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STATE OF NEBRASKA ET AL., APPELLANTS, V. ODD FELLOWS HALL ASSOCIATION ET AL., APPELLEES.

FILED JULY 1, 1932. No. 28133.

1. **Taxation**: EXEMPTIONS: COUNTY BOARD OF EQUALIZATION: POWERS. County boards of equalization "shall hold a session of not less than three and not more than twenty days" and, during the time thus limited by law, are vested with ample power, upon proper complaint, to hear, investigate, and determine, from competent evidence, the tax exempt character of real estate.
2. ———: ———: ———: JURISDICTION. County boards of equalization are limited to a period of twenty days, not necessarily continuous, with power to adjourn from day to day, or time to time, and jurisdiction to exercise their statutory functions within the time thus defined until July 10th of any year, but no longer.
3. ———: COUNTY BOARD OF EQUALIZATION: APPEAL. Section 77-1705, Comp. St. 1929, and cognate sections, providing for appeals from the orders of county boards of equalization, neither enumerate the persons or classes of persons entitled to appeal, nor do they attempt to limit or preclude the exercise of that right by any person, representative, or entity whose interest may be adversely affected by any action taken by the county board of equalization.
4. ———: ———: EXEMPTIONS: APPEAL BY STATE. The state being an "entity" that may be adversely affected by the action of county boards of equalization in their determination of the assessability of property, and being a "person" within the meaning of the revenue act, is entitled to an appeal from an adverse decision of such board exempting property from taxation as being "owned and used exclusively for educational, religious, charitable or cemetery purposes," and "not owned or used for financial gain or profit to either the owner or user."
5. ———: ———: APPEAL BY STATE. When the state of Nebraska appeals from the action of a county board of equalization, it may do so by causing a statutory written notice to be served on the county clerk within twenty days after the making of the decision appealed from. No bond for costs, appeal, or supersedeas of any kind may be required of the state as a prerequisite to its exercising the right of appeal.
6. ———: ———: ———: NOTICE. Notice of appeal and service thereof as given and made in the instant case, approved.

7. ———: ———: EXEMPTIONS: APPEAL BY TAX COMMISSIONER. The words of section 28, art. IV of the Constitution of Nebraska, viz., "A tax commissioner shall be appointed by the governor with the advice and consent of the senate. He shall have jurisdiction over the administration of the revenue laws of the state," construed as self-executing, and in connection with section 77-301, Comp. St. 1929, constitute this officer an administrative agency charged with the duty of securing a just and uniform enforcement of the revenue laws of the state, and empower him, in the name of the state of Nebraska, to prosecute appeals from orders of county boards of equalization exempting property from taxation.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed, with directions.*

C. A. Sorensen, Attorney General, and *Hugh LaMaster,* for appellants.

Raymond G. Young, Kelso A. Morgan, Rosewater, Mecham, Burton, Hasselquist & Chew, Joseph A. Vojir, Howell, Tunison & Joyner, A. W. Jefferis, Votava & McGroarty, Daniel J. Gross, J. H. Adams, J. J. Krajicek, H. M. Baldrige, William Raab, T. B. Dysart, O'Sullivan & Southard, Gerald M. Vasak, James T. English, G. F. Nye, Brown, Fitch & West, Smith, Schall & Sheehan, W. C. Ramsey, James M. Patton, and *Montgomery, Hall & Young, contra.*

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

EBERLY, J.

In this cause are presented appeals by the state of Nebraska and the state board of equalization and assessment, as appellants, from a judgment entered by the district court for Douglas county dismissing appeals by these appellants from the order of the board of equalization of Douglas county entered on the 19th day of August, 1930, purporting to exempt from taxation for that year certain real estate owned in severalty by the appellees herein, situated in that county, as property "owned and used exclusively for educational, religious, charitable or cem-

etery purposes, when such property is not owned or used for financial gain or profit to either the owner or user." Const. art. VIII, sec. 2. The appellees are twenty-seven in number. The rights of each are involved in a separate and distinct appeal to this court, and relate to separate and distinct real estate. However, for mutual convenience, these cases have been, in effect, consolidated, argued, and presented here as one case.

The record discloses that the notice of appeal was served by the appellants on the 8th day of September, 1930; an appeal bond was at that time filed and approved, and a complete transcript of the proceedings of the board of equalization in all cases appealed from was, on the same day, filed in the district court for Douglas county. On the 19th day of June, 1931, after hearing thereon, the appeals from the board of equalization of Douglas county, so taken by appellants, were dismissed by the district court for Douglas county, "for the reason that the court has no jurisdiction herein and the said appellants no authority to take said appeals." So, in each of these cases but two questions were presented and decided by the trial court, viz.: First, Did it possess jurisdiction of the appeals? Second, Were the state of Nebraska and the board of equalization and assessment, or either of them, competent as parties litigant to present the questions involved? Both were decided against the appellants.

The following sections of the statutes are pertinent in view of the questions before us:

"The county board, the county assessor and county clerk shall constitute the county board of equalization, and the county clerk shall be the clerk of said board." Comp. St. 1929, sec. 77-1701.

"The county board shall hold a session of not less than three and not more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday after the second Monday of June each year, and" (for the purpose of this hearing the remainder of this section will be taken as conferring ample power and authority

upon the board of equalization of Douglas county of 1930, during the time limited by law, upon proper complaint, to hear, investigate, and determine from competent evidence the tax exempt character of the different tracts and parcels of real estate of the several appellees described in these several complaints). Comp. St. 1929, sec. 77-1702. See *State v. Drexel*, 75 Neb. 751.

"Appeals may be taken from any action of the county board of equalization to the district court within twenty days after its adjournment, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county." Comp. St. 1929, sec. 77-1705.

It may be said in passing that section 77-1707, Comp. St. 1929, provides: "The county assessor, immediately after the board of equalization shall have completed its labors, shall prepare an abstract of the assessment rolls of his county on blanks to be furnished by the state board, (the values to be given shall be as equalized and corrected by the county board,) and forward it to the state board of equalization and assessment on or before the tenth day of July."

Under these provisions this court has determined that a county board of equalization is limited to a session of twenty days, not necessarily continuous, but that it may adjourn from day to day, or time to time, and jurisdiction to exercise its vested powers may thus continue until July 10th in any year, but no longer. *Missouri P. R. Corporation v. Board of Equalization*, 114 Neb. 84; *Hiller v. Unitt*, 113 Neb. 612.

In proper construction of this language providing for an appeal from the determinations of the board of equalization, it may be said that section 26-119, Comp. St. 1929, provides in part: "And when the claim of any person against the county is disallowed, in whole or in part, by the county board, such person may appeal from the decision of the board to the district court of the same county, by causing a written notice to be served on the

county clerk, within twenty days after making such decision and executing a bond to such county, with sufficient security, to be approved by the county clerk, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellants."

Section 26-120, Comp. St. 1929, provides: "Any taxpayer may likewise appeal from the allowance of any claim against the county by serving a like notice within ten days and giving a bond similar to that provided for in the preceding section."

Section 26-121, Comp. St. 1929, provides: "The clerk of the board, upon such appeal being taken, and being paid the proper fees therefor, shall make out a complete transcript of the proceedings of the board relating to the matter of their decision thereon, and shall deliver the same to the clerk of the district court, and such appeal shall be entered, tried, and determined the same as appeals from justice courts," etc.

It is to be noted, however, that section 20-2231, Comp. St. 1929, provides: "No bond for costs, appeal, supersedeas or attachment shall be required of the state of Nebraska, or of any state officer, state board, state commission, head of any state department, agent or employee of the state, the secretary of the department of trade and commerce as receiver of insolvent state banks or any receiver appointed on application of the state of Nebraska; in any proceedings or court action in which said state, officer, board, commission, head of department, agent or employee is a party litigant in its or his official capacity."

The section last quoted is section one of an act entitled, "An act relating to the giving of bonds by the state of Nebraska and state officers, boards, commissions, heads of departments, agents and employees, and receivers appointed on the application of the state of Nebraska, and the liability of the state of Nebraska for court costs and damages; and to declare an emergency." Laws 1930, Special Session, ch. 8. This act included an emergency clause,

and thus, by its terms, obviated the requirement of the execution of appeal bonds by the appellants in the present appeals.

With reference to the service of the notice of appeal, it may be said that the form of this notice is not prescribed by the terms of the statute requiring the same. In the instant case a notice in writing appears to have been actually served, and forms a part of the transcript certified to by the clerk, the officer who by law is required to be served with it. All appellees were named therein, and the notice placed in the possession of the county clerk required the appellees to take notice of the appeal. In this notice the action of the county board of equalization with reference to the property of each of the appellees is fully and correctly set forth, and described; and the notice itself specified that "said appeal will be taken severally as to each of said exemptions and reductions." So, too, the county clerk, pursuant to this notice, has fully performed the requirements of section 26-121, Comp. St. 1929. It appears, therefore, that the notice has served its full purpose and so far as objections thereto are based upon the form, contents, and service of the notice, they are wholly unavailing.

Appellees strenuously insist that neither the state of Nebraska nor the state board of equalization and assessment has a right to appeal from the action of the county board of equalization. The trial court adopted this view. It is obvious that, if either of these appellants possess the right of review, the district court has erred in its judgment, and the present case is for reversal. It is noteworthy, however, that in the many cases which the industrious counsel for the appellees have laid before us for consideration neither the state of Nebraska nor the state board of equalization and assessment have appeared in the role of complainant before the county board of equalization, nor, as an appellant, has prosecuted an appeal from the final order in tax matters made by such county

board. It seems that the precise question here presented has never been determined in this jurisdiction.

The right of appeal from the action of the county board of equalization depends for its existence upon the provisions of section 77-1705, Comp. St. 1929, already quoted. It must be admitted, however, that the general language of this section neither enumerates the persons or classes of persons entitled to appeal, nor does it expressly, or in terms, attempt to limit or preclude the exercise of that right by any person, representative, or entity, whose interest may have been adversely affected by the action appealed from. If such limitations exist, they must be found in cognate provisions applicable to this subject, and must be due to implications which the language of sections other than the one providing for the right of appeal may furnish.

Appellees insist that such restrictions exist by virtue of section 77-1706, Comp. St. 1929. It is true that in this section last referred to provisions are made regulating the practice to be followed in cases wherein a person appeals from the assessment of his own property, and also where the appeal is from the assessment of the property of another. And it is also to be remembered that, in the latter class of cases, a special exception is provided where the appellant is the "county assessor" or "county clerk." It would seem that the language of this exception affords a substantial basis for the inference that the officers named, in taking the action referred to, were acting in behalf of the public or state, which would indeed be the real party in interest in such case. This, considered as an implied recognition of the right of the general public or the state in its governmental capacity to invoke the jurisdiction of the reviewing instrumentality, certainly may not be taken at the same time as an implied limitation denying to all parties, except those expressly named, viz., the county clerk and county assessor, the right to appear in this proceeding in behalf of the real party in interest. The very language of the section in-

volved precludes this conclusion. This statutory language relates to the appeal of "any person." Section 77-111, Comp. St. 1929, in its legislative definitions of the terms of our revenue act, expressly prescribes: "The word 'person' includes any number of persons; and any copartnership, association, joint stock company, corporation, or any other entity that may be the owner of property." This is but a legislative recognition of the general rule that "a state * * * may be regarded as a person in law, and as such may be recognized by the courts as a party plaintiff." 47 C. J. 19.

"It (a state) is an artificial person. It has its affairs and its interests; it has its rules; it has its rights; and it has its obligations. It may acquire property, distinct from that of its members." *Chisholm v. Georgia,* 2 Dall. (U. S.) 419, 455. So, in the sense of the defined terms of our revenue act, "state" is not only embraced in the term "person" as implied therein, but is likewise within the terms of the descriptive language, "any other entity (a real being, whether in thought [as an ideal conception] or in fact. Webster's New International Dictionary.) that may be the owner of property."

Then, again, the construction here suggested is in accord with the interpretation of similar language of other revenue enactments. In *Kearney County v. Hapeman,* 102 Neb. 550, a part of our inheritance tax law relating to appraisement of property as one of the steps in assessing that tax was before this court. The appeal of the county of Kearney in this action from the appraisal as made by the county judge had been dismissed by the district court, on the theory that the controlling words of this statute, "Any person or persons dissatisfied with the appraisement or assessment may appeal," did not contemplate an appeal by the county, for the reason that it had no appealable interest. Addressed to this question the following language was employed by this court: "The question is important from whatever angle it may be viewed. The county as a unit of government is a representative of the

sovereign power, the state, in matters affecting revenue, and as such it has a vital interest in questions relating to revenue. A person whose inheritance is affected by the tax in question is also interested, and neither the state nor the individual should be denied the right of having an adverse decision reviewed. The law favors the right of appeal, and that, too, on equal terms and without discrimination as to either party. It is elementary that a statute providing otherwise would be unconstitutional. It is held generally that, if a statute grants the right of appeal to one party, such statute will not be construed to be exclusive as to the other party. 2 R. C. L. 28; 2 Sutherland (Lewis') Statutory Construction (2d ed.) secs. 516, 717. While not bearing on the present case, but merely to show the solicitude of the people that the right of review shall be held inviolate, it will be borne in mind that the Bill of Rights provides: 'The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied.' Const. art. I, sec. 24." The conclusion of this court in that case was: "That which is implied is as much a part of the statute as that which is expressed;" that the county as representative of the sovereign power, the state, was a "person" within the meaning of the language quoted; that the district court had jurisdiction to entertain the appeal as made, and the judgment of the trial court was reversed.

We do not find that the judicial construction which these controlling provisions have received by this tribunal in any way operates to restrict their purview. Indeed, in general it must be admitted that the tendency in the decisions of this state is to construe the provisions under consideration as essentially remedial in their inherent nature, and entitled to be construed as such. Thus, we are committed to the view that it is not even a prerequisite to the right of appeal that the appellants should file objections with, or appear before, the board of equalization. *In re Assessment of Bankers Life Ins. Co.*, 88 Neb. 43.

It follows that the state, being an "entity" that may be adversely affected by the action of the county board of equalization in determining the assessability of property, and being a "person" within the meaning of the revenue act, is entitled to an appeal from an adverse decision of such county board. The question remaining is, whether the appeals as here presented in the name of the state of Nebraska and in the name of the board of equalization and assessment of Nebraska are in law and fact legally authorized.

In 1920 section 28, art. IV, was adopted as an amendment to our Constitution. It provides: "A tax commissioner shall be appointed by the governor with the advice and consent of the senate. He shall have jurisdiction over the administration of the revenue laws of the state, and together with the governor, secretary of state, state auditor and state treasurer shall have power to review and equalize assessments of property for taxation within the state. He shall have such other powers and perform such other duties as the legislature may provide." The words "shall have jurisdiction" are not new in Nebraska jurisprudence. Prior to the adoption of the amendment of 1920 quoted, they had received a definite and settled construction in other connections. Indeed, this court has long been committed to the view that the terms of the constitutional provision that "the district courts shall have both chancery and common law jurisdiction" are not only definite, but are self-executing. Const. art. V, sec. 9. And that under them district courts have constitutional equity jurisdiction which may be exercised without legislative enactment. *Matteson v. Creighton University,* 105 Neb. 219; *State v. Maltby,* 108 Neb. 578, 588; *Abbott v. Johnston,* 93 Neb. 726; *Gainsforth v. Peterson,* 114 Neb. 442; *Robinette v. Olsen,* 114 Neb. 728; *Norfolk Packing Co. v. American Ins. Co.,* 116 Neb. 118; *Burnham v. Bennison,* 121 Neb. 291. And is beyond the power of the legislature to limit or control. *Lacey v. Zeigler,* 98 Neb. 380. It is obvious that the words, "He shall have juris-

diction over the administration of the revenue laws of the state," are just as definite, complete, and certain, with respect to the subject-matter to which they relate, as the words, "The district courts shall have both chancery and common law jurisdiction." Both are addressed to courts, not legislatures. *Willis v. Mabon,* 48 Minn. 140; *State v. Kyle,* 166 Mo. 287. Nothing appears in either provision that indicates that the matter is referred to the legislature for further action. *Harris v. Walker,* 199 Ala. 51. "Constitutional provisions are 'self-executing' where it is the manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given, or to the enforcement of a duty or liability imposed." *State v. Harris,* 74 Or. 573. See *Lyons v. Longmont,* 54 Colo. 112; *State v. Duncan,* 265 Mo. 26. Indeed, it may be said in passing that this construction has received the approval of the legislative department of the state, for we find in section 1, art. III, ch. 133, Laws 1921, this language: "The tax commissioner shall be appointed by the governor with the advice and consent of the senate, and shall receive * * * and have jurisdiction over the administration of this act and all the revenue laws of the state."

So, too, in light of the principle, "The proceedings and debates of the constitutional convention, while powerless to vary the terms of the Constitution, are nevertheless valuable aids in determining the purpose and consequent meaning of a doubtful provision" (6 Ency. of Law [2d ed.] 930), it may be said that in the records of the constitutional convention of 1920 it appears that the report of the chairman of the committee by which this proposition (relating to a tax commissioner) was introduced contains the following: "That this matter relates to taxation wholly, and it is a part of our taxation system and the committee is unanimously of the opinion that a centralized control over the matter of the assessment of taxes is necessary in order to carry out any constitutional provision." Proceedings Neb. Const. Conv. 1919-1920, vol.

