default in premium payment. The same principle, applied to the instant case, suspends the policy during the time that the automobile therein insured is being used as a rented or leased car. Insurance companies are permitted to select the kind of risks against which they will insure, and may also select the kind of risks against which they decline to insure. It is entirely within their discretion whether they will insure cars while being used in racing meets, or rented or leased, to be driven by the lessee. An insurance company may properly refuse to insure an automobile while it is being used for carrying highly inflammable or explosive material, and may, by contract, provide that if an automobile, covered by the policy, is so used during its life it will be suspended during such use."

Where the provisions of an insurance contract are not uncertain or ambiguous, but are clear and certain as to their meaning, and such provisions are not contrary to public policy or contrary to the provisions of our statutes, such policy will be enforced as made.

Where, as here, the express provisions of the policy clearly provide that the policy does not cover any liability as respects injuries while the car is being operated by any person in violation of law as to age, such provision, not being contrary to public policy or against any provisions of our statute, will be enforced as made, and the insured's car being driven by his son, fifteen years of age, for purposes other than attending school, and by leaving the route to and from his home and school by the nearest street or highway, was being driven in violation of our statute as to age, and such policy, during the time that the insured's car was being so driven, was suspended and no liability could attach to the insurer.

With reference to appellee's contention that this case falls within the doctrine of *Davis v. Highway Motor Underwriters,* 120 Neb. 734, 235 N. W. 325, by reason of the statement made by Mrs. Gulizia to Lad Tesar, a member of the firm of Tesar & Tesar, at the time of obtaining the policy, a careful examination of the facts in that case will disclose a positive statement was made to the agent as to the age of the boy and the requirement of the applicant to have a policy covering the car while being driven by the boy; that the agent of the insurer understood the requirements of the applicant and believed the policy delivered contained such provision. Because of the mutuality of the agreement the court reformed the policy in accordance therewith. Here, the only statement made to the agent of the insurer was that "the only person to drive said car was Joe Gulizia and that the other members of the family could not operate an automobile." Nothing was said as to the age of the boy, nor that a policy was desired to cover the car while being operated by the son in violation of law as to age, nor does it appear that the agent agreed to furnish a policy with provisions other than the one actually delivered. Under the facts it does not come within the rule announced in *Davis v. Highway Motor Underwriters, supra.*

The judgment of the district court is therefore

REVERSED.

JULIA BURKLUND SHERWOOD, APPELLANT, V. A. J. SALISBURY, SHERIFF, ET AL., APPELLEES.
299 N. W. 185

FILED JUNE 27, 1941. No. 31145.

1. **Judgment.** Where the defendant, plaintiff's judgment debtor, owns a judgment which runs against the plaintiff, the legal title to which is in another, but without any beneficiary interest, and the defendant judgment debtor owns all of the beneficiary interest in the judgment, a court of equity may, in a proper proceeding, direct the defendant's interest in the judgment to be set off against the plaintiff's judgment, whether or not the title was so placed in the third person with fraudulent intent.
2. **Set-off and Counterclaim.** "Insolvency of a party, against whom set-off is sought, may be sufficient ground for a court of equity to allow a set-off which is not provided for by statute." *Clark Implement Co. v. Wallace*, 103 Neb. 26, 170 N. W. 171.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions.*

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

Harold E. Coates and *William S. Padley, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from a decree of the district court for Lincoln county, dissolving the plaintiff's temporary restraining order, denying injunction and set-off, and dismissing plaintiff's action.

This action was instituted in the district court for Lincoln county by Julia Burklund Sherwood, formerly Julia E. Burklund, appellant, against the sheriff of Lincoln county and A. S. Coates and Hubert J. Price, appellees, to perpetually enjoin the enforcement of a judgment of $553.75, interest and costs, obtained by the receiver of the American State Bank of Sutherland, Nebraska, against Julia E. Burklund, then single, the appellant, on January 9, 1935, in the county court of Lincoln county, Nebraska, and on March 28,

1936, assigned to the defendant A. S. Coates and transcripted to the district court for Lincoln county on January 17, 1939, and execution issued and levied on real property of the appellant in Lincoln county, for the reason that the defendant Hubert J. Price, who was and is insolvent, is the real and true owner of said judgment; that the appellant is the owner by assignment dated February 11, 1938, of a judgment of $4,005, interest and costs, obtained by Charles W. Burklund against the defendant Hubert J. Price on October 18, 1937, in the district court for Lincoln county, and that if the enforcement of the judgment against plaintiff is not enjoined and set-off thereof allowed as against the plaintiff's judgment and credited thereon, the plaintiff is without adequate remedy at law and will be irreparably damaged.

Temporary restraining order was entered and upon hearing on September 13, 1940, default was entered against the defendant Hubert J. Price and trial had as to the defendant A. S. Coates, the court finding that he was the real and true owner of said judgment, and thereupon vacated and set aside the temporary restraining order, denied perpetual injunction, and dismissed plaintiff's action at plaintiff's cost. From this judgment plaintiff appeals, contending that the judgment is contrary to the facts and law.

Upon this appeal, so far as is necessary, this court retries the issues of fact and law presented by the record *de novo*, and reaches an independent conclusion without reference to the conclusion reached in the district court. Comp. St. 1929, sec. 20-1925.

The record discloses that Hubert J. Price was the sole managing officer of the American State Bank located at Sutherland, Nebraska, until it was taken over by the department of banking and E. H. Luikart appointed receiver. The receiver obtained a judgment against the appellant on January 9, 1935, for obligations owing the bank, in the sum of $553.75 with interest and costs, which judgment remained part of the assets of the receivership until offered for public sale with other remaining assets of said bank on March 12,

1936. Subsequent to the failure of said bank, and prior to the sale of the remaining assets, Hubert J. Price had moved from Sutherland and was practicing as an attorney at law at Grand Island and subsequently at Gothenburg. A. S. Coates, who was an elderly gentleman and justice of the peace, had for many years lived at Sutherland, and on the day of the sale of the remaining assets of the American State Bank had gone to North Platte and, pursuant to advice from Mr. Price, bid upon the remaining assets of both the American State Bank and Farmers State Bank, which were being offered for sale at the same time, and successfully placed the highest bid upon the remaining assets of both the American State Bank in the amount of $230 and the Farmers State Bank somewhere between $500 and $800. It appears that at this sale Mr. Coates and Mr. Price were sitting across the table from each other, and that numerous other parties were present at said sale, including Fred Siegelin and Leo Goedert, both of whom had notes, upon which they were makers, among the remaining assets of the American State Bank, and upon which they were bidding; that during the course of the bidding Mr. Price called them into the hall away from the room in which the assets were being sold and advised them that if they ceased bidding he would let them have their notes at a certain price, as he was bidding on the assets, and pursuant to this conversation they ceased to bid, and subsequently the bids of A. S. Coates on the assets of the American State Bank and Farmers State Bank were accepted; that during the sale, whenever any one had bid higher than Coates, Mr. Price would kick Mr. Coates on the leg under the table and thereupon Coates would raise his bid. At the conclusion of the sale 25 per cent. of the purchase price was required to be deposited and Mr. Price gave his check for this amount for both bids made by Mr. Coates. This Mr. Coates testifies he subsequently repaid in cash. However, on February 24, 1936, immediately before this sale, Mr. Coates had made an application to the county assistance office for old-age assistance in which application he set forth that the only assets he had was his home and

the lot on which it was located in Sutherland, and upon subsequent applications he never at any time listed the ownership of these assets. After the sale of the assets of the American State Bank was confirmed, Mr. Coates testified that he paid the receiver the balance of the purchase price in cash and received from him an assignment of the assets purchased; however, he immediately turned over all of these assets to Mr. Price, except two notes, being the notes of Herman Mine and Leo Goedert, and some fixtures. Mr. Goedert testifies that Mr. Coates told him he received his note as part of the deal with Price; that after the sale Mr. Siegelin called on Mr. Price at Gothenburg in response to a letter and at that time Mr. Price had a large envelope from which he drew forth the note of Mr. Siegelin which was part of the assets, and that he had the other papers with him; that Mr. Price on numerous occasions called on the appellant's father in Sutherland in regard to this judgment and later, in the spring of 1937, wrote to appellant in regard thereto setting forth that he had purchased these assets of the American State Bank, and that unless arrangements were made to pay her judgment appellant would be brought into court to make a disclosure of her assets in order to satisfy the judgment; that in December, 1938, Mr. Padley, who is an attorney at law at Gothenburg, was consulted by Mr. Price in regard to collecting the remaining assets of this bank and requested him to consult Mr. Coates in regard thereto; that Mr. Coates was at the time not acquainted with Mr. Padley, but he did assign the Siegelin note to him for collection and authorized him to proceed with other matters. During all this time and up to the time of this suit Mr. Price made no accounting of any kind to Mr. Coates, and outside of the Goedert note on which he testifies he collected $2.50, and the Herman Mine note, which he settled for $10, and for a small amount he received for some fixtures, Mr. Coates, who lived in Sutherland, made no effort to collect any of the assets nor employed any legal counsel for that purpose, although his son was a practicing lawyer at North Platte, and all of the matters were handled by Mr. Price or

some one at the direction of Mr. Price. Nor was Mr. Price called to explain any of these matters, although defendant Coates testified they were bought at his advice.

No attempt was made by A. S. Coates to collect the Burklund judgment, although he knew appellant and her father for years and lived in the same town of Sutherland, and during this time he was financially destitute, was sickly and needed medical attention.

On October 18, 1937, Charles W. Burklund on notes dated September 19, 1931, obtained a judgment against the defendant Hubert J. Price for $4,005 with interest and costs, which judgment was assigned to plaintiff on February 11, 1938, and remains wholly unsatisfied. The evidence further shows that on March 7, 1933, James Peterson obtained a judgment in the county court of Lincoln county against Hubert J. Price for the amount of $578.40; that on September 15, 1937, the department of banking obtained a judgment in the district court for Lincoln county against the defendant Hubert J. Price in the sum of $6,766.17.

While the lower court found from the facts that A. S. Coates was the true owner of said judgment, from a careful analysis of the entire testimony and all of the circumstances in connection with the dealings of the parties it would appear clear that Hubert J. Price was actually the owner of this judgment, and that Mr. Coates merely had the assignment thereof in his name for convenience and without any beneficial ownership therein, and it further appears without question from the default entered against Mr. Price and the evidence offered that at all times he was insolvent and that appellant would be without any means at law to satisfy the judgment assigned to her against the said Hubert J. Price. As has been stated by our court in the case of *Cochran v. Cochran,* 62 Neb. 450, 87 N. W. 152: "If the judgment debtor owns real estate, the legal title to which is in another, but without any beneficiary interest, and the judgment debtor owns all the beneficiary interest in the land, a court of equity may, in proper proceedings, direct the defendant's interest in the land to be sold whether or not

the title was so placed in the third person with fraudulent intent." And so here, where the plaintiff's judgment debtor, Price, owns a judgment against the plaintiff, his judgment creditor, the legal title to which is in the defendant Coates, but without any beneficiary interest, and the judgment debtor owns all the beneficiary interest in the judgment, a court of equity may, in a proper proceeding, direct the defendant's interest in the judgment to be set off against the plaintiff's judgment, whether or not the title was so placed in the third person with fraudulent intent.

Our court has held: "Insolvency of a party, against whom set-off is sought, may be sufficient ground for a court of equity to allow a set-off which is not provided for by statute." *Clark Implement Co. v. Wallace,* 103 Neb. 26, 170 N. W. 171. See *Richardson v. Doty,* 44 Neb. 73, 62 N. W. 254. And as stated in *Wells v. Cochran,* 88 Neb. 367, 129 N. W. 533: "The insolvency of a party against whom a set-off was claimed is recognized as sufficient to justify the intervention of a court of equity."

Where therefore, as here, the record shows that the defendant A. S. Coates is an elderly gentleman without means other than his home, and where the defendant Hubert J. Price is shown to be insolvent and a judgment against him could not be collected, and where he owns all of the beneficiary interest in a judgment against the appellant, but held in the name of the defendant A. S. Coates, who has no interest therein, but is however attempting to enforce the judgment in his name and against the property of the appellant who has an unsatisfied judgment against the defendant Hubert J. Price, and it appears that the enforcement of said judgment would cause irreparable damage to the appellant for which she has no adequate remedy at law, a court of equity should relieve the party from this inequitable situation, and the enforcement of the judgment in the name of A. S. Coates should be permanently enjoined, the judgment be declared to be the property of the defendant Hubert J. Price, and because of his insolvency a set-off of the full amount of said judgment and costs be allowed and credited

on the unsatisfied judgment of appellant against the defendant Hubert J. Price, satisfying the judgment against appellant in full, and taxing the costs of this proceeding against the defendants A. S. Coates and Hubert J. Price.

It further appears that subsequent to the commencement of this action A. S. Coates made an assignment of this judgment to his daughter, Nevita Schatz, and that a lien for attorney's fees was filed in favor of Harold E. Coates and W. S. Padley; however, these all being filed subsequent in time to the commencement of this action create no lien or right in and to the judgment that in any way affects this judgment as to the appellant's right of set-off as herein determined.

Wherefore the findings and judgment of the lower court are reversed and the cause is remanded with directions.

REVERSED.

WILLIAM T. DARNELL, APPELLEE, V. CITY OF BROKEN BOW ET AL., APPELLANTS.

299 N. W. 274

FILED JULY 3, 1941. No. 30983.

1. **Taxation.** A city purchasing and foreclosing a tax sale certificate on real estate does so as trustee of an express trust for the use and benefit of the state and all governmental subdivisions entitled to participate in the distribution of the proceeds.
2. **Municipal Corporations.** The beneficial owners of the taxes enforced by the statutory trustee are entitled to a strict accounting of the avails of the tax foreclosures prosecuted by it on the basis of the integrity of the separate funds involved. This is wholly inconsistent with the claim of the trustee in the instant case to compensate its attorney by an aliquot part of the avails of a recovery as a contingent fee under the circumstances disclosed by the record before us.
3. ———. The necessary revenue of the state and its governmental subdivisions shall be raised in such manner as the legislature may direct.
4. **Taxation.** The legislature has exclusive and discretionary power to prescribe the means by which taxes shall be collected, and taxes are collectible in, and only in, the manner so provided.

5. **Maxims.** In this equitable proceeding the controlling maxims are: "Equity looks through forms to substance," or, as stated in similar language, "A court of equity goes to the root of a matter and is not deterred by forms."
6. **Municipal Corporations.** Ambiguous terms may be properly interpreted by reference to the circumstances of the parties at the commencement of and during the continuance of the transactions in which such terms are employed, the terms of the obligations contractual then entered into by them, and the acts of the parties during the continuance of such obligations, and subsequently.
7. ———. The proper interpretation of a transaction and the several constituent parts thereof, where ambiguity and incompleteness appear, invokes the application of the rule that it is proper, and courts will generally follow the interpretation adopted by the parties themselves.
8. ———. In some cases, courts will look to the subsequent acts of the parties themselves. Especially is this true where both parties to a contract, with full knowledge of its terms, by their actions under it have given it the same construction.
9. ———. The tax collection contract of April 21, 1931, so construed (looking as equity always does to the substance and not shadows, to the thing done and not the misnomer of that thing), is invalidated by the provisions of section 17-518, Comp. St. 1929.
10. ———. The mayor and council of a city of more than 1,000 and less than 5,000 inhabitants, which is the owner of certain tax sale certificates, each of which evidences unpaid taxes together with accrued interest thereon in excess of the sale value of the lands described therein, are not authorized or empowered, in violation of their municipal code and statutes applicable thereto, to enter into a contract of employment with an attorney at law, as a private practitioner, to foreclose such tax sale certificates on behalf of such city, and enforce the same, and receive as a contingent attorney's fee for such services a certain percentage or aliquot part of the public revenues affected thereby to be deducted from the proceeds of such public sales.
11. **Taxation.** When the statutes provide a remedy for the collection of taxes under given circumstances, that remedy is exclusive.
12. **Municipal Corporations.** However, the foreclosure of the tax sale certificates here involved, by a civil action, was clearly within the statutory powers of the municipality. The lawful employment of an attorney's services for that purpose was, therefore, within the corporate functions thereof and clearly contemplated by the provisions of its municipal code.

13. ———. This court adopts the view that under the circumstances in this case, even though the contract of employment of the attorney because of provisions contained therein be void, so that no recovery upon such contract at law may be had therein, still such attorney, in a proper action, is entitled to be paid on a *quantum meruit* basis for lawful services rendered by him.
14. **Attorney and Client.** "In determining the value of attorney's fees, the following elements should be considered: The importance and result of the case; the difficulties thereof; the degree of professional skill, diligence and ability required and exercised; the experience and professional standing of the attorney, and the prominence and character of the parties where they affect the importance of the litigation; the questions of law raised, and the time and labor necessarily required in the performance of duties." *Prince v. Pathfinder Life Ins. Co.*, 133 Neb. 705, 276 N. W. 661.
15. ———. Evidence examined and value of the attorney's services performed determined as set out in the opinion.
16. **Equity: ESTOPPEL.** "If prejudice will not be occasioned to the defendant as a result of the assertion of the complainant's right, laches is not predicable of delay attending the commencement of the suit. * * * Where the complainant seeks to arrest a further invasion by the defendant of the complainant's rights, the suit may not be defended on the ground that the complainant has permitted or acquiesced in the defendant's conduct." 19 Am. Jur. 353, sec. 509.

APPEAL from the district court for Custer county: LOUIS LIGHTNER, JUDGE. *Affirmed as modified.*

Perry, Van Pelt & Marti, for appellants.

Evans & Lee, contra.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER, MESSMORE and YEAGER, JJ., and MEYER, District Judge.

EBERLY, J.

This is a suit in equity by William T. Darnell, as a resident, inhabitant, and taxpayer of the city of Broken Bow, Nebraska, against Allan F. Black, an attorney at law, the city of Broken Bow, and certain public officers, to cancel two tax collection contracts entered into by Black and the city authorities for the collection and enforcement of cer-

tain tax sale certificates covering real estate situated within that municipality as unauthorized, void and *ultra vires*, and for an accounting by Black of the moneys received by him pursuant thereto. From adverse findings and judgment of the district court, Black and the city of Broken Bow appeal, and for the same reason a cross-appeal is presented by plaintiff.

The facts leading up to and involved in this litigation may be stated as follows: The defendant city is a municipal corporation of more than 1,000 and less than 5,000 population. Allan F. Black is an attorney at law admitted to practice in the state of Nebraska. On September 9, 1930, he was appointed city attorney of Broken Bow (for a term ending April 28, 1931), his salary fixed at the rate of $200 per annum, he had accepted the appointment, and served as such until on April 21, 1931, he submitted his resignation to the mayor and council of that city at a special meeting, which was immediately accepted.

The applicable statutes relating to the situation here presented include the following:

Section 17-107, Comp. St. 1929, provides in part: " * * * the mayor, with the consent of the council, may appoint * * * a city attorney * * * who shall hold their offices for one year unless sooner removed by the mayor with the advice and consent of the council."

Section 17-108, Comp. St. 1929, provides: "The salaries of all officers of the city shall be fixed by ordinance, not exceeding the following amounts respectively: * * * city attorney, four hundred and fifty dollars per year."

Section 17-516, Comp. St. 1929, provides: "The city or village attorney shall be the legal adviser of the council or board of trustees. He shall commence, prosecute and defend all suits and actions necessary to be commenced, prosecuted or defended on behalf of the corporations, or that may be ordered by the council or board of trustees; and when requested, shall attend meetings of the council or board and give them his opinion upon any matters submitted to him, either orally or in writing, as may be required."

Section 17-517, Comp. St. 1929, provides: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation, nor shall any officer receive any pay or perquisites from the city other than his salary, as fixed by ordinance and this chapter; and neither the city council nor board of trustees shall pay or appropriate any money or other valuable thing to any person not an officer for the performance of any act, service or duty, the doing or performance of which shall come within the proper scope of the duties of any officer of such corporation."

Section 17-518, Comp. St. 1929, provides: "The emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed; and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed, when during the same time emoluments had been increased."

The municipal code as adopted by the city of Broken Bow contained the following provisions:

Section 6. "There shall be appointed by the mayor at the beginning of each municipal year, on the last Tuesday in April, as aforesaid, appointive officers as follows: * * * city attorney; * * *."

Section 20. *"City Attorney; Appointment; Duties; Special Counsel.*—Whenever, in the judgment of the mayor and council of this city it shall be deemed necessary or expedient, the mayor shall forthwith appoint a city attorney with the advice and consent of the council. The city attorney shall be the general legal advisor of the mayor and council. He shall commence, prosecute and defend all suits and actions necessary to be commenced, prosecuted or defended on behalf of the city or that may be ordered by the mayor and council, and, when requested, he shall attend upon the sittings and meetings of the aforesaid body and, either

orally or in writing, deliver to it, upon request, his opinion upon any inquiry of a legal nature which may be required of him in the regular course of said body's official business. In their discretion, the aforesaid body may employ an attorney or attorneys, both for substituted and supplemental services, or for special pieces of legal work, and pay for the same out of the general fund of this city for incidental purposes."

On April 21, 1931, the next official action taken after the acceptance of the resignation of Allan F. Black was the immediate adoption of a resolution by the mayor and council "that the city of Broken Bow, Nebraska, purchase tax sale certificates numbered 1 to 110 inclusive and enter into a contract with Allan F. Black to commence and prosecute such proceedings as in his judgment are necessary in order to enforce the collection of said taxes, a list of which is attached hereto and made a part hereof, marked exhibit A, and that the said Allan F. Black be paid for his services in enforcing said collection the following amounts:

"1. In all cases where a foreclosure is commenced and prosecuted to final judgment, the attorney's fee of 10 per cent. which is taxed by the court as part of the costs in the case shall be paid to the said Allan F. Black as compensation for his services in said cases so prosecuted to final judgment.

"2. In all cases where redemption is effected or payment of the taxes is made after the passing and approval of this resolution and before a decree has been entered and before an attorney's fee has been taxed by the court the said Allan F. Black shall receive as his compensation 10 per cent. of the amount so paid by tax debtor."

Notwithstanding his resignation on April 21, 1931, Black received his usual official stipend covering the entire month of April at the rate of $200 per year, which, under the terms of his original appointment as city attorney, he was entitled to receive while serving as such.

On April 26, 1932, at the annual meeting of the mayor and council of the city of Broken Bow, which occurred after the city election of that year and which is devoted in part to the

filling of the municipal offices, the following business was transacted: "The mayor then announced the following appointments: (among others) city legal advisor, Allan F. Black."

The reappointment of Allan F. Black as city legal advisor was announced to the city council at the annual meeting held April 25, 1933.