1, p. 834. "It is quite obvious that the object and purpose in contemplation at the time of the adoption of section 28, art. IV of the Constitution, are clearly apparent from the words employed therein, as well as from the purpose expressed in the proceedings of the constitutional convention, and plainly evidence an intention to strengthen and correct the admitted weakness of the taxing system of Nebraska as it existed prior thereto. True, the amendment in terms continued the existence of the state board of equalization and assessment which previously existed by statutory authority. But this instrumentality of the state lacked the power of central control in the assessment of taxes and in the determination of the question of the assessability of property. By the revenue act, which in effect still remains upon the statute books of this state, the question of liability to taxation of property was a matter vested in the county board of equalization, with appeal from their decision to the district court. The state board of equalization and assessment had no jurisdiction of this question on appeal. *State v. Drexel,* 75 Neb. 751. In the light of the circumstances surrounding the adoption of the amendments of 1920, the words, "He shall have jurisdiction over the administration of the revenue laws of this state," have no uncertain meaning. It is to be remembered that "a section of the Constitution * * * must be construed so as to give effect, if possible, to it as an entirety, and render every word, phrase, and clause operative." *Finerty v. First Nat. Bank,* 92 Okla. 102. So, too, every provision in a Constitution should be construed, if possible, so as to give effect to every other provision of the instrument. *People v. Case,* 220 Mich. 379. And should also "be interpreted so as to carry out the general principles of the government and not defeat them." *Jenkins v. State Board of Elections,* 180 N. Car. 169. Further, the conclusion is indisputable that "that which is implied in a Constitution is as much a part of it and is as effective as that which is expressed." *State v. Greer,* 88 Fla. 249. Jurisdiction over the administration of all the rev-

enue laws of the state necessarily embraces jurisdiction of the proceedings authorized by sections 77-1702 to 77-1705, Comp. St. 1929.

The exercise by the tax commissioner of his constitutional powers, express and implied, included in this constitutional grant to him of jurisdiction, does not necessarily involve depriving the taxation agents of any authority and powers they had previously exercised under the terms of the revenue act. It merely provided an additional administrative agency, expressly and impliedly charged with the duty of securing a just and uniform enforcement of the terms of this law, and also of the proper exercise of the powers of the revenue officers. The necessity involved in the situation, as well as the existence of these newly created powers, fully justifies and authorizes the tax commissioner, for and on behalf of the state of Nebraska, in intervening in tax proceedings, prosecuting appeals from county boards of equalization, and carrying on such other proceedings as may be expedient or necessary to secure a proper and uniform determination of questions of taxation, such as are involved in these several appeals. To determine otherwise is to negative the action of the state in the adoption of the controlling amendment, and to determine that the language incorporated therein is wholly ineffectual to accomplish the purpose it clearly expresses. This we cannot do. The defect sought to be remedied by this constitutional amendment is plain. The powers conferred by the terms of the constitutional grant are ample, and the general purposes of government will be subserved by their due enforcement.

So far as the use of "The State of Nebraska" as a party appellant, it may be said, in conformity with the general principles of our Civil Code, that "every action must be prosecuted in the name of the real party in interest" (Comp. St. 1929, sec. 20-301), and "officers may sue * * * in such name as is authorized by law" (Comp. St. 1929, sec. 20-304). The tax commissioner, in the ex-

ercise of constitutional powers, appearing for and on behalf of the state as the real party in interest in tax matters, by fair implication, in the absence of an express statute directing otherwise, is authorized to carry on proceedings in the name of the state.

It follows that the district court erred in determining it had no jurisdiction, and also in determining that the state of Nebraska had no authority to prosecute the appeals taken.

The judgments of the district court of dismissal in each of the appeals taken by the appellants herein are reversed, and said causes are remanded to the district court, with directions to determine the validity of each of the orders of the board of equalization heretofore appealed from, and for further proceedings in conformity with this opinion.

REVERSED.

IN RE ESTATE OF DONALD T. AYRES.
FEDERAL TRUST COMPANY, APPELLANT, V. ESTATE OF DONALD T. AYRES ET AL., APPELLEES.

FILED JULY 1, 1932. No. 28272.

1. **Executors and Administrators: CONTINGENT CLAIMS.** "A contingent claim against a decedent's estate is one upon which the liability depends upon some future event, which may or may not happen, and which makes it uncertain whether it will ever be a liability." *In re Estate of Golden*, 120 Neb. 233.
2. ———: ———. Where a note has been secured by a mortgage, payment of which by the terms of a deed the grantee therein, now deceased, has assumed; and the payee of the mortgage note has elected, in event of default occurring, to enforce his remedy by foreclosure; and the ultimate value of the mortgaged premises at the date of such enforcement of this mortgage is now unknown and unascertainable; and a deficiency judgment may thus be obtained; these facts do not render claim for possible deficiency against the deceased "contingent."

APPEAL from the district court for Dixon county: MARK J. RYAN, JUDGE. *Affirmed.*

Herman Ginsburg and *Joseph Ginsburg,* for appellant.

George W. Ayres and *C. A. Kingsbury, contra.*

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

EBERLY, J.

The facts in this case are not in dispute. The Federal Trust Company, appellant, and hereinafter designated as plaintiff, holds solely as trustee a certain promissory note for the sum of $15,000, signed by Edward F. O'Flaherty and wife, which, by its terms, will be due April 1, 1935. To secure the payment of this note contemporaneous with its making and delivery, the makers thereof, as husband and wife, executed and delivered to the plaintiff a mortgage on a half section of land in Dixon county, Nebraska. Thereafter O'Flaherty and wife sold the land thus mortgaged to Donald T. Ayres and Francis Kingsbury, conveying the same to the persons last named by general warranty deed containing a clause providing that such conveyance was "subject to a mortgage of fifteen thousand ($15,000) dollars, given to the Federal Trust Company of Lincoln, Nebraska, which mortgage the grantees herein assume and agree to pay." Thereafter Donald T. Ayres died, and probate proceedings in his estate were commenced in the county court of Dixon county. During that proceeding there was filed in such court a claim by plaintiff, entitled, "Contingent Claim of Federal Trust Company, a Corporation, Trustee." This pleading in appropriate allegations set forth the facts herein already set out, and its present ownership of the note and mortgage is alleged to be in plaintiff as trustee. It expressly alleges also that said plaintiff "does not know whether or not said note and mortgage will be paid at maturity or whether said interest coupons will be paid as due; and in the event default is made thereunder, this petitioner (plaintiff) does not know whether said real estate will bring sufficient at foreclosure sale to pay the amount due

and the costs," and that petitioner will bring an action for the foreclosure of said mortgage in the event of default occurring, etc.

Plaintiff expressly sets forth in said pleading that it "makes no claim against said estate for the payment of said note, coupons and mortgage; but hereby makes its contingent claim for any deficiency that may be due petitioner, after the foreclosure of said mortgage in the event such foreclosure is necessary because of default in the payment thereof." It concludes with a prayer that plaintiff may be allowed "a contingent claim" for the right thus accruing.

It is obvious that plaintiff in this procedure seeks to avail itself of the right secured by article VII, ch. 30, Comp. St. 1929. But it fairly appears, however, that the questions raised in this appeal in plaintiff's behalf have been fully adjudicated in this court against its contentions. In the case of *In re Estate of Golden,* 120 Neb. 232, there was presented for allowance, as a contingent claim, a claim "based on a plea for a deficiency judgment against the Golden estate in a pending action to foreclose a real estate mortgage executed by Golden in his lifetime to secure a note for $5,000." In an opinion on rehearing, 120 Neb. 233, the controlling question then before this court was: "Is such a claim, under the circumstances set forth, a 'contingent claim?'" It was answered in the negative. This court approved the following language by Day, J., setting out the reasons for the rule adopted: "When Golden executed his note for $5,000, he created an obligation which was absolute, fixed and determined. He owed an obligation which was definite. The happening of no subsequent event was necessary to create the obligation to pay. The failure of any event to happen would not relieve him from payment. Unlike a stockholder's liability that only accrues when and if the corporation becomes insolvent; unlike the obligation upon a bond, liability upon which does not accrue until default, the obligation of the maker of the note is fixed, definite,

and certain. The confusion in this case may be accounted for because of the payee's selection of remedies. It chose to proceed to enforce its claim against the security. It could not have been forced to so proceed. *Carson's Executors v. Buckstaff*, 57 Neb. 262. A contingent claim against a decedent's estate is one upon which the liability depends upon some future event, which may or may not happen, and which makes it uncertain whether it will ever be a liability. *Stichter v. Cox*, 52 Neb. 532; *Hazlett v. Estate of Blakely*, 70 Neb. 613; *Davis v. Davis*, 137 Wis. 640; 11 R. C. L. 205, sec. 229.

"In *Stichter v. Cox, supra*, we held: 'When a grantee of real estate, as part of the consideration for the purchase, assumes and agrees in the deed to pay a certain mortgage on the premises, he is liable for the mortgage debt, and the grantor, immediately upon the maturity of the mortgage, may recover from the grantee the amount due thereon, though the grantor may have paid no part of it.' In *Carson's Executors v. Buckstaff, supra*, the court held: 'A creditor cannot be compelled to exhaust the collateral security held by him as a condition precedent to his right to sue his debtor upon his note.' A note is an absolute obligation to pay, and the fact that it has been secured by a mortgage, and the payee has elected to enforce his remedy by foreclosure, and a deficiency judgment may be obtained, does not render the claim contingent. It is an absolute claim against decedent's estate."

To the language quoted we need only add: The assumption clause contained in the warranty deed on which plaintiff relies in effect places the grantees accepting the same in the shoes of the mortgagors. As the $15,000 note at all times evidences the principal contract, an absolute fixed and determined obligation of the makers, the effect of the assumption clause is to impose identical duties and liabilities on the grantees so assuming, which is beyond the powers of the mortgagee to affect or change by any subsequent election of remedies for enforcement of his

contractual rights. As between the parties to this proceeding, therefore, the instruments in suit may not be considered as evidencing a contingent claim within the meaning of the statutory proceedings relating thereto.

It follows that the action of the district court in denying the allowance of this claim as a contingent claim is in all things correct, and is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, RELATOR, V. RALPH J. SCOVILLE, RESPONDENT.

FILED JULY 1, 1932. No. 28225.

1. **Pleading:** JUDGMENT ON PLEADINGS. Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court.
2. **Attorney and Client:** DISBARMENT. The conviction of an attorney for a felony involving moral turpitude is a sufficient cause for disbarment.
3. ———: ———: CONVICTION OF FELONY. Conviction in the federal courts is conclusive evidence warranting disbarment, if the offense is a felony or misdemeanor involving moral turpitude, as such term is defined by the statutes.
4. ———: ———: "FELONY." The term "felony" comprehends an offense that may be punished by imprisonment in the penitentiary.
5. ———: LICENSE TO PRACTICE. "In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." *State v. Burr*, 19 Neb. 593.
6. ———: ———. In order to retain license to practice law, an attorney must abstain from conduct which establishes a depreciation of good moral character.
7. ———: DISBARMENT. Misconduct of attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment.

Original proceeding by the state to disbar the respondent.

MOTION for judgment on the pleadings. *Motion sustained, and respondent ordered disbarred.*

C. A. Sorensen, Attorney General, and *Clifford L. Rein,* for relator.

P. F. O'Gara and *Ralph J. Scoville,* for respondent.

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and DAY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

DAY, J.

This proceeding was instituted by the attorney general to discipline an attorney at law. The petition charges that the attorney committed personal misconduct and sustained a disqualifying depreciation in moral and professional character sufficient to warrant disbarment. The specific charge is: "That on October 26, 1929, in the United States district court for the district of Nebraska, Norfolk division, the defendant Ralph J. Scoville was convicted of the felony denounced by section 85 of the Penal Code of the United States of America and consisting of a conspiracy to extort $10,000 in money from one Frank Tillman, Junior; and that attached hereto, made a part hereof and marked 'exhibit A' is a duly certified transcript of the record of the indictment, arraignment, plea, trial and conviction of the said defendant." The defendant in his answer admits the conviction, but alleges that at the time and for a period of about seven years prior thereto he had not engaged in the practice of law or giving counsel to a client.

This matter comes before the court upon a motion of the attorney general for a judgment on the pleadings.

Where, upon statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court. *Manning v. City of Orleans,* 42 Neb. 712; *Scofield v. Clark,* 48 Neb. 711; *Connor v. Becker,* 62 Neb. 856. The conviction of an attorney for a felony involving moral turpitude is a sufficient cause for disbarment. *Morton v. Watson,* 60 Neb. 672; *In re*

Disbarment Proceedings of Newby, 76 Neb. 482; *In re Hopkins,* 54 Wash. 569. This rule has been applied in cases of convictions for extortion and attempted extortion. *In re Coffey,* 123 Cal. 522. Participation in extortion is unprofessional conduct. *In re Bartlett,* 47 S. Dak. 208; *In re Coffey,* 123 Cal. 522. In the *Manning* case, *supra,* there is dictum which would seem to indicate that a conviction of a crime would not affect the result of a disbarment proceeding. But in the *Scofield* case a different view is suggested and is now definitely announced. The difficulty in the early cases was due to the fact that it had not yet been determined whether a disbarment proceeding was a criminal or a civil action. This court has held that a disbarment proceeding is in the nature of a civil action. *State v. Priest,* 118 Neb. 47. In this case, we held that a final judgment in a suit for an accounting was conclusive evidence of a misappropriation of funds belonging to a client. A judgment of a court in a criminal case under the strict rules for the protection of the defendant ought to have at least as much weight as a judgment rendered in a civil case upon a mere preponderance of the evidence.

The term "felony" comprehends an offense that may be punished with imprisonment in the penitentiary. Comp. St. 1929, sec. 29-102.

Conspiracy to extort money under federal laws carries a maximum imprisonment penalty of two years. U. S. Code Ann. title 18, sec. 88, p. 125; U. S. Code Ann. title 18, sec. 171, p. 325. Extortion or attempted extortion or a conspiracy to effect the same carries a maximum penalty of more than a year in the penitentiary under the statutes of Nebraska. Comp. St. 1929, secs. 28-453, 28-457.

The defendant in his answer alleges and argues before this court that the offense, which he does not admit, was not committed in his professional capacity. The statutes provide that no person shall be admitted to the bar unless such person is of good moral character. Comp. St. 1929, sec. 7-102. Good moral character is a universal re-

quirement for admission to the bar. Would it be seriously contended that the defendant, with the recent conviction of a felony involving moral turpitude, was possessed of such good moral character as would entitle him to admission to the bar? Surely, it would not.

In an early case, this court held: "In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts." *State v. Burr*, 19 Neb. 593.

In order to retain license to practice law, an attorney must abstain from conduct which establishes a depreciation of good moral character. It was obviously the legislative intent and recommendation that those who exercise the prerogatives of an attorney should be persons of good moral character. It would avail nothing from a practical standpoint to insist upon good moral character at the time of admission to the bar, if we failed to take cognizance of moral relapses thereafter.

Misconduct of an attorney, indicative of moral unfitness for the profession sufficient to deny an applicant admission to the bar, even if the act is not committed in a professional capacity, justifies disbarment. *In re Disbarment of Cary*, 146 Minn. 80; *In re Disbarment of Moerke*, 184 Minn. 314; *In re Morrison*, 43 S. Dak. 185; *In re Stolen*, 193 Wis. 602, affirmed on rehearing, 193 Wis. 627.

The motion for judgment on the pleading should be sustained. It is, therefore, the order of the court that a judgment of disbarment be entered, that the defendant be enjoined from the further practice of law in this state and his name be stricken from the roll of attorneys.

JUDGMENT OF DISBARMENT.

CLARENCE G. BLISS, RECEIVER, APPELLANT, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED JULY 1, 1932. No. 28320.

1. Banks and Banking: INSOLVENCY: ORDER ALLOWING CLAIM A JUDGMENT. Where a court in a receivership proceeding allows a depositor of an insolvent bank a preferred claim payable from the guaranty fund, the order is a judgment.
2. ———: DEPARTMENT OF TRADE AND COMMERCE. "The department of trade and commerce and the guaranty fund commission were created by statute as governmental agencies of the state and as trustees for the beneficial owners of trust funds coming into the custody of such agencies." *Bliss v. Continental Nat. Bank*, 120 Neb. 568.
3. ———: BANK GUARANTY FUND. "The bank guaranty fund and the bankers' conservation fund in the custody of the secretary of the department of trade and commerce are trust funds belonging to the proper distributees as determined by courts of competent jurisdiction in judicial proceedings." *Bliss v. Continental Nat. Bank*, 120 Neb. 568.
4. ———: INSOLVENCY: ALLOWANCE OF CLAIM: LIEN. A judgment lien upon the guaranty fund is created by statutory provision.
5. ———: ———: EQUITABLE LIEN. The depositors' guaranty fund being a trust fund, even though the statute did not create a lien, an equitable lien would arise under the facts in this case to the end that this specific fund should be applied to the payment of this judgment.
6. ———: ———: TRANSFER OF ASSETS. Subdivisions (b) and (c), sec. 1, ch. 6, Laws 1930, Special Session, which provide for the transfer of the assets from the depositors' guaranty fund of the state of Nebraska to the depositors' final settlement fund, transfer only such assets as were not subject to the payment of judgment liens.

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

Woods, Woods & Aitken and *Good, Good & Kirkpatrick*, for appellant.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

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

DAY, J.

This is a suit in equity brought by the receiver of the State Bank of Superior for the depositors of said bank, whose claims have been allowed as preferred, to enjoin the secretary of the department of trade and commerce from distributing any of the funds belonging to the depositors' guaranty fund except in accordance with the statutes of Nebraska prior to 1930, and for a declaratory judgment fixing the rights of the parties hereto to the funds now in the hands of the department.

The petition alleges that, after the appointment of a receiver for the State Bank of Superior, the court allowed such claims as were payable out of the depositors' guaranty fund, and upon the 14th day of January, 1928, in accordance with the provisions of section 24, ch. 191, Laws 1923, as amended by section 12, ch. 30, Laws 1925, the court entered its order finding a deficiency of $591,-868.87 payable out of depositors' guaranty fund, which it adjudged should be paid out of said fund; that this order of judgment was certified to the department of trade and commerce on the 20th day of January, 1928, whereupon the secretary of the department drew against the depositors' guaranty fund, but the draft was not paid for lack of cash in said fund.

It is also alleged that the depositors' guaranty fund at the time was the owner of assets purchased by it at receiver's sales of various banks theretofore litigated; that it also had as assets money due it from state banks under assessments levied to replenish the guaranty fund under the statutes of Nebraska; that there were on January 20, 1928, drafts in favor of receivers of several other banks which had not been paid for want of funds to satisfy them which are claims upon the fund prior to any claim of the plaintiff; that thereafter there accrued to said depositors' guaranty fund further sums and further assessments, so that in April, 1930, the sum due from

the assessments was in excess of $3,000,000, so that at that time there were sufficient funds due from the assessments and assets owned by the guaranty fund to pay all prior drafts and in addition thereto the draft in favor of this bank; that the assessments were not paid, for that litigation was pending, the object of which was to have such assessments declared confiscatory and unconstitutional (*Abie State Bank v. Weaver*, 119 Neb. 153); that in April, 1930, while this litigation was pending in the supreme court of the United States (*Abie State Bank v. Bryan*, 282 U. S. 765), the legislature meeting in special session (46th Special Session 1930) enacted legislation (Laws 1930, Special Session, ch. 6) which purported to abolish the depositors' guaranty fund, to create a new fund designated as the depositors' final settlement fund, and attempted to transfer all assets belonging to the former to the latter.

It is also alleged in the plaintiff's petition that the depositors' guaranty fund was a trust fund and that the adjudication and allowance of the claims of the depositors as preferred claims coming within the protection of the guaranty fund are judgments of the court against said fund and constitute an equitable and statutory lien upon the assets of the guaranty fund in the hands of the defendants, the governor and the secretary of the department of trade and commerce. The plaintiff asks for an order of this court finding that he is entitled to have these claims paid in the order of priority as provided by the statutes prior to April, 1930.

The trial court sustained a general demurrer to said petition for the reason that it did not state a cause of action.

The nature of an allowed claim of a deposit in a receivership proceeding has been frequently considered by this court. In *State v. Farmers State Bank*, 113 Neb. 679, the court held that a claim upon a certificate of deposit was a judgment payable from the fund, for that it should bear interest at 7 per cent. from the date of hear-

ing in the district court until paid. This claim was held to come within the purview of section 45-103, Comp. St. 1929, which provides for interest on all decrees and judgments for the payment of money. This court in *State v. Nebraska State Bank,* 118 Neb. 660, discusses the nature of a claim of a depositor as follows: "Is the depositors' guaranty fund chargeable with interest on the claim at 7 per cent. from the date of its allowance by the district court? In several cases we have held that the allowance of the claim amounted to a judgment and came under the general provision of the statute that judgments should draw interest at 7 per cent. It is contended by counsel for receiver that these decisions were rendered at a time when the guaranty fund was solvent and able to pay all claims certified to it under the law, but that at the time of the trial there were approximately $7,000,000 in claims certified for payment and unpaid. * * * The argument * * * is of considerable force and its rejection results in leaving the guaranty fund charged with a burden of staggering weight, but we would not be justified in relieving it unless in accordance with legal principles applicable to the facts in the case." Additional cases which have allowed interest upon these judgments are *State v. Farmers State Bank,* 113 Neb. 679; *State v. Octavia State Bank,* 116 Neb. 825; *State v. Security State Bank,* 116 Neb. 521; *State v. Security State Bank,* 116 Neb. 526; *State v. Security State Bank,* 116 Neb. 530. While it is not directly stated in these cases that the allowance of the claim by the court is a judgment, the principle upon which the court held that interest was allowable was based upon the assumption that an allowance of the claim was in the nature of a judgment. In *State v. Monowi State Bank,* 115 Neb. 396, the court used the following language: "The total judgment entered in favor of the complainant was $57,520.90. It should have been $113.75 less, or $57,407.15. In all other respects the judgment of the district court is right. The judgment of the district court is therefore modified so as to allow claim-

ant a judgment of $57,407.15, as of date March 6, 1925, payable from the depositors' guaranty fund as a preferred claim, and, as modified, the judgment is affirmed." The subject of the litigation in the last case was a claim based upon 13 certificates of deposit, which claim was allowed as preferred and adjudged payable from the depositors' guaranty fund. The only rule deducible from the line of Nebraska cases cited herein and going back to 1925 is that, where the court in a receivership proceeding allows a depositor of an insolvent bank a preferred claim payable from the guaranty fund, the order is a judgment.

The nature of the guaranty fund has also been discussed by this court. In *Bliss v. Continental Nat. Bank,* 120 Neb. 568, it was held: "The department of trade and commerce and the guaranty fund commission were created by statute as governmental agencies of the state and as trustees for the beneficial owners of trust funds coming into the custody of such agencies.

"The bank guaranty fund and the bankers' conservation fund in the custody of the secretary of the department of trade and commerce are trust funds belonging to the proper distributees as determined by courts of competent jurisdiction in judicial proceedings."

The judgment lien upon the guaranty fund is created by statutory provision. The law provided that "claims of depositors were to be paid according to the priority of adjudication." *Abie State Bank v. Bryan,* 282 U. S. 765. There was created a trust fund for a specific purpose, which was the payment of claims as determined by the courts in judicial proceedings. The depositors' guaranty fund being a trust fund, even though the statute did not create a lien, an equitable lien would be created, to the end that this specific fund should be applied to the payment of this judgment. *Bliss v. Continental Nat. Bank,* 120 Neb. 568. "Generally speaking, an equitable lien is a right, not recognized at law, and which a court of equity recognizes and enforces as distinct from strictly

legal rights, to have a fund or specific property, or the proceeds, applied in full or in part to the payment of a particular debt or demand. * * * An equitable lien has the nature of, or is analagous to, a trust and really grows out of the doctrine of constructive trusts." 37 C. J. 308. In this case the judgment was certified to the department of trade and commerce and the secretary of said department drew against the depositors' guaranty fund for the amount. This draft was not paid, but it was an appropriation of the fund to the payment thereof. The appellant has complied strictly with statutory provisions in this case.

The claim of a depositor against the receiver of an insolvent bank and allowed as a claim against the guaranty fund is a judgment and the priority to which it is entitled is determined by the law relating to judgments. The depositors' guaranty fund was a creation of statute subject to such liabilities as the legislature provided. Assessments were levied under the police power of the state for the protection of depositors in state banks. The law provided that, in case a bank failed and its assets were insufficient to meet the claims of depositors, the court should determine the amount of the insufficiency and order the department of trade and commerce to draw against the guaranty fund in an amount necessary to make up the difference. Claims of depositors were to be paid according to priority of adjudication. *Cleary v. Fidelity & Deposit Co.*, 117 Neb. 478; *State v. Security State Bank*, 116 Neb. 223. The statutes of this state provide for the liquidation of insolvent state banks by invoking the judicial power of the state. *State v. State Bank of Minatare, ante*, p. 109. Under the statutes of this state, as interpreted by this court, the allowance of such a claim is a judgment and is an equitable and statutory lien upon the guaranty fund and payable out of it.

The attorney general in his brief argues that the guaranty fund is not to be subjected to the payment of the claims which have been allowed and that the appellant

has no right to a continuance of the guaranty law. The appellees concede that they have no vested right in the continuance of the law as such. On account of this concession, we will not discuss that matter. But it is argued, first, that claims allowed by the court in the process of judgment and liquidation are not judgments; second, that, even if they are judgments, they are not liens upon such fund, and then the case of *Wirtz v. Nestos,* 51 N. Dak. 603, is cited as authority for the proposition. It is apparent from that opinion that the liquidation of state banks in North Dakota is an executive function as distinguished from a judicial function as in this state. In that case the North Dakota court held that certificates of indebtedness issued by the liquidating agent were not liens against the fund to be paid in the order they were issued. To the same effect is cited *State v. Smith,* 234 N. W. (S. Dak.) 764, in which the South Dakota court held that "the intention as to priority inherent in the original portion of the law providing for method and time of payment * * * gave rise to no lien claims upon the fund." The South Dakota case cites *Lacy v. State Banking Board,* 118 Tex. 91, in which case there was likewise no question of a judgment in a judicial liquidation. These cases might well be cited as authority for the proposition that a depositor in a bank who comes within the provisions of a guaranty law has no vested right in a continuance of a police regulation enacted for a public purpose in the interest of the public welfare. However, since this question is not presented, these cases are not applicable to this situation. The guaranty fund law was enacted by the legislature in the exercise of its police power for the protection of depositors in state banks. The rights of the appellant arise by virtue of this statute. These rights became vested by solemn judgment of the court in 1928, which found that they were preferred claims and payable out of the guaranty fund. The legislature thereafter by the act of 1930 attempted to distribute the remaining assets of the guaranty fund to all depositors of failed

state banks prior to April, 1930. The legislature had the undoubted right to repeal the guaranty law which was a police regulation. However, since the assets of this fund were a trust fund collected for a specific purpose against which the court had entered judgments, the legislature could not transfer or impair the rights vested in the depositors by virtue of these judgments. In *Arnold & Murdock Co. v. Industrial Commission,* 314 Ill. 251, where an employee had obtained an award for an injury in 1917 and thereafter the legislature passed a law permitting an employer to petition for a decrease where the disability of the injured employee had lessened since the date of the award, and where the employer petitioned for a decrease under the new statute, the court denied the relief as follows: "No one has a vested right in a public law but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law. * * * A judgment is a vested right of property and cannot be destroyed * * * by a retroactive statute. * * * Before that enactment had been adopted the award in this case confirmed had been by final judgment and was a vested right." In *McCullough v. Virginia,* 172 U. S. 102, the court held: "It is not within the power of a legislature to take away rights which have been once vested by a judgment, * * * but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

Subdivisions (b) and (c), sec. 1, ch. 6, Laws 1930, Special Session, which provide for the transfer of the assets from the depositors' guaranty fund of the state of Nebraska to the depositors' final settlement fund, transfer only such assets as are not subject to the payment of judgment liens. The assets of the depositors' guaranty fund subject to such payment by judgment are not strictly assets of the fund. It was beyond the power of the legislature to transfer assets subject to such liens, for

that would be an interference with vested property rights, and if such were the intention of the legislature it would be void as violative of section 1 of the Fourteenth Amendment of the Constitution of the United States and section 3, art. I, Constitution of Nebraska. It will be presumed that the legislature did not intend to violate the Constitution. " 'Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter.' *United States v. Delaware & Hudson Co.*, 213 U. S. 366." *Enos v. Hanff*, 98 Neb. 245. See *Wood v. Byrne*, 60 N. Dak. 1; *In re Harrand*, 254 Mich. 584; *Jessner v. State*, 202 Wis. 184; *Mancuso v. State, ante*, p. 204.

The judgment of the trial court is accordingly reversed and the cause remanded, with directions to enter judgment enjoining the governor and the secretary of the department of trade and commerce from transferring from the depositors' guaranty fund any of the assets of the former necessary to pay the judgments which had been entered prior to the enactment of chapter 6, Laws 1930, Special Session.

REVERSED.

ROYAL HIGHLANDERS, APPELLEE, V. JAMES H. LOUTHAN ET AL., APPELLANTS.

FILED JULY 1, 1932. No. 28239.

1. **Judicial Sales:** SETTING ASIDE: INADEQUACY OF PRICE. "A judicial sale of real estate will not be set aside on account of mere inadequacy of price, unless such inadequacy is so gross as to make it appear that it was the result of fraud or mistake." *First Nat. Bank v. Hunt*, 101 Neb. 743.

2. **Mortgages:** FORECLOSURE: SALE: FAIR PRICE: MEANS FOR ASCERTAINING. "There are no restrictions upon the means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale or that a subsequent sale would not realize a greater amount. The burden is upon the appellants to show affirmatively that the judgment of the trial court is

erroneous." *Occidental Building & Loan Ass'n v. Beal*, 122 Neb. 40.

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

Orville C. Wisdom, for appellants.

C. C. Flansburg, Leonard A. Flansburg, George A. Lee, R. V. Rodman and *John H. Kuns, contra.*

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

HORTH, District Judge.

The defendants, James H. Louthan and Mary L. Louthan, appeal from an order of the district court for Banner county confirming the sale of a section of land, under a decree of foreclosure. The errors alleged and relied upon by the appellants are: (1) The court erred in finding that the property sold for its fair and reasonable value under the circumstances and conditions of the sale; and (2) the court erred in finding that the property would not realize a greater amount at a second sale.

The burden of proof is upon the appellants to show affirmatively that the judgment of the trial court was erroneous. The evidence on the question of the value of the land was by way of affidavits and these are not convincing that the amount for which the land sold under the circumstances and conditions of the sale was so inadequate as to make it appear that it was the result of fraud or mistake. On the question of whether a greater amount would be realized at a second sale, appellants' evidence is silent.

The judgment of the district court is therefore affirmed, with leave to appellants to redeem before the mandate is issued.

AFFIRMED.

THOMAS PAT O'CONNOR V. STATE OF NEBRASKA.

FILED JULY 8, 1932. No. 28266.

1. **Criminal Law:** CONVICTION: CONFLICT OF EVIDENCE: REVIEW. "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State*, 115 Neb. 277.
2. **Evidence.** "Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." Comp. St. 1929, sec. 20-1211.
3. **Witnesses:** CROSS-EXAMINATION. In the cross-examination of a defendant who voluntarily becomes a witness in his own behalf, considerable judicial discretion is committed to the trial court to go beyond the literal scope of the direct examination in matters testing the accuracy, memory or credibility of the witness.
4. **Criminal Law:** REVIEW: MISCONDUCT OF PROSECUTOR. Evidence as to misconduct of prosecutor and the rulings of the court thereon examined and *held* not to affect the substantial rights of the defendant. Comp. St. 1929, sec. 20-853.

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

Donald Gallagher and *T. C. Gaughan*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

GOSS, C. J.

Defendant was convicted on a charge—under section 28-537, Comp. St. 1929—of entering the building of the Lincoln National Bank & Trust Company, on September 17, 1930, by violence and by putting in fear certain named officers of the bank, with intent to steal. Sentenced to the penitentiary, he brings error proceedings.

The brief of defendant says: "The only question involved in the whole case was this: Did Thomas Pat

O'Connor stand in front of the Lincoln National Bank with a machine gun during the robbery?" O'Connor was a witness for himself. He testified he was never in the state of Nebraska, did not rob the bank in question and was in East St. Louis, Illinois, on September 17, 1930. He testified to certain facts indicating that on September 16 and 17, 1930, he was in his home town dealing with a motor company in the exchange and delivery of his car for a new one. Officers and employees of the motor company and others corroborated him both orally and by documentary evidence as to his presence at East St. Louis on the day the bank was robbed in Lincoln. Several witnesses for the state had positively identified defendant as participating in the robbery of the bank by guarding the outside of the bank with a machine gun while his associates were engaged in looting the bank and depository. On this conflicting evidence the jury believed the witnesses for the state. The question was for the jury to decide. "This court, in a criminal action, will not interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that we can say, as a matter of law, that it is insufficient to support a finding of guilt beyond a reasonable doubt." *Williams v. State,* 115 Neb. 277.

The chief error assigned and relied upon arises out of the cross-examination of defendant. The testimony of defendant was confined to his denial of his presence in Nebraska and of his participation in the robbery; and to details as to his presence in Illinois at the time of the robbery. It is claimed that error was committed in allowing his cross-examination to go beyond the scope of his examination as a witness for himself. The following instances are set up:

(1) Having answered questions showing his acquaintance with Pop Lee, Gus Winkler and others, defendant was shown a group photograph in which the witness appeared with some of them. While being interrogated about Winkler, he was asked if he was not "arrested in

company with him at that time," and answered, "I think I was." His counsel objected to the matter as prejudicial, moved to strike the answer as made before he had a chance to object and asked the court to instruct the jury to disregard it. He was overruled. (2) Having declared he did not know whether Winkler is a licensed airplane pilot and knew nothing whatever about him, the county attorney asked defendant: "Well, you knew him well enough to be arrested with him, didn't you?" The court sustained an objection to this but declined to caution the jury to disregard it. (3) Defendant was asked if he had been convicted of a felony in Louisville, Kentucky. Objection to the question was overruled and he answered in the negative. He was then asked if he was not out on a $20,000 appeal bond to the supreme court. Objection to this was sustained; the court instructed the jury to disregard the question and cautioned counsel not to proceed further with questions of that character. (4) Defendant was shown some record (not described), asked to "glance through there" and to tell whether he was the party referred to. Over objection he answered in the affirmative. (5) Defendant was asked whether he was not arrested on October 22, 1929, in New York City and gave his name as "Thomas Donovan." On objection and request to instruct the jury to disregard the question, the court overruled the objection and received the answer merely, as the court said, "for the purpose of testing the memory" and "is not to be considered as in any wise proving that he had been guilty of anything else." He answered in the affirmative. (6) A similar question, situation and ruling arose with reference to his giving the name of "Thomas J. Gleason" in Peoria, Illinois, on June 7, 1929, and defendant answered he could not remember.