On April 28, 1936, at a regular meeting of the mayor and council of Broken Bow, the minutes disclose: "The mayor then recommended Allan F. Black as legal advisor for the city of Broken Bow. It was moved by Smith and seconded by Chrisman that the appointment of Allan F. Black as the city's legal advisor be approved. Motion carried."

It also appears that the name of Allan F. Black had been carried as an officer of the city of Broken Bow continuously since April 21, 1931. At first it appeared as "City Attorney," later merely as "Attorney."

The minutes of the regular meeting of the mayor and council of the city of Broken Bow held on April 11, 1933, disclosed that a motion was duly adopted for the appointment of a committee to cooperate with the city's legal advisor in regard to special tax sales, and a resolution was also duly adopted which, in part, was as follows: "That it be, and it hereby is, recognized that since the 21st day of April, 1931, the said Allan F. Black has at all times been and now is special counsel for the city of Broken Bow, Nebraska, and has not been since April 21st, 1931, an officer of the city of Broken Bow, Nebraska, in the capacity of city attorney, and that any and all sums of money paid to the said Allan F. Black by the city of Broken Bow, Nebraska, since April 21, 1931, have been fees paid to a private practicing attorney and not in any sense a salary as city attorney." This resolution thus adopted ratified and approved the contract then existing between Allan F. Black and the city of Broken Bow in connection with the collection and foreclosure of city tax certificates numbered 1 to 110, inclusive.

The official minutes of the regular meeting of the mayor and council of the city of Broken Bow held on April 15, 1936, includes the adoption of a resolution of which the following constitutes a part: "Now therefore be it resolved that the city of Broken Bow, Nebraska, purchase tax sale certificates upon real estate described in the attached list and employ attorney Allan F. Black to proceed with the collection of the same on the terms and conditions of the contract herewith submitted which the mayor and clerk of the said city are hereby authorized to make."

The tax sale certificates referred to in this resolution were all issued subsequently to those referred to in the resolution of April 21, 1931, and the compensation agreed to be paid Black by the city of Broken Bow under the contract of 1936 was: "In all cases where foreclosure is commenced and prosecuted to final judgment, the attorney's fee of ten per cent. which is taxed by the court as part of the costs in the case shall be paid to party of the second part, but only where, and to the extent that the same is available as part of the costs out of the proceeds of the sale of the real estate involved." Together with the further agreement: "In all cases where redemption is effected or payment of the taxes is made after the execution of this contract, and before a decree of foreclosure has been entered, the party of the first part shall pay to party of the second part (Black) as his compensation five per cent. of the amount so paid by the tax debtor."

The compensation for Black set forth in the contract of 1931 was: "The attorney's fee of 10 per cent. which is taxed by the court as part of the costs," and where redemption is made or taxes paid by the owner of the land before decree of foreclosure is entered, "Allan F. Black shall receive as his compensation 10 per cent. of the amount so paid by the tax debtor."

From the date of his first appointment, September 9, 1930, as city attorney of Broken Bow at a salary fixed at $200 per annum to the commencement of this action on September 30, 1939, there was paid to Allan F. Black from

the general fund of the city, for legal services, the sum of $1,783.30. These payments, except the first one, it appears, were at all times regularly made quarterly on the time basis of $200 a year. The bills therefor were rendered by Black and allowed by the mayor and council on the time basis and not on the basis of the reasonable value of each item of service performed by the claimant. Thus, we have a bill for $50 for a quarter where the services specified were "attending six council meetings." Another bill was allowed wherein the services are specified: "Attended six council meetings. Case of State of Nebraska vs. Fisher. In regard to the Telephone Co. contract. $50." And a third claim for services recited: "From April 25th to July 25th, 1933. Drafting and revising the Occupation Tax Ordinance. Preparation and drafting of Beer ordinance. Vagrancy case—City of Broken Bow v. Jenkins. In re claim of Janee Crawford. Attendance at six council meetings. Total, $50."

Under these tax collection contracts, Mr. Black, as attorney, filed a total of 14 cases in the district court for Custer county, which contained a total of 117 causes of action on tax sale certificates. The court entered 106 foreclosure decrees, aggregating $181,018.32. Eleven causes of action were still pending at the time of the institution of this instant suit. One hundred six tracts of land have been sold at public sale and sales confirmed. On these the sheriff has received and accounted for, as sale price, the sum of $23,749.66. Actual court costs in these cases other than attorney fees taxed aggregated $2,556.08, and $12,566.75 was the net amount received by the county treasurer for disposition as provided by law. Mr. Black has been paid or is to be paid $8,626.83 for his services in bringing these actions. The results of the foreclosure proceedings show a deficiency after judicial sale and confirmation of the 106 tracts of land thus sold amounting to $167,451.57. In no cause of action did the property sell at judicial sale for a sum of money sufficient to equal the tax decree and interest accrued thereon, exclusive of costs and attorney's fees taxed therein.

It also appears that, after the making of the contracts above referred to and prior to the commencement of the foreclosure proceedings and the entry of decrees of foreclosure, tax debtors appeared at the office of the county treasurer, and redeemed their lands from such tax sales; and that the county treasurer thereupon received and accepted such payments, wrote regular tax receipts and canceled the tax sales involved. The total of such payments aggregated the sum of $32,782.10, for which, under the terms of the contracts hereinbefore referred to, Black claimed and received compensation in the sum of $2,020, paid by the city of Broken Bow. All this commission was paid during the "two years waiting period," and before actions to foreclose had been instituted.

The trial court, after consideration of all the evidence received, adjudged the contracts of April 21, 1931, and April 17, 1936, null, void and illegal, and duly canceled the same, enjoined all further performance thereunder, and adjudged that the defendant Black account for and pay into the court the sum of $5,201.83.

In support of their appeal, appellants take issue with the findings and judgment of the trial court. It is their contention that Allan F. Black was, by virtue of his appointment, a public officer, that his resignation took effect immediately, and that acceptance thereafter by the mayor and council was unnecessary. Authorities are cited in support thereof. However, statutory provisions appear to have rendered unnecessary any consideration of this contention. Section 32-1701, Comp. St. 1929, provides: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: First. The resignation of the incumbent; * * *." Section 32-1702, Comp. St. 1929, provides: "Resignations of civil officers may be made as follows: * * * Sixth. By all officers holding appointments, to the office or body by whom they were appointed. Such resignation shall not take effect until accepted by board or officer to whom the same is made." Section 32-1703, Comp.

St. 1929, provides: "Vacancies shall be filled in the following manner: * * * in city and village offices, by the mayor and council * * *."

The record discloses, however, that Black's resignation had been accepted evidently in strict compliance with the statutory provisions quoted.

In this equitable proceeding the controlling maxims are: "Equity looks through forms to substance," or as stated in similar language, "A court of equity goes to the root of a matter and is not deterred by forms." These maxims will be applied, "looking, as equity always does, to substance and not shadows, to the thing done not the misnomer of that thing." 21 C. J. 204, note 65.

The use by the mayor and council of the terms "Special Counsel" for the city of Broken Bow, and "City Legal Advisor," etc., being ambiguous, may be properly interpreted by reference to the circumstances of the parties at the commencement of and during the continuance of the transactions in which such terms were employed, the terms of the obligations contractual then entered into by them, and the acts of the parties during the continuance of such obligations, and subsequently. *Drake & Jackson v. Corporation of Victoria*, 1 B. C. Rep. (Part 2) 165.

Proceeding from the accepted basis of the investigation above set forth, it is evident from the record and attendant circumstances which may be gleaned therefrom that the subject-matter of the first tax collection contract had been fully investigated and reported to the mayor and council or their representatives prior to April 21, 1931. The object it was desired to accomplish with reference to the same had been agreed upon, and prior to the submission of the resignation to the city council, the terms of the proposed tax collection contract had been substantially settled between the parties, and the method of the future discharge of the duties imposed by statute on the city attorney's office fully understood, as well as the necessity of Black's formal resignation realized. Indeed, we find that these matters were, prior to April 21, 1931, submitted to an eminent member

of the Nebraska Bar who was not in attendance at the meeting of the mayor and council on that date, and that an approved form of a typewritten tax collection agreement had been prepared by him before April 21, 1931, which prior to the resignation, had been accepted and approved by Black, and immediately after the acceptance of the latter's resignation, it had been formally adopted and made of record by the mayor and city council.

The proper interpretation of this transaction and the several constituent parts thereof, in view of existing ambiguity and incompleteness, invokes the application of the rule that it is proper, and courts will generally follow the interpretation adopted by the parties themselves. *Gorder & Son v. Pankonin,* 83 Neb. 204, 119 N. W. 449.

In some cases courts will look to the subsequent acts of the parties; and where both parties to a transaction, with full knowledge thereof, by their action under it have given it the same construction, it is a safe rule to adopt that construction. *School District v. Estes,* 13 Neb. 52, 13 N. W. 16.

Thus, the subsequent acts of the corporate authorities and defendant Black have evidenced the complete agreements and understanding entered into on the 21st day of April, 1931, at a time when the term of office in which Black was serving had not yet expired. It is thus fairly established that at this time these mutual obligations included the immediate formal resignation by defendant Black of his office as city attorney, but that the duties imposed by law upon the office of city attorney he would continue to perform under an unchanged remuneration at the rate of $200 a year and under the designation of "Special Counsel," though he was otherwise held out as city attorney, city legal advisor, etc.; and that commencing on the 21st day of April, 1931, he should also receive the additional compensation provided in the tax collection contract. Notwithstanding the formal acceptance of his resignation as city attorney, in view of all the facts, Black remained city attorney *de facto,* and thereafter performed continuous service as such, and received the compensation previously

prevailing. The situation clearly brings the matter within the letter and reason of section 17-518, Comp. St. 1929, and the first tax collection contract, in clear effect intending to and operating to unlawfully increase the emoluments of Black's office during the term for which he was appointed, is invalidated by that fact, even though he be considered to be, in effect, appointed to succeed himself.

The validity of this first tax collection contract, as well as the one entered into on April 17, 1936, is challenged on the additional ground that, as applied to the public revenue, both, being contracts for contingent fees or compensation, are invalid as to form, unreasonable as to amounts specified, and contrary to a sound public policy. In support of this, the case of *Platte County v. Gerrard*, 12 Neb. 244, 11 N. W. 298, is cited. That case involved a contract wherein Gerrard and Whitmoyer, as attorneys, agreed to perform such acts as might be necessary in having certain lands, previously unlawfully omitted, properly placed upon the public tax rolls and subjected to public taxation. In consideration whereof, the board of county commissioners agreed to pay such attorneys for such services, 25 per cent. of the amount of such taxes for the year 1873, payable only in the event of those taxes being collected according to law. This court determined that the contract in question, because of its contingent character, was one which the board had no legal power to make, and that it could not be upheld by the courts. In the opinion in that case Cobb, J., speaking for the court, says, in part:

"But let us suppose this not to have been the case, that the board of county commissioners might at their discretion employ counsel of their choice, to advise them as to their duties, and pay therefor either an agreed price, or a *quantum meruit* out of the public funds; does it follow that such board might, as a mode of compensation for such advice, lawfully bargain away an aliquot part of such of the public revenues as might be affected thereby? And making such compensation contingent upon the success of the measures taken under such advice? We think not. The giving of

contingent fees, or compensation for services rendered to the public, is contrary to sound policy.

"It is the spirit of our laws to collect from the people only such amount of money by taxation as may be sufficient to a certain and economical support of the government in all its branches, and to require the strictest accountability therefor. The law has provided for all officers and public servants, having to do with the levy and collection of taxes, a fixed salary, depending in no degree upon the amount of taxes actually collected, and while in some of the Latin nations of Europe there was formerly, and may yet be, a system of farming out the collection of the public revenues, we do not think that such a thing was ever known, or would be tolerated, in any country inhabited by an English speaking people."

This would sustain the conclusion that the tax sale contracts here under consideration, so far as expressly providing for the contingent payment of an aliquot part of the taxes actually collected or the equivalent thereof, would be clearly within the scope of the inhibition announced above by Cobb, J., and wholly void.

Further, this conclusion apparently finds support in the inherent nature of the entire transaction. The proceedings here under consideration grow out of the purchase by the corporate authorities of Broken Bow, pursuant to section 77-2010, Comp. St. 1929, for the use and benefit of that city at a county treasurer's tax sale, of certain certificates of tax sale, which were duly delivered to them. By reason of the ownership of such tax sale certificates, the municipality was thereafter deemed to be the assignee and owner of all liens for taxes embraced therein, theretofore possessed by the state, county, city, school district, or other municipality which originally levied the same and for which said tracts of land assessed were sold. Comp. St. 1929, sec. 77-2040.

At the time of this purchase the city paid no money thereon, and in fact no money was due or payable thereon, "until, by redemption or foreclosure proceedings, he (the pur-

chaser) shall have received the money thereon." Comp. St. 1929, sec. 77-2011.

This court has repeatedly announced the doctrine that, "A city, purchasing and foreclosing a tax sale certificate on real estate, does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of the proceeds. Comp. St. 1929, secs. 77-2009 to 77-2011; *County of Lancaster v. Trimble*, 34 Neb. 752, 52 N. W. 711; *Logan County v. Carnahan*, 66 Neb. 685, 693, 92 N. W. 984, 95 N. W. 812; *City of Plattsmouth v. Hazzard*, 132 Neb. 284, 271 N. W. 801." *City of McCook v. Johnson*, 135 Neb. 270, 281 N. W. 69.

Notwithstanding the creation of this special statutory trust by the city's purchase of the tax sale certificates, the inherent nature of the taxes included therein remained unchanged. The statutory trustee was empowered to enforce the liens thereof in the manner provided by law, but the beneficial ownership as *cestuis que trustent* of the taxes themselves remained in the public corporations by which they had been levied. This necessarily involved the assurance of the integrity of the separate tax funds and restricting the application of what was realized therefrom to the purpose for which originally levied.

In 4 Cooley, Taxation (4th ed.) 3572, sec. 1819, the principle is thus stated: "Municipal taxes levied for one purpose ordinarily cannot be applied by the municipality to another purpose. So a township fund raised by taxation for special and specific purposes cannot be diverted to other purposes, and taxes levied for school purposes cannot be used for county purposes nor can taxes levied for county purposes be used for school purposes."

Likewise, taxes may not be diverted from state to county nor from county to any other municipality, and neither may taxes levied for a definite purpose by either of these public corporations be diverted from this purpose for which assessed at the mere option of the corporate authorities levying the same.

Our revenue system is based on the principle thus announced. As an example we have the following pertaining to county funds: "Whenever a tax is levied for the payment of a specific debt, the amount of such tax collected shall be kept as a separate fund in the county treasury, and expended only in the liquidation of such indebtedness: *Provided,* any surplus remaining in the treasury after full payment of such indebtedness shall be transferred to the general fund of the county." Comp. St. 1929, sec. 26-123.

It follows that the beneficial owners of the taxes enforced by the statutory trustee are entitled to a strict accounting of the avails of the tax foreclosures prosecuted by it on the basis of the integrity of the separate tax funds involved. This is wholly incompatible with the claim of the trustee in the instant case to compensate its attorney by an aliquot part of the avails of a recovery as a contingent fee under the circumstances disclosed by the record before us.

Of course, it is obvious that where the proceeds of a sale are sufficient to fully satisfy all taxes embraced in the foreclosure, together with costs taxable in the action, including attorney's fees, the matter of unlawful diversion of funds would not be involved. But in the instant case the proceeds realized from the tax foreclosure sales amounted to but $23,749.66, and after due application of this amount to the decrees entered there remained a deficiency of $167,451.57. It is obvious that after the deduction of the $2,556.08 court costs taxed therein, and the further deduction of $8,626.83 as the attorney's contingent fees under his contracts with the city of Broken Bow, leaving but $12,566.75 for distribution to the state and all municipalities involved in the proceedings, such deductions would inescapably operate as an unlawful diversion and use of tax levies in a manner not contemplated by the revenue laws of this state.

This conclusion is even more strikingly apparent when we examine the results of the actual enforcement of these contingent attorney fee contracts in six of these tax foreclosure cases which are embraced in the totals hereafter

set forth. The first column contains the case number, the second column the amount of money actually received by Attorney Black pursuant to these contracts, and the third column the actual amount of money realized by the public corporations whose taxes were being foreclosed:

11195	$1,514.76	$538.81
11284	732.66	283.35
11354	274.20	86.45
11385	62.67	nothing
11761	146.15	8.98*
11807	55.23	6.50*

(*These sums are still in the hands of the clerk of the district court.)

An added reason for adhering to the principles announced in *Platte County v. Gerrard*, 12 Neb. 244, 11 N. W. 298, is to be found in the fact that neither expressly nor by necessary implication do our revenue laws direct or authorize the employment by public corporations of the collection device of contingent fees or compensation for services employed in the collection of public revenue, notwithstanding that decision has, in effect, for sixty years denied the employment of that method, and no legislative act has been had on this subject which in any manner militates against its full force and effect.

The controlling principle appears to be: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Const. art. VIII, sec. 1.

"The legislature had exclusive and discretionary power to prescribe the means by which taxes shall be collected. * * * Taxes are collectible in, and only in, the manner provided by statute, the matter being wholly statutory." 61 C. J. 1010.

"Courts cannot extend the operation of such statutes (public revenue), or allow compensatory fees in such case, without direct statutory authority." *Kane v. Union P. R.*, 5 Neb. 105.

"An officer cannot charge fees not authorized by statute for services performed (in the enforcement of public rev-

enue laws), and any service rendered for which no statute authorizes a fee must be performed gratuitously." *Red Willow County v. Smith*, 67 Neb. 213, 93 N. W. 151.

"When the statute provides a remedy for the collection of taxes under given circumstances, that remedy is exclusive of all others." *Chamberlain v. Woolsey*, 66 Neb. 141, 92 N. W. 181. See, also, *Richards v. County Commissioners, Clay County*, 40 Neb. 45, 58 N. W. 594.

Without a recapitulation of reasons already stated, they support the conclusion that the tax collection contracts here in suit are each unauthorized by law, contrary to public policy, and void. But the foreclosure of tax sale certificates by a civil action was clearly within the statutory powers of the municipality. The lawful employment of an attorney's services for that purpose was therefore within the corporate functions thereof. *Meeske v. Baumann*, 122 Neb. 786, 241 N. W. 550; *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346.

In such a case, even though the contract of employment of the attorney, because of provisions therein contained, be void so that no recovery at law may be had thereon, still such attorney, in a proper action, is entitled to be paid on a *quantum meruit* basis for lawful services rendered by him. *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242; *Call Publishing Co. v. Lincoln*, 29 Neb. 149, 45 N. W. 245; *Scheschy v. Binkley*, 124 Neb. 87, 245 N. W. 267; *Lincoln & Dawson County Irrigation District v. McNeal*, 60 Neb. 613, 83 N. W. 847; *Rogers v. City of Omaha*, 76 Neb. 187, 107 N. W. 214; *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349; *Cathers v. Moores*, 78 Neb. 17, 113 N. W. 119; *Miles v. Holt County*, 86 Neb. 238, 125 N. W. 527; *O'Neill v. City of South Omaha*, 102 Neb. 836, 170 N. W. 174; *Nebraska Telephone Co. v. City of Red Cloud*, 94 Neb. 6, 142 N. W. 534; *Stickel Lumber Co. v. City of Kearney*, 103 Neb. 636, 173 N. W. 595; *Hustead v. Richardson County*, 104 Neb. 27, 175 N. W. 648; *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N. W. 919.

It appears that for certain services which are within the

enumeration of the duties of city attorney contained in section 17-516, Comp. St. 1929, as well as the city ordinance relating thereto defining the same, defendant Black was paid the sum of $1,783.30. This sum included official salary for the period commencing September 9, 1930, and terminating April 21, 1931, paid him at the rate of $200 a year. The remainder of this sum was made up from quarterly bills allowed Black for performing services of the same class, but performed by him when designated as, "Special Counsel for the City of Broken Bow," "City Legal Advisor," etc., and allowed and paid by the mayor and council by warrants drawn on the general fund as prescribed by the municipal code. We are convinced that the amounts thus allowed by the city and thus received by defendant Black were not in excess of the reasonable value of the services performed, and that the latter is entitled to retain the same.

The legality of the payments made to Black aggregating the sum of $2,020 as compensation is also challenged by plaintiff and appellee. These sums were received by Black under that portion of the written contracts providing for the payment to him of certain percentages of tax moneys received by the county treasurer from tax debtors in redemption from tax sale certificates covered by such collection contracts during a period commencing with the date of such contracts and terminating with the entry of decrees of foreclosure and sale. During the period last referred to, under unambiguous provisions of statute, the tax debtor rightfully paid the necessary redemption moneys to the county treasurer, upon the basis of which this compensation was determined. The county treasurer likewise made the necessary entries in the public records which effected a complete redemption from the tax sale involved and wholly nullified and rendered unenforceable the tax sale certificate thereof then outstanding, and thereupon, as required by official duties prescribed by statute, transmitted such funds to the public tax creditors in accordance with their respective interests therein, first deducting the statutory fees to which he was entitled. This procedure was followed in

every case whenever redemption was made. The evidence discloses, however, that with the exception of a single case no action had been instituted on the certificates of tax sale prior to the redemption therefrom, and in but a single instance the action to foreclose such certificates of tax sale had been instituted by the city and redemption had been effected thereafter, but prior to the entry of any decree in such proceeding. In the several acts performed in accomplishing the statutory redemption, of necessity Black had no part. Neither did this redemption form any part of the litigation which by the terms of his contract Black was to carry on. The statute with reference to the enforcement of tax sale certificates by foreclosure in equity provided only for the institution and prosecution of an action thereof by the owner. The performance of no previous acts as a tax collector was contemplated by the governing statutes and no compensation for such services by the tax creditor was authorized either expressly or by necessary implication. This omission, the good intentions of the parties in interest cannot supply. Even if the services here involved be deemed services performed, which involves an obvious impossibility, still the controlling rule would be, in view of the nature of the subject-matter, that "Any service rendered for which no statute authorizes a fee must be performed gratuitously." *Red Willow County v. Smith*, 67 Neb. 213, 93 N. W. 151.

It follows that the $2,020 was an unauthorized diversion of public funds, and that the plaintiff is entitled to recover the same from the defendants for the benefit of the municipality unlawfully paying out the same.

The abstracting costs amounting to $617 appear to have been reasonable compensation for services, as to costs reasonably and necessarily involved in the institution of the several actions to foreclose the tax liens involved in the present litigation. These costs were a proper expenditure in the accomplishment of a public purpose, and authorized as within the scope of the controlling statute providing for the institution by municipalities of foreclosure proceedings upon tax liens by them purchased.