While the trial court gave the purpose of the admission of certain of the above evidence in the cross-examination of O'Connor as testing his "memory," the ultimate purpose of such a cross-examination as we have recited was to enlighten the jury as to the accuracy, memory,

veracity or credibility of the witness. Considerable judicial discretion is committed to the trial court in admitting evidence seeking to bring to light collateral facts bearing on the truth and impartiality of the witness. 28 R. C. L. 607, sec. 197. It is a relaxation of the general rule as to cross-examination ordinarily being confined to the scope of the direct examination and to strictly relevant issues. In this state the legislature has sanctioned it by providing in the Code: "Facts which have heretofore caused the exclusion of testimony, may still be shown for the purpose of lessening its credibility." Comp. St. 1929, sec. 20-1211. Further, the Code provides: "A witness may be interrogated as to his previous conviction for a felony. But no other proof of such conviction is competent except the record thereof." Comp. St. 1929, sec. 20-1214.

While, in some aspects, the trial court might well have restrained the prosecutor and limited the cross-examination, we do not find there was such an abuse of discretion as to call for a reversal on the points heretofore stated. An analytical perusal of the evidence on these six points, in the light of the entire circumstances, does not indicate that prejudicial error resulted. The statute says that we must, in every stage of an action, disregard any error not affecting the substantial rights of a party. Comp. St. 1929, sec. 20-853.

On cross-examination defendant was asked if, when arrested in East St. Louis on May 5, 1931, he was carrying a .38 revolver. He denied it. By further cross-examination a foundation was laid, and, on rebuttal, Hal Roberts of Dixon, a member of the Illinois state police, testified that he took the loaded gun from inside defendant's belt at the time of his arrest. He was corroborated by Roy Steffens, a Chicago police officer, who was also one of the arresting officers. Roberts identified the shells taken from the gun. His testimony showed that part of the lead had been cut off and the ends creased; and that the identification numbers on the revolver had been

ground off. The argument on behalf of defendant that it was erroneous even to ask defendant about the revolver considered as a collateral matter has already been answered generally. It seems to be settled that, on such a charge as was involved here, evidence that defendant, when arrested, was armed with a revolver, is admissible generally. 54 C. J. 1060. One of the cases there cited is *State v. Barone,* 173 Minn. 232. There it was held that evidence in relation to weapons and shells found at the time of defendant's arrest, nearly eight months after the robbery, was admissible, though remote. The remoteness goes more to its weight than to its admissibility.

Defendant argues that the revolver evidence was purely collateral and that the answers of defendant could not be contradicted on rebuttal. The principle is stated in *Attorney General v. Hitchcock,* 1 Wels. H. & G. Exch. (Eng.) 91: "The test, whether the matter is collateral or not, is this: If the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such connection with the issue that you would be allowed to give it in evidence—then it is a matter on which you may contradict him." See *Boche v. State,* 84 Neb. 845; *Carter v. State,* 36 Neb. 481; *Smith v. State,* 5 Neb. 181. We cannot agree that this issue of fact was collateral. It was germane to the main issue of the defendant's presence and participation in the robbery, particularly in view of his taking the stand to testify. It bore on his character and credibility as a witness. These matters he submitted to the jury when he voluntarily took the stand in his own behalf; the jury had a right to be aided by the evidence in these respects.

During the arguments by the prosecutors, the counsel for defendants interrupted and made objections 27 times to the language used as constituting misconduct. Some objections were sustained. Most of them were overruled. As examples of proper and legal forensic art these closing addresses to the jury would probably not rank with some historic examples that have been preserved for the

edification of the student of the law as it should be practiced in the criminal branch. Only excerpts from addresses on behalf of the state were preserved. Arguments of counsel for defendant do not appear in the record. There are indications that at least some of the instances of misconduct alleged were probably provoked by resourceful counsel for defendant. The learned and experienced trial judge who tried the cause heard all the evidence and arguments. While we do not approve the course of the prosecutors in some of the argument that has been brought to our attention, yet we do not find that prejudicial error has resulted to defendant by reason thereof.

Defendant was sentenced on October 29, 1931. On January 7, 1932, he filed a motion, and affidavits in support thereof, asking that the judgment be vacated and a new trial granted because of newly discovered evidence; requesting that W. E. Barkley be examined orally in support of the motion; alleging that Barkley and others named now know the identity of all the participants in the robbery and now know that this defendant is innocent. Barkley was examined orally on the hearing of the motion. He testified that he was now more perfectly convinced than ever that O'Connor and two others about whom he was asked are guilty. Without entering into a detailed discussion, we do not discover error in the conclusion of the court that he found nothing in the showing to justify the object of the motion and therefore overruled it.

Counsel for defendant express strong conviction that the defendant is innocent and that facts appearing after the trial will demonstrate it. If and when this event occurs, it will be a matter for executive clemency. This court is limited to a review of the record, and, in the circumstances, cannot judicially afford relief because we find no prejudicial error.

AFFIRMED.

VERN PENDROCK, APPELLEE, V. F. W. WOOLWORTH COMPANY ET AL., APPELLANTS.

FILED JULY 8, 1932. No. 28283.

1. Slander: PROOF. In an action for slander plaintiff to whom slanderous words were spoken may prove by direct or circumstantial evidence, or by both, that the defamatory utterances were heard and understood by a third person.
2. Appeal: SLANDER: PROOF. In testing on appeal the sufficiency of the evidence to sustain a verdict that defendants uttered and published a slander, reasonable and proper testimony of plaintiff on those issues may be accepted as truthful.
3. Slander: REVIEW. Evidence outlined in opinion *held* sufficient to support a verdict that defendants spoke slanderous words to plaintiff and communicated them to a third person.
4. Trial: REFUSAL OF INSTRUCTION. Refusal to give a requested instruction is not prejudicially erroneous where the directions therein were properly included in the instructions given.

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

Crofoot, Fraser, Connolly & Stryker, for appellants.

Merrow & Murphy and *John A. McKenzie, contra.*

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

ROSE, J.

This is an action to recover $10,000 in damages for slander. In Omaha plaintiff was a salesgirl in a store owned by defendant F. W. Woolworth Company and managed by defendant Arthur Davis. The petition alleged that Davis, February 25, 1930, acting for himself and his employer, wrongfully and maliciously intending to slander, malign and injure plaintiff, told her in presence of co-employees that six cents found in her shoe did not belong to her; that she had stolen it from them and was a common thief. In explaining the presence of the money in her shoe she stated in her petition that she was required to deposit daily with defendants her purse, street shoes and other personal belongings before entering upon

her duties in the store; that she found in an aisle six cents belonging to a customer who had lost the money and that she put it in her shoe to keep it separate from money she was handling for defendants; that in the evening, having changed her store shoes for her street shoes before departing for home, defendants discovered the six cents in her store shoe, subsequently uttered the slander outlined and discharged her.

Defendants in their answer denied unadmitted allegations of the petition, specifically denied the charges that Davis accused plaintiff of wrongfully taking the money, of stealing it and of calling her a common thief, and pleaded that, pursuant to a request of Davis who found money in her shoe on the evening of February 24, 1930, she came to him in the basement of the store the next morning—February 25, 1930; that he then and there informed her she had broken a rule by concealing money in her apparel; that he would be obliged to discharge her; that the conversation between them was conducted in a moderate tone of voice, was not sufficient to, and did not, attract the attention or notice of any other person and that plaintiff left quietly and unnoticed. The facts pleaded as a defense were put in issue by a reply.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $2,000 and from a judgment thereon defendants appealed.

The principal ground upon which defendants rely for a reversal is the insufficiency of the evidence to sustain the judgment. They directed a formidable argument to the proposition that plaintiff did not make a case for damages and that consequently the trial court erred in overruling a motion by them for a nonsuit. The evidence on behalf of both sides shows that, before the store was opened to customers on the morning after the coins had been found in the shoe, plaintiff and Davis had a conversation in the basement of the store in regard to that incident. What then and there occurred was the material inquiry. The store was conducted on two floors—the first

and the basement. Plaintiff had been employed as a clerk at a counter in the basement. She testified that, when near her counter on her way to work, Davis, who, with five or six other employees, was in the basement when she arrived, called to her from a distance of about 15 feet and said: "Pendrock, come over here;" that she did as directed and he said, "What is the matter with your shoe?" Her version of what followed, quoting from the record, reads thus:

"I didn't say anything. I looked down at my shoe and at him, and he said, 'You stole some money from the store.' I said, 'What do you mean—that six cents I found?' He said, 'You didn't find that. You stole it, you little thief.' And I said, 'Oh, no, Mr. Davis, I found it.' He took me by the arm and said, 'Don't try to tell me that. You stole it. That is all there is to it.' And he led me to the check room and he said, 'We can't have thieves around here.'"

Plaintiff testified further that Davis was angry and spoke in a loud tone of voice and that other employees were there where they could hear the conversation. The jury believed her evidence in preference to testimony of a different import and, for the purposes of appeal, their verdict established the fact that Davis, acting for himself and his employer, uttered in the presence of plaintiff and others the defamatory expressions pleaded in the petition—utterances of themselves slanderous. Confronted with the evidence and the verdict, defendants take the position that each employee present at the time, with the exception of plaintiff, denied hearing any defamatory words and that therefore the publication essential to an actionable slander was not proved, evidence of what was said to plaintiff and not heard by any one else being insufficient to show publication or resulting damages. The rule of law that defamatory utterances, to be actionable as slanders, must be published or communicated to a third person is well understood, but there seems to be a fallacy in the argument applying the principle invoked to

the evidence in the present case. A plaintiff to whom slanderous words were spoken may prove by direct or circumstantial evidence, or by both, that the defamatory utterances were heard and understood by a third person. In testing on appeal the sufficiency of the evidence to sustain a verdict that defendants uttered and published a slander, reasonable and proper testimony of plaintiff on those issues may be accepted as truthful. Many of the circumstances were harmoniously disclosed by both sides. A conversation between Davis and plaintiff was shown by all litigants. It occurred in the basement of the store in absence of customers. Besides plaintiff there were at least five other employees present, each at a counter arranging merchandise for sale. There was nothing to indicate that the natural sense of hearing of any one of them had been impaired. As witnesses they heard, understood and answered the questions propounded by counsel at the trial. They all spoke understandable English. While the conversation to which Davis testified was free from slander and was in plain language, plaintiff's different version of what he said at the time was equally clear. There was only one conversation in issue. If plaintiff testified to the truth, Davis was angry and spoke loudly and she heard him at a distance of about 15 feet when he first called her. One employee, while testifying as a witness for defendants, said he was about six feet from Davis and heard the conversation in detail. According to his testimony Davis "told her that she had broken the rule and that he would have to discharge her" and "she said she knew she had and she supposed all he could do was to discharge her." He was a third person. If he heard the conversation in detail as he said he did, and as the circumstances indicated, he heard the slanders to which plaintiff testified, if she told the truth, as the jury found on sufficient evidence. Other employees were scattered around the room at different counters and as witnesses negatived the hearing of defamatory words, but their testimony, in view of all other evidence and the

circumstances thereby disclosed, did not make a finding in favor of defendants the only alternative on the issue of publication. The jury were at liberty to believe the testimony of the third person that he heard the details of the conversation and also the testimony of plaintiff that Davis told her she stole from defendants the money found in her shoe, and that she was a thief. The conclusion on appeal is that plaintiff made a case for the determination of the jury on the contested issue that defendants uttered and published the slanders pleaded in the petition. Assignments of error directed to the failure of the trial court to give a peremptory instruction in favor of defendants are accordingly overruled.

One of the assignments of error assails the failure of the trial court to give a requested instruction to the effect plaintiff could not recover damages unless she proved by a preponderance of the evidence that Davis spoke the slanderous words which she imputed to him and that they were heard and understood by a third person. Defendants are not entitled to a reversal on this ground, for the reason that the entire charge contained instructions that the burden of proof was on plaintiff to satisfy the jury by a preponderance of the evidence that the slanders charged in the petition were spoken maliciously and were published; that publication is a communication of defamatory matter to some third person or persons; that the communication must be intelligible to such third person.

Other assignments of error have been considered with the entire record without finding an error prejudicial to defendants.

AFFIRMED.

STATE OF NEBRASKA v. WILLIAM L. BISHOP.

FILED JULY 8, 1932. No. 28075.

1. **Statutes: CONSTRUCTION.** When the language of a statute is clear and unambiguous, courts will not by construction usurp the function of the law-making body and give it a meaning not intended or expressed by the legislature

2. **Intoxicating Liquors: ILLEGAL POSSESSION: PROOF.** One may not be convicted of illegal possession of intoxicating liquor, who has in his private dwelling-house intoxicating liquor for his own personal use and needs only, and in amount no more than reasonably sufficient for such purposes, regardless of when such liquor was manufactured.
3. **Exceptions Overruled.** Evidence and the rulings of the court thereon examined, and exceptions of the state thereto overruled.

ERROR to the district court for Dodge county: FREDERICK L. SPEAR, JUDGE. *Exceptions overruled.*

C. A. Sorensen, Attorney General, Clifford L. Rein, L. Ross Newkirk and *Fred H. Richards,* for plaintiff in error.

John P. Corbett, contra.

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

DEAN, J.

William L. Bishop was complained against in the district court for Dodge county and there charged with unlawfully having in his possession, on or about April 11, 1931, sixty-nine pints of beer, or a quantity alleged to have been more than reasonably sufficient for his own personal needs. It is charged by the state that the liquor in question here was held by the defendant for unlawful disposition and that such liquor was acquired after May 1, 1917, when the prohibitory law went into effect. The action was tried to a jury and, pursuant to the court's instructions, a verdict was returned finding the defendant not guilty. The record has been brought here upon the exceptions of the state to the rulings of the trial court, pursuant to the provisions of section 29-2314, Comp. St. 1929, solely for a determination of the law to govern in any similar case now pending or that may hereafter arise.

Section 53-111, Comp. St. 1929, contains the following provision:

"Any person may purchase and keep in his possession ethyl alcohol treated as required by this act so as to be

unfit for use as a beverage. It shall be unlawful for any person to have, possess or permit any intoxicating liquor to be in, upon or about any room, office, building or in any other place except in such person's private dwelling-house, and except when and where and in the manner especially authorized as herein otherwise provided; and no person shall keep or possess intoxicating liquor in his private dwelling-house in an amount more than is reasonably sufficient for his personal use and needs: Provided, however, that in any action brought under the provisions of this act, or based upon complaint of any violation thereof, or in any civil action growing out of any such actions, the possession, in and of itself, of any intoxicating liquor, including the possession of raw whiskey, commonly called 'moon shine,' in a private dwelling-house by the person against whom the violation of the act is charged, shall constitute *prima facie* evidence that such liquor was kept by such person with the purpose of unlawful sale, use or disposition in violation of law."

Pursuant to the plain and unmistakable language of the statute, we are compelled to adopt the view that the foregoing section provides that a person may have in his private dwelling-house an amount of liquor "reasonably sufficient for his personal use and needs."

The state contends, however, that the right to keep a reasonable quantity of intoxicating liquor in a private dwelling-house for personal use does not imply any lawful means for obtaining possession thereof, and that the privilege of possessing a reasonable amount is limited to that intoxicating liquor acquired before the prohibitory law became effective.

The court instructed the jury that the date of the manufacture of the liquor was immaterial and had no bearing on the guilt or innocence of the defendant. And the jury were also instructed that the defendant had a legal right, under the act, to keep or possess intoxicating liquor in his private dwelling-house in an amount reasonably sufficient for his personal use and needs and that

"the only issue in this case bearing on the guilt or innocence of the defendant is as to the reasonableness of the amount."

In this respect, there is evidence tending to prove that a single can of malt is sufficient to make the amount of beer possessed by the defendant and that it would be impracticable to make a less quantity. It is admitted that the state chemist, were he called, would have testified that the beer was intoxicating liquor. And the evidence establishes, and it is admitted in the brief of the state, that the beer was not in a greater quantity than was reasonably sufficient for the defendant's personal use and needs.

The statute in question contains no provision that the liquor, to be lawfully possessed in a private dwelling-house, must be liquor that was manufactured prior to May 1, 1917, and we do not think the court erred in refusing to so instruct the jury. The statute was adopted in 1917 and, since that time, other legislatures have had an opportunity but no change has been made in respect of the date when liquor, to be lawfully possessed in a private dwelling-house, must have been obtained. And when the language of a statute is clear and unambiguous, courts will not by construction usurp the function of the law-making body and give it a meaning not intended or expressed by the legislature.

It is contended that the court erred in refusing to instruct the jury that the possession of the beer in question was presumptively for an unlawful purpose unless the defendant "has satisfactorily accounted for and explained the possession thereof and that it was not kept for an unlawful purpose." We find no error in the court's ruling, for the reason that no attempt was made by the state to show that the liquor was kept for an unlawful purpose. The evidence stands uncontradicted that the defendant intended the liquor for his own personal use and, to a certain extent, as a laxative.

Upon an examination of the evidence and the law applicable thereto, we conclude that one may not be convicted of illegal possession of intoxicating liquor, who has in his private dwelling-house intoxicating liquor for his own personal use and needs only, and in amount no more than reasonably sufficient for such purposes, regardless of when such liquor was manufactured.

EXCEPTIONS OVERRULED.

PAINE, J., concurring.

In concurring in the opinion adopted by the members of this court, I desire to state briefly certain additional facts.

In a sentence, the opinion holds that, under the present law, one cannot be convicted of illegal possession of intoxicating liquors who has in his dwelling-house an amount no more than reasonably sufficient for his own personal use.

When, by a large majority, the people of Nebraska voted dry, an amendment to our Constitution was adopted, reading as follows: "On and after May 1, 1917, the manufacture, the sale, the keeping for sale or barter, the sale or barter, under any pretext, of malt, spirituous, vinous or other intoxicating liquors, are forever prohibited in this state, except for medicinal, scientific or mechanical, or sacramental purposes."

This amendment was adopted in 1916 by popular initiative, and became section 10, art. XV of the Nebraska Constitution, and clearly exempts intoxicants used exclusively for medicinal, mechanical, scientific, or sacramental purposes, which four definite uses are not involved in the case on trial. It may be pointed out that this amendment does not prohibit the possession in the home of intoxicating liquors, because our prohibitory laws from the first recognized a person's right to possess in his private dwelling-house, for his own personal use, a reasonable amount of intoxicating liquors, because, at the moment the amendment took effect, many citizens had in their homes intoxicants which had been lawfully purchased and stored there before the law took effect.

In our federal laws in reference to such liquor, after providing for the possession of such liquor, it adds: "And the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used." Mason's U. S. Code, 1926, title 27, ch. 2, sec. 50.

Discussing this section of the national prohibition act, Thorpe, in his textbook, "Prohibition and Industrial Liquor," section 1072, says: "As the possession of intoxicating liquor is not prohibited *eo nomine* by the Eighteenth Amendment, it cannot be said that the possession of intoxicating liquor is absolutely prohibited by the enforcement act. This section merely indicates the significance of possession."

Now, in the case at bar, the complaint filed by the county attorney of Dodge county against this defendant was limited solely to and charges only the illegal possession of intoxicating liquor in his dwelling-house, and in section 53-111, Comp. St. 1929, set out in the main opinion, illegal possession in one's private dwelling-house is limited by this clause, "and no person shall keep or possess intoxicating liquor in his private dwelling-house in an amount more than is reasonably sufficient for his personal use and needs;" so that, as the county attorney had limited his complaint solely to the question of possession, the court in the main opinion has held that the district court did not err in limiting the jury to the consideration of whether the amount the defendant had in his dwelling-house was reasonably sufficient for his personal use and needs. When the jury had found him not guilty under these instructions, if the county attorney had immediately filed a complaint against this same defendant for the manufacture of this same liquor, which the defendant admitted making in his home within 24 hours of his arrest, the defendant could scarcely have been allowed to escape on a plea of former jeopardy, because the question of manufacture was not before the trial court, or this court, under this complaint. In *McLaughlin v. State,* 104

Neb. 392, this court held that the right to keep a reasonable quantity of intoxicating liquors in one's private dwelling-house for personal use does not imply any lawful means for obtaining possession of liquor after such act went into effect.

JESSE G. HAWKINS, APPELLANT, V. CITY OF RED CLOUD ET AL., APPELLEES.

FILED JULY 8, 1932. No. 28182.

1. **Municipal Corporations**: ORDINANCES: VALIDITY: PRESUMPTION. "In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation." *State v. Withnell*, 91 Neb. 101.
2. ———: POLICE POWER: MUNICIPAL LEGISLATURE: POWERS. "In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised." *State v. Withnell*, 91 Neb. 101.
3. ———: ———: USE OF PRIVATE PROPERTY. The ownership and use of private property in a city is subject to proper police regulations required by public safety and welfare.
4. ———: POLICE REGULATIONS. Police regulations promoting public safety and welfare may be valid, though restricting the liberty of citizens in regard to occupations and the ownership and use of property.
5. **Eminent Domain.** Private property used in a business prohibited by a valid police regulation may be depreciated in value by such legislation without any provision to compensate the owner for his loss.
6. **Municipal Corporations**: ORDINANCES: PASSAGE: COURTS. If a city ordinance is valid as an exercise of police power, courts will not inquire into the motives of the city council in enacting it.
7. ———: FILLING STATIONS: POLICE REGULATIONS: VALIDITY. A city ordinance prohibiting the installing and operating of "Automatic Coin-in-the-Slot Gasoline Pumps" at gasoline filling stations without an attendant, *held* valid as against pleas of prohibition rather than regulation; of uncertainty, discrimination and unreasonableness; of invasion of personal and property

rights under the guise of police regulation; of violation of due process clauses of federal and state Constitutions.

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

George I. Craven and *E. G. Caldwell,* for appellant.

J. S. Gilham and *Bernard McNeny, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

DEAN, J.

This is a suit for an injunction to prevent the city of Red Cloud and its officers from enforcing an ordinance which by its terms would prevent plaintiff from installing and operating an "Automatic Coin-in-the-Slot Gasoline Pump" at a gasoline filling station without an attendant. The petition challenges the validity of the ordinance by pleas of prohibition rather than regulation; of uncertainty, discrimination and unreasonableness; of invasion of personal and property rights under the guise of police regulation; of violation of due process clauses of federal and state Constitutions. Details as to the property and investments which plaintiff meant to devote to the sale and delivery of gasoline without an attendant and the ordinance itself are set out at length in the petition. Defendants interposed a demurrer and plaintiff refused to plead further after it was sustained. The suit was dismissed. Plaintiff appealed.

The petition and the ordinance show on their face that the action of the mayor and council was an exercise of police power in the interests of public safety and welfare. The presumption is that the city lawmakers acted with full knowledge of the conditions relating to the subject of the legislation. *State v. Withnell,* 91 Neb. 101. The fire hazard arising from the sale and delivery of gasoline is a well known subject of city regulation. A filling station where gasoline may be procured with no attendant present to prevent delivery while a gasoline motor is run-

ning at close range, or where the driver of an automobile may operate the slot device and fill his gasoline tank while he is smoking, or where children may play with matches or fire when no one is present to protect or warn them, may well be regarded by city lawmakers as a place of public danger subject to a prohibitive ordinance. They determine the necessity for such legislation and their acts are valid, if within police power delegated to them. The following is a rule of general application:

"In the exercise of police power delegated by the state legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people, and as to when and how such police power should be exercised." *State v. Withnell,* 91 Neb. 101.

The ownership and use of private property in a city are subject to proper police regulations required by public safety and welfare. *State v. Withnell,* 91 Neb. 101. Such regulations may be valid, though restricting the liberty of citizens in regard to occupations and the ownership and use of property. *Halter v. State,* 74 Neb. 757, 205 U. S. 34. Private property used in a business prohibited by a valid police regulation may be depreciated in value by such legislation without any provision to compensate the owner for his loss. *Mugler v. Kansas,* 123 U. S. 623. If a city ordinance is valid as an exercise of police power, courts will not inquire into the motives of the city council in enacting it. *Stewart v. Barton,* 91 Neb. 96. In view of these well established principles of law and the facts pleaded by plaintiff, the petition fails to show the invalidity of the ordinance assailed. Plaintiff was not entitled to an injunction and the suit was properly dismissed.

AFFIRMED.

JESSE G. HAWKINS, APPELLANT, V. CITY OF RED CLOUD ET AL., APPELLEES.

FILED JULY 8, 1932. No. 28205.

Municipal Corporations: FILLING STATIONS: POLICE REGULATIONS: VALIDITY. City ordinance prohibiting the installing and operating of "Automatic Coin-in-the-Slot Gasoline Pumps" at gasoline filling stations without any attendant, *held* valid as proper exercise of police power.

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

George I. Craven, for appellant.

J. S. Gilham and *Bernard McNeny, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

DEAN, J.

This is a suit for an injunction to prevent the city of Red Cloud and its officers from enforcing an ordinance which by its terms would prevent plaintiff from installing and operating an "Automatic Coin-in-the-Slot Gasoline Pump" at a gasoline filling station without any attendant. A demurrer to the petition was sustained and the action dismissed. Plaintiff appealed.

The determining questions presented by the appeal were considered in *Hawkins v. City of Red Cloud, ante,* p. 487, submitted herewith. Following the rulings in that case, the judgment in the case at bar is

AFFIRMED.

HERSCHEL L. BABCOCK, APPELLANT, V. SCHOOL DISTRICT NO. 107, APPELLEE.

FILED JULY 8, 1932. No. 28328.

Master and Servant: ACTION FOR COMPENSATION: INSUFFICIENCY OF EVIDENCE. Evidence in the record examined, and *held* insufficient to prove that the accident, for which compensation was sought by the plaintiff, arose out of and in the course of his employment.

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

J. W. Kinsinger, H. C. Henderson and *Lincoln Frost, Jr.*, for appellant.

Kennedy, Holland & De Lacy, Edward J. Svoboda and *Slama & Donato, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

EBERLY, J.

This is an action by Herschel L. Babcock, under the workmen's compensation act of the state of Nebraska, against School District No. 107, Cedar Bluffs, Nebraska. Before the compensation commissioner, Babcock, in the capacity of a duly employed teacher and superintendent of schools of the defendant district, received a favorable award. On appeal to the district court, that court found "that Herschel L. Babcock sustained an injury as the result of an accident on the 22d day of September, 1928;" that the said accident and injury did not arise out of and in the course of the employment of plaintiff; that the said petition for compensation was filed on the 4th day of January, 1930, before the compensation commissioner; that the claim for compensation for the injury in said petition set forth is barred because not filed within one year from the date of the happening of said accident; and the district court denied the application. Plaintiff appeals.

Plaintiff now predicates his recovery solely because of personal injury arising out of and in the course of employment by the defendant district, as superintendent of schools, which injury complained of was a compound fracture of the left femur received in an automobile accident on the 22d day of September, 1928.

The contract of employment, dated March 6, 1928, was in writing and received in evidence. It is in the prescribed form as required by "Section 74, article 4, School Laws." By its terms Babcock agrees "to teach the school of said district in a faithful and efficient manner for the term of nine months commencing on the 3d day of September, 1928," and he also undertakes "in all things to observe the rules and regulations of the district board." There is no evidence in the record as to the adoption of any "rules and regulations" by the district board.

Babcock testifies that his general duties were "to take care of the general running of the school; supervision * * * teaching, and ordering of supplies," viz., textbooks, papers, pencils, ink, chalk, janitor supplies, anything in connection with the school with the exception of coal; and that he had "ordered everything that was ordered" for this term.

Appearing as part of the evidence introduced is an invoice of the Omaha School Supply Company, Omaha, Nebraska, dated "9-22-28," setting forth that it had "sold to Mr. H. L. Babcock, Superintendent, Cedar Bluffs, Nebraska, 1-50 lb. drum chemical toilet powder .13—$6.50;" and also a similar invoice, dated "9-7-28," evidencing a like sale and purchase of 170 school books of various kinds.

Babcock testifies that on September 22, 1928 (Saturday), he went to Omaha in his own automobile to "get the books and everything * * * which had been ordered;" that he checked up the books and accounts; that he did not receive anything, however, but directed the school supply house to get the ordered supplies to Cedar Bluffs as soon as possible. It seems that the drum of chemical toilet powder was purchased at this time.

It is conceded that the claimant, in making this trip to Omaha, left Cedar Bluffs accompanied by his wife, in his own automobile, paying for his own oil and gas, about the middle of the forenoon of Saturday, September 22, 1928. On arrival at Omaha he left his wife at the home of her father and mother, and then immediately proceeded to the Pontiac agency, where the car was left for repairs, or, as expressed by witness, for "checking over." From this agency he proceeded to the Omaha School Supply Company, where he arrived "very close to 12 o'clock," where he remained only long enough "to transact that business," when he left. During the noon hour all business transacted for the benefit of the defendant district had been fully completed. Plaintiff then called at the office of Dr. Martin and arranged for the completion of certain proofs required of him in another compensation claim in which he was also plaintiff. This done, he went to the Oakland-Pontiac garage, where his car had been left, and remained for several hours awaiting the completion of the work on his automobile. From there he proceeded to the home of his wife's father and mother, where he remained visiting until between 6 and 7 o'clock p. m. It appears, according to his own story, that no business was transacted for or on behalf of the school district after the noon hour. The rest of the day was devoted to his own personal affairs, and the accident occasioning the injury in suit occurred while he was enroute from Omaha to Cedar Bluffs at about 9:30 p. m. At this time plaintiff was returning home and his wife was with him. None of the property purchased for the school was either in his possession or then being transported by him. There is no evidence in the record that the trip to Omaha was specifically directed or ordered by the board of education. True, a member of the school board testified to the effect that "supplies and things" for the school were customarily bought by the superintendent; that the bills for the property thus purchased by him were subsequently approved by the board of the district

and ordered paid. There is no testimony in the record that the board of district No. 107 of Cedar Bluffs, or the members composing the same, had any knowledge of, or were ever consulted by the plaintiff with reference to, the proposed purchase of the books evidenced by the invoice of 9-7-28, or the drum of chemical toilet powder evidenced by the invoice of 9-22-28, or of plaintiff's proposed trip to Omaha, prior to the occurrence of the accident. It is not even claimed that the corporate authorities of this district gave any specific directions as to his proceeding to Omaha on the district's business. In view of these uncontroverted facts, did the accident and injury occasioned thereby in suit, arise out of and in the course of plaintiff's employment?

It would seem in the instant case that plaintiff's employment is contractual, and that the sum of the duties imposed by a valid contract, including those incidental thereto, is a necessary limitation of the right of recovery in his behalf for an accident and injury "arising out of and in the course of the employment."

"The relation of master and servant must have been established in accordance with the recognized legal standards; and it is essential that the relationship be such as the law recognizes as lawful." 28 R. C. L. 760, sec. 55.

"The general rule to be deduced from the authorities is that a workman's compensation act does not cover illegal contracts of employment, but is based on the existence of a lawful contract of employment and from the foundation of such a contract regulates the compensation to be paid for injuries growing therefrom." Ann. Cas. 1918B, 679, note. See *Stetz v. F. Mayer Boot & Shoe Co.*, 163 Wis. 151; *Benner v. Evans Laundry Co.*, 117 Neb. 701.

It is to be remembered in this connection that "A school district is a creature of statute possessing no powers whatever beyond those given by the legislature, and is unable to contract, *ad libitum*, as individuals may do, but only respecting objects, and to the extent, the

laws permit." *American Surety Co. v. School District,* 117 Neb. 6.

No valid contract in evidence in this case, fairly construed, imposes on plaintiff a duty of purchasing and securing for the defendant school district school books or chemical toilet powder. Indeed, this power is, by necessary implication, expressly denied him. In 1891 chapter 46 of the session laws of that year, relative to school text-books, was duly enacted and approved. It provided, in part, that school district boards, under the terms and conditions set forth in said act, "are hereby empowered and it is made their duty to purchase all text-books necessary for the schools of such district." Comp. St. 1929, sec. 79-1801. And also: "It shall be the duty of the state superintendent of public instruction to prepare and have printed a form of contract between district boards and publishers of school books, and to furnish the same, through the county superintendent, to the several district boards in the state; and no other form of contract shall be used by such district boards and publishers in carrying out the provisions of this article." Comp. St. 1929, sec. 79-1807. It is provided in section 79-1810, Comp. St. 1929: "The provisions of this article shall include all school supplies." There is no claim in behalf of appellant, in the record before us, that School District No. 107 ever entered into a written contract for the purchase of text-books and school supplies in 1928.

The validity of this act was approved by the unanimous opinion of this court in *Affholder v. State,* 51 Neb. 91. The provisions of this enactment are mandatory, its language is plain, and its purpose and policy are equally clear. District boards, and district boards alone, in Nebraska, under the limitations prescribed by this legislation, are vested with the exclusive power of purchasing and supplying text-books and school supplies to their respective districts. Even the form of the written contract, by which these express and limited powers are to be exercised by district boards, is, by the provisions of

the act, imposed upon them. These duties, and the discretion expressed and implied in the purchase of supplies and text-books for schools, under the terms of this statute, are to be exercised by district boards in strict compliance with its mandate, and are not to be imposed upon, or delegated to, teachers and the superintendents of schools in violation of its terms. It follows that text-books and school supplies may not be legally purchased by a district save by the corporate agency therein designated, upon written contract, and in conformity with the controlling provisions of the act.

It is manifest that none of the several items of service alleged to have been performed by the appellant in, and connected with, the purchase and securing of text-books and school supplies for district No. 107, prior to receipt of his injuries for which he sues, was required of him, nor authorized by any valid contract existing at the time of their performance. None of them was, therefore, within the scope of his legal employment. It is quite obvious that the accident, resulting in the injuries to the plaintiff, occurring as he was returning from participation in this unauthorized and unlawful purchasing transaction, is not such as arises "out of and in the course of" the lawful employment of a teacher and superintendent of village schools.