There remains, in view of the invalidity of the two contracts in suit, the duty of determining the reasonable value of the professional services performed by defendant Black which are here in issue. These include fourteen cases involving 117 causes of action which have been reduced to decree, which has been carried into effect and properly sold, and from which gross proceeds amount to $23,749.66. Four of these cases, involving 37 causes of action, were originally reduced to decree prior to the expiration of the right of redemption, but thereafter these decrees were set aside and causes of action dismissed without prejudice. In one case it appears the action of foreclosure was commenced and dismissed before decree was entered therein.

The compilation of the partial abstract of title of the lands involved in these foreclosure cases was indeed a necessary service in order that the proper parties could be ascertained and the actions properly instituted. The charges for the same appear to be reasonable and the payment thereof was authorized as within the scope of the controlling statute empowering municipalities to purchase certificates of tax sales and to enforce the same by foreclosure proceedings.

Having heretofore determined that the defendant Black was entitled to compensation for services performed in the transactions on the basis of *quantum meruit,* we now address ourselves to determining the reasonable value of the professional services performed by Black in the matter of tax collection for the city of Broken Bow.

The applicable rule may be stated as follows: "In determining the value of attorney's fees, the following elements should be considered: The importance and result of the case; the difficulties thereof; the degree of professional skill, diligence and ability required and exercised; the experience and professional standing of the attorney, and the prominence and character of the parties where they affect the importance of the litigation; the questions of law raised, and the time and labor necessarily required in the performance of duties." *Prince v. Pathfinder Life Ins. Co.,* 133 Neb. 705, 276 N. W. 661. See, also, *In re Estate of*

Moore, 118 Neb. 568, 225 N. W. 705; *Hemmer v. Metropolitan Life Ins. Co.,* 133 Neb. 470, 276 N. W. 153.

The record contains an unusually complete description of the work actually performed, the issues involved, the methods employed, the results attained, the circumstances surrounding the transactions, and the personalities of the parties interested therein.

Applying the rule above quoted to the evidence in the record, after due consideration of all the testimony tendered by the respective parties, we fix the reasonable value of the professional services furnished by Black, as follows:

For services performed in fourteen cases, involving 117 causes of action, which were reduced to decree and the property sold at public sale for the sum of $23,749.66 gross, we determine their reasonable value to be $2,925 and no more.

For services performed in instituting four actions containing a total of 37 causes of action, prior to the expiration of the two-year period of redemption (Const. art. VIII, sec. 3), which were reduced to decree, but which decrees were, pursuant to direction of the mayor and council, set aside by the order of the district court and actions dismissed, we adjudge the reasonable value of such services to be the sum of $500.

For services performed in instituting an action to foreclose a tax sale certificate which was dismissed before decree of foreclosure was entered therein, because of redemption effected by the tax debtor, we determine their reasonable value to be the sum of $75.

Thus, it appears that, excluding from consideration the sum of $1,783.30 paid to Black upon bills rendered to the city of Broken Bow and $617 abstracting costs which we have approved, there has been unlawfully paid by the clerk of the district court to Black and received by him, out of the proceeds of the foreclosure sales here under consideration, the sum of $5,810.74; and also there has been deducted from the aforesaid proceeds of such sales by said clerk the additional sum of $2,816.09, which is now held by him for

Black, the payment of which has been enjoined by the terms of the decree appealed from in this case. Also, there has been unlawfully paid to Black the sum of $2,020 as hereinbefore determined. These amounts unlawfully deducted total the sum of $10,646.83, for which sum plaintiff is entitled to a judgment, subject, however, to a credit or offset in favor of defendant Black for $3,500 the determined reasonable value of the professional services performed by him under the two tax collection contracts in suit, and also an additional credit in the sum of $2,816.09, now held by the clerk of the district court, when this latter amount is paid by such clerk to the county treasurer entitled thereto.

The defendants challenge the right of plaintiff to prosecute this action, because it is claimed he is guilty of laches. The circumstances appearing in the record disclose no prejudice created by the delay. "If prejudice will not be occasioned to the defendant as a result of the assertion of the complainant's right, laches is not predicable of delay attending the commencement of the suit. * * * Where the complainant seeks to arrest a further invasion by the defendant of the complainant's rights, the suit may not be defended on the ground that the complainant has permitted or acquiesced in the defendant's conduct." 19 Am. Jur. 353, sec. 509. See, also, 21 C. J. 221.

It is insisted by defendants that it was incumbent upon the plaintiff to plead and prove that he made demand upon the officers of the city to bring this action. The case of *Scheschy v. Binkley*, 124 Neb. 87, 245 N. W. 267, is cited in support of this proposition. However, we are quite committed to the view that, where demand would be useless, one is not required to do a useless thing. In the recent case of *Taxpayers League of Wayne County v. Wightman, ante*, p. 212, 296 N. W. 886, we held in a taxpayer's action, and under facts quite comparable with the instant situation, the fact that the defendant city appeared and answered, and is resisting plaintiff, established as a fact that the making of a demand, such as is here insisted upon, would have been an idle ceremony.

The injunctions issued by the trial court, except as herein modified as to stated amounts, are in all respects sustained, and the decree entered in the district court, except as herein modified, is affirmed. Remanded for entry of judgment in conformity herewith.

AFFIRMED AS MODIFIED.

HOME SAVINGS & LOAN ASSOCIATION, APPELLANT, V. MOUNT ZION BAPTIST CHURCH (COLORED) ET AL., APPELLEES.
299 N. W. 287

FILED JULY 3, 1941. No. 31019.

1. **Mortgages.** "Unless restricted to some particular interest or estate, a mortgage conveys all the title and interest which the mortgagor then has in the premises in question; and where it purports to convey a greater estate than the mortgagor owns, it passes so much as he has a right to convey." But, "The mortgage will give the mortgagee no greater rights or interests than the mortgagor possessed, and will bind only the latter's actual interest or estate." 41 C. J. 476.
2. ———. Annexations affixed to an estate by the owner before the execution of a mortgage, and of such a character as apparently are calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part thereof and to pass with it by a mortgage.
3. **Fixtures.** A building intended as a permanent improvement to the premises where situated, even though still in course of construction, is deemed a part of the land and to possess the character of real estate.
4. ———. "Buildings or other improvements of a permanent character, placed on real estate by the mortgagor while the property is encumbered by the mortgage, become a part of the mortgaged estate and subject to the lien of the mortgage." 41 C. J. 485.
5. **Religious Societies.** From the admitted facts in this case, the building in controversy had been erected upon the real estate and made an inseparable part thereof as possessing all the attributes of real property and subject to all the conditions and limitations expressed or implied in the terms of the legislative act of 1883 (Laws 1883, ch. 92) prior to the execution of appellant's mortgage.
6. **Injunction.** "The state through its attorney general was entitled

to enjoin any threatened diversion, on the part of either the original grantee or a third party, of the use for which such property was granted." *State v. Home Savings & Loan Ass'n*, 137 Neb. 231, 288 N. W. 691.

7. ———. "The general principles applicable in respect of the conclusiveness of judgments and decrees generally apply in the case of final decrees awarding or refusing injunctions. A decree for a perpetual injunction operates as a final adjudication which stays the acts threatened." 32 C. J. 387.
8. **Query.** Whether a mere mistake of law, in the entire absence of a mistake as to facts involved, is sufficient to invoke the powers of equity, query.
9. **Religious Societies.** The power to mortgage, so far as the Mount Zion Baptist Church (Colored) is concerned, is as nonexisting as to the permanent improvements on lot 6, block 179, Lincoln, Nebraska, as it is nonexistent as to the earth of which this lot was composed.

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

George E. Hager, for appellant.

John Adams, Jr., contra.

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

EBERLY, J.

After a permanent injunction had been entered in the case entitled *State v. Home Savings & Loan Ass'n*, 137 Neb. 231, 288 N. W. 691, in effect enjoining any interference with the exclusive use and occupation of lot 6, in block 179, original plat of the city of Lincoln, Nebraska, by the Mount Zion Baptist Church (Colored), a petition in equity was filed in the original foreclosure suit in the district court for Lancaster county. This petition was thereafter amended. The defendants named therein, including the defendant church, demurred to the last amended petition on the grounds: (1) That the court has no jurisdiction to grant relief prayed for in said amended petition; (2) that said amended petition does not state facts sufficient to constitute a cause of action. The district court, upon hearing, sustained these demurrers, and plaintiff electing to plead no

further its amended petition was dismissed. Plaintiff appeals.

The recital of the following facts tends to disclose the origin and development of the instant controversy:

In 1883 there was duly enacted by the legislature of this state "An Act to dedicate to the use of the Mount Zion Baptist Church (Colored) lot number 6 in block 179 in the city of Lincoln." Laws 1883, ch. 92. Within the period limited by the act this church accepted the same, entered into possession of the lot described, and thereafter continued to occupy and use the same for church purposes. The effect of the act, followed by acceptance and occupancy of such lot, constituted a grant to the Mount Zion Baptist Church (Colored) of an "estate in fee simple defeasible with a limitation upon its use." This church organization soon after the passage of the legislative act referred to took possession of this lot and built a small church building and parsonage thereon. In March, 1923, it was decided to build a larger church building thereon. The church, through its corporate organization, entered into a contract with one R. O. Stake for the construction of the church edifice which is now upon lot 6. This contractor proceeded with the building to a point where it was almost completed, when the work of construction ceased for the reason that the payments contracted for had not been made. However, church trustees formally authorized by the congregation secured a loan of $8,000 from the Home Savings & Loan Association. With the proceeds of this loan the indebtedness due contractor Stake was discharged and the church building was completed. This loan was evidenced by a negotiable bond for $8,000 and was secured by a real estate mortgage covering the church property. The real estate mortgage and $8,000 bond secured by the same were executed by the board of trustees. This mortgage was in the usual form, and recited that, "In consideration of the sum of Eight Thousand ($8,000) dollars do hereby sell and convey unto the Home Savings & Loan Association, of Lincoln, Nebraska, the following described premises, situated in Lancaster county,

Nebraska, to wit: Lot six (6), in block one hundred seventy-nine (179). * * * To have and to hold the premises above described, with the appurtenances thereto belonging, unto the said Home Savings & Loan Association and its successors." It appears that the source and condition of the title possessed by the Mount Zion Church was known to all parties to this transaction, and that no misrepresentations of facts were made by or on behalf of the church organization. Of course, whatever the limitations contained in the legislative act, as well as the legal effect thereof, the mortgage lien of the plaintiff was subordinate and subject thereto. As to the coverage of this real estate mortgage upon the permanent improvements, such as buildings situated upon the mortgaged premises at the time of its execution, the established rule appears to be: "Unless restricted to some particular interest or estate, a mortgage conveys all the title and interest which the mortgagor then has in the premises in question; and where it purports to convey a greater estate than the mortgagor owns, it passes so much as he has a right to convey. * * * On the other hand the mortgage will give the mortgagee no greater rights or interests than the mortgagor possessed, and will bind only the latter's actual interest or estate." 41 C. J. 476.

These principles have been accorded due recognition in this jurisdiction. In *Frost v. Schinkel,* 121 Neb. 784, 238 N. W. 659, we held: "Annexations affixed to an estate by the owner before mortgage, of such a character as are apparently calculated to be for the permanent use and enjoyment of the realty, are presumed to be intended to form a part of the realty and to pass with it by a mortgage."

While it appears in the present case that the building in controversy was almost completed at the time of the execution of appellant's mortgage, the rule appears to be that a building intended as a permanent improvement, even though still in course of construction, is deemed a part of the land and to possess the character of real estate. *Ward v. Yarnelle,* 173 Ind. 535, 91 N. E. 7.

So, it is also the law of this state that "Buildings or other

improvements of a permanent character, placed on real estate by the mortgagor while the property is encumbered by the mortgage, become a part of the mortgaged estate and subject to the lien of the mortgage." 41 C. J. 485. And, in like manner, they would become subject and subordinate to the limitations and conditions expressed or implied in the terms of the legislative grant.

Thus, from the admitted facts in this case, the building in controversy had been erected upon the real estate and made an inseparable part thereof as possessing all the attributes of real property and subject to all the conditions and limitations expressed or implied in the terms of the legislative act of 1883 prior to the execution of appellant's mortgage.

The use and occupancy of lot 6, block 179, Lincoln, Nebraska, being in the nature of a public charity, created by the grant and dedication of the legislature of the state, the state has a vital interest therein, and in the due enforcement of the conditions and limitations expressed or necessarily implied by the terms of the act of 1883 pertaining to that lot, including the permanent improvements thereon, which in law are considered as real property and part of the premises described. The attorney general is fully authorized and empowered to protect the interest of the public, as well as the beneficiaries of the charity involved. *State v. Home Savings & Loan Ass'n*, 137 Neb. 231, 288 N. W. 691.

It may be said in passing that as part of the permanent injunction in the case last cited is the item, "That the Mount Zion Baptist Church (Colored) of Lincoln, Nebraska, a religious association, be and the same hereby is forever enjoined from conveying or alienating in any manner said property (lot 6, block 179, in Lincoln, Nebraska) or any part thereof." This decree is and remains in full force and effect.

It also appears that the mortgagors in course of time defaulted in the payments required by the terms of their mortgage loan; that a proceeding to foreclose the mortgage upon said lot 6, block 179, in Lincoln, Nebraska, given to

secure the payment of such loan, was begun in the district court for Lancaster county in an action in which the Home Savings & Loan Association of Lincoln, Nebraska, a corporation, was plaintiff, and the Mount Zion Baptist Church (Colored) of Lincoln, Nebraska, George B. Todd, K. H. Brewer, George W. Owens, Dewey C. Jackson, N. Ross, Nebraska Baptist State Convention, Incorporated, Lincoln Baptist Union, and the State of Nebraska were defendants. In due time a decree of foreclosure and sale was entered. It is not claimed that the district court in this proceeding obtained jurisdiction over the state of Nebraska. Thereafter, pursuant to decree, the premises were sold to plaintiff for the amount of its decree. The sale was confirmed, and a deed conveying the mortgaged premises was executed and delivered to the purchaser. Thereupon the attorney general instituted an action entitled *State v. Home Savings & Loan Ass'n*, 137 Neb. 231, 288 N. W. 691, wherein, upon appeal, this court found in favor of the state; found that under the terms of the special act of the legislature of 1883 the Mount Zion Baptist Church (Colored) had no power or authority to alienate or encumber; that the lot had been dedicated in trust for the use of said Mount Zion Baptist Church (Colored), as a place of worship, etc., and directed the district court to enter a permanent injunction enjoining and restraining the Home Savings & Loan Association from in any manner interfering with the Mount Zion Baptist Church (Colored) in the use of said property, including the church building, which as real property constituted a part thereof. The effect of this injunction was determined by this court in *State v. Davis*, p. 875, *post*, 299 N. W. 291.

It may be said that "Rules applicable generally to construction of decrees in equity apply in the case of final decrees awarding * * * relief by injunction. Also the general principles applicable in respect of the conclusiveness of judgments and decrees generally apply in the case of final decrees awarding or refusing injunctions. A decree for a perpetual injunction operates as a final adjudication which stays the acts threatened." 32 C. J. 387.

Plaintiff, after the complete disposition of the case in *State v. Home Savings & Loan Ass'n, supra,* finally filed an amended petition in equity in the original foreclosure action, as to which the order of the trial court sustaining demurrers thereto constitutes plaintiff's present complaint. The gist of plaintiff's contentions, as recited in its brief, are as follows:

"Plaintiff further alleged in said petition, that at the time the original decree was entered in said foreclosure suit, the district court had also been mistaken; that it had been of the opinion that said mortgage was a valid and subsisting lien against said lot 6, block 179, of the city of Lincoln and entered its decree accordingly; whereas such was not the case, as now appears from the decision in this court in State, ex rel. Hunter, Attorney General, v. Home Savings & Loan Association. The plaintiff loan association, therefore, prayed that the sheriff's deed issued to it upon the sale, had in said case, be recalled and canceled; that the order approving the sale; the sale and all proceedings in said case back to and including the decree be set aside upon the grounds of mistake of all parties concerned. And that the plaintiff loan association be given leave to file an amended petition setting up the facts in accordance with the evidence already taken, in the light of the decision in State, ex rel. Hunter, v. Home Savings & Loan Association, and that a new decree be entered in said case impressing the lien of said mortgage upon the buildings located upon said lot 6, block 179, only, as chattels real."

As to whether a mere mistake of law, in the entire absence of mistake as to facts involved, is sufficient to invoke the powers of equity, query.

It is obvious, however, that the theory of plaintiff's case as set forth in the amended petition misconceived the character of the church building as a permanent improvement to lot 6, block 179. The fact is that we have here three distinct parties in interest in the subject-matter of litigation. The rights of the state of Nebraska were, as to all others, paramount. Even if it be assumed, as plaintiff urges, that in

giving the original mortgage foreclosed on the property (lot 6, block 179) as an entirety, said Mount Zion Baptist Church (Colored) intended to and did pledge said buildings as security for the payment of said loan, the rights of the state to relieve the charity from unlawful encumbrance still remains unaffected because the permanent improvements are a constituent part of the real estate involved. In short, the power to mortgage, so far as the church was concerned, was as nonexisting as to the permanent improvements on lot 6, block 179, as it was nonexistent as to the earth of which this lot was composed. In addition, the permanent injunction entered prior to the filing of the last amended petition expressly enjoins any interference by the Home Savings & Loan Association with the church building. *State v. Davis*, p. 875, *post*, 299 N. W. 291. It is obvious that what was sought to be raised by plaintiff's amended petition had been already determined in the proceedings theretofore had adversely to it. From a broader standpoint the applicable principle of equity here is embodied in the following: "Indeed, a court of chancery will not correct every character of mutual mistake. Where it appears that the parties to an instrument had equal knowledge or equal means of obtaining knowledge of the facts, and no surprise or imposition is shown, the mistake is often held to lay no foundation for equitable interference, being said to be strictly *damnum absque injuria.*" 19 Am. Jur. 77, sec. 57.

In view of the entire record, it is obvious that the action of the trial court in sustaining the demurrers filed to plaintiff's last amended petition is correct, and its judgment dismissing such petition is

AFFIRMED.

STATE, EX REL. HOME SAVINGS & LOAN ASSOCIATION, APPELLANT, V. JAMES W. DAVIS, SHERIFF, APPELLEE.
299 N. W. 291

FILED JULY 3, 1941. No. 31020.

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

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

George E. Hager, for appellant.

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

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

EBERLY, J.

Application for a writ of mandamus directed to James W. Davis, sheriff of Lancaster county, Nebraska, denied. Relator appeals.

This is an action in mandamus in which the state of Nebraska, on the relation of the Home Savings & Loan Association, seeks to enforce the execution of a writ of possession issued out of the district court for Lancaster county in a case wherein the Home Savings & Loan Association was plaintiff and the Mount Zion Baptist Church (Colored) et al. were defendants, and which required James W. Davis, as sheriff of Lancaster county, pursuant to such writ, to forthwith remove the Mount Zion Baptist Church from the possession of the buildings only located on lot 6, block 179 of the original plat of the city of Lincoln, Lancaster county, Nebraska, and to forthwith put the relator in full possession of such buildings. Thereupon, to the alternative writ served upon him, the respondent made answer setting forth the proceedings had which ultimately culminated in the opinion adopted by this court in the case of *State v. Home Savings & Loan Ass'n,* 137 Neb. 231, 288 N. W. 691, and the judgment of reversal entered in this court pursuant thereto.

Respondent also set forth that upon remand of said cause to the district court for Lancaster county, Nebraska, pursuant to the mandate of this court and the opinion duly adopted as herein referred to, on the 19th day of January, 1940, the district court made and entered its final decree, substantially as follows:

"The cause then coming on for further hearing upon the motion of the plaintiff for judgment in accordance with said mandate, is submitted to the court, upon consideration whereof the court finds generally in favor of the plaintiff against the defendants, and that the allegations of plaintiff's petition are true.

"It is therefore considered, adjudged and decreed by the court, agreeably to the directions of the supreme court, as contained in said mandate, that the defendant, Home Savings & Loan Association, a corporation, be and it is hereby forever restrained and enjoined from interfering with the use and possession of the following described property, viz.: Lot No. 6 in block 179, in the city of Lincoln, Lancaster county, Nebraska, by the defendant Mount Zion Baptist Church (Colored), of Lincoln, Nebraska, a religious association, and from preventing in any way the use and devotion of said property to religious, charitable and pious uses, and that the defendants and each of them be and *they are hereby forever restrained and enjoined from diverting said above described property to any use of (or) purpose other than its use as a church* and for charitable, pious and religious purposes by the Mount Zion Baptist Church (Colored), of Lincoln, Nebraska, a religious association, and that the Mount Zion Baptist Church (Colored), of Lincoln, Nebraska, a religious association, be and the same hereby is forever enjoined from conveying or alienating in any manner said property or any part thereof, and that the plaintiff recover of the defendants, its costs herein expended." (Italics ours.)

This record discloses that in a case entitled Home Savings & Loan Ass'n v. Mount Zion Baptist Church (Colored), the relief sought was the equitable foreclosure of a real estate mortgage dated July 24, 1925, executed and delivered

by defendant church to the "association," in which the mortgaged premises are described as lot 6, block 179, of the original plat of the city of Lincoln, Nebraska. The church building here in controversy as a permanent improvement on this lot at the time this mortgage was executed is properly considered as real estate and a component part of the premises described in that instrument. It may be said that by the description "lot 6, block 179," etc., the mortgaged premises were described in the petition of foreclosure, in the decree of foreclosure and sale entered thereon, in the advertisement of the sale made pursuant to decree, in the sheriff's return of the public sale thereof, and in the sheriff's deed which pursuant to decree of confirmation conveyed the mortgaged premises to the Home Savings & Loan Association. It is obvious that as employed the term "lot 6, block 179," etc., included as a constituent part thereof the church buildings which as a permanent improvement were situated thereon. It was therefore properly described in the proceedings on which the Home Savings & Loan Association relies. By the same token, "lot 6, block 179," etc., as employed by the attorney general in his injunctive proceedings (State, ex rel. Richard C. Hunter, Attorney General, Appellant, v. Home Savings & Loan Ass'n et al., Appellees), which terminated in the entry of the decree of injunction heretofore set forth, must be deemed to be used in the identical sense as employed by the Home Savings & Loan Association in the foreclosure proceedings against the Mount Zion Baptist Church (Colored). Even if the church buildings were to be considered as separable from the real estate of which in law they form a part, the terms of the injunction applying to and covering the entirety would restrain interference with the use and possession of all and each of the component parts thereof. That which embraces and protects the whole of any subject-matter inevitably protects its several constituent parts. But the language of the decree entered, viz., "they are hereby forever restrained and enjoined from diverting said above described property to any use of (or) purpose other than its use as a church," un-

equivocally discloses the judicial intent to extend the protection of its injunctive process to the church buildings as well as to the earth on which they were situated.