For another reason, of a somewhat different character, this conclusion so stated is sustained by the facts established by the evidence. Relatively a very small portion of the time spent by the plaintiff in Omaha on September 22, 1928, was devoted to the services of his school district. The evidence on this subject tends strongly to support the view that services performed on behalf of the school district were merely incidental to the plaintiff's personal transactions had by him on that day.

The rule appears to be: "But the mission (of the master) must be the major factor in the journey or movement, and not merely incidental thereto, that is to say, if incidental to the main purpose of going to or

from the place of employment it would not bring such person under the protection of the act. If, on the other hand, the main purpose of going or coming was to perform some act arising out of his employment, he would be under the protection of the act, although, incident to the performance of such duty, he might be going or coming from his home." *London Guarantee & Accident Co. v. Industrial Accident Commission,* 190 Cal. 587. See, also, *Madden's Case,* 222 Mass. 487; *Southern Casualty Co. v. Ehlers,* 14 S. W. (2d) (Tex. Civ. App.) 111; *McNicol's Case,* 215 Mass. 497; *Eastman v. State Compensation Insurance Fund,* 12 N. C. C. A. 387, note; *Eby v. Industrial Accident Commission,* 75 Cal. App. 280.

In view of the admitted facts this theory becomes unimportant, for it is certain that no contract of employment was established which imposed any duty upon plaintiff save such as were to be performed at the school building of the defendant district in the capacity of teacher and superintendent of schools. Without the knowledge or express direction of his district board he, on the day of the accident, proceeds to Omaha in his automobile, and there participates in a transaction in that city in a manner not required by any valid contract, but wholly unauthorized and in contravention of the positive provisions of the statute. On his return home, en route from Omaha to Cedar Bluffs, an accident occurs and injuries follow. We are thus confirmed in the opinion that the district court is correct in its determination that the evidence adduced is insufficient to prove that the accident, for which compensation was sought by Herschel L. Babcock, the plaintiff, arose out of and in the course of plaintiff's employment by the defendant district.

The judgment of the district court is, therefore,

AFFIRMED.

FURMAN B. CARLEY, APPELLEE, V. JOHN H. MORGAN ET AL., APPELLANTS.

FILED JULY 8, 1932. No. 28361.

Mortgages: FORECLOSURE: APPEAL: AFFIRMANCE. Evidence in the record examined, and *held* to sustain the action of the district court in denying the defense of usury tendered on behalf of Adda H. Morgan, and in entering decree of foreclosure of real estate mortgage in suit and directing the sale of mortgaged premises described therein.

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

E. D. Crites and *F. A. Crites,* for appellants.

Allen G. Fisher and *Charles A. Fisher, contra.*

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

EBERLY, J.

This is an appeal from a decree of foreclosure of a real estate mortgage wherein the district court for Dawes county determined adversely a defense of usury sought to be interposed by appellants.

The material facts are not in dispute. On December 31, 1929, John H. Morgan and wife made and delivered their negotiable promissory note for the sum of $5,000, payable "with interest from this date until paid, at the rate of eight per cent. per annum, payable semiannually, as per coupons hereto attached." This note also contained the further provision that, "should any of said interest not be paid when due, it shall bear interest at the rate of 8 per cent. per annum from time same becomes due." The coupons evidencing these interest payments were in the usual form, providing, "This interest note to draw 8 per cent. per annum from maturity." On the same day Morgan and wife executed and delivered to plaintiff a real estate mortgage "in usual form," which contained the following tax clause: "It is further agreed

that the mortgagor shall pay all taxes which may be levied upon this mortgage and the indebtedness secured hereby, and hold mortgagee harmless therefrom." It further appears that defendants Morgan and wife defaulted in the payment of the semiannual interest due on July 1, 1930, and also on January 1, 1931. They also failed to pay the taxes assessed on the premises for the year 1929 and the year subsequent thereto. Thereupon the plaintiff, pursuant to the terms of his mortgage, elected to declare the entire amount secured thereby due and payable, and instituted this action in equity to secure a foreclosure thereof.

The defendants in the petition were John H. Morgan, Adda H. Morgan (his wife), Lee Card, and Russell F. Christensen. Personal service of summons was made upon all defendants named. Card and Christensen made default. Morgan and wife answered setting up two defenses, viz., (1) usury; (2) that Adda H. Morgan signed only as surety and to release her interest in the mortgaged real estate. At the trial on the merits the court, in a decree of foreclosure entered on January 16, 1932, adjudged Card and Christensen to be in default; sustained the defense of coverture as to Adda H. Morgan; denied the defense of usury; and entered the usual decree of foreclosure and sale. From an order overruling defendants' motion for a new trial, entered on January 16, 1932, John H. Morgan, his wife, Adda H. Morgan, and Russell F. Christensen "separately" appeal.

It will be noted, however, that Christensen neither answered in the original case, nor secured the setting aside of the default entered as to him in the decree of foreclosure. It also appears that a request for stay of order of sale was duly filed by the defendant John H. Morgan, as provided by section 20-1506, Comp. St. 1929. It is obvious that the attempted appeal by Christensen is, under the circumstances referred to, wholly without merit, and likewise that John H. Morgan is precluded from so doing by the express terms of section 20-1509, Comp.

St. 1929, providing: "No proceedings in error or appeal shall be allowed after such stay is taken." *Ecklund v. Willis*, 42 Neb. 737; *Clark v. Pahl*, 75 Neb. 161.

Adda H. Morgan, wife of the mortgagor, therefore remains as the sole qualified appellant, and the sole issue presented by her appeal is the question of usury, created by the quoted provision of the mortgage as to the payment of taxes. The sole evidence in the record from which this contention is to be supported, if at all, is, in addition to the facts set forth in the petition, the fact that the mortgagee purchased, at tax sale held in November, 1930, the mortgaged premises for the taxes legally assessed in 1929, which, with interest accrued thereon, then amounted to $292.60, and that on May 1, 1931, the mortgagee and purchaser at such tax sale also paid taxes for 1930 assessed thereon, in the sum of $290. These amounts thus paid were incorporated in plaintiff's petition for foreclosure of his mortgage, and constitute a part of the decree entered in his favor, from which appeal is taken.

It is, in effect, insisted that the taxes on the money loaned, which the terms of the mortgage obligated the mortgagor to pay, constituted a portion of the compensation for the use of such money; and that, as such taxes plus the interest provided for in the note and mortgage aggregated more than 10 per cent. of the mortgage loan, it must be deemed a usurious provision. Appellant insists that the controlling rule applicable is: "A mortgage which, by its express terms, requires the mortgagor to pay the maximum legal rate of interest on the debt which it secures, and, in addition, to pay the taxes upon the mortgagee's interest in the mortgaged premises, is usurious." *Stuart v. Durland*, 115 Neb. 211; *Quesner v. Novotny*, 116 Neb. 84; *Dwyer v. Weyant*, 116 Neb. 485; *Dawson County State Bank v. Temple*, 116 Neb. 727; *Detweiler v. Forman*, 120 Neb. 780.

It will be noted, however, that in each of the cases cited the mortgage sought to be enforced in express terms

"required the mortgagor to pay the maximum legal rate of interest (10%) on the debt which it secured," and, in addition, provided for the payment of taxes thereon. It is obvious that any requirement in excess of the interest rate so stipulated for, be it much or little, necessarily has the effect of increasing the per cent. exacted for compensation for use of the money beyond the limitation of lawful interest. It follows that this effect must, therefore, have been necessarily intended by the parties to the contract. The conclusion follows that under these circumstances there was conclusively established in each case an intent on part of the borrower to give, and on part of the lender to receive, interest in excess of the legal limit. The very terms of the instruments there in suit clearly involved this conclusion. But such is not the effect of the provisions of the instruments in suit in the instant case. By its express terms the mortgagor in suit is not required to pay the maximum legal rate of interest on the debt it secures. Indeed, the controlling principle is not to be found in the cases on which appellant relies, but is as announced in *Menzie v. Smith*, 63 Neb. 666, viz.: "To make a contract usurious, there must be an agreement between the borrower and the lender by which the latter receives or reserves a greater rate of interest than the law allows. There must be an intent on the part of the borrower to give, and of the lender to receive, interest in excess of the legal limit. *Rose v. Munford*, 36 Neb. 148."

The instant loan was made on December 31, 1929. The annual rate stipulated for, 8 per cent. payable semiannually, was well within the statutory limitation. The language of the mortgage, "It is further agreed that the mortgagor shall pay all taxes which may be levied upon this mortgage and the indebtedness secured hereby," can have no relation to, nor connection with, the taxes for the year 1929. These had been fully levied and assessed on the premises here in suit long prior to the creation of the indebtedness and the execution and delivery of the

instruments evidencing and securing the same. Indeed, these were not subject to taxation for the year 1929. As to the taxes on the mortgage indebtedness levied for the year 1930, this was a matter for the determination of the various taxing authorities which the statute required should be made by them many months subsequent to the date of the present transaction, and over which none of the parties here litigant had supervision, knowledge, or control. The only connection between the tax levy for 1930 and the mortgage and note in suit is the stipulation of the parties as to what was actually done by the taxing authorities more than six months after the loan in suit had been fully completed. Thus there is nothing which tends to establish that at the time of entering into the contract in suit there was "intent on the part of the borrower to give, and of the lender to receive, interest in excess of the legal limit." The evidence disclosed by the bill of exceptions wholly failing to establish that at the time of entering into the contract in suit there existed the illegal intent on part of the borrower to give and on part of the lender to receive interest in excess of the legal limit, it may not be presumed, and appellant's contention cannot be sustained. This conclusion is wholly based upon the principles announced in the series of cases heretofore referred to, of which *Stuart v. Durland,* 115 Neb. 211, is the leading case.

But it must not be overlooked that, subsequent to the announcement of the determination of this court in *Stuart v. Durland, supra* (February 1, 1927), the legislature of 1927, by the adoption of chapter 178 of the session laws of that year, sought to amend the laws relative to the assessment of real estate mortgages. This amendment became effective July 1, 1927, and was in full force and effect at the time of the execution of the note and mortgage in suit. This statutory provision, as amended, so far as applicable to the present controversy, may be quoted as follows (after providing for the assessment of mortgagee's interest and owner's interest separately):

"When any mortgage contains a condition that the mortgagor shall pay the tax levied upon the mortgage or the debt secured thereby, the mortgage shall not be entered for separate assessment and taxation, but both interests shall be assessed and taxed to the mortgagor or owner of the real estate. An agreement of this character in the mortgage shall not destroy the negotiability of any note secured thereby *nor render such note usurious.*" (Italics ours.) Comp. St. 1929, sec. 77-1503. True, in *War Finance Corporation v. Thornton,* 118 Neb. 797, a case wherein the mortgage in suit was executed prior to the adoption of this amendment of 1927, this court held that this amendment operated "prospectively only," and refused to pass on certain objections made to the validity thereof, based on the proposition that it was a provision retroactive in effect. But in the present case appellant Adda H. Morgan in no way challenges the validity of the amendment of 1927. No question of invalidity thereof is therefore presented in this case to this tribunal. "Every legislative act comes before this court surrounded with the presumption of constitutionality (and validity), and this presumption continues until the act under review clearly appears to contravene some provision of the Constitution." *Davis v. State,* 51 Neb. 301.

It follows that in no view of the law of this jurisdiction, whether as defined by the principles announced in *Stuart v. Durland,* 115 Neb. 211, or as determined by the express terms of section 77-1503, Comp. St. 1929, can it be said, in the light of the uncontradicted facts of this record, that a usurious contract is presented in the instant case.

The judgment of the trial court is, therefore, correct, and its decree is

AFFIRMED.

IN RE ESTATE OF IDA WECKER.
HUGO A. WECKER ET AL., APPELLEES, V. ANNA ZUECHER ET AL., APPELLANTS.

FILED JULY 8, 1932. No. 28294.

1. **Courts:** LAW OF THE CASE. The doctrine of the "law of the case" is not a rule laid down by legislative enactment, but is a rule adopted by courts, and rests upon *res judicata*. It is distinct from that of *stare decisis*, for a ruling made in the same case will not ordinarily be departed from by that court. It presents itself in two aspects: First, as applied to proceedings in the trial court after the case is remanded; and, second, as applied to subsequent proceedings in the reviewing court.
2. **Appeal:** LAW OF THE CASE. While the decision rendered on former appeal is not *res judicata* in the sense that this court is absolutely precluded from again investigating the soundness of the conclusions reached therein, and doing justice between the parties, yet, unless it appears from the evidence now before the court that the former conclusions were incorrect, such former decision becomes the law of the case and will not be reopened.
3. ———: ———. The doctrine of "law of the case" does not include the examination of points of law not presented and determined, actually or impliedly, although they may have been involved in the record of the former appeal.
4. **Stipulations.** A stipulation of the parties as to the interpretation of a will, made at the first trial of the case, may be received in evidence at a subsequent trial of the same suit, unless it is clear that the stipulation was made only for the pending trial, or was withdrawn, or unless the court, in the exercise of its discretion, deems it proper to relieve the party therefrom.
5. **Wills:** BEQUEST: REVERSION. Personal property left by a husband to his wife for life, then to remaindermen named in his will, does not revert to the husband's estate upon the death of the life tenant, to be disposed of by an administrator *de bonis non* of his estate.
6. ———: BEQUEST TO LIFE TENANT. Personal property given, without restriction in the will, to a life tenant for her free use becomes her own property, to all intents and purposes, except that she is held to exercise reasonable precautions to preserve the full value of the property received by her for transmission to the remaindermen at her death.
7. ———: ———: ACCUMULATIONS. The estate of the life tenant is entitled to profits accumulated through the use of the

personal property in the life estate, in the absence of the testator's contrary expression of intent, and the same passes to her heirs or devisees.

APPEAL from the district court for Pierce county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

Douglas Cones and *Leamy & Leamy,* for appellants.

Frederick M. Deutsch and *George D. Stevens, contra.*

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

PAINE, J.

Judgments were entered in the district court to secure an equal division to ten children of all of the personal property left in the estate of their mother. Such judgments are brought here upon the complaint that a certain portion of her estate consisted of personal property in which she held only a life estate, which portion should be distributed to six of the children who are remaindermen, and the balance of the estate should be distributed equally to all ten heirs.

Nicholas Wecker, a resident of Pierce county, died June 1, 1915, testate, at the age of 71 years, having made a will upon April 20, 1914, which was duly admitted to probate, and in which will paragraphs 3 and 4, which are material in this action, read as follows:

"3. I give, will and bequeath to my beloved wife, Ida Wecker, all of the remainder of my property, both real, personal and mixed of every kind and description of which I may die seized, for her use during her natural life, without the power to sell the real estate of said property.

"4. I give, will and bequeath all of the rest, remainder and residue of my said property, both real, personal and mixed of every name and nature, to my daughters, Anna Zuecher, Selma Grunwald, Clara Wecker, Ida Wagner, Lena Huwaldt, and my son Oscar Wecker, as tenants in common, share and share alike, reserving only the real

estate described in paragraph 2, which I give to my son, Oswald B. Wecker, and a life estate in the remainder of my property, which I give to my wife as set forth in paragraph 3."

Upon July 5, 1916, his widow, Ida, named as executrix, duly receipted for all of the personal property belonging to said estate, which amounted to $18,902.49, and was given to her for life, and upon July 7, 1916, a final decree was entered in the said estate, which formally discharged Ida Wecker as executrix, and the estate of Nicholas Wecker was closed. In addition to this personal property, she was also given possession, as life tenant under the will, of the northeast quarter of section 29, township 27, range 2, in Pierce county, and lots 1 and 2 in block 54 in the town of Pierce, upon which the home was located.

It appears that Nicholas Wecker had given comparatively large amounts of real estate to three sons, to wit, Nicholas (also called Frederick), Gustave and Hugo, and in the second paragraph of his will he gave several tracts of land, amounting in all to 320 acres, to his youngest son, Oswald. In his will he provided that his five daughters, together with his other son, Oscar, should be the remaindermen after the termination of the life estate given to his widow. These ten children, all being children of Nicholas Wecker and Ida Wecker, were the only children of the parties, and are the only parties to this lawsuit. During these years the ten children have been divided into two groups: The three oldest sons and the youngest son are the plaintiffs and appellees herein, who had each been given property by the father, and the other group of six remaindermen, consisting of the five daughters and one son, are the defendants and appellants in the case at bar.

Ida Wecker died intestate, also a resident of Pierce county, Nebraska, upon November 2, 1926, at the age of 78 years, at which time she was possessed of a life estate in the two tracts of real estate of an appraised value of

$21,350, and, in addition, was possessed of personal property of the approximate value of $28,772.39, as shown by the inventory filed December 3, 1926. Her estate was duly administered, and the time for filing claims expired October 4, 1927, upon which date the final report of her administrator was filed. Of this personal property of which she was possessed at the time of her death, several items of shares of corporation stocks, amounting in value to $1,200, were the same identical items which had been in the estate of her husband, Nicholas Wecker.

The contest is over the personal property in her estate at the time of her death. After her death the same person was appointed as administrator *de bonis non* of Nicholas Wecker's estate and appointed as administrator of her estate. The county court entered a final decree in the estate of Ida Wecker, directing that all of her estate, both real and personal property, except household furniture, should be distributed to the six remaindermen under paragraph 4 of the will.

Upon appeal to the district court, it was charged that none of the remaindermen had filed a claim against Ida Wecker's estate for the value of their alleged remainder interests, and that the time for filing claims was barred. In the district court, the remaindermen were substituted as answering defendants in the place of the administrator *de bonis non* of the estate of Nicholas Wecker and the administrator of the estate of Ida Wecker. Upon July 26, 1928, the district court for Pierce county rendered its first decree, based largely upon stipulation of the parties and the exhibits, which decree modified the decree of the county court, and provided in substance that only the personal property received by Ida Wecker from her husband's estate, of the value of $18,902.49 approximately, should be distributed to the six remaindermen, and the rest of the personal property, being in the sum of $8,847.27, should be distributed equally to all the ten children, that is, to all of her heirs at law.

A motion for new trial was filed by the four sons, appellees, but none by the remaindermen, and, upon the hearing thereon, the district court vacated its decree of July 26, 1928, and entered a new decree upon March 20, 1929, changing the value of the property to $20,831.38 in place of $18,902.49, the other provisions remaining the same. The four sons filed a motion for a new trial, but did not file a supersedeas bond in the time provided by law, and therefore, upon June 1, 1929, the administrator proceeded to distribute to each of the six remaindermen the sum of $4,085.37, making a total of $24,512.22. In the first appeal to this court, the remaindermen were the appellees, and in the case at bar they are the appellants.

Upon April 3, 1930, an opinion was filed, which appears in 119 Neb. 537, in which opinion additional facts will be found relating to this litigation. The judgment of the district court was reversed and the cause remanded for a new trial in accordance with the views expressed in the opinion. The opinion sets out that there was no evidence to show that Ida Wecker possessed any personal property in her own right at the time of her husband's death, nor was proof made that she had in no way depleted the corpus of the personal property derived from the estate of her husband. Because of the failure of the evidence on these and other points, the case was sent back for retrial in the district court. It was also stated that the matter should have been considered as arising in the estate of Ida Wecker alone. Upon going back to the district court for Pierce county, the case was tried again before the same district judge, and a new decree was entered October 31, 1931.

In this decree the district court finds that all of the personal property in possession of Ida Wecker at the date of her death, except the shares of corporate stock of the value of $1,200, was her own property, and should be distributed to all of her heirs at law; that, as the appellants herein did not supersede the former decree of this

court, a distribution was made to each remainderman on June 1, 1929, of $4,085.37, or a total of $24,512.22, and thereafter, upon January 13, 1931, a distribution was made to each of the four appellees herein of $849, or a total amount of $3,396, making a total amount distributed of $27,908.22; that from this sum there should be deducted the value of the corporate stock, of $1,200, leaving $26,708.22 net, and that the correct amount due each of the ten heirs is, therefore, $2,670.82, and 24 separate judgments were entered for repayment from each of the six remaindermen to each of the four appellees of sufficient sums so that each of the ten heirs will receive the same amount of $2,670.82, together with order for payment of costs. From this last decree, the six remaindermen have appealed.

1-3. It is contended by the appellees that the decision of the supreme court upon a previous appeal of the same case settles conclusively the points adjudicated.

The doctrine of "law of the case" has two aspects: First, as applied to proceedings in the trial court after the case has been remanded by an appellate court; and, second, as applied to proceedings in the reviewing court when the same case again appears. The law of the case is a phrase which is used to give expression to the rule that the final judgment of the highest court upon a question of law establishes the rights of the parties to that controversy, and is a final determination thereof which estops the parties afterwards from questioning its correctness, and it has been held to be binding not only on the trial court but also upon the appellate court when the case is brought again before it. This doctrine is distinct from that of *stare decisis,* for a ruling made in the same case has been held to be a final adjudication, from which the court itself cannot depart. The doctrine of this law is founded not on legislative enactment, but it is simply a rule adopted by the courts, resting upon the doctrine of *res judicata.* It has been held that, where the court reverses a judgment and orders a new trial, its opinion is

conclusive as to the principles which shall govern upon the new trial.

In examining the Nebraska decisions, we are cited to *Smith v. Neufeld,* 61 Neb. 699, in which it was held that, when a question in controversy has been once squarely decided, that decision, if not recalled, becomes the law of the case and is binding upon the parties in all subsequent stages of the litigation.

In *McBride v. Whitaker,* 5 Neb. (Unof.) 399, and in *Wells v. Cochran,* 98 Neb. 725, it was held that, when a cause was remanded to the district court, the correctness of the decision was not open to inquiry in the district court. In *Estate of Korff v. Bueker,* 75 Neb. 60, the opinion says that a reexamination of the questions discussed in the former opinion have satisfied us that the case was correctly disposed of and the law properly applied to the facts under consideration, clearly indicating that, while the "law of the case" rule was applied in that opinion, it was not applied until after a careful reexamination.

"It is a settled rule in this court that a legal principle involved in the trial of a case, when once determined, becomes thereafter the law of the case, binding, not only upon the trial court, but this court as well, and will not, ordinarily, be reexamined in a subsequent review of the proceedings of an inferior court had in the further trial of the action. This rule, however, is not applicable to decisions rendered on questions of fact; in such cases, the decision as to the sufficiency of testimony on a particular feature of the case, as disclosed by the record on the first trial, is not binding in a subsequent trial, where the testimony is, or may be presumed to be, materially different, in the investigation of which a reviewing court is to be controlled by the record then before it, uninfluenced by such prior decision." *Missouri P. R. Co. v. Fox,* 60 Neb. 531.

In *Nedela v. Mares Auto Co.,* 110 Neb. 108, it was held that the rule known as the law of the case is applicable

only to legal principles enunciated and rules of law laid down by the reviewing court, but has no relation to decisions upon questions of fact where the evidence at the second trial is materially different than at the first trial. *State v. Paxton,* 65 Neb. 110; *Stratton v. Bankers Life Co.,* 102 Neb. 755.

"There is some confusion in the cases as to the questions which are embraced by the doctrine of law of the case. The doctrine clearly applies to questions of law actually presented and determined upon a former appeal, as essential to its just disposition, and does not, according to many authorities, include points of law not presented and determined, either actually or impliedly, although they may be involved in the record of the appeal." 9 Bancroft, Code Practice, sec. 7464.

Let us examine the time-tried case of *City of Hastings v. Foxworthy,* 45 Neb. 676, 34 L. R. A. 321. This case had been before this court three times, and on its fourth appearance here Commissioner Irvine wrote the opinion, reviewing all of the Nebraska decisions and reviewing many other authorities, and holding that, where a case upon its first appeal is remanded generally for a new trial, and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal, and may reexamine and reverse its rulings on such questions, and, with that rule announced by our Nebraska court in mind, we will examine anew the evidence and also the authorities as now presented in the briefs, together with many additional opinions found in a search on the points involved.

In the first opinion written in this court in the case at bar, 119 Neb. 537, a reversal was entered, and the one syllabus reads as follows: "The record being examined, *held* that it fails, in the particular shown in the opinion, to furnish a definite basis to support the decree and judgment of the district court. The judgment is reversed and the cause is remanded for a new trial in accordance

with the views expressed in the opinion." In the opinion a few helpful suggestions were made, and attention was called to the fact that the estates of Nicholas Wecker and Ida Wecker were coupled in the title, by having the same person appointed administrator in each estate, and it is stated that the case should be tried as if it arose in the estate of Ida Wecker alone, and that there was no evidence for the decree of the court, which found that she had in no way depleted the corpus of the personal property derived from the estate of her husband.

Under the authorities cited, this court believes that, where a case is remanded for a new trial, it is the duty of the court, upon its reappearance here, to carefully re-examine the contentions on this new appeal, while the appellees insist that this court is absolutely bound by its former decision. It is insisted by the appellants that nothing was decided in the first opinion except that the evidence then before the court was insufficient to sustain the judgment.

4. The next question presented for determination in the case at bar is the question whether a stipulation of facts, made in the district court at the first trial of a cause, is binding and effective at a subsequent trial of the same case.

To get the matter squarely before us, it is necessary to examine the stipulation itself, and we find upon June 1, 1928, at the first trial in the district court, this entry: "It is further stipulated that, by terms of the said last will and testament, it was the intention of the said Nicholas Wecker, deceased, to give a life estate in the residue of his property, therein referred to, to the said Ida Wecker with the power of disposition and sale of the personal property and also the right to consume such portions of the corpus thereof as might be reasonably necessary for her support and maintenance according to her standard of living and station in life."

Upon the second trial, we find this record:

By Mr. Leamy: "Let the record show that the defendants in this case are not stipulating as to what the rights of Ida Wecker were under the terms of the will of Nicholas Wecker, deceased, for the reason that the interpretation or construction of the will of said Nicholas Wecker is a question of law for the court."

By Mr. Deutsch: "There is no question but what that stipulation was made at the first trial pursuant to which an appeal was taken to the supreme court, is there?"

By Mr. Leamy: "No, none whatever."

Appellants insist that the construction of the terms of a will is a question of law for the court (40 Cyc. 1855; 2 Bancroft, Code Practice, sec. 1412; 28 R. C. L. 405, sec. 417), and that counsel may not make a binding stipulation as to a question of law (7 Bancroft, Code Practice, sec. 5857; 25 R. C. L. 1098, sec. 5). It is insisted that courts will not permit the course of justice, upon trials before them, to be stipulated or contracted in such a manner as to defeat the ends to be subserved by such trials. *Modern Woodmen of America v. Michelin,* 101 Okla. 217, 36 A. L. R. 971; 36 Cyc. 1285. A stipulation is inoperative if it be an attempt to determine the law properly applicable to the stipulated facts. *Luce v. Ash,* 28 S. Dak. 109.

Where a stipulation made on the trial of a cause appears to have been made improvidently, and to stand in the way of substantial justice, the trial court should relieve against it. *Butler v. Chamberlain,* 66 Neb. 174. And it has been held that courts may allow stipulations to be set aside. *Keens v. Robertson,* 46 Neb. 837.

It is held that the stipulation was upon the interpretation of a will, a question of law, and that the appellants are not bound by said stipulation, which they specifically rejected in the second trial of the case. A court, in the exercise of its discretion, may relieve a party from a former stipulation if it deems it is justified in so doing.

5-7. The question which appears to have given the most serious trouble in this case is the consideration of a life estate in personal property.

Originally, a gift of personal property carried the absolute interest, but there is now no question but what a life estate to one with a remainder to another in personalty may be given. 17 R. C. L. 617, sec. 3; 21 C. J. 1038.

Judge Gardner, of the United States circuit court of appeals for the eighth district, recently held that the common law did not originally admit of the creation of a life estate in personal property with a reversion or remainder over, but it is now well settled that life estates may be created in money as well as other personal property, with a remainder over to others. *Warfield v. Bixby,* 51 Fed. (2d) 210.

The distribution or delivery of property to a life tenant inures to the benefit of the remaindermen, and upon determination of the life estate the title and right of possession vest in the remaindermen, without any action on the part of the executor or administrator. *Corney v. Corney,* 257 Ill. App. 13.

In *Peck v. Smith,* 227 N. Y. 228, the testator gave his wife, Grace A. Peck, $20,000 for life. The three executors of his estate settled their account and were discharged; then later two of the executors brought suit to recover from the wife, an executrix, some bonds which she had in bad faith transferred to her sister. The plaintiffs won in the lower court, but this decision was reversed on the ground that the plaintiffs have no right to maintain the action, and are not proper parties to sue, for the $20,000 had been paid to her as a life tenant and without any reservation, and the estate closed, and therefore the former executors of her husband's estate had no further control over or right to the fund.

Improvements made to land by the life tenant will pass to the remaindermen, who cannot be required to make compensation therefor to the estate of the life tenant. *Darnell v. Williams,* 171 Ga. 651. The life tenant is entitled to everything in the nature of profits or income accruing during his tenancy in the absence of contrary restrictions. *Wagnon v. Wagnon,* 16 S. W. (2d) (Tex. Civ. App.) 366.

Increase in the value of bank stock, due to increase in the book value, passes to the heirs of the life tenant, and not to the remaindermen. *Wallace v. Wallace,* 90 S. Car. 61.

In *Skellenger v. England,* 81 Cal. App. 176, it is held that a life tenant, with the right to consume the principal for support, is not a trustee of the remaindermen. The life tenant is ordinarily entitled to appropriate only the income and profits, and cannot encroach upon the corpus of the estate unless clearly authorized to do so by will. 21 C. J. 1040, 1041.

In Pennsylvania, under a special statute, it has been held that a life tenant may use the property at his own discretion, and on his death his estate will be entitled to any profit made in the investment thereof, such life tenant not being the trustee for the remaindermen, but being their debtor in the sense that his estate will be liable only for the appraised value of the property when received by him, as was held in the case of *Letterle's Estate,* 248 Pa. St. 95, the court saying that the testator did not direct that his estate be held in trust for his wife, but gave to her the free use, possession, enjoyment, benefit, and advantage of the same during the term of her natural life, and that, therefore, she did not take this as trustee, for the property became her's for her free use, possession and enjoyment; that the money became her own, to all intents and purposes, and that she was simply a debtor to the parties ultimately at her death, whose claim is now payable out of her estate, and that such remaindermen are entitled to interest from the date of her death. *Shelley's Estate,* 287 Pa. St. 105.

It has been generally held, in decisions from many jurisdictions, that the life tenant is entitled to the profits and gains which he accumulates through the use of a life estate in personal property in the absence of the testator's contrary expression of intent. *Ruppert v. McArdle* (D. C.) Ann. Cas. 1916B, 126; *Whitehill v. Whitehill,* 211 Ia. 475; *Milner v. Brokhausen,* 153 Ia. 560.

Without extending this opinion to an undue length, we will attempt to apply the principles set out herein to the case at bar, under the evidence as now before us since the last trial in the district court.

Ida Wecker, as executrix of the estate of Nicholas Wecker, filed the receipt of herself as life tenant upon July 5, 1916, showing the receipt of the following items from his estate: Cash, $2,627.49; bank stock, $2,600; grain and lumber companies' stock, $1,200; good promissory notes, $4,500; and certificates of deposit in various banks, $7,975; making a total net sum she received as life tenant of $18,902.49. It is found that the administrator of her estate inventoried the same in 1927 at $29,981.04, and that, after deducting allowed costs and expenses of $2,072.82, there was left in her estate the net sum of $27,908.22. Only the stock in the grain and lumber companies, of the value of $1,200, remained in specie as she had received it. She had bought and sold personal property with consummate ability, selling all of the bank stock when prices were high and investing the proceeds wisely. She did not live penuriously, but lived as befitted her standing in the community. Her acts were all done in strict accord with the decree of the county court entered in her husband's estate upon March 13, 1916, which reads in part as follows: "It is further considered, ordered, adjudged and decreed by the court that all money, notes, certificates of deposit and all personal property hereinbefore set forth be and the same hereby is assigned to Ida Wecker, widow of Nicholas Wecker, deceased, with power to hold, invest, loan and change the evidences of such indebtedness from time to time as she may see fit and to possess and hold the original amounts thereof always in trust for the devisees and legatees in remainder of said estate. She, the said Ida Wecker, to have all the rents, interest, issues and profits thereof for her sole use and benefit during her life."

Acting strictly in accord with the authority given her in such decree, she had, in addition to providing living

expenses for over ten years, increased the life estate given her some $11,078.55. Her estate is clearly, under the will of her husband, indebted to the six remaindermen in the sum of $18,902.49 together with 7 per cent. interest thereon from the date of her death upon November 2, 1926, to the day of payment to them. The net balance of the funds remaining in her estate should be paid to her heirs, the ten children, share and share alike. It is directed that the costs in district court shall be paid by each heir in proportion to the amount received under this opinion. All of the judgments entered by the district court in this case are reversed, and the cause is remanded to the district court, with direction to enter a decree in accordance herewith.

REVERSED.

EARL MARLER, APPELLEE, V. GRAINGER BROTHERS, APPELLANT.

FILED JULY 8, 1932. No. 28341.

1. **Judgment as Bar.** Where an employee is injured in the course of his employment and thereafter receives workman's compensation for a temporary disability, by the voluntary payment thereof by the employer, instead of through a compulsory award, and thereafter, upon advice of competent physicians and surgeons, is operated on for a hernia, for which he brings an action for an award of compensation, which was denied, and subsequent to the final determination thereof developed a disability as a result of the injury aforesaid, which at the time of the former hearing was latent and then unknown to the employee and undiscernible to himself or his physicians, *held* that such former action is not a bar to a recovery of compensation in this action.
2. **Master and Servant: WORKMEN'S COMPENSATION ACT: TIME FOR FILING CLAIM: LATENT INJURY.** Where an injury is latent and of a progressive nature and culminates in a compensatory disability, claim may be filed within a year after the culmination thereof.
3. ———: ———: ———: ———. Where an injury is latent and of a progressive nature and culminates in a compensatory disability, the statutory limitation for filing begins to run from the culmination and not from the time of injury.

4. ———: ———: INJURY. Evidence examined and *held* to sustain the decree of the trial court that the employee's condition was caused by an injury received in the course of his employment.