It follows that the execution by the sheriff of the writ of assistance in this case would involve a clear violation of the terms of the injunction, that his refusal to execute and serve the same was manifestly proper, and that the judgment of the district court denying mandamus and dismissing relator's action is fully supported by the record.

The judgment entered by the district court for Lancaster county is, therefore, correct, and is

AFFIRMED.

HOWARD CORNELL V. STATE OF NEBRASKA.
299 N. W. 231

FILED JULY 3, 1941. No. 30851.

Criminal Law. Where a prosecuting attorney cross-examines a hostile witness called by the state, for the purpose of showing why such witness was called, the defendant will not be heard to complain of the extent of such cross-examination where proper objection was not made thereto at the time.

ERROR to the district court for Madison county: ADOLPH E. WENKE, JUDGE. *Affirmed.*

Spillman & Ptak, for plaintiff in error.

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

Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER and YEAGER, JJ., and POLK, District Judge.

PAINE, J.

An oral argument was allowed on the motion and brief for rehearing, limited to one question.

This case was first argued to this court September 24, 1940, and an opinion was released, affirming the conviction, but reducing a sentence of four years to two years. This

opinion, written by Judge Johnsen (*Cornell v. State*, 138 Neb. 708, 294 N. W. 851), sets out in detail the facts of the case, and we will not now repeat that evidence.

Upon consideration of motion and brief for rehearing, an oral argument was ordered, limited to the question whether the impeachment of the witness Allison constituted prejudicial error. This supplemental opinion will be confined to that one question.

Stanley Allison was called as a witness by the county attorney, and testified that he was a married man, 22 years of age, his home being Norfolk, but right at the time of the trial he was running a cement mixer at the high school at Hoskins, Nebraska. He testified that he had worked off and on for Howard Cornell, the defendant, in his exchange or second-hand store in Norfolk, but that he was *not working for him on January 21, 1939*, on which day the information charges defendant received the stolen property. Witness Allison then testified: "I know I was working that day and went home early and went to the show after supper." He was then asked: "Did you not on the 17th day of February, 1939, in my office, in the presence of E. N. Anderson and Mildred J. Balentyne (Ballantyne), make a statement in answer to the question: 'Did you work for Howard Cornell in his second-hand store at 200 Norfolk avenue on the 21st day of January, 1939?' give the answer 'yes'? A. I don't remember it. I didn't see the statement." The record is then as follows: "Mr. Spillman: Defendant objects to the impeachment of his own witness. The Court: He is taken by surprise. He can impeach his own witness. Proceed."

Later in the trial Mildred J. Ballantyne, stenographer in the law office of Mapes & Mapes, testified that she had typewritten exhibit No. 7, and that the statement was read to Mr. Allison after it was typewritten, and she saw him sign it, and then she signed as a witness, as did E. N. Anderson.

Exhibit No. 7 consists of three pages of questions and answers. The questions were asked by the chief of police, and the important information in exhibit No. 7 is that he said that he worked for Howard Cornell, defendant, on the

21st day of January, 1939; that Lawrence Hale was also working there; that on the evening of that day he saw Lawrence Fischer and Alvin Luikens come into Cornell's second-hand store, first at 5 o'clock, and again about 7 o'clock, and about 9 o'clock they came back again, and the defendant told him and Hale to bring in "the stuff" from outside the east door. It was a red wheel and truck tire, 700-17, and they rolled it into the basement, and defendant Cornell told them to take off the wheel and paint it black, and that Stanley Allison and Lawrence Hale and defendant Cornell buffed the number off the tire with a soldering iron, and Cornell gave Allison $5 to give to Luikens, and when they were almost finished with the work defendant Cornell told them it was stolen. The language he used was, as reported by Allison: "He said he wanted to get it done, and get it out of there, because it was hot." The last question was: "Do you understand that this statement can be used against you? A. Yes." The exhibit was dated February 17, 1939.

The plaintiff in error in his original brief asked for a reversal upon the record made in the cross-examination of the witness Allison, and the court's instruction in trying to explain why exhibit No. 7 was received in evidence at all. In the motion for rehearing, it was insisted that the state was not surprised by the testimony of the state's own witness, Allison, and that the state abused the rules of law as to the admissibility of previous inconsistent statements. These statements are the errors assigned in the briefs of the plaintiff in error.

In the twelfth and thirteenth paragraphs of the motion for a new trial, it was alleged that the court erred in admitting the signed statement of Stanley Allison in an effort to impeach its own witness, and erred in its rulings with respect to said exhibit, changing and modifying its rulings after the exhibit had gone to the jury, which so confused the jury that they thought Allison was the defendant's witness instead of the state's witness.

It should be noted that in the motion for new trial no

objection was taken to the cross-examination of Allison by the state, which is now set out as the prejudicial error. We therefore have before us for consideration only the alleged error set out in the motion for a new trial, of admitting exhibit No. 7 in evidence. The trial court endeavored to cover this matter in instruction No. 10, which reads as follows: "The state was permitted to lay the foundation for impeachment of the witness Stanley E. Allison to show by another witness, Mildred J. Ballantyne, that Stanley E. Allison answered various questions in the office of Andrew D. Mapes, county attorney, on or about February 17, 1939, together with the answers he gave to such questions. This testimony was admitted solely because it may or may not affect the credibility of the testimony of Stanley E. Allison, and it must not be considered by you for any other purpose." This instruction very properly limited the purpose of exhibit No. 7 solely to its effect on the credibility of Allison. In the oral examination of Allison, all of the important facts of exhibit No. 7 had only been placed before the jury, and the exhibit itself added nothing to that.

The trial court gave a very complete instruction to the jury on the credibility of witnesses, showing that the weight to be given to the testimony of each of them was a question for the jury to decide, and detailed at considerable length the elements they were to consider in giving weight to the evidence of any particular witness, and no instruction was tendered by the plaintiff in error in regard to the admission of exhibit No. 7.

In the prosecution of a criminal case, the county attorney sometimes finds that a few of the witnesses are not inclined to tell the whole truth, and it has become quite customary, upon his first appearance in the office of the county attorney, to take a signed statement of the circumstances as he then gives them, to the end that the prosecuting attorney can present to the jury all the facts. At the trial, which is sometimes after a lapse of months, if one of the witnesses fails to testify to the facts as originally given, it is quite proper to refresh his recollection from the written state-

ment which was taken, usually in the presence of a witness.

It is argued at some length that the county attorney was not taken by surprise by Allison's evidence, which was entirely contrary to what he had given in his signed statement. It does not seem necessary that counsel must always arise in open court during the examination of a witness and state that he has been taken by surprise by a statement just made by a witness which is contrary to a written statement which the attorney holds in his hand. By proper interrogatories the counsel has shown that the witness is going back on a written statement which he had given, which in itself proves surprise, as the court stated in the case at bar.

Several references have been made to a cross-examination of the witness Allison. Technically, this was not a cross-examination, but it was a direct examination of his own witness, who had testified to a different state of facts than he had given in his written statement. In this case the defendant's counsel did not make the proper and necessary objection, or lay the required foundation for a reversal of the case on that issue.

In 3 Wigmore, Evidence (3d ed.) the discussion of the impeachment of one's own witness runs from page 383 to page 443. It is impossible to even summarize this exhaustive discussion, with the many authorities set out. He shows that the primitive idea that a party is morally bound by the statements of his own witnesses no longer finds any support. The witnesses who must be called in a criminal case as eyewitnesses of the alleged offense cannot be selected beforehand by the prosecutor, but are determined simply by the circumstances of who happened to be present at that time and place. It is the duty of the prosecutor to take such preliminary statements, examine into all the facts, weigh the character and standing of the witnesses, and if one of the witnesses, when the case comes to trial, unexpectedly changes his story, he is privileged to show the jury the facts which led him to call such witness to the stand.

This court has stated: "Where one has been misled or entrapped into calling a witness by reason of such witness,

previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial." *Penhansky v. Drake Realty Construction Co.*, 109 Neb. 120, 190 N. W. 265. See, also, *Stanley v. Sun Ins. Office*, 126 Neb. 205, 252 N. W. 807; *Mason v. Reynolds*, 135 Neb. 773, 284 N. W. 257; 74 A. L. R. 1042, Ann.

In the homicide case of *Hickory v. United States*, 151 U. S. 303, 14 S. Ct. 334, it is stated that a party taken by surprise by the evidence of his own witness may interrogate him as to inconsistent statements previously made by him for the purpose of refreshing his recollection, or inducing him to correct his testimony. Proof of such contradictory statements was generally not admissible at common law (*Melhuish v. Collier*, 15 Q. B. *878), but later, by statute in England and in many of the states, this has been modified so that a party may, in case the witness shall, in the opinion of the judge, prove adverse, show that he has made at other times statements inconsistent with his present testimony.

In conclusion, we have tried to make it clear that the impeaching statement, exhibit No. 7, taken in the attorney's office before several witnesses, is not *proof* of anything, as it is not substantive evidence. Its only purpose is to explain to the jury the reason why a hostile witness was called to the stand by the state. See *Sindelar v. Hord Grain Co.*, 116 Neb. 776, 219 N. W. 145; *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N. W. 586.

In the former opinion, we summarized the facts, and included this sentence: "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." As it does not appear that these facts are found in the evidence, except in exhibit No. 7, which is not substantive evidence, this sentence in the former opinion is withdrawn.

With this change, the judgment and sentence as set out in our former opinion, 138 Neb. 708, 294 N. W. 851, are

AFFIRMED.

SIMMONS, C. J., dissenting.

Allison was the state's witness. Twice during the progress of the cross-examination of Allison by the county attorney, defendant objected on the ground that the state was impeaching its own witness. It is quite apparent that under the repeated holdings of this court the state had the right, upon a proper foundation being shown, to impeach its own witness, and that the ruling of the court on the objection as made was correct. Later the state offered the signed statement of Allison. The objection then made was that it was "incompetent, irrelevant, and immaterial." This the court overruled, and the exhibit was received for the sole purpose of impeaching the witness.

This court, in its first opinion, considered the statement to be substantive evidence, and it does not seem improbable that the jury did likewise and that the verdict of guilty rests thereon. It is likewise apparent that, had proper objection been made and the evidence admitted over that objection, it would have been reversible error. That appears to be the position of the majority. See *Masourides v. State*, 86 Neb. 105, 125 N. W. 132; *Erdman v. State*, 90 Neb. 642, 134 N. W. 258. However, the majority opinion reaches the conclusion that "the defendant's counsel did not make the proper and necessary objection, or lay the required foundation for a reversal of the case." In the light of that conclusion it is obvious that whether or not the county attorney was surprised and the evidence thereby admissible is not material to a decision here.

What foundation was necessary? The majority appear to hold that a sufficient foundation of surprise is shown when a witness by his answers discloses that he "is going back on a written statement which he has given." That, however, is not sufficient.

The rule appears to be that, "In addition to the requirement that a witness give material prejudicial testimony, in

order that the party calling him may be allowed to impeach him by proof of prior inconsistent statements it must also appear that such a party was taken by surprise * * * and that such surprise was *bona fide* and founded upon an honest belief that the witness' testimony would be different from that given." 3 Wharton, Criminal Evidence (11th ed.) 2280. See, also, 3 Wigmore, Evidence (3d ed.) 397; Underhill, Criminal Evidence (4th ed.) 854; 70 C. J. 1032; *Blochowitz v. Blochowitz,* 122 Neb. 385, 240 N. W. 586.

Was the county attorney "actually surprised" by the testimony of the witness Allison? The county attorney did not claim that he was surprised. The record does not show surprise, but clearly shows lack of surprise. The events here considered happened upon the second trial of the defendant. The statement was given to the officers before the first trial. Allison was subpœnaed by the state as a witness at the first trial. When asked if he testified, he answered, "No; *they wouldn't let me testify; they held me off the stand. I don't know why.*" This testimony was stricken on motion of the state as not responsive. Allison was arrested shortly after the first trial. He was asked, "You had refused to testify to anything derogatory to the defendant had you?" and he answered, "I knew it was all false." This last answer was stricken from the record by the court on its own motion. When called as a witness by the state, Allison, after preliminary questions, testified that he was not at defendant's store on the night in question. Without further direct examination about the alleged crime, the state started to cross-examine him regarding the statement he had previously given. Defendant's counsel objected that the state was impeaching its own witness. The county attorney said nothing and made no showing of surprise. The court said: "He is taken by surprise. He can impeach his own witness. Proceed."

This is not a showing of surprise, either by the county attorney or by the incidents of the trial, that meets the requirements of the rule announced by the cited texts and the supporting cases. The incidents of the trial negative surprise.

It will thus be seen that, upon the mere denial of Allison that he had been in the store that day, the state proved not only his previous statement that he had been in the store, but also put in all the questions and answers as to what Allison had said was his part and the part of Cornell in handling the property, and admissions alleged to have been made by Cornell. The state then called the stenographer who had transcribed the statement, had her identify it, and put it in evidence. Thus, the entire statement was twice put in evidence as impeaching Allison's denial that he was in the store.

It is not our task to determine the guilt or innocence of the accused. That, under proper procedure, is the duty of the jury. One of our tasks is to announce and properly apply rules of law. The rule permitting the impeachment of one's own witness is neither properly announced nor properly applied by the majority in this case.

MARTENA SWINFORD, APPELLEE, V. SYLVESTER FINCK, APPELLANT.
299 N. W. 227

FILED JULY 3, 1941. No. 31153.

1. **Trial.** Ordinarily, a demurrer to the evidence presents an issue of law on the facts established by the evidence, and is a proceeding by which the court is called upon to decide what the law is upon the facts shown in the evidence.
2. **Highways.** Failure within a reasonable time to clear a highway of dangerous articles left thereon, or to reasonably warn of a dangerous condition, is actionable negligence.
3. ———. What is a reasonable time for removal of dangerous articles left upon a highway, or what is a reasonable warning of a dangerous condition, are questions for the jury under the evidence.
4. **Appeal.** On questions of negligence, when the verdict is reasonably and substantially supported by the evidence, it will not be disturbed.
5. **Automobiles.** It is the general rule that it is negligence as a matter of law for a motorist to drive an automobile so fast on a

highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps; however, the rule has no application where the object is of such a character or color that it cannot be observed by the exercise of ordinary care in time to avoid a collision.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Jean B. Cain, for appellant.

Joseph C. Reavis and *A. O. Delaney, Jr., contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

YEAGER, J.

This is an action for damages for personal injuries by Martena Swinford, plaintiff and appellee, against Sylvester Finck, defendant and appellant. The action grows out of an accident which occurred on a highway in Richardson county, Nebraska, at a point about three miles east of Falls City.

The plaintiff in her petition sets forth, to the extent necessary for present purposes, that at about 7:00 p. m. on December 13, 1939, after darkness had fallen, plaintiff was riding in an automobile which was being driven by her husband eastward from Falls City when suddenly, and too late to avoid running over it, the endgate of a truck was seen in the path of the automobile in which plaintiff was riding. The automobile ran over the endgate resulting in loss of control over the automobile by the driver and a blow-out of one of the tires. The automobile turned over on the north side of the highway causing the plaintiff to sustain injuries. In this connection she set out that on the evening in question, and shortly before the accident, the defendant with his truck went into a farmyard on the north side of the highway and loaded a bull of about the age of one year and weighing 500 or 600 pounds into his truck, and, after loading, put the endgate in the truck and drove out into the highway and headed eastward, when the endgate fell out

upon the south side of the highway into the proper path of the automobile in which plaintiff was riding; that the bull was allowed to escape, and that after the endgate fell out the bull escaped from the truck and defendant thereafter proceeded up the highway. The particular acts of negligence alleged and necessary to be set forth here are that defendant (1) failed to secure and fasten the endgate of the said truck, (2) failed to warn others of the dangerous condition of the highway, and (3) failed to, within a reasonable length of time, clear the highway of said endgate. Other charges of negligence are set forth, but an examination of the bill of exceptions discloses that they have received no support from the evidence.

The answer is a general denial and an allegation that the accident was caused by the gross negligence of the driver of the automobile in which plaintiff was riding, which gross negligence was the proximate cause of the accident. A general denial was pleaded in the reply to the answer.

At the conclusion of the evidence of the plaintiff, and again at the conclusion of all the evidence, the defendant demurred to the petition and to the evidence, which demurrers were overruled, whereupon the case was submitted to a jury for determination. The jury returned a verdict in favor of plaintiff for $1,000 upon which verdict judgment was rendered. From this judgment the defendant has appealed.

Appellant urges in his brief the proposition that the court erred in refusing to sustain the demurrers to the evidence, and the further proposition that the verdict is excessive.

Ordinarily a demurrer to the evidence presents an issue of law on the facts established by the evidence, and is a proceeding by which the court is called upon to decide what the law is upon the facts shown in the evidence. *Goodman & Lucas v. Ford*, 23 Miss. 592; *Birdsong v. Jones*, 225 Mo. App. 242, 30 S. W. (2d) 1094; *Van Stone v. Stillwell & Bierce Mfg. Co.*, 142 U. S. 128, 12 S. Ct. 181; 64 C. J. 371. However, in the presentation of this case here, the only question raised by the demurrer is the sufficiency of the

evidence to sustain a judgment based upon the issues presented by the pleadings. Is then the evidence sufficient to support one or more of the three charges of negligence hereinbefore set out?

The facts are in dispute in only a few particulars. The evidence of plaintiff shows that on December 13, 1939, at about 7:00 p. m. and after dark, the defendant loaded a bull into his truck at a farmyard about three miles east of Falls City, Nebraska, and that he drove out of the farmyard and over and across a ridge of gravel, which was on the north side, to the south side of the highway and headed in an easterly direction; that opposite the entrance to the farmyard and perhaps a little to the east, and in the path of east-bound traffic, the endgate of the truck fell out without the knowledge of the defendant; that somewhat later defendant discovered that the endgate and the bull were missing; that following this discovery the defendant and a boy who was riding with him proceeded to a point about 500 feet east from the entrance to the farmyard, where they turned around and started back looking for the bull; that plaintiff, in an automobile driven by her husband at about 40 miles an hour, came from the west on the right side of the highway and ran over the endgate causing a blowout, and causing the driver to lose control of the automobile; that by reason of loss of control of the automobile it was overturned on the north side of the highway 100 or more feet east of the endgate, and directly west of where defendant's truck was standing; that the automobile had its lights on and had good brakes, but that the driver did not see the endgate until he was about 20 feet distant and too close to avoid running over it; that plaintiff did not see the endgate until they were right upon it or just a few feet away; and that plaintiff and her husband saw the bull near the center of the highway to the east of the endgate. To this point the evidence of defendant does not differ materially from that of plaintiff, except that it indicates that the endgate was never in the traveled portion of the highway, but that it fell out to the north of the ridge of gravel on the

north side of the highway and, of course, that the automobile in which plaintiff was riding never ran over it. Additional testimony of the defendant was to the effect that he stopped some distance east of the point of the accident, got out, and from a point at the front end of his truck, by the use of a flashlight, attempted to warn plaintiff and her husband. His testimony further showed that the bull was loaded into the truck which had a body 12 feet in length, 7 feet in width and a height of about 6 feet; that, after loading, the endgate was placed in its proper channels and secured by a tie-rod made from a 2 by 4 timber, which tie-rod extended across the top of the body at the endgate; that the truck was twisted as it crossed the ridge of gravel, causing the tie-rod to break loose, thus releasing the endgate.

On this evidence it is not difficult to conclude that there is an absence of evidence to support a charge of negligence that the defendant failed to secure and fasten the endgate to the truck. The undisputed evidence on this point is to the effect that at the time of the loading the endgate was properly and sufficiently secured.

While there is a dispute as to whether or not the endgate was upon the highway, the evidence is amply sufficient to justify the jury in adopting the position of the plaintiff in this regard. In the light of the verdict rendered, the jury did so find. The effect of the verdict, further, was a finding either that the defendant failed within a reasonable length of time to clear the highway of the endgate, or that he failed reasonably to warn of the dangerous condition of the highway, or both. If he failed in either or both of these respects, such failure would be actionable negligence. *Simonsen v. Thorin,* 120 Neb. 684, 234 N. W. 628; *Zimmer v. Brandon,* 134 Neb. 311, 278 N. W. 502.

The defendant had immediate notice of the severe twist of the truck which he says broke the tie-rod and which, in turn, released the endgate. He also had notice, at some point before turning around, that the bull and the endgate were somewhere upon or along the highway. He had a companion who was capable of operating the truck, in fact to whom

he later turned over its operation. He did not look for the endgate until after the accident, and gave no warning until after the truck had turned around and came to a stop, and then from a point near the front of the truck and on the opposite side of the road.

We are of the opinion, under this evidence, that neither of these questions was properly determinable as a matter of law, but they were questions of fact properly to be submitted to a jury. On the question of negligence the verdict of the jury, having been reasonably and substantially supported by the evidence, will not be disturbed (*Schindler v. Mulhair*, 132 Neb. 809, 273 N. W. 217; *Plotkin v. Checker Cab Co.*, 133 Neb. 1, 274 N. W. 198; *Hardung v. Sheldon*, 133 Neb. 427, 275 N. W. 586), unless it appears that the driver of the automobile in which plaintiff was riding was guilty of negligence which was the proximate cause of the accident as is contended by the defendant.

Defendant urges that the driver of the automobile in which plaintiff was riding, in the exercise of the duty required of him by law, should have seen the endgate in time to avoid striking it, and for failure so to do he was guilty of negligence which was the proximate cause of plaintiff's accident, and in support of this contention cites *Roth v. Blomquist*, 117 Neb. 444, 220 N. W. 572; *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465; *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373.

In the syllabus in *Roth v. Blomquist, supra*, it is stated: "As a general rule it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." In the opinion it is stated: "There are recognized exceptions to the general rule or instances to which it does not apply, among them an unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and not anticipated * * *; corner of a platform with a narrow edge extending from a drag line over a street car track and discernible only in close proximity to the obstruction * * *;

an obstruction consisting of a pile of gravel similar in color to the surface of the highway * * *." It is proper then to inquire whether this case falls within the general rule or the recognized exceptions.

A case very closely in point is the case of *Adamek v. Tilford*, 125 Neb. 139, 249 N. W. 300. In that case the plaintiff was knocked to the street by a hit-and-run driver, and while lying prostrate in the street the defendant ran over him. Defendant claimed that he could not see plaintiff until it was too late to avoid hitting him. The court said in reference to the situation presented, and the rule in *Roth v. Blomquist, supra:* "To the general rule, as pointed out in the opinion in the case cited, there are exceptions, where the object or obstruction or depression is the same color as the roadway and for that reason, or for other sufficient reasons, cannot be observed by the exercise of ordinary care in time to avoid a collision. The present case is clearly within the exceptions." The failure here of plaintiff's husband to see the endgate in time to avoid hitting it is equally clearly excused within the same exceptions.

The only remaining question is the amount of the verdict which defendant claims is excessive. As a result of the accident the evidence shows that plaintiff, before the accident normal and healthy, sustained sprains to both ankles, a dislocated shoulder, many bruises and contusions; that she was in premature and abnormal labor for more than two weeks; that the child with which she was pregnant was born prematurely; and that at the time of the trial she was still nervous as a result of the accident and her injuries. The verdict is not excessive.

For the reasons herein stated, the judgment of the district court is

AFFIRMED.

INDEX

Abatement and Revival.

Objections to jurisdiction raised by special appearance may properly be preserved by appropriate allegations in the answer. *Rose v. Gisi* 593

Account Stated.

1. Account stated defined. *Bingaman v. Huntley* 819
2. In creating an account stated, the minds of the parties thereto must meet and understand that a final adjustment of the respective demands of each on the other is being made. *Bingaman v. Huntley* 819

Appeal. SEE CRIMINAL LAW. TRIAL. MASTER AND SERVANT, 8-12.

1. The supreme court on appeal will dispose of a case on the theory on which it was presented to the trial court. *U. S. Tire Dealers Mutual Corporation v. Laune* 26
2. Where a law action is tried to the court, its findings of fact have the same effect as findings of the jury, and cannot be set aside unless clearly wrong. *Fox v. Carman* 34
3. It is not prejudicial error to fail to give an instruction defining "proximate cause" where the legal causation is clear, and no evidence is introduced to minimize defendant's negligence, or affirmatively defend as against defendant's negligence. *Hildebrand v. McCauley* 55
4. The giving of an instruction defining "proximate cause," though such definition had no materiality because the legal causation was clear, was not prejudicial error. *Kielley v. McCauley* 60
5. Where amended petition was identical with original petition except as to one paragraph, ruling on demurrer to original petition was not a bar to a ruling on demurrer to amended petition. *Clark v. Lincoln Liberty Life Ins. Co.* 65
6. Harmless error in the admission of evidence is not ground for the reversal of a judgment. *Gorman v. Bratka* 84
7. All parties interested in a matter heard before county court in exercise of probate jurisdiction, who may be affected by modification or reversal of a final order of county court, must be made parties in error proceedings in district court to review such matter. *In re Estate of Berg* 99

8. The inclusion of allegations of which there is no proof in the statement of issues to the jury is error which may be prejudicial. *McClelland v. Interstate Transit Lines*..... 146
9. Appeal dismissed for want of proper parties. *In re Estate of Fines*..... 247
10. All parties to a joint judgment or who may be affected by modification or reversal thereof must be made parties in a proceeding in error or appeal to the supreme court, and a failure so to do is ground for dismissal, if the objection is seasonably made. *In re Estate of Fines*..... 247
11. The supreme court has the inherent power to award an injunction to protect the subject-matter of an appeal and preserve the *status quo* of the parties in their relation thereto, where the judgment finally rendered would otherwise be ineffectual and moot, but such power will not be exercised unless it is indispensable to the protection of the rights of the party asking it and the means are at hand to protect fully the rights of adverse parties. *State, ex rel. Phoenix Loan Co., v. Marsh*..... 290
12. Where it is shown that irreparable damage will result to an applicant if a restraining order be not granted pending appeal, and it appears that a bond will afford ample protection to adverse parties, a restraining order may properly issue in aid of the appellate jurisdiction of the court on giving bond conditioned as required by the court. *State, ex rel. Phoenix Loan Co., v. Marsh*..... 290
13. An executor is required to give bond where he appeals to protect his individual interests. *In re Estate of Vetter*.... 307
14. The right of an executor to appeal without giving an appeal bond is properly raised by a motion to dismiss. *In re Estate of Vetter*..... 307
15. Where a jury is waived in a law action, findings of the district court have the effect of a jury's verdict and will not be set aside on appeal unless clearly wrong. *Helleberg v. City of Kearney*..... 413
16. Where an original bill of exceptions is used, as distinguished from a bill of exceptions copied in the transcript, it must be certified by the clerk of the trial court. *Essex v. Brown*..... 435
17. A bill of exceptions not authenticated by the clerk of the trial court will not be examined in the supreme court. *Essex v. Brown*..... 435
18. The supreme court will, on its own motion, refuse to consider a purported bill of exceptions when not authenticated by the clerk of the trial court. *Essex v. Brown*.. 435

19. Questions of fact will not be considered in the supreme court if there is no bill of exceptions. *Essex v. Brown*.... 435
20. The district court was without authority to determine an issue not pleaded and render judgment thereon in an action where one of parties to judgment was not a party to the action nor before the court. *Clark v. Clark*..... 446
21. Where defendant admits that there is a balance due plaintiff and counterclaims for damages, and the claims of the parties are not so inconsistent that a finding for plaintiff would in law negative defendant's claims, an instruction that, if jury find for plaintiff on his claims, they need not consider claims of defendant is prejudicially erroneous. *Olsen v. McMaken & Pentzien*..... 506
22. In absence of a bill of exceptions containing the evidence, an order of the district court confirming sale of realty is presumed to be supported by sufficient evidence. *Federal Land Bank v. Dymek*..... 525
23. One who, after appealing from a decree in his favor, voluntarily accepts the benefits of the decree is thereby precluded from afterwards prosecuting the appeal. *First Trust Co. v. Hammond*..... 546
24. One may not voluntarily accept payment of that part of a judgment in his favor and afterwards prosecute an appeal from the part which is against him. *First Trust Co. v. Hammond*..... 546
25. One cannot accept a benefit under a judgment and then appeal from it, where the effect of the appeal may be to annul the judgment, unless his right to the benefit is absolute, and where there is no possibility that the right to the benefit may be affected by reversal of the judgment, the right to appeal is unimpaired by acceptance of the benefit. *First Trust Co. v. Hammond*..... 546
26. The use of a judgment defensively in another action will not operate as a waiver of the right of appeal. *First Trust Co. v. Hammond*..... 546
27. Where a verdict is opposed to the undisputed physical facts of a case, or is in flat contradiction to recognized physical laws, it will be set aside. *Moore v. Krejci*..... 562
28. Where there is a reasonable dispute as to pertinent physical facts, the conclusions to be drawn therefrom are for the jury, and a verdict based thereon will not be disturbed unless clearly wrong. *Moore v. Krejci*..... 562
29. Misconduct of counsel in argument to the jury cannot be properly shown by affidavit, but the statements must be taken by the official court reporter, together with ob-

jections made thereto and the court's ruling thereon, or the misconduct is waived. *Rose v. Gisi* 593
30. Filing of appeal bond within ten days from rendition of judgment in an appeal from the county court is necessary to confer jurisdiction on the district court. *Taylor Dairy Products Co. v. Owen* 603
31. The county judge's default preventing timely appeal cannot be properly established by filing of affidavits in the supreme court. *Taylor Dairy Products Co. v. Owen* 603
32. When error exists as to only one or more issues, and the judgment is in other respects free from error, and it is clear that no injustice will result therefrom, the reviewing court may, when remanding the cause for a new trial, limit the new trial to the issues affected by the error. *Harper v. Young* 624
33. On appeal without a bill of exceptions, the pleadings must be sufficient to support the judgment. *Stitzel v. Hitchcock County* 700
34. Where the jury have disregarded material testimony, a new trial will be granted. *Davis v. Security Ins. Co.* 730
35. A verdict based on conflicting evidence will not be disturbed on appeal unless clearly wrong. *McCown v. Schram* 738
36. An instruction not based on evidence, though correct as a legal proposition, is ground for reversal if it has a tendency to mislead the jury. *Heiden v. Loup River Public Power District* 754
37. Unless an abuse of discretion is shown, the supreme court will not disturb the ruling of the trial court on a motion for change of venue. *Heiden v. Loup River Public Power District* 754
38. Where appeal is taken from rulings on objections to trustee's final account from county to district court and then to supreme court, where the findings of district court are approved, with direction to district court to remand case to county court for distribution of the funds, county court has jurisdiction thereof for settlement of subsequent costs and expenses, including, on application, allowance of attorney's fees for preservation of assets of trust. *In re Estate of Linch* 761
39. To raise question of attorney's misconduct in argument on appeal in the supreme court, objection must be made to trial court at the time, and an adverse ruling had thereon, and the objection and ruling made part of the record. *Dunn v. Omaha & C. B. Street R. Co.* 765

40. One may not complain of misconduct of opposing counsel if, with knowledge of such misconduct, he does not object thereto and ask for a mistrial. *Dunn v. Omaha & C. B. Street R. Co* 765
41. A verdict on question of negligence substantially supported by evidence will not be disturbed. *Swinford v. Finck* 886

Assignments.

If the plaintiff, or his assignor, has been guilty of any misconduct, a court of equity will either decline to grant any relief or grant it on such terms as may be equitable. *Glissmann v. Bauermeister* 354

Attorney and Client.

1. To constitute the practice of law, acts performed while appearing before the railway commission must require the exercise of legal training, knowledge and skill. *State, ex rel. Johnson, v. Childe* 91
2. The supreme court has the sole power to punish for contempt any person assuming to practice law in Nebraska without a license. *State, ex rel. Johnson, v. Childe* 91
3. It is the character of the act, not the person by whom or for whom or the place where it is performed, that determines whether it is unauthorized practice of law. *State, ex rel. Johnson, v. Childe* 91
4. The power to define what constitutes practice of law is an exclusive judicial function. *State, ex rel. Johnson, v. Childe* 91
5. The determination of persons to be licensed to practice law is a judicial function over which the courts have exclusive control. *State, ex rel. Johnson, v. Childe* 91
6. One skilled in handling matters relating to fixing and revision of transportation and service rates and charges of common carriers cannot practice law before the state railway commission without a license. *State, ex rel. Johnson, v. Childe* 91
7. Evidence did not justify disbarment of attorney on ground of professional misconduct. *State, ex rel. Nebraska State Bar Ass'n, v. Bachelor* 253
8. Fidelity to trust and performance of duty are standards of professional conduct that an attorney at law cannot violate without exposing himself to discipline. *State, ex rel. Nebraska State Bar Ass'n, v. Hendrickson* 522
9. On appeal in suit for an accounting between a client and her former attorney, an additional item of credit was allowed the attorney. *Munchhoff v. Merten* 554

10. Evidence sustained allowance of attorney's fees for services in preservation of trust property. *In re Estate of Linch* 761
11. Elements to determine the value of attorney's fees stated. *Darnell v. City of Broken Bow* 844

Automobiles.

1. In an action for personal injuries, evidence *held* insufficient to show that at time of accident one member of a partnership, who was involved in the accident, was engaged in a mission within the scope of the partnership business, and therefore the other partner was not liable for damages arising out of the accident. *Hildebrand v. McCauley* 55
Kielley v. McCauley 60
2. Evidence supported finding that defendant's negligence was the proximate cause of a collision between automobiles. *Gorman v. Bratka* 84
3. Speed and right of way at street intersection are issues of fact for jury. *Gorman v. Bratka* 84
4. In an action for personal injuries, judgment was reversed for errors in instructions. *McClelland v. Interstate Transit Lines* 146
5. Gross negligence is an entire failure to exercise care, or the exercise of so slight a degree of care as to justify belief that there was indifference to safety of others. *Gummere v. Mudd* 370
6. When evidence is resolved most favorably toward existence of gross negligence, and thus a fixed state of facts had, whether such facts will support a finding of the existence of gross negligence is a question of law. *Gummere v. Mudd* 370
7. A motorist who enters an intersection first has the right of way over vehicles approaching from his left, but he is obligated to use the care of a reasonable and prudent person, having regard for approaching traffic, the condition of the highway and the protection of life and property. *Klement v. Lindell* 540
8. The nonresident motorists' law permitting service of process by serving the secretary of state is to be strictly construed and applies only to those persons specifically designated in the statute. *Rose v. Gisi* 593
9. Where nonresident employee in charge of a truck permitted an unauthorized nonresident to operate it on the public highways of Nebraska in the master's business, all three were subject to service of process under the nonresident motorists' law. *Rose v. Gisi* 593

10. A motorist traveling on his own side of the highway cannot reasonably be charged with the duty of anticipating that another car, awaiting an opportunity to make a left turn across his line of travel, will suddenly be hurled in front of him by negligence of the driver of a third automobile in crashing into the rear end of the waiting car. *Moses v. Mitchell* 606
11. Before the doctrine of the last clear chance can apply, there must be proof of a reasonable opportunity on part of defendant to avoid injuring plaintiff after his danger was discovered, or ought to have been discovered. *Moses v. Mitchell* 606
12. Where a person driving an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which deliberate judgment might prove to be wrong. *Moses v. Mitchell* 606
13. In action for death of boy riding bicycle, struck in rear by automobile driven by defendant on public highway in country, evidence *held* to sustain court's action in directing verdict for defendant. *Bixby v. Ayers* 652
14. Under Kansas automobile guest statute, a guest must show, in order to recover for injuries, gross and wanton negligence of the operator of the motor vehicle. *McCown v. Schram* 738
15. Under Kansas automobile law, the word "guest" denotes one whom the owner of an automobile invites or permits to ride with him without any financial return except ordinary courtesies of the road. *McCown v. Schram* 738
16. Under Kansas automobile law, "gross and wanton" negligence is that conduct of a motorist which evinces a willingness that harm might result therefrom, or reckless unconcern as to whether a guest might be injured. *McCown v. Schram* 738
17. The general rule that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his lamps has no application where the object is of such a character or color that it cannot be observed by exercise of ordinary care in time to avoid a collision. *Swinford v. Finck* 886

Bills and Notes.

1. An indorser of a check is not liable to the drawer for a loss occasioned by a forged prior indorsement, where the circumstances are such as to estop the drawer from

setting up the forgery. *Metropolitan Casualty Ins. Co. v. First Nat. Bank* 329
2. As between the drawer of a check who delivered it to an impostor and the person who cashed it on the impostor's indorsement, the loss was held to fall on the drawer. *Metropolitan Casualty Ins. Co. v. First Nat. Bank* 329
3. An answer alleging that defendant was accommodation maker of note and that note was without consideration to such maker stated affirmative defenses, and burden was on defendant to prove either or both of such defenses by a preponderance of the evidence, and an instruction with reference thereto which left the question of the burden in doubt was erroneous. *Johnson v. Hansen* 428
4. An instruction that note introduced in evidence was some evidence of what agreements of parties were was erroneous, since the note was *prima facie* evidence of indebtedness. *Johnson v. Hansen* 428
5. A duly executed note "for value received" evidences a consideration, in absence of any defense to it. *Petersen v. Dethlefs* 572

Boundaries.

1. In an action to recover realty, it is not necessary to state how plaintiff's estate or ownership is derived. *McGowan v. Neimann* 639
2. The statute relating to establishment of boundaries contemplates establishment of title and possession to realty by a determination of boundaries, with determination of the right to title and possession as the primary purpose and fixing of boundaries incidental thereto. *McGowan v. Neimann* 639
3. Section 34-301, Comp. St. 1929, authorizes a suit to determine boundaries of realty, the ownership of which is in whole or in part in dispute. *McGowan v. Neimann* 639
4. A suit to determine boundaries to realty is maintainable, though the remedy at law in ejectment may at the time be available. *McGowan v. Neimann* 639

Carriers.

1. If a carrier who has a lien on goods for freight wrongfully sells them, he is liable to an action for the conversion, and the measure of damages is the market value of the goods, deducting the amount of the lien. *Indiana Harbor Belt R. Co. v. Alpirn* 14
2. Written notice of a shipper's claim for loss or damage was excused, where the carrier was chargeable with

actual knowledge of all conditions as to damages which a written notice would give. *Indiana Harbor Belt R. Co. v. Alpirn* 14
3. Any matter which tends to defeat or diminish a carrier's right of recovery against a shipper may be asserted by way of defense, provided it has been properly pleaded, and shipper may obtain affirmative relief against the carrier. *Indiana Harbor Belt R. Co. v. Alpirn* 14
4. Strict compliance with the terms of the bill of lading by the carrier in the sale of goods for freight charges and demurrage is required, unless there has been a waiver of the requirements thereof by the owner of the goods. *Indiana Harbor Belt R. Co. v. Alpirn* 14
5. Under the Carmack Amendment to the Interstate Commerce Act, an action for damages for breach of the terms of a bill of lading may properly be brought against the initial carrier. *Fairmont Creamery Co. v. Thompson* 677
6. An unprecedented flood was an act of God within the provision of a bill of lading excluding carrier's liability for damages caused by an act of God, which is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been reasonably anticipated or expected. *Fairmont Creamery Co. v. Thompson* 677
7. When damage to goods in transit is shown to have resulted from an immediate act of God, the carrier is exempt from liability if liability is excluded in the bill of lading, and if the carrier is not guilty of some negligence in not providing for the safety of the goods. *Fairmont Creamery Co. v. Thompson* 677
8. The test in determining a carrier's liability on the theory of the carrier's negligence in caring for goods in transit is whether the carrier failed to exercise the care and diligence of reasonable persons similarly situated, in anticipating danger, in taking adequate measures to prevent damage to the goods, and whether such failure was the proximate cause of the damage. *Fairmont Creamery Co. v. Thompson* 677

Chattel Mortgages.

In a prosecution for unlawful sale of mortgaged chattels without written consent of the mortgagee, oral consent of mortgagee to the sale, coupled with payment of the value of the chattels, is a defense. *Knapp v. State* 810

Constitutional Law.

1. Any attempt by the legislature to oust the district court of its jurisdiction over trusts and trust funds and liti-

gation in relation thereto would be ineffective and void. *Clark v. Lincoln Liberty Life Ins. Co.* 65
2. The district court is a creation of the Constitution, as is also its common-law and equity power and jurisdiction, and such power and jurisdiction are not limited by terminology, and the terminology does not admit of legislative limitation, but only of legislative extension. *Clark v. Lincoln Liberty Life Ins. Co.* 65
3. The supreme court must be presented with a case where issues and evidence would support a conviction for violation of a statute, if valid, before this court can rule on the question as to whether the statute invades constitutional rights. *Dickens v. State* 163
4. Information charging first degree murder did not violate the due process clause of the state or federal Constitution. *Veneziano v. State* 526

Contracts.

1. In a suit for rescission or cancelation of a contract, plaintiff's failure to return or offer to return the consideration will not preclude relief, where the consideration is merely money paid, the amount of which can be credited in partial cancelation of plaintiff's claim, and where it is patent that a tender, if made, would be rejected. *Langdon v. Loup River Public Power District* 296
2. In construction of a contract, not only the express terms, but what is necessarily implied therefrom, should be considered. *Alexander v. Turner* 364
3. An agreement by a public officer to perform his services for less compensation than that fixed by law is contrary to public policy. *Hansen v. Cheyenne County* 484
4. The doctrine of commercial frustration applies alone to executory contracts. *Kunkel Auto Supply Co. v. Leech* 516
5. The mere apprehension of legal proceedings, unaccompanied by any act of oppression causing a person to enter into a contract, is not ground for avoiding a contract. *Kunkel Auto Supply Co. v. Leech* 516
6. A contract complete in itself will be presumed to supersede another one made prior thereto in relation to the same subject-matter and between the same parties. *Price v. Platte Valley Public Power and Irrigation District* 787

Corporations.

1. One who contracts with a corporation and recognizes and deals with it as a corporation is estopped to deny its

corporate existence. *U. S. Tire Dealers Mutual Corporation v. Laune* 26
2. A corporation manifests its assent to and makes contracts by deed or vote of the corporation, or by the agreement of its authorized agents, and not by the unauthorized promises of its individual members. *Drainage District No. 1 v. Suburban Irrigation District* 333
3. The powers of a corporation organized under statutes are only such as the statutes confer, and the charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. *Drainage District No. 1 v. Suburban Irrigation District* 333

Costs. SEE TRUSTS, 1.

Counties and County Officers.

1. Demurrer to petition in action by county surveyor for mileage *held* improperly sustained. *Fitch v. Cass County* 483
2. Mileage fees fixed by the legislature as compensation for county surveyors are not subject to change by agreement of the parties, nor by voluntary action of the surveyors. *Hansen v. Cheyenne County* 484
3. County commissioners act quasi judicially in passing on claims against the county, when their action involves determination of questions of fact upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed. *Hansen v. Cheyenne County* 484
4. If a claim against a county is one on which judicial action is required by the county board, passing on the claim is a judicial act and final unless appealed from. *Hansen v. Cheyenne County* 484
5. Ascertainment of number of miles traveled by a county surveyor was a question for judicial determination by the county board, but applying the rate fixed by statute was a ministerial act. *Hansen v. Cheyenne County* 484
6. A county is not liable at common law for negligence in maintaining a public road or bridge. *Stitzel v. Hitchcock County* 700
7. Counties are not liable to individuals for damages on account of the negligent or tortious acts of their officers or servants, unless made so by statute. *Stitzel v. Hitchcock County* 700

Courts.

1. A county court in the exercise of its probate jurisdiction has no power to construe wills. *In re Estate of Stieber* 36
2. Section 20-1903, Comp. St. 1929, was legally enacted

on adoption of Revised Statutes of 1913, and it provides effective procedure by "petition in error" to secure review by district court of a final order made by county court in exercise of probate jurisdiction. *In re Estate of Berg* 99
3. The remedy provided by statute authorizing appeal to district court from final orders of county court in exercise of probate jurisdiction is not exclusive. *In re Estate of Berg* 99
4. District courts have jurisdiction of suits for specific performance of a contract to bequeath property. *Cox v. Johnston* 223
5. The interpretation of a syllabus is gathered from the arrangement of words and their relation to each other, regardless of punctuation marks. *Jolliffe v. City of North Platte* 431
6. If a judge makes an erroneous ruling and afterwards in trial of the case finds that his first ruling is wrong and corrects it, the first ruling does not become the law of the case. *Drainage District No. 1 v. Suburban Irrigation District* 460

Criminal Law.
1. In Nebraska all public offenses are statutory; and no person can be punished for any act or omission which is not made penal by the plain import of written law. *Dickens v. State* 163
2. Where an information charges two distinct crimes, the court may, after conviction, properly impose a sentence for each of the crimes. *Wright v. State* 684
3. Where a defendant is convicted of two separate offenses, the court may properly impose a penitentiary sentence in one and suspend sentence and grant a parole in the other. *Wright v. State* 684
4. After violation of a parole, the defendant may be brought before the court, and, after violation is established, the court may impose any penalty which might have been imposed before defendant was placed on probation. *Wright v. State* 684
5. The granting or refusal of a new trial rests in the sound discretion of the trial court, and its ruling will not be disturbed in absence of clear abuse of such discretion. *Baskins v. State* 803
6. A motion for a new trial for newly discovered evidence will not be granted if the other evidence is sufficient to sustain the verdict. *Baskins v. State* 803
7. A new trial will not be granted for newly discovered

evidence which would merely impeach or discredit a witness who testified at the trial. *Baskins v. State* 803
8. A new trial will not be granted for newly discovered evidence, in absence of a showing of due diligence in ascertaining and producing it at the trial, or where sufficient excuse for lack of such due diligence is not shown. *Baskins v. State* 803
9. A question propounded, in order to be the foundation for an offer, should be specific and definite, and should put the adverse party on notice of the testimony sought to be elicited. *Knapp v. State* 810
10. A question which fairly puts the adverse party on notice of material testimony sought to be elicited furnishes sufficient foundation for an offer. *Knapp v. State* 810
11. Where a prosecuting attorney cross-examines a hostile witness called by the state for the purpose of showing why such witness was called, accused will not be heard to complain of extent of cross-examination where proper objection was not made thereto at the time. *Cornell v. State* 878

Damages.