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

Stewart, Stewart & Whitworth, for appellant.

Peterson & Devoe, contra.

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BEGLEY, District Judge.

Action to recover workman's compensation. From a decree awarding such compensation the defendant has appealed.

Earl Marler, the plaintiff, while in the employ of Grainger Brothers, on September 25, 1928, was engaged in unloading sugar from a railroad car. A metal gang plank was placed between the car door and the unloading platform. Marler in the course of his employment pushed a hand truck loaded with sacks of sugar on this gang plank which slipped out of position, and as the front part of the truck went down, the rear part was thrown into the air, and Marler, having hold of the handles, was also thrown upward, and in the fall struck the lower part of his abdomen on the front right handle of the truck with the full weight of his body. Plaintiff was then receiving wages from the defendant at the rate of $80 a month and was paid compensation for a short period. He returned to work in four or five weeks and continued until about July 1, 1929, when because of his physical condition, which was gradually growing worse, he was compelled to quit work. Thereafter he filed a petition with the compensation commissioner, which was denied, and plaintiff thereafter appealed to the district court. Before the hearing in the district court, the plaintiff under direction of competent surgeons was operated

on for hernia, but he apparently received no relief. The petition filed in the district court contained the following allegation as to injuries:

"The muscles of his abdomen were stretched, torn and bruised; plaintiff received a rupture or hernia; the muscles, ligaments and tendons of his groin were stretched, torn and bruised; plaintiff's leg was rendered lame, was bruised and permanently injured; the normal action of his intestines was permanently impaired and as a result of said accident plaintiff is unable to do work of any kind and has been permanently injured."

The answer was a general denial. The district court denied the plaintiff any compensation, but rendered a decree finding that the plaintiff has heretofore received all the compensation to which he is entitled. Said decree has not been appealed from.

On February 9, 1931, the plaintiff commenced this new action against the defendant before the compensation commissioner, claiming that since the prior adjudication on November 20, 1929, by the commissioner, he developed a latent and unexpected disability consisting of a post traumatic neurosis, increased heart rate, dizziness, and general debility as a result of the alleged injury of September 25, 1928, and that by reason thereof plaintiff was totally and permanently disabled, entitling him to compensation and medical benefits.

The defendant filed an answer thereto alleging among other things that the issues joined and tried and determined in the prior case in the district court and the subject-matter there involved are the same issues and subject-matter involved in this new action; that the judgment therein estopped and barred plaintiff from claiming any further compensation by reason of the alleged accident, and further alleged that the commissioner did not have jurisdiction of the parties or the subject-matter; that by reason of the judgment entered in the district court in the prior case the plaintiff is estopped and barred from claiming any further compensation; that he

failed to make claim for compensation from defendant as required by law, and that by reason thereof the alleged cause of action is barred; that plaintiff's disability is not the result of the said alleged accident. A hearing was had in the district court and plaintiff was awarded compensation as prayed. The court made the following findings:

"The court further finds that subsequent to the hearing before the compensation commissioner in November, 1929, and subsequent to the hearing on appeal therefrom had in this court in January, 1930, and subsequent to the final determination thereof in this court, the plaintiff herein developed a disability as a result of the injury aforesaid, which, at the time of the prior hearings hereinbefore referred to, was latent and was then unknown to the plaintiff and undiscernible to either the plaintiff himself or to his physicians.

"The court finds that since the hearing aforesaid, the plaintiff developed and is now suffering from post traumatic neurosis, increased heart rate and loss of acuity of vision, at times amounting to almost blindness, and that said disability is the direct result of the injury sustained by the plaintiff on September 25, 1928.

"The court finds that said disability was not discernible nor diagnosed until in October, 1930, and that plaintiff's condition in October, 1930, was a disability progressive in character which reached its consummation or culmination on or about January 1, 1931.

"The court further finds that the plaintiff made claim for said disability within six months from the time that said disability became known to him and within two months from the time of the consummation or culmination thereof and filed his petition for a determination of his disability, before the compensation commissioner of the state of Nebraska, on February 5, 1931, and that an award was entered in favor of the plaintiff by the compensation commissioner on the 19th day of October,

1931, from which award the defendant herein has prosecuted this appeal.

"The court finds that the plaintiff, as a result of the injury aforesaid, is now and has since January 1, 1931, been totally and permanently disabled by reason of the latent and undiscernible disability in the form hereinbefore found and which was neither known nor discernible nor put in issue at the former hearing.

"The court finds that the plaintiff is entitled to compensation in the sum of $12.33 per week beginning on January 1, 1931, and continuing thereafter so long as said total and permanent disability shall continue, but not to exceed 300 weeks, including the period for which compensation has heretofore been paid, and that from and after the expiration of said 300 weeks, plaintiff shall receive compensation at the rate of $8.30 per week for the rest of his natural life."

Then follows a further finding that plaintiff is entitled to recover medical expenses in the sum of $620 from the defendant, and that he will require further medical care and treatment and that the same should be furnished by the defendant as required.

Three questions are raised by the appeal: (1) Is recovery of the compensation barred by the former proceedings? (2) Was notice of claim given within the required time? (3) Is plaintiff's present condition caused by the injury received in the course of employment?

The first contention of the appellant is that the recovery of compensation is barred by the former proceedings. The testimony of two physicians is to the effect that the present injury is latent and of a progressive nature and was not discovered until October 30, 1931. Under our compensation act it is held that, where an injury is latent and of a progressive nature and culminates in a compensatory disability, claim may be filed within a year after the culmination thereof. *Travelers Ins. Co. v. Ohler*, 119 Neb. 121; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *City of Hastings v. Saunders*, 114 Neb. 475.

"The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants." 34 C. J. 905.

The former case was predicated upon the existence or nonexistence of a hernia, while the present action is based upon the existence of a post traumatic neurosis, culminating as the court found on January 1, 1931.

The second contention of the appellant is that the notice of the claim was not given within the required time. This court is committed to the doctrine based upon sound principles and conscience that, where injury is latent and of a progressive nature and culminates in a compensatory disability, the statutory limitation begins to run from the culmination and not from the time of injury. In the present case there is no testimony to the effect that the conditions now found in the plaintiff were present at the time of the former trial. There is no testimony that any doctor at that time had even a suspicion that the case would develop as it actually did. Plaintiff's doctors, both men of standing in their profession, who saw him almost continuously, testified that they did not diagnose the case as post traumatic neurosis until in October of 1930. It is true that doctors representing the defendant testified that he was previously nervous. None of them testified that they then recognized a post traumatic neurosis.

The case was filed before the compensation commissioner on February 9, 1931, within forty days after the culmination of the disability. The case was therefore filed within the statutory period from the date of the culmination of the disability. See *Henry Cowell Lime & Cement Co. v. Industrial Accident Commission,* 211 Cal. 154, 75 A. L. R. 1118, with note.

The appellant next contends that the plaintiff's present condition is not caused by the injury received in the course of his employment. The record shows that the nervous condition of the plaintiff, preexisting, was aggravated by the injury and that the nervous condition plus the injury has produced the condition which we now find.

Dr. Smith testified: "After having seen this man between some fifty and sixty times during the course of two years and three months, I would say that his present condition, as I have seen it develop, is the direct result of the trauma received in the course of his work in 1928."

Dr. Johnson testified: "There is a definite proximate relationship exists in that there is no unbroken nor intervening factors to account for this present condition. It is established by the history, by the trauma that he received, and by the surgical treatments following his injury in each successive step, one has been built one upon the other to the present time without a break."

No doctor or medical advisor testified to the contrary, and the evidence shows that the present condition was absent at the former hearing.

The decree of the district court is therefore affirmed and appellee is allowed an attorney fee of $200 on this appeal.

AFFIRMED.

AMERICAN SAVINGS & LOAN ASSOCIATION, APPELLEE, V. FRANK BARRY ET AL., APPELLANTS.

FILED JULY 12, 1932. No. 28260.

1. **Estates: MERGER.** The general legal rule is that, when a greater and a less estate meet in one person, without any intermediate estate, the less estate is merged in the greater.
2. **———: ———: EQUITY.** In equity the legal rule of merger of a less estate in the greater is not always followed, and the question whether the legal rule will be applied depends upon the facts of each particular case. *Citizens State Bank v. Petersen*, 114 Neb. 809.

3. Mortgages: FORECLOSURE: SALE: RIGHTS OF PURCHASER. Where prior mechanics' liens and a mortgage were foreclosed, but, owing to negligent search, judgment liens were not discovered, the mortgagee purchaser under the foreclosure sale was entitled to be restored to the liens of his mortgage and prior lienors as against the judgment creditors; their position not having changed to their prejudice.
4. Quieting Title: INJUNCTION. In a suit under section 76-401, Comp. St. 1929, to quiet title as against judgments claimed to be a lien against real estate, it is not improper to enjoin the threatened enforcement of the judgment pending the determination of the issues.

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

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

Burkett, Wilson, Brown, Wilson & Van Kirk, contra.

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

GOSS, C. J.

This is an appeal from a decree requiring appellants, Frank Barry and Mabel J. Horton, to redeem certain real estate from rights of the appellee association, and, upon failure to redeem, ordering title quieted in the appellee. The decree enjoined appellants from selling on execution two of the properties.

The facts are all stipulated. On the 7th day of August, 1929, the appellant Frank Barry recovered two judgments against Kenneth D. Horton, in the municipal court of Lincoln, Lancaster county, one judgment in the sum of $305.40 and the other in the sum of $1,000, and on the 8th day of August, 1929, transcripts of said judgments were filed in the office of the clerk of the district court for said county.

On August 26, 1926, the appellant Mabel J. Horton recovered a judgment against Kenneth D. Horton in the district court for Frontier county, Nebraska, in the sum of $500, a transcript of which judgment was duly filed

in the office of the clerk of the district court for Lancaster county on August 29, 1929.

On the dates that the several transcripts were filed, Kenneth D. Horton was the owner of the following described real estate in Lancaster county, Nebraska: Lots two (2) and three (3), block thirteen (13), Martin Heights Addition to Lincoln, Nebraska; block four (4) of Lemon's subdivision of the east half of the southwest quarter, section sixteen (16), township ten (10), range seven (7). These properties will be referred to herein as lot 2, lot 3 and block 4.

Against each of these properties were recorded mortgages in favor of the American Savings & Loan Association and also certain mechanics' liens, all of which were recorded prior to the transcripts of the said judgment creditors.

On the 10th day of August, 1929, and two days subsequent to the filing of the transcripts in the office of the clerk of the district court by the defendant Frank Barry, as above set forth, one of the said mechanic lien holders, to wit, the Holland Lumber Company, filed a separate foreclosure suit on its lien against each of the above described properties and made the said American Savings & Loan Association a party defendant, and on the 9th day of September, 1929, another of said mechanic lien holders, to wit, U. S. Supply Company, filed separate foreclosure on its mechanic liens upon each of the said properties and made the said American Savings & Loan Association defendant. Later by order of the court the two cases against the said properties were consolidated. Frank Barry and Mabel J. Horton, appellants here, were not made parties to any of the foreclosure cases. (The petition in the instant case alleges that this occurred through "inadvertence and mistake.") Decrees were entered foreclosing the mechanic liens and the mortgages of the American Savings & Loan Association in the actions involving said lot 2 and block 4 and the American Savings & Loan Association became the purchaser and

received sheriff's deeds therefor. In the action involving lot 3 a decree of foreclosure was entered as to the mechanics' liens, but not as to the mortgage of the American Savings & Loan Association, because the answer and cross-petition of the American Savings & Loan Association had not been filed until after answer day and no service thereafter had been made upon Kenneth D. Horton, the holder of the fee title. The decree expressly provided that the matter was left open as to the rights of the American Savings & Loan Association. Thereafter the said property was sold at sheriff's sale to the mechanic lien holders above referred to and by them conveyed to the American Savings & Loan Association.

The American Savings & Loan Association went into possession of all the properties, advertised the same for rent and sale, collected the rents and profits and treated the same as its own. And as to block 4, it sold and conveyed said property by warranty deed to a party in no way connected with any of the proceedings, and the purchaser went into possession of said property.

On October 8, 1930, Frank Barry caused an execution to be issued out of the district court for Lancaster county upon a præcipe directing the sheriff to levy on each of the three properties above described. Accordingly, said levy was made and the properties advertised, as provided by law, to be sold at 2 o'clock p. m. November 11, 1930, at the east door of the courthouse in Lancaster county, and said lot 3 was sold under said execution to the judgment creditor, Frank Barry, and the district court refused to confirm the sale. Barry appealed and at the time of trial, July 16, 1931, the appeal was pending. November 10, 1931 the action of the district court was affirmed by this court. *Barry v. Horton,* 122 Neb. 20.

On November 10, 1930, the American Savings & Loan Association filed its petition in the instant suit, and obtained a restraining order restraining the sheriff from selling lot 2 and block 4 under the execution sued out by Frank Barry. The petition prayed that the several

mortgages of the association and the mechanics' liens which were found to be prior to the mortgages be considered, as between the plaintiff and defendants here, as in full force as liens prior to the judgment liens of defendants; that the defendants Frank Barry and Mabel J. Horton be required to redeem or be enjoined from asserting rights against said properties, and that the titles be quieted in plaintiff.

The parties stipulated also that the plaintiff, its officers and attorneys, had only such constructive notice as the records of Lancaster county afforded and had no actual knowledge of the judgments until after the completion of the foreclosure proceedings and a few days prior to the filing of this petition; and that the judgments are unpaid except that $200 was applied on Barry's judgment by reason of a sale of property not involved here.

When Barry caused the real estate to be sold on his execution November 11, 1930, and bid it in for $171, the district court refused to confirm the sale. On appeal, this court affirmed the judgment because, for one reason, the real estate was not sold subject to all the prior liens. The court knew of this suit then pending in the district court but declined to discuss the rights of the parties thereunder. *Barry v. Horton,* 122 Neb. 20. In that opinion the court cited *Hibbard v. Weil & Kahn,* 5 Neb. 41, and quoted therefrom: "A sale upon execution vests in the purchaser all the rights of the judgment debtor to the property, but that right is subject to all liens prior to the lien of the judgment on which the execution sale is made." Following this quotation this court said: "This has been the law of this state for many years."

When transcripts of Barry's two judgments were filed in the district court on August 8, 1929, and Mabel J. Horton's transcript of judgment was likewise filed on August 29, 1929, each, by operation of law, became a lien upon all real estate in the county belonging to Kenneth D. Horton, as of the day of filing. If these judgment creditors had thereupon duly levied and sold the real

estate they would have been entitled to sell subject to liens prior to theirs and to have their liens paid out of the proceeds if the property sold to a third party for enough to satisfy their liens. If they had been made parties to the foreclosure suit of then prior liens of record their liens would have ranked in the same order. The solution of the matter requires a decision as to whether, in the light of all the facts, these prior liens have been extinguished in law and equity and whether the judgments of the appellants thereby have become liens of such standing on the properties that an execution sale thereunder will divest the appellee of its title as owner of the fee.

Appellants' argument is that the liens that formerly were prior to theirs were extinguished by merger and that the plaintiff holds the title subject to the lien of their judgments. Appellee insists that equity will not permit the adoption of such a rule in the circumstances shown in this case.

The general rule is: "Whenever a greater and a less estate coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or in the law phrase it is said to be merged." 21 C. J. 1033. "In equity, the rules of law as to merger are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, whether expressed or implied." 21 C. J. 1034. "Whether the two estates will be held to have coalesced will depend upon the facts and circumstances in the particular case, the then intention of the party acquiring the two estates, and the equities of the parties to be affected." *Peterborough Savings Bank v. Pierce,* 54 Neb. 712. "It will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself." *Wyatt-Bullard Lumber Co. v. Bourke,* 55 Neb. 9. "In equity, however, the legal rule of

merger is not always followed, and the question whether the legal rule will be applied depends upon the facts and circumstances of each particular case." *Citizens State Bank v. Petersen,* 114 Neb. 809. We cite these cases, not because the facts are identical with those at bar, but to show that the exceptions to the hard legal rule as to mergers have been recognized in this court; and that, in determining whether a merger has taken place, the court will consider the circumstances of the particular case in the light of equity and good conscience.

Appellants have cited other Nebraska cases which follow the legal rule and either make no mention of the exception to which we have called attention or find that the facts under consideration do not defeat merger.

In the case of *Institute B. & L. Ass'n v. Edwards,* 86 Atl. 962 (81 N. J. Eq. 359) it was held: "Where a prior mortgage was released and a new one executed for the same debt, but owing to negligent search intervening judgments were not discovered, the mortgagee was entitled to be restored to the lien of its canceled mortgage as against the judgment creditors; they not having changed their position to their prejudice." The text of the opinion discusses and cites many authorities sustaining the principles announced in the syllabus which we have quoted. See, also, *Parker v. Tout,* 207 Cal. 590; *Louisville Joint Stock Land Bank v. Bank of Pembroke,* 225 Ky. 375.

The judgment creditors, Barry and Mabel J. Horton, who obtained their judgment liens just after the foreclosure suit was started, either stood by awaiting a chance to improve their positions or, without knowledge of the pending foreclosure, now seek to profit by an extinguishment of liens prior to theirs at the time theirs was perfected. They paid no consideration for such a benefit. None of their original rights will be abridged, nor will their original position be changed to their prejudice by denying merger