1. Recovery of $30,000 for injuries from being struck by an automobile *held* not excessive. *Hildebrand v. McCauley* .. 55
2. Recovery of $12,500 for injuries from being struck by an automobile *held* not excessive. *Kielley v. McCauley* 60
3. A verdict of $2,500 for personal injuries was not excessive. *Gorman v. Bratka* 84
4. Where undisputed facts in personal injury action show that the injury was not the proximate result of defendant's acts, the question is one of law. *Harper v. Young* .. 624

Death.

1. The amount recovered by a personal representative under the death statute must be distributed among such of the widow, widower and next of kin of deceased as suffer pecuniary loss by death of deceased. *In re Estate of Lucht* 139
2. The father of a child who had contributed nothing toward the child's support, and from whom the child's mother had secured a decree of divorce granting custody of the child to the mother, was not entitled to share in damages recovered for death of the child. *In re Estate of Lucht* 139
3. What persons are entitled to share in damages recovered for wrongful death is for the court to determine, while

the ratio of distribution is fixed by the death statute. *In re Estate of Lucht* 139

Deeds.

1. In suit by aged people to set aside their conveyances of realty and transfers of personalty to niece, demurrer to plaintiffs' evidence should have been overruled. *Copass v. Wilborn* 124
2. Undue influence on a grantor arises usually from deceit or fraud, and its existence is established when it is clearly shown that the opportunity to exercise it existed, that an attempt to exercise it was designedly made, and that its effect on the grantor was such as to cause the act of the grantor to be the result of such influence. *Stuehm v. Mikulski* 374
3. Evidence *held* to necessitate a finding of undue influence. *Stuehm v. Mikulski* 374
4. Deed to residence property standing alone outside city limits, grantor owning no other realty in the vicinity, containing clause conveying all "appurtenances," conveyed sewer connecting residence with city sewer. *Platner v. McMartin* 814

Divorce.

1. Where there were no proceedings to review a divorce decree awarding the wife a certain sum monthly for support of minor children, within the time provided therefor, the decree was a final judgment and became a lien on husband's realty in another county as soon as a transcript of the decree was filed in the other county. *In re Application of Miller* 242
2. A decree for child support does not become dormant because of failure to issue execution thereon for more than five years. *In re Application of Miller* 242
3. Where a wife intervenes in a partition suit to assert her lien on the husband's interest in realty being partitioned, she need not plead and prove that she had no adequate remedy at law. *In re Application of Miller* 242
4. A divorce decree awarding a certain sum monthly for support of minor children during their minority will be construed to provide for the monthly payment of such sum until the youngest child attains its majority. *In re Application of Miller* 242
5. The fact that one or all of minor children, for whom a decree awarded support, became self-supporting before attaining majority is a proper basis for application to modify the award in the court which granted it, but it

cannot be raised in a suit to foreclose the judgment lien. *In re Application of Miller* 242
6. Monthly payments decreed for maintenance of wife and minor children became vested in payee as they accrued, and court was without authority to reduce amount of such accrued payments. *Clark v. Clark* 446

Drains.
1. An assessment by a drainage district must conform to the statute, and where the evidence discloses a gross departure from the method set forth in the statute, a demonstrable mistake of fact exists, and such assessment is void and open to collateral attack. *Drainage District No. 1 v. Village of Hershey* 205
2. Assessments for drainage district benefits on property not within the drainage district are void. *Drainage District No. 1 v. Village of Hershey* 205
3. Assessment of benefits on property outside a drainage district constitutes a void judgment. *Drainage District No. 1 v. Village of Hershey* 205
4. A drainage district organized under statute is a public corporation. *Drainage District No. 1 v. Suburban Irrigation District* 333
5. A drainage district must maintain its drainage system so that landowners whose lands were assessed for construction of the system on the basis of expected benefits may be protected in enjoyment of such benefits. *Drainage District No. 1 v. Suburban Irrigation District* 333
6. The legislation delegating powers to a drainage district pertaining to continuance of the corporate entity and preservation of its drainage ditches and other works and improvements is mandatory. *Drainage District No. 1 v. Suburban Irrigation District* 333
7. Damming of drainage channel to detriment of drainage district may be enjoined. *Drainage District No. 1 v. Suburban Irrigation District* 333
8. Under statute, the boards of supervisors of drainage districts are "public officers," and a right of appeal from their decision is provided. *Drainage District No. 1 v. Suburban Irrigation District* 333
9. Supervisors of a drainage district have authority to bind the corporation only when they act collectively as a board, and are not *ex officio* agents of the corporation. *Drainage District No. 1 v. Suburban Irrigation District* .. 333
10. A drainage district cannot engage in irrigation or authorize diversion of water for irrigation, nor can it

authorize obstruction of a drainage ditch. *Drainage District No. 1 v. Suburban Irrigation District* 333

Electricity.

An option for one year for a right of way and perpetual easement for construction and maintenance of a transmission line across private property *held* to have been fraudulently obtained. *Langdon v. Loup River Public Power District* 296

Eminent Domain.

1. The two elements of damage involved in a condemnation action are the market value of the land actually appropriated, and the damages suffered by diminution in value of the remainder of the land, less special benefits received. *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District* 114
2. The benefit accruing to all irrigable land within an irrigation system's area of delivery by reason of the availability of water for irrigation is a general benefit, and may not be deducted from consequential damages to land not taken. *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District* 114
3. The appreciation in the value of land resulting from the general expectation of the construction and successful operation of public works may properly be considered in determining the value of land taken or damaged in a condemnation action. *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District* 114
4. The measure of damages for condemned land is the market value of the land appropriated and the difference in the market value of the remainder of the land before and after the taking. *Rasmussen v. Central Nebraska Public Power and Irrigation District* 456
5. The jury in fixing damages for condemned land may take into account resulting elements of annoyance and disadvantage which would influence an intending purchaser's estimate of the market value of the land. *Rasmussen v. Central Nebraska Public Power and Irrigation District* 456
6. Danger from an electrical power transmission line is not an independent item of damage, but may be considered in estimating depreciation in market value of land occasioned by condemnation of right of way and construction and maintenance of the transmission line. *Rasmussen v. Central Nebraska Public Power and Irrigation District* 456

7. Where there was no competent evidence of "menace or danger" in operation of transmission line over a farm, submission of the question to the jury was erroneous. *Rasmussen v. Central Nebraska Public Power and Irrigation District* 456
8. Waters in drainage ditches are not subject to appropriation under irrigation laws as waters of "natural streams." *Drainage District No. 1 v. Suburban Irrigation District* 460
9. The jury in a condemnation case have a right to consider all competent evidence offered on the subject of damages. *Wahlgren v. Loup River Public Power District* 489
10. In condemnation proceeding, the landowner is entitled to recover compensation for land taken, and such damages to the residue as are equivalent to its diminution in value. *Wahlgren v. Loup River Public Power District* 489
11. In condemnation proceeding, the jury, in their consideration of damages, must be limited to land taken, and to land on which there was a restriction of use, or diminution in value. *Wahlgren v. Loup River Public Power District* 489
12. In condemnation of farm land for construction of electric transmission line, general fear, or fear which is not an incident of knowledge of present danger, cannot be made the basis on which to predicate depreciation in market value of farm. *Wahlgren v. Loup River Public Power District* 489
13. The only fear which may be considered as an element in fixing value of land condemned for construction of electric transmission line is that of danger, the present or potential existence of which is grounded in experience, or in scientific investigation, and which limits use in the area of the danger, and which lessens market value of the land. *Wahlgren v. Loup River Public Power District* 489
14. In condemnation proceedings, the productivity of soil is an element to be considered in determination of farm land values, also anything connected with the land that would influence its market value in the mind of an intending purchaser. *Wahlgren v. Loup River Public Power District* 489
15. Compensation for land taken by eminent domain is measured by its market value at time of taking, and evidence of its peculiar value to its owner is inadmissible. *Wahlgren v. Loup River Public Power District* .. 489

16. If the court in condemnation proceedings abuses its discretion in determining qualifications of witnesses to testify as to damages, it is ground for a new trial. *Wahlgren v. Loup River Public Power District* 489
17. Where condemnor in a condemnation proceeding appeals from an award of damages, and later decides not to prosecute the appeal, the proper procedure is a motion to affirm the award with interest and costs, and in absence of fraud or undue advantage, such disposition of the appeal is a matter of right. *United States Nat. Bank v. Loup River Public Power District* 645
18. Where, on appeal in condemnation proceedings, the only issue is the amount of damages, no pleadings in district court are necessary. *United States Nat. Bank v. Loup River Public Power District* 645

Equity.

1. Generally, equity rules are not fixed and rigid in order that equity courts may be free to mold remedies to fit the conditions with which they have to deal. *Ricketts v. Lincoln Safe Deposit Co* 318
2. Plaintiffs the same as defendants must come into equity with clean hands. *Glissmann v. Orchard* 344
3. Equity seeks the rights of the parties, and applies the remedy in such manner as to relieve those having the controlling equities. *Glissmann v. Bauermeister* 354
4. Equity endeavors to carry out the intent of parties to a contract. *Glissmann v. Bauermeister* 354
5. Where the party having the right to object voluntarily submits to jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. *Penn Mutual Life Ins. Co. v. Katz* 501
6. Equity will devise a remedy to meet emergencies, and will adjust property interests of litigants whenever it can do so without prejudice to legal or equitable rights of any person. *Penn Mutual Life Ins. Co. v. Katz* 501
7. If prejudice will not be occasioned to defendant as result of assertion of complainant's right, laches is not predicable of delay attending commencement of suit. *Darnell v. City of Broken Bow* 814

Estoppel.

1. One entitled to an estoppel need not always formally plead the estoppel, if the facts constituting the estoppel are in any way sufficiently pleaded. *U. S. Tire Dealers Mutual Corporation v. Laune* 26
2. Where the complainant seeks to arrest further invasion

by defendant of complainant's rights, suit may not be defended on ground that complainant has permitted or acquiesced in defendant's conduct. *Darnell v. City of Broken Bow* 844

Evidence.

1. Official charts and records, kept in the regular course of business under the rules of a reputable hospital, are admissible in evidence when a proper foundation has been laid. *Willis v. Order of Railroad Telegraphers* 46
2. A county assessor who was acquainted with and had inspected a building and dimensions of land on which it stood, and who was acquainted with value of lands and buildings in the neighborhood used for like purposes, was competent to testify as to value of the land and improvements thereon for taxation purposes, and court's refusal to permit him to testify was an abuse of discretion constituting prejudicial error. *Beebe & Runyan Furniture Co. v. Board of Equalization* 158
3. A nonexpert witness may give his opinion concerning the mental condition of a person with whom he had an extended and intimate acquaintance. *In re Estate of Steininger* 284
4. After plaintiff has introduced evidence tending to establish his case, if defendant fails to testify to matters peculiarly within his knowledge necessary to his defense, a presumption exists that his testimony, if produced, would militate against his interest. *Alexander v. Turner* 364
5. In determining the meaning of the word "osteopathy" the court may resort to the definition and description of it given by the founder of the practice, by those who teach and practice it, and by lexicographers who define it as a science. *State, ex rel. Johnson, v. Wagner* 471
6. Courts will take judicial notice of the character and scope of occupations classed as professions. *State, ex rel. Johnson, v. Wagner* 471
7. In condemnation proceedings, witnesses familar with the land in question may testify as to the value of the land immediately before and after the appropriation. *Wahlgren v. Loup River Public Power District* 489
8. Determination of qualifications of witnesses to testify as to damages in condemnation proceedings rests in the court's discretion. *Wahlgren v. Loup River Public Power District* 489
9. A party to an action in condemnation has a right to have all his competent evidence on the question of dam-

ages submitted to a jury, and court's failure to allow its submission is reversible error. *Wahlgren v. Loup River Public Power District* 489
10. Expert testimony is not admissible to prove the direction of force causing damage to one of two vehicles involved in a collision, since this subject does not call for special skill, knowledge or experience. *Moore v. Krejci* 562
11. Competent relevant testimony of unimpeached witnesses should not be held contradicted by inferences from circumstantial evidence, unless circumstances shown and natural inferences therefrom cannot in reason be reconciled with the conclusion that the direct evidence is true. *Bixby v. Ayers* 652
12. A written statement signed by a party to an action, if it is against his own interest and tends to establish or disprove a material fact, is competent evidence when the proper foundation has been laid. *Gorman v. Bratka* 718
13. The law presumes official acts of public officers, in a collateral attack thereon, to have been done rightly and with authority, and, in such a collateral attack, acts done, which presuppose the existence of other acts to make them legally effective, are presumptive proof of the existence of such other acts. *Majerus v. School District* 823

Executors and Administrators.

1. Where, on executor's application for license to sell realty to pay debts, every creditor with an unpaid claim filed written request that the application be dismissed on the ground that a sale under present economic conditions would cause a sacrifice of the realty, the court properly dismissed the application. *In re Estate of Erwin* 21
2. The dismissal, on creditors' request, of executor's application for license to sell realty to pay debts did not bar future action by the district court on application and showing by the executor, or by the county court, to require the executor to apply to the district court for a license to sell realty for payment of debts. *In re Estate of Erwin* 21
3. A homestead exemption is no part of the assets of an estate to be administered in the probate court. *United States Fidelity & Guaranty Co. v. Bates* 131
4. If an order on an administrator under which he makes payment into court is void, such order affords no protec-

tion to the administrator, and receipt of payment by the county judge cannot be considered as having been received by him in his official capacity, but if the order is erroneous merely, it binds all parties until reversed, affording protection to the administrator against further liability, and the receipt of the money by the judge is an official act. *United States Fidelity & Guaranty Co. v. Bates* 131

5. A county court has general jurisdiction over an administrator and settlement of an estate and it is the court's duty to ascertain to whom money should be distributed, and a direction to pay to the wrong person is a judicial error, but not usurpation of jurisdiction. *United States Fidelity & Guaranty Co. v. Bates*..... 131
6. The bar of the statute of limitations will not prevent application of the doctrine of retainer to an estate claim against an heir, since the statute of limitations bars the right of action, and not the debt. *Fischer v. Wilhelm*.... 583
7. Where a devisee is indebted to the estate, the executor should retain from his devise the amount of the debt. *Fischer v. Wilhelm*..... 583
8. An administrator's sale of estate assets to himself is voidable. *Meade v. Vande Voorde*..... 827
9. Delay by heirs in questioning administrator's sale of estate assets to himself may amount to ratification, but seven months is not an unreasonable delay by heirs who had no prior notice or knowledge of the sale. *Meade v. Vande Voorde* 827
10. Failure to notify heirs, either personally or constructively, of sale of estate's personalty to administrator at grossly inadequate price was decisive evidence of fraud. *Meade v. Vande Voorde*..... 827

Fixtures.

1. A building intended as a permanent improvement, even though still in course of construction at time of execution of a mortgage, is deemed a part of the realty. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church*.... 867
2. Buildings or other improvements of a permanent character placed on realty by the mortgagor while the realty is encumbered by a mortgage become part of the mortgaged estate. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church*..... 867

Fraudulent Conveyances.

1. In a suit by a creditor to set aside deeds to land as fraudulent, creditor's means of knowledge of possessor's

interests, by search of public records and by inquiry, may be the same in equity as knowledge itself. *Blum v. Voss* 233
2. In equity, mere lapse of time less than period fixed by statute of limitations may not bar a suit by a creditor to set aside a debtor's fraudulent conveyance of land, where rights and obligations of parties remain unchanged and the fraud undiscovered. *Blum v. Voss*..... 233
3. A creditor's inexcusable delay in taking steps to set aside a debtor's deed to land as fraudulent, though less than the time fixed by statute of limitations, may bar such relief, where, in the meantime, the debtor's grantee, while in possession of the land, relying on her title without knowledge of the creditor's claim, discharged a mortgage and other liens on the land. *Blum v. Voss*..... 233

Garnishment.

1. A judgment creditor's claim against a garnishee is no greater than that of the principal debtor. *Royal Tire Service v. George W. Bell Co*..... 238
2. A cashier's check deposited with city by construction company to comply with a bid on a paving contract was not subject to garnishment by a judgment creditor of the construction company after bid was not accepted, as construction company had no title to the check or fund it represented. *Royal Tire Service v. George W. Bell Co.* 238
3. A judgment creditor who attached a cashier's check in the hands of a third person was not a *bona fide* purchaser for value. *Royal Tire Service v. George W. Bell Co.* 238

Highways.

1. Where a contractor owes a materialman under several contracts, including a highway construction contract secured by a bond, the surety on the bond has a legal right to have payments by the contractor from funds derived from the highway contract applied to the indebtedness thereunder, and is not liable to the materialman who, knowing the source of the funds, applies them in payment of other indebtedness, though directed by the contractor so to do. *Ash Grove Lime & Portland Cement Co. v. Moran Construction Co*..... 176
2. An essential element of the right of recovery against a county for negligence in maintaining a highway is that the highway is one which the county is required to keep in repair. *Stitzel v. Hitchcock County*..... 700
3. In an action against a county for negligence in maintaining a highway, the petition must sufficiently allege

that the highway is one which the county is required to maintain. *Stitzel v. Hitchcock County* 700
4. Failure within a reasonable time to clear a highway of dangerous articles left thereon, or reasonably to warn of a dangerous condition, is actionable negligence. *Swinford v. Finck* 886
5. What is a reasonable time for removal of dangerous articles left on a highway, or what is a reasonable warning of a dangerous condition, are questions for the jury. *Swinford v. Finck* 886

Homestead.

The county court of the county in which an estate is settled has jurisdiction to assign the homestead, where the facts on which the right of homestead depends are not in dispute. *United States Fidelity & Guaranty Co. v. Bates* 131

Homicide.

1. In a prosecution for murder in the first or second degree the court, in instructing the jury, is required to state only the law applicable to the facts proved and those which the evidence tends to prove. *Veneziano v. State*.... 526
2. Where there is no evidence tending to prove manslaughter, the court, in prosecution for murder, is not required to charge the jury with reference to the law applicable to such a nonexistent situation. *Veneziano v. State* 526

Husband and Wife.

1. Where the contract of a married woman does not in express terms bind her separate estate for payment of a debt partially secured by a mortgage in which she is a mortgagor, the question of her intention to do so, if put in issue by pleadings in a foreclosure suit, must be determined as a fact. *Federal Land Bank v. Plumer* 301
2. Owner of fee title to realty cannot, without intervention of a trustee, convey directly to himself and wife and thereby create in himself and his wife an estate in joint tenancy with right of survivorship. *Stuehm v. Mikulski* 374

Indictment and Information.

1. Information charging picketing *held* insufficient. *Dickens v. State* 163
2. To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the

language of the statute or its equivalent. *Dickens v. State* 163
3. An allegation that the person, firm or corporation picketed was, as a result of the picketing, induced or coerced against his, their or its will, or intimidated or threatened to do something he, they or it might legally refrain from doing or to refrain from doing something which may be lawfully done, is an essential element of a charge of crime under the statute against picketing. *Dickens v. State* 163
4. An information which alleges all facts necessary to constitute the offense described in a statute and intended to be punished is sufficient. *Veneziano v. State* 526

Injunction.

1. The state could enjoin threatened diversion of realty by a religious association and a mortgagee of the realty which had been dedicated by the state to the association for church purposes. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867
2. A decree for an injunction operates as a final adjudication which stays the acts threatened. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867
3. A decree enjoining mortgagee from diverting property to any use other than to use as a church applies to the building thereon. *State, ex rel. Home Savings & Loan Ass'n, v. Davis* 875

Innkeepers.

1. The proprietor of a hotel is not an insurer against accident to persons invited on the hotel premises, but he must exercise reasonable care to keep the premises reasonably safe for the purposes for which they are to be used. *Pierce v. Burlington Transportation Co* 423
2. The fact that an invitee in a hotel falls in a lavatory and suffers injury raises no presumption of negligence on part of hotel proprietor, and the doctrine *res ipsa loquitur* does not apply. *Pierce v. Burlington Transportation Co* 423
3. Where recovery is sought for personal injuries sustained as result of a fall in a hotel lavatory, the burden is on plaintiff to prove negligence of the proprietor, and if plaintiff does not make out a case, a verdict should be directed for defendant. *Pierce v. Burlington Transportation Co* 423
4. The fact that there were steps which plaintiff was required to ascend in going from a lavatory in a hotel was

not of itself evidence of want of due care on part of hotel proprietor which would render him liable to invitee for injuries sustained in fall. *Pierce v. Burlington Transportation Co*..... 423
5. The fact that floor in hotel was slippery was of itself not negligence on the part of proprietor which would render him liable to invitee for injuries sustained in fall. *Pierce v. Burlington Transportation Co*..... 423

Insane Persons.
1. A transfer of the personalty of a ward by his guardian must be authorized by the proper court. *First Trust Co. v. Hammond*..... 546
2. The right to an appeal in an action by a guardian on behalf of his ward is a substantial one, and may not be waived by the guardian without approval of the county court within the time allowed by law for appeal. *First Trust Co. v. Hammond*..... 546
3. Acceptance by the guardian of the benefit of a judgment affecting the ward's property without approval of the county court will not operate to estop the prosecution of an appeal where the judgment is, in part, in favor of, and, in part, against the ward. *First Trust Co. v. Hammond*..... 546
4. Where the interests of incompetent wards are concerned, courts recognize as paramount the rights of such wards to the end that such rights may not be waived or sacrificed by the unapproved acts of their guardians. *First Trust Co. v. Hammond*..... 546

Insurance.
1. Insured who, during period when policy lapsed, was able to lease property, collect rents, and attend to other business matters, even though then suffering increasing nervousness and irritability, and though a year later she was adjudged insane, was not "totally and permanently disabled" within provision of policy waiving payment of premiums in case of such disability. *Gowe v. Mutual Life Ins. Co*..... 1
2. Where the evidence in an action on a policy was insufficient to sustain a judgment for insured, the trial court properly discharged the jury and found for defendant. *Gowe v. Mutual Life Ins. Co*..... 1
3. Nonmedical application for insurance in a fraternal company is not required to be attached to the policy, but warranties therein are conditions precedent to the issu-

ance of the policy. *Willis v. Order of Railroad Telegraphers* 46
4. In an action on policy, insurer had the burden of proving that insured was not in sound health at time of issuance of policy. *Willis v. Order of Railroad Telegraphers*..... 46
5. In action on policy, evidence showed breach of warranty of sound physical condition in application precluding recovery. *Willis v. Order of Railroad Telegraphers* 46
6. The assets of mutual insurance companies are trust funds. *Clark v. Lincoln Liberty Life Ins. Co*..... 65
7. The surplus of a mutual life insurance company belongs to its members, and a minority member may sue on behalf of himself and all others similarly situated for misapplication thereof. *Clark v. Lincoln Liberty Life Ins. Co.* 65
8. The insurance department is not an agency created by the Constitution, but it is an executive department of government created by the legislature under constitutional authority. *Clark v. Lincoln Liberty Life Ins. Co.* 65
9. The statutes do not confer on the insurance department quasi judicial power or original exclusive jurisdiction to determine legal and equitable controversies between insurance companies and their policyholders. *Clark v. Lincoln Liberty Life Ins. Co*..... 65
10. Enforcement of rights and liabilities existing between insurance companies and policyholders has received no legislative attention in the insurance code. *Clark v. Lincoln Liberty Life Ins. Co*..... 65
11. The insurance department has no legislative authority to abridge any of the constitutional, common-law or equity power or jurisdiction of the district court. *Clark v. Lincoln Liberty Life Ins. Co*..... 65
12. The term "public conveyance" or "livery conveyance" means a vehicle used indiscriminately in conveying the public. *Pimper v. National American Fire Ins. Co*..... 109
13. Where an automobile insurance policy provided that insurer would not be liable for loss or damage while the automobile was used as a "public or livery conveyance for carrying passengers for compensation," the insured automobile was not a "public or livery conveyance" within the meaning of those terms, while being used by owner on a trip with friends who were to pay part of the expenses. *Pimper v. National American Fire Ins. Co*..... 109
14. The burden rests on the party seeking reformation of an insurance policy to overcome presumption arising from

the terms thereof, that it correctly expresses the parties intention. *Beideck v. National Fire Ins. Co.* 171
15. Evidence *held* insufficient to warrant reformation of an insurance policy. *Beideck v. National Fire Ins. Co.* 171
16. Exceptions to general liability provided in automobile policy are to be strictly construed against insurer. *Moffitt v. State Automobile Ins. Ass'n* 512
17. The exclusionary clause of automobile insurance policy which provided that the policy should not apply while insured truck was being used for towing or propelling any trailer or vehicle did not exclude liability for an accident which occurred while the truck was towing a hay grinder. *Moffitt v. State Automobile Ins. Ass'n* 512
18. Evidence in action on automobile insurance policy was insufficient to establish liability against insurer. *Card v. Minneapolis Fire & Marine Ins. Co.* 602
19. Where husband and wife agreed to reciprocal provisions for distribution of death benefits under certificates but shortly before death the wife substituted other beneficiaries without informing her husband, equity would direct distribution of proceeds of wife's certificate to husband. *McLean v. Fidelity Life Ass'n* 751
20. Where there is no uncertainty as to the meaning of an insurance contract, it will be enforced as made. *Gulizia v. Royal Idemnity Co.* 832
21. Where automobile liability policy provided that insurer should not be liable for injuries caused while automobile was being operated by any person in violation of law as to age, and insured's 15-year old son injured a third person while operating the automobile, insurer was not liable. *Gulizia v. Royal Indemnity Co.* 832

Interest.

In bondholders action to recover additional interest, based on tortious conduct of payers in preventing a trustee from making distribution of money in trustee's possession to the bondholders, *held* that bondholders could not maintain the action; that the principal subject of the claim having been extinguished, all of its incidents went with it. *Fender v. Waller* 612

Joint Adventures.

1. A joint adventure is an enterprise undertaken by two or more persons to carry out a single business enterprise for profit. *Alexander v. Turner* 364
2. A contract of joint adventure does not continue for any longer time than the parties mutually consent, and may

be dissolved by either party at any time. *Alexander v. Turner* 364
3. When two persons engage in a joint adventure, each has a right to demand the utmost good faith in all that relates to their common interests, since they stand in a fiduciary relation to each other. *Alexander v. Turner*..... 364
4. One party to a joint adventure may sue the other for a breach of contract, and equity will order an accounting between the parties. *Alexander v. Turner*..... 364

Joint Tenancy.

The creation as well as the continued existence under the common law of an estate in joint tenancy, as allowed to exist in Nebraska, requires a unity of possession, interest, time, and title in all holding an interest in such estate. *Stuehm v. Mikulski*..... 374

Judges.

1. State and county officers are liable on their official bonds for loss of any funds committed to their care, except where the loss is occasioned by the act of God or the public enemy. *United States Fidelity & Guaranty Co. v. Bates*..... 131
2. Sureties on official bonds do not undertake to answer for acts done by their principal under color of office, but only for acts done by virtue of office. *United States Fidelity & Guaranty Co. v. Bates*..... 131
3. For all wrongful acts or omissions of a public officer within the limits of what the law authorizes or enjoins upon him as such officer, his sureties are liable. *United States Fidelity & Guaranty Co. v. Bates*..... 131

Judgment.

1. Under a prayer for general and special relief, the court may give such relief as the case warrants. *Copass v. Wilborn* 124
2. A void judgment is one that has merely the semblance of a judgment, without some essential element or elements upon which its validity as such depends. *Drainage District No. 1 v. Village of Hershey*..... 205
3. In action on note, doctrine of *res judicata held* to apply. *Blum v. Truelsen*..... 282
4. Where parties voluntarily try an issue not made by the pleadings to a court that has jurisdiction of the subject-matter and the parties, the judgment entered thereon is binding on the parties. *Clark v. Clark*..... 446
5. Defendant's failure to appear and defend the action on a

note does not entitle plaintiff to any findings or judgment foreign to the pleadings. *Petersen v. Dethlefs*..... 572
6. A district court has power, after expiration of the term, to modify a judgment obtained contrary to the course of law and the practice of the courts. *Petersen v. Dethlefs*.. 572
7. A finding or other part of a judgment foreign to any pleading and not necessary to relief grantable to any litigant in a case is void and should be stricken from the record on motion. *Petersen v. Dethlefs*..... 572
8. Where payment is made with the intention of complying with bid made at foreclosure sale, and not to satisfy personal liability, the payment does not operate as satisfaction of the decree. *Ohio Nat. Life Ins. Co. v. Baxter* 648
9. A judgment is not *res judicata* as to any fact at issue in subsequent action where neither issues nor parties are the same. *Gulizia v. Royal Indemnity Co*..... 832
10. Where defendant, plaintiff's judgment debtor, owns a judgment against plaintiff, the legal title to which is in another, equity may direct that defendant's judgment be set off against plaintiff's judgment. *Sherwood v. Salisbury* 838

Landlord and Tenant.

In action against landlord for personal injuries resulting from a fall at a bathroom entrance, *held* that the proximate cause of the accident was the act of the injured party. *Lepley v. Von Dorn*..... 410

Licenses.

A professional engineer who had the required residence, had paid registration fee, and was of good character and of high scholastic standing was entitled to certificate of registration to practice engineering, though much of his time was taken up with outside business. *Downs v. Nebraska State Board of Examiners*..... 23

Limitation of Actions.

1. Where action on note, payable to bank, was barred by limitations, and maker died having a balance in a checking account in the bank, and bank applied the balance to the note and filed it as a claim against deceased's estate, the payment was not a voluntary payment, removing bar of the statute. *In re Estate of McEachen*.... 250
2. The statute of limitations does not run against a trust fund until it is converted into an adverse holding and knowledge of such conversion is brought to the bene-

ficiary of the trust. *Havelock Nat. Bank v. Northport Irrigation District* 747
3. Voluntary part payment of an existing debt arising on contract will toll the statute of limitations. *Price v. Platte Valley Public Power and Irrigation District* 787
4. Payment by voucher *held* a voluntary payment of salary under oral contract, tolling statute of limitations. *Price v. Platte Valley Public Power and Irrigation District* 787

Lost Instruments.

Suit can be maintained on a lost mortgage which has been duly recorded, when the petition alleges diligence in endeavor to recover it. *Bashus v. Abboud* 579

Lotteries.

1. For a scheme to be a lottery, it must contain the elements of chance, prize and consideration. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n* 312
2. In order for a lottery to exist, it is not necessary that every participant directly pay a consideration. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n* 312
3. A game does not cease to be a lottery because some, or even many, of the players are admitted to play free, if others continue to pay for their chances. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n* 312
4. The scheme known as "Prosperity Club" operated by defendants included the necessary elements of chance, prize and consideration to constitute it a lottery. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n* 312

Mandamus.

1. Delay of two years in acting on application to board of examiners for certificate of registration to practice engineering, no excuse for delay appearing, was unreasonable and applicant was entitled to writ of mandamus directing issuance of certificate of registration. *Downs v. Nebraska State Board of Examiners* 23
2. A court may issue a peremptory writ of mandamus without notice, only when there is no room for controversy as to the right of an applicant, and when from the nature of the facts set forth in the supporting affidavit a court can take judicial knowledge that a valid excuse cannot be given by respondent. *State, ex rel. Platte Valley Irrigation District, v. Cochran* 324
3. When it does not clearly appear that a valid excuse can-

not be given by respondent, a court has no power to issue a peremptory writ of mandamus without notice and a writ so issued is void. *State, ex rel. Platte Valley Irrigation District, v. Cochran* 324

4. An action to obtain a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court, and a notice that the writ will be applied for at a certain time and place, before any papers have been filed, confers no jurisdiction to issue a peremptory writ in a case where notice is required. *State, ex rel. Platte Valley Irrigation District, v. Cochran* 324

Marriage.

1. Common-law marriages are recognized in the state of Minnesota, and mutual, present consent, lawfully expressed, constitutes such a marriage. *Wilson v. Wilson* .. 153
2. A common-law marriage in Minnesota may be proved by admissions of the parties, evidence of general repute, of cohabitation as married persons, and other circumstantial or presumptive evidence from which the fact of marriage may be reasonably inferred. *Wilson v. Wilson* 153
3. Where evidence showed that a resident of Minnesota entered into a common-law marriage in Minnesota with a man from whom she had not been divorced or widowed, a subsequent ceremonial marriage with another man was void. *Wilson v. Wilson* 153

Master and Servant.

1. An award of compensation benefits which is not based on findings of fact showing it to be within the provisions of the workmen's compensation act is totally defective where it appears that the evidence on which it is purportedly based is directly conflicting. *Jurgensen v. Rogers* 30
2. Where disability resulting from compensable injury to fingers is the logical consequence of the injury, no compensation can be awarded in addition to that provided by the statutory schedule. *Ottens v. Western Contracting Co.* 78
3. Where compensation claimant has suffered a schedule injury to some particular member, and some unusual condition affecting some other member has developed as a result of the accident, an increased award should be made. *Ottens v. Western Contracting Co* 78

4. Compensation claimant must show by preponderance of evidence that the disability of which he complains was caused by an accident arising out of and in the course of his employment. *Ottens v. Western Contracting Co.* 78
5. Evidence sustained finding that claimant sustained a permanent partial disability to his hand to the extent of 35 per cent. for which he was entitled to recover compensation. *Ottens v. Western Contracting Co.* 78
6. Where an employee suffers an accident in the course of his employment, producing a coronary thrombosis as a direct result, the disability resulting therefrom is compensable. *Schirmer v. Cedar County Farmers Telephone Co.* 182
7. An attorney's fee is not allowable in the district court where an employee seeking compensation is denied recovery in the compensation court and on appeal to the district court an award of compensation is made. *Schirmer v. Cedar County Farmers Telephone Co.* 182
8. Dismissal of appeal of compensation claimant for failure to file petition in district court within 14 days *held* proper. *Jolliffe v. City of North Platte* 431
9. A transcript of proceedings before a compensation court and a petition on appeal in the district court are filed with the clerk of the district court when such papers are placed in his custody and deposited by him in the place where his official papers and records are usually kept. *Jolliffe v. City of North Platte* 431
10. Only when the clearly expressed language of statutory requirements for appeal have not been met will a court dismiss an appeal for want of jurisdiction. *Cole v. M. L. Rawlings Ice Co.* 439
11. The statute providing for a hearing in district court within 14 days after filing a bill of exceptions from compensation court is directory. *Cole v. M. L. Rawlings Ice Co.* 439
12. Award of compensation based on contract of hiring in force at time of accident approved. *Cole v. M. L. Rawlings Ice Co.* 439
13. The unauthorized selection by an employee of a substitute is a wrong to the employer, but it is not negligence toward the public if substitute is competent and there is fitting supervision. *Rose v. Gisi* 593
14. If act causing injury is within the class of service for the doing of which the servant was employed, the master is bound, even if the servant was forbidden to per-

form the particular act, but if the act forbidden was outside the class of service which the servant was employed to perform, the doing of the act was outside the scope of employment, and no liability attached to the master. *Rose v. Gisi* 593
15. The provision of the compensation law that the word "employee" shall not be construed to include any person whose employment is casual and not in the usual course of the trade of his employer means both casual employment and usual course of trade. *McConnell v. Johnston* 619
16. Employment of helper injured by buzz saw *held* to be "casual." *McConnell v. Johnston* 619
17. To render a municipal corporation liable for payment of benefits to its agents and employees under the compensation law, the injury must have resulted from an act done in the exercise of some power conferred on the municipality by its legislative charter or by other positive enactment. *Coyne v. City of O'Neill* 686
18. The transportation of persons generally to and from trains is not ordinarily a municipal function. *Coyne v. City of O'Neill* 686
19. A farming and stock-feeding business is not a "plant where machinery is used," within the compensation law. *Groat v. Clausen* 689
20. Rules adopted by the department of labor with reference to "safety appliances" are not applicable to a farming and stock-raising business. *Groat v. Clausen* 689
21. An employee assumes risks not ordinarily incident to his employment, provided he knows of them and appreciates the danger, or the risks are so plainly observable that he must be presumed to know them. *Groat v. Clausen* 689
22. Under a contract for hire terminated by mutual agreement, where such contract is superseded by another between the same parties, payment of salary under the first contract becomes immediately due and payable. *Price v. Platte Valley Public Power and Irrigation District* 787
23. The fact that an employee is the general servant of one employer does not, as a matter of law, prevent him from becoming the particular servant of another, who may become liable for his acts. *Mansfield v. Andrew Murphy & Sons* 793
24. The right of control, or want of it, determines if the

relation of master and servant, at a particular time, existed between an employee and his general employer, or whether there had been a change in relationship and he had become, for the time being, a special employee of another. *Mansfield v. Andrew Murphy & Son* 793

25. Whether the right of control, or want of it, over employee existed, is ordinarily a question of fact for the jury; but where the pertinent facts pertaining to the contract and relationship of the persons involved are not in dispute, and but one reasonable inference can be drawn therefrom, it is a question of law for the court. *Mansfield v. Andrew Murphy & Son* 793

Mortgages.

1. 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. *Federal Land Bank v. Miller* 161
2. The statute taking from district courts the power to enter a deficiency judgment in a foreclosure suit does not apply to a mortgage executed before that restriction was imposed and was not then due nor in litigation. *Federal Land Bank v. Plumer* 301
3. If mortgage does not confer power on trustee, after acquiring title to the mortgaged property, to sell and convey it to obtain cash to pay mortgage bonds, a court of equity, to protect the interests of bondholders, has inherent power to authorize a sale by the trustee. *Ricketts v. Lincoln Safe Deposit Co* 318
4. A reorganization plan presented in connection with an application by a trustee for approval of a sale of trust property must be equitable to all bondholders who do not desire to enter into the plan. *Ricketts v. Lincoln Safe Deposit Co* 318
5. An equity court, in passing on the reasonableness of a sale of mortgaged property, may properly consider any reorganization plan submitted, in determining whether the sale should be approved, and unless it be equitable to all bondholders it should be rejected. *Ricketts v. Lincoln Safe Deposit Co* 318
6. The consideration of a reorganization plan in connection with an application to an equity court for approval of a sale of mortgaged property is a proper exercise of equity jurisdiction to protect minority bondholders from financially strong majority bondholders, or to protect

majority bondholders from those who attempt to create a nuisance value for their bonds by obstructing reorganization. *Ricketts v. Lincoln Safe Deposit Co.* 318
7. Evidence failed to establish fraud on part of defendants. *Glissmann v. Orchard* 344
8. An assignment of possession and rents by mortgagor to mortgagee, effective upon default and given as consideration for an extension of a mortgage then in default, is not against public policy. *Penn Mutual Life Ins. Co. v. Katz* 501
9. When an assignment of possession and rents from mortgaged land is lawfully executed by mortgagor and upon default demand for its observance is timely made but refused, parties plaintiff or defendant may file application for its adjudication in a pending foreclosure suit and, upon issues joined thereon, the court may retain the same for trial and award that relief to which parties are entitled. *Penn Mutual Life Ins. Co. v. Katz* 501
10. A mortgagor is not entitled to continue in possession of land after foreclosure sale, but may reenter temporarily for the purpose of harvesting the crop. *Federal Land Bank v. Dymek* 525
11. Where payment of mortgage note was pleaded in answer, the burden was on defendant to prove payment. *Bashus v. Abboud* 579
12. An action on a note secured by a mortgage is an action at law, even if an attachment be issued and levied on the land. *Linder v. Terre Haute Brewing Co.* 636
13. An acceleration provision in a mortgage securing a note becomes a part of the note so that maturity of the note is advanced in like manner with the maturity of the mortgage, not only for the purpose of foreclosure, but for all purposes. *Linder v. Terre Haute Brewing Co.* 636
14. The statute limiting the power of the court in a foreclosure suit to decreeing delivery of possession of the premises to the purchaser thereof has no application to an action at law on the note, even if accompanied by attachment. *Linder v. Terre Haute Brewing Co.* 636
15. The taking of a stay of order of sale under a decree of foreclosure constituted a waiver of all errors prior to obtaining of stay. *Ohio Nat. Life Ins. Co. v. Baxter* 648
16. Where evidence as to value of realty sold under foreclosure decree was conflicting and there had been a previous sale for approximately the same amount, and

no showing was made that a subsequent sale would realize a greater amount, the trial court did not err in confirming sale. *Ohio Nat. Life Ins. Co. v. Baxter* 648
17. The powers of a trustee are such as are conferred on him in specific words by terms of the trust, or are necessary or appropriate to carry out the purposes of the trust and are not forbidden by its terms. *Refshauge v. Sesostris Temple* 775
18. Where a written agreement, first mortgage and bonds contain all terms of a trust and define duties of trustee, the rights of mortgagor and bondholders in specific language, duties and rights of trustee are defined exclusively by the trust agreement, and not by a fiduciary relationship. *Refshauge v. Sesostris Temple* 775
19. Trustee did not violate trust agreement by accepting and applying payment on second mortgage under direction of mortgagor. *Refshauge v. Sesostris Temple* 775
20. Where bonds are issued, secured by a first mortgage on all property of the mortgagor, and prospective purchasers are apprised thereof, but are not apprised of a commission second mortgage on the same property, *held* not to constitute concealment, evasion or misrepresentation on part of trustee, depriving the purchasers of material information relative to the subject-matter of the trust, to their injury. *Refshauge v. Sesostris Temple* 775
21. Unless restricted to some particular interest or estate, a mortgage conveys all the title and interest which the mortgagor then has in the premises. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867
22. Where a mortgage purports to convey a greater estate than the mortgagor owns, it passes so much as he has a right to convey. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867
23. Annexations affixed to an estate by the owner before execution of a mortgage for permanent use of the realty are presumed to be intended to form part thereof and to pass with the realty by the mortgage. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867

Municipal Corporations.

1. A city purchasing and foreclosing a tax sale certificate on realty does so as trustee of an express trust for the use and benefit of all entitled to participate in the distribution of the proceeds, and may not bid in the

realty without paying the amount of bid. *Taxpayers' League v. Wightman* 212
2. Where a city purchased realty sold under decree of foreclosure of tax sale certificates without paying amount of bid and the sale was confirmed *pro forma*, the proceedings constituted a constructive fraud and were void, and the liens of the decrees under which the realty was offered for sale were not satisfied nor barred. *Taxpayers' League v. Wightman* 212
3. A resident taxpayer of a city may maintain a suit to have sheriff's deed to realty sold under decree foreclosing tax sale certificate set aside, on city's refusal to do so, without showing any interest peculiar to himself. *Taxpayers' League v. Wightman* 212
4. A contract between architect and city for plans and specifications for a city hall, and providing that should the bond election fail or grant not be allowed, then contract should become void, was void in its entirety on failure of city electors to vote bonds in aid of the project at the first election for that purpose. *Helleberg v. City of Kearney* 413
5. No member of a city council nor the mayor, nor the city attorney, each acting as an individual, can bind the city by a contract creatable only by official action of the city council, nor can any one of them ratify or reinstate a void city contract or estop the city from denying the validity thereof. *Helleberg v. City of Kearney* 413
6. Initiative and referendum laws ordinarily apply only to legislative acts. *Read v. City of Scottsbluff* 418
7. Both legislative and administrative powers are vested in a mayor and city council. *Read v. City of Scottsbluff* 418
8. Administrative powers of a city may be exercised by motion, resolution, or ordinance. *Read v. City of Scottsbluff* 418
9. Referendum laws are usually directed against the supposed evils of legislation alone. *Read v. City of Scottsbluff* 418
10. To allow referendum laws to be invoked to annul or delay executive or administrative action would tend to delay, and in some cases to annul, prompt and efficient administration of city affairs. *Read v. City of Scottsbluff* 418
11. The administrative action of the mayor and city council in accepting a bid and directing that a contract be en-

tered into is not subject to a referendum. *Read v. City of Scottsbluff* 418
12. The transportation of the public to and from trains by chief of police of city of the second class is not part of his duties under the law. *Coyne v. City of O'Neill* 686
13. It is the duty of a treasurer of a municipal corporation to give notice to the holder of warrants when sufficient money is in the treasury to pay such warrants. *Havelock Nat. Bank v. Northport Irrigation District* 747
14. Money collected by municipal corporations for a special fund against which warrants have already been issued becomes a trust fund. *Havelock Nat. Bank v. Northport Irrigation District* 747
15. Foreclosure of tax sale certificates by a civil action and employment of an attorney's services for that purpose were within the city's corporate functions. *Darnell v. City of Broken Bow* 844
16. Though contract of employment of attorney by city to foreclose tax sale certificates was void, still the attorney was entitled to be paid on a *quantum meruit* basis. *Darnell v. City of Broken Bow* 844
17. In construing a contract, courts will look to the subsequent acts of the parties, especially where both parties to a contract, with full knowledge of its terms, by their actions under it have given it the same construction. *Darnell v. City of Broken Bow* 844
18. A city of less than 5,000 inhabitants had no power to enter into a contract with a private attorney to foreclose tax sale certificates on a contingent attorney's fee. *Darnell v. City of Broken Bow* 844
19. The beneficial owners of taxes enforced by city are entitled to a strict accounting of avails of the tax foreclosures prosecuted by the city on the basis of the integrity of the separate funds involved. *Darnell v City of Broken Bow* 844
20. The necessary revenue of the state and its governmental subdivisions should be raised in such manner as the legislature may direct. *Darnell v. City of Broken Bow* 844
21. In suit by taxpayer to cancel tax collection contracts by city with attorney, ambiguous terms used in contract to describe attorney were properly interpreted by reference to acts and circumstances of the parties at commencement of and during the transactions. *Darnell v. City of Broken Bow* 844
22. In interpreting a transaction, where ambiguity and

incompleteness appear, it is proper to follow the interpretation adopted by the parties. *Darnell v. City of Broken Bow* 844

Negligence.

1. Alleged negligence of plaintiff's married daughter, who resided in her own home, and who, in driving an automobile with plaintiff as guest, collided with a car driven by defendant, was not imputable to plaintiff, where plaintiff was not negligent, and the plaintiff and her daughter were not engaged in an enterprise giving plaintiff authority to direct or assist in operation of the car. *Gorman v. Bratka* 84
2. Where a structure collapses, and the collapse of which is such as in the ordinary course does not happen if those who have its management use proper care, the collapse affords reasonable evidence, in absence of explanation, that it arose from want of care of managers. *Miratsky v. Beseda* 229
3. The rule *res ipsa loquitur* is not applicable where there is direct evidence as to the cause of an accident and all the facts and circumstances attendant on the occurrence clearly appear. *Miratsky v. Beseda* 229
4. The rule *res ipsa loquitur* is not applicable to a defendant unless the structure, the collapse of which caused injury, was exclusively in the possession and under the management of the defendant. *Miratsky v. Beseda* 229
5. In an action for damages to realty by fire, evidence was insufficient to justify submission of case to jury. *Currie v. L. L. Coryell & Son* 328
6. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes on persons to protect themselves from injury, and which, concurring with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause. *Klement v. Lindell* 540
   Groat v. Clausen 689
7. Where evidence in action for injuries sustained in automobile collision established that plaintiff was guilty of negligence more than slight, it became a question for the court, and it was the court's duty to direct a verdict for defendant. *Klement v. Lindell* 540
   Groat v. Clausen 689
8. A person is answerable only for natural and probable

consequences of his own acts, and where some new and efficient cause intervenes, not set in motion by him nor flowing from any act of his, which causes the injury, it is the proximate cause. *Moses v. Mitchell* 606
9. One who fails to use ordinary care for his own safety and knowingly exposes himself to obvious danger is guilty of contributory negligence. *Groat v. Clausen* 689
10. Evidence *held* insufficient to prove that plaintiff's decedent was induced, by employer's promise to repair, to work with defective appliances. *Groat v. Clausen* 689
11. Under certain circumstances, the owner of an automobile may be a guest of the bailee, and the bailee's negligence will then not be imputed to the owner. *Gorman v. Bratka* 718

New Trial.

1. A reasonable dispute as to pertinent physical facts presents a question for the jury. *Moore v. Krejci* 562
2. When the amount of damages allowed by a jury is clearly inadequate, it is error for the trial court to refuse to set aside the verdict. *Harper v. Young* 624
3. A verdict so clearly wrong as to induce the belief that it must have been found through passion, prejudice or mistake will be set aside. *Davis v. Security Ins. Co* 730
Heiden v. Loup River Public Power District 754

Notice.

Possession of land is notice to the world of all possessory interests of which inquiry of the possessor would elicit knowledge. *Blum v. Voss* 233

Officers.

1. Where an officer charged with the custody of public funds serves successive terms, he is presumed to have received in his new official capacity money 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. *United States Fidelity & Guaranty Co. v. Bates* 131
2. Where no evidence is adduced to rebut the presumption that a public officer has received and has on hand in his new official capacity money which it was his duty to pay in his old, such presumption becomes absolute and must be accepted as an established fact. *United States Fidelity & Guaranty Co. v. Bates* 131

Partition.

Where a defect in title to realty in a partition suit is of such a nature that it may be removed by further proceedings in that suit, without injustice to a purchaser at a sale had therein, such purchaser should not be released from his bid merely on account of such defect. *In re Estate of Stieber* 36

Partnership.

Liability for tort committed by a member of a partnership and an employee thereof when not on a mission connected with or within the scope of the partnership business does not attach to members of partnership not present or participating therein. *Hildebrand v. McCauley* 55
Kielley v. McCauley 60

Payment.

1. Where no specific direction is given by a debtor as to the application of a credit, the credit may be applied by the creditor on any indebtedness owing by the debtor to the creditor. *Fox v. Carman* 34
2. Where maker of notes directed that he be given credit on the notes for money due for pasturage, without designating any particular note, payee could apply the credit on any one of notes. *Fox v. Carman* 34
3. Generally, a creditor must comply with the debtor's direction regarding the application of payments. *Ash Grove Lime & Portland Cement Co. v. Moran Construction Co* 176
4. Where parties are on equal terms, one threatened with civil suit must make his defense to the merits in the first instance. *Kunkel Auto Supply Co. v. Leech* 516
5. One who voluntarily with knowledge of the facts pays a disputed demand cannot ordinarily recover it back. *Kunkel Auto Supply Co. v. Leech* 516

Physicians and Surgeons.

1. Osteopathic physicians are entitled to perform "surgery" under the osteopathic statute if the surgery is confined to surgery as taught and used as part of the osteopathic system of healing, but are not entitled to enter into the general field of operative surgery with surgical instruments. *State, ex rel. Johnson, v. Wagner* 471
2. Under statute, a license to practice osteopathy authorizes the licensee to engage in the practice of obstetrics. *State, ex rel. Johnson, v. Wagner* 471

3. The Nebraska statute recognizes the use of anesthetics as a branch of osteopathy. *State, ex rel. Johnson, v. Wagner* 471
4. The practice of obstetrics and the use of anesthetics are not within the definition of osteopathy but are in addition to it, and except for legislative action they would not be within the scope of the license to practice osteopathy. *State, ex rel. Johnson, v. Wagner*..... 471
5. The legislature has by statute recognized a difference between the practice of medicine and surgery and the practice of osteopathy, and has provided for issuance of different certificates to the two classes of practitioners. *State, ex rel. Johnson, v. Wagner*..... 471
6. The practice of osteopathy consists of a system of manipulation of the limbs and body of the patient with the hands without the aid of medicine or operative surgery. *State, ex rel. Johnson, v. Wagner*..... 471
7. A statute granting a licensed osteopath the right to practice osteopathy in all its branches as taught in recognized osteopathic colleges does not authorize such licensee to practice outside the recognized field of osteopathy, even if subjects outside such field are taught in such colleges. *State, ex rel. Johnson, v. Wagner*..... 471
8. The practice of operative surgery in its commonly accepted meaning requires a license to practice medicine and surgery as provided by statute. *State, ex rel. Johnson, v. Wagner*..... 471

Pleading.

1. Procedure when amended petition filed with leave of court contains substantially the same allegations as original petition is, before demurrer, to call the matter to the court's attention by motion. *Clark v. Lincoln Liberty Life Ins. Co.*..... 65
2. An issuable fact pleaded by defendant in the answer to the petition is available to plaintiff as evidence at the trial. *Gorman v. Bratka*..... 84
3. A court must read a pleading as if it contained a statement of all matters of which the court is required to take judicial notice, even when the pleading contains an express allegation to the contrary. *State, ex rel. Johnson, v. Wagner*..... 471
4. A defendant, answering over after an adverse ruling on a general demurrer to the petition, was not precluded from raising the question that the petition did

not state facts sufficient to constitute a cause of action. *Stitzel v. Hitchcock County* 700

Principal and Surety.

Where a surety paid a county judge's obligation which had become absolute under the judge's bond, the surety was entitled to recover under an indemnity agreement which obligated the judge to indemnify the surety. *United States Fidelity & Guaranty Co. v. Bates* 131

Railroads. SEE TRIAL, 6.

Where there was no evidence of actionable negligence of railroad in action for injuries sustained at railroad crossing, dismissal of the case was proper. *Swanson v. Megan* 578

Religious Societies.

Church organization was without power to mortgage church building erected on realty held under legislative grant which forbade alienation of the realty. *Home Savings & Loan Ass'n v. Mount Zion Baptist Church* 867

Sales.

1. If delivery of goods under a contract of sale is made by carrier, the place of shipment is ordinarily deemed the place of delivery, unless a contrary intention appears. *Olsen v. McMaken & Pentzien* 506
2. Where goods are delivered to a buyer without previous examination, he is not deemed to have accepted them until he has had reasonable opportunity of examination. *Olsen v. McMaken & Pentzien* 506
3. What constitutes a reasonable opportunity for examination of goods sold under contract depends on the facts in each case. *Olsen v. McMaken & Pentzien* 506
4. Where articles are sent to buyer at a distant point, reasonable opportunity of examination does not ordinarily exist at point of loading, and in the absence of special circumstances or agreement otherwise, the buyer is entitled to examination when the goods arrive. *Olsen v. McMaken & Pentzien* 506
5. Where one purchases goods and accepts delivery, performance of contract to pay is not excused by fact that purpose for which goods were purchased turned out to be unprofitable, nor by fact that legislature repealed law on which business venture depended and for which the goods were purchased. *Kunkel Auto Supply Co. v. Leech* 516

Schools and School Districts.

1. A contract of a school district is *ultra vires* only when it has no power to enter into such contract. *Harms v. School District* 714
2. Power exercised illegally or without proper authority by school authorities in the purchase of materials for construction of a schoolhouse, if not *ultra vires*, does not preclude action for the reasonable value of the materials. *Harms v. School District* 714
3. The presumption as to regularity of the organization of a school district does not extend to the question of what land is included within the district. *Majerus v. School District* 823
4. In suit to enjoin levy and collection of taxes for school district purposes on lands alleged to lie outside defendant school district, the burden of proving that lands were outside the district was on plaintiff. *Majerus v. School District* 823

Set-off and Counterclaim.

Insolvency of a party against whom set-off is sought may be sufficient ground for a court of equity to allow a set-off which is not provided for by statute. *Sherwood v. Salisbury* 838

Specific Performance.

1. Jurisdiction of a district court in a suit for specific performance of a contract to leave property by will does not arise from any distinction between realty and personalty, but arises rather from the inadequacy of an action at law. *Cox v. Johnston* 223
2. A suit against an executrix for specific performance of a contract by deceased to bequeath personalty to plaintiff was not such a suit against the executrix as is prohibited by statute. *Cox v. Johnston* 223

Statute of Limitations. SEE TAXATION, 1, 5.

Statutes.

1. The mere reenactment of a statute in a code or revision does not change its meaning, construction or effect, and the rule applies though the sections of an act are separated and arranged in different connections. *McDonald v. Lincoln County* 188
2. The "intent statute" relates only to rules of construction, and does not enlarge, limit, or modify any rule of substantive law that existed at the time of its passage or that thereafter has been created. *Stuehm v. Mikulski* 374

Subrogation.

A party cannot acquire by subrogation any rights not possessed by the party whose rights are subrogated. *Metropolitan Casualty Ins. Co. v. First Nat. Bank* 329

Subscriptions.

The issue of the mental capacity of the maker of an "estate pledge" to a hospital to make such pledge is a question for the jury. *In re Estate of Steininger* 284

Taxation. SEE EVIDENCE, 2.

1. The liability of a county to the holder of a tax sale certificate for refund of taxes illegally assessed by the county is measured solely by the statute relating thereto which bars such claims after five years from date of certificate. *McDonald v. Lincoln County* 188
2. Where a county treasurer sells lands for taxes which were not liable to taxation and upon which no taxes were due, the tax purchaser may recover from the county the amount paid with interest. *McDonald v. Lincoln County* 188
3. Where a county has assessed nontaxable land and levied taxes thereon and has sold the land, and afterwards has levied taxes thereon, the tax purchaser may pay such taxes to protect his supposed lien, and, upon failure of his interest in the land, may recover from the county the amount he has so paid with interest. *McDonald v. Lincoln County* 188
4. Where a county assesses land and levies taxes thereon, a tax purchaser may presume that the property was taxable, and is not required to investigate that fact as a condition of maintaining action against the county for the purchase money and interest and taxes thereafter paid to protect his supposed lien. *McDonald v. Lincoln County* 188
5. The limitation of the revenue law with respect to the period within which an action must be brought to enforce a tax lien, or a claim for refund of void taxes, does not relate to the remedy merely, but to the cause of action. *McDonald v. Lincoln County* 188
6. Purchasers of property at tax sales, whether for investment or for the purpose of securing title thereto, must look to the remedy prescribed by statute. *McDonald v. Lincoln County* 188
7. The liability of a county to refund taxes paid by purchaser of realty at a county treasurer's sale for delin-

quent taxes, where the title fails or the property is exempt from taxation, is statutory and does not exist at common law. *McDonald v. Lincoln County* 188
8. The legislature may define certain words in a statute, or may declare in the body of the act what construction is to be placed thereon, and the court is bound by such definition or construction. *McDonald v. Lincoln County* 188
9. The term "cumulative" as applied to section 77-2054, Comp. St. 1929, must be construed as in addition to, but in no manner amending, changing, or modifying the terms of section 77-2030, Comp. St. 1929. *McDonald v. Lincoln County* 188
10. The statutory remedy for the collection of taxes is exclusive. *Darnell v. City of Broken Bow* 844
11. A city purchasing and foreclosing a tax sale certificate on realty does so as trustee of an express trust for the use and benefit of the state and all governmental subdivisions entitled to participate in distribution of the proceeds. *Darnell v. City of Broken Bow* 844
12. The legislature has exclusive and discretionary power to prescribe the means by which taxes shall be collected, and taxes are collectible only in the manner so provided. *Darnell v. City of Broken Bow* 844

Trial. SEE APPEAL. CRIMINAL LAW.
1. The overruling of a motion to direct a nonsuit for failure of proof is not erroneous, where the evidence will support a verdict in favor of plaintiff on the controverted issues. *Gorman v. Bratka* 84
2. Where instructions as a whole correctly state the law applicable to the controverted issues, the verdict of the jury, if supported by sufficient evidence, will not be set aside because particular instructions considered separately contain mere informalities or omissions which are not misleading or confusing. *Gorman v. Bratka* 84
3. In considering demurrer to plaintiff's evidence every reasonable intendment in plaintiff's favor must be drawn from evidence adduced, and if there is any substantial evidence tending to show plaintiff's right to recover, demurrer should be overruled. *Copass v. Wilborn* 124
4. Issues should not be stated in an instruction by substantially copying the pleadings, and if doing so results in prejudice to the complaining party, there is ground for reversal. *McClelland v. Interstate Transit Lines* 146
5. In outlining the issues to be submitted to the jury, the court should limit the issues to such as are controverted

and are supported by evidence. *In re Estate of Steininger* 284
6. Mere negative testimony of motorist that, while approaching a railroad crossing over a public street and keeping a sharp lookout, she did not see or hear any crossing signal in time to avoid collision with train, was insufficient for jury on question of railroad's negligence, where uncontradicted physical facts and affirmative testimony conclusively proved that all signals required by law were in view or given. *Walsh v. Megan* 575
7. Though a party fails to object to evidence admitted, he has the right to have the court declare in its instructions the correct rule on the matter to which the evidence relates. *Harper v. Young* 624
8. In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any on which a jury can properly find a verdict for the party producing it, on whom the burden of proof is imposed. *Fairmont Creamery Co. v. Thompson* 677
9. Evidence of negligence of a carrier and its employees alleged to have resulted in the loss of a car of produce in a flood *held* insufficient to raise a question for the jury. *Fairmont Creamery Co. v. Thompson* 677
10. On defendant's motion for a directed verdict at close of plaintiff's evidence, if the evidence is sufficient to sustain the allegations of the petition, the motion should be overruled. *Parish v. County Fire Ins. Co* 726
11. Credibility of witnesses and their testimony are for the jury. *McCown v. Schram* 738
12. A judgment will not be reversed for alleged error in an instruction, where the instructions, considered in their entirety, are not prejudicial. *McCown v. Schram* 738
13. A court is not required to give a proffered instruction on a subordinate issue, or an instruction which unduly emphasizes part of the evidence in the case. *Dunn v. Omaha & C. B. Street R. Co* 765
14. If tendered instruction is not relevant to the issues, it should be refused, and it is immaterial that it states a correct principle of law. *Dunn v. Omaha & C. B. Street R. Co* 765
15. A demurrer to the evidence is a proceeding by which the court is called on to decide what the law is on the facts shown in the evidence. *Swinford v. Finck* 886

Trover and Conversion.

"Conversion" is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Indiana Harbor Belt R. Co. v. Alpirn* 14

Trusts.

1. Where one of many persons having a common interest in trust property sues to preserve the property for the benefit of all, if he succeeds the court may order that he be reimbursed his costs and expenses, including counsel fees, from the property, or order those benefited to contribute proportionately thereto, but reimbursement can only be made after the services have been rendered and a determination made that they were of substantial benefit to other members of the class who are alleged to have benefited therefrom. *In re Estate of Linch* 761
2. Timely action in equity by heirs to declare a trust on personal property still in possession of the administrator, who at grossly inadequate price sold same to himself at his own sale without notice to heirs, was properly brought though administrator's final account was approved by county court and no appeal taken. *Meade v. Vande Voorde* 827

Waters.

1. A well-defined distinction exists between artificial streams and natural streams in artificial channels, and riparian rights do not ordinarily attach to artificial streams in artificial channels. *Drainage District No. 1 v. Suburban Irrigation District* 333
2. The common-law rules as to rights and duties of riparian owners are in force in Nebraska, except as altered or modified by statute. *Drainage District No. 1 v. Suburban Irrigation District* 460
3. Rights of irrigation in Nebraska exist only as created and defined by statute and the Constitution. *Drainage District No. 1 v. Suburban Irrigation District* 460
4. The right of appropriation for irrigation purposes is limited to waters of "natural streams." *Drainage District No. 1 v. Suburban Irrigation District* 460
5. In action for damages to farm from seepage, evidence as to nature and productivity of soil and crop yields measured in tons or bushels, or in net income from cash or crop rentals, when shown with reasonable certainty,

is admissible for consideration in fixing the value of the leasehold. *Heiden v. Loup River Public Power District*.. 754
6. Owner of farm permanently damaged by seepage water may recover difference between market value of farm before and after seepage and also for damages to crops injured in fields at time of seepage, but cannot recover for loss of future crops caused by the same seepage. *Heiden v. Loup River Public Power District*..... 754

Wills.
1. The law favors the early vesting of estates, and, if consistent with the intent of the testator, the court will construe a will so as to vest the estate immediately even though the taker may be subject to being divested thereof later by some contingency. *In re Estate of Stieber*.... 36
2. A devise of realty to the testator's widow for life, and on her death "so much thereof as shall remain" to two children of the widow, share and share alike, to them and to their heirs, creates but a life estate in the widow, even though the words "so much thereof as shall remain" be construed to give power to the widow to sell the entire fee title during her lifetime. *In re Estate of Stieber* 36
3. The doctrine of acceleration of the time of the enjoyment of a remainder that is subject to a life estate, by the termination of the life estate by an act other than the death of the life tenant, such as an election by a widow to take by statute, will ordinarily be applied to cases in which such termination results in a diminution of the beneficial interests of the other beneficiaries in substantially the same proportion. *In re Estate of Stieber* 36
4. A trust lapses when the sole beneficiary predeceases the testator, and a gift after death of the beneficiary vests absolutely at testator's death. *In re Estate of Dale*..... 631
5. Generally, a family settlement may provide for disbursement of the testator's estate in a manner at variance with his will. *In re Estate of Dale*..... 631
6. On appeal from decree of county court construing a will, petition of appellant in district court may be challenged by demurrer. *In re Estate of Robinson*..... 707
7. Where petition for construction of a will does not support petitioner's contention and prayer, it is subject to demurrer. *In re Estate of Robinson*..... 707
8. Where the language of a will is clear and unambiguous, the testator's intention must be determined from the

language thereof, and extrinsic evidence is not admissible. *In re Estate of Robinson* 707
9. Where testator devised a house to one not an heir, but provided that if the heirs objected to beneficiary receiving the house the executors should deliver to her the sum of $15,000 in stocks instead of the house, and heirs objected to beneficiary receiving the house, beneficiary was not entitled to receive the house, notwithstanding stocks were sold to pay debts. *In re Estate of Robinson* 707
10. In construction of a will, a court must give effect to the testator's intent, so far as it can be collected from the whole instrument, if such intent is consistent with rules of law. *In re Estate of Pfost* 784
11. 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. *In re Estate of Pfost* 784
12. Where there is a patent ambiguity in a will resulting from the use of words, and nothing appears within the will to clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *In re Estate of Pfost* 784

Witnesses.

1. Where insured and beneficiary waived all legal objections to allowing any physician consulted by insured to testify in any matter involving the policy of insurance, it was not error to admit such evidence in action on the policy. *Willis v. Order of Railroad Telegraphers* 46
2. A written statement, purportedly given by the plaintiff to an action and offered for impeachment, is not admissible without a proper foundation. *Moore v. Krejci* 562
3. Ordinarily, the proper foundation for admission of a statement given by plaintiff must be made by calling the person who procured the statement and establishing by him that it was correctly typed or correctly read to or by plaintiff and contains the declarations made by him. *Moore v. Krejci* 562
4. In suit for partition of realty of deceased father, wherein the father's administrator and all heirs were parties, a daughter was incompetent to testify to a conversation with her deceased father about deducting a debt due him from her brother. *Fischer v. Wilhelm* 583
5. "Representative of a deceased" person is any person who succeeds to the rights of the deceased, whether by purchase, descent, or operation of law. *Fischer v. Wilhelm* .. 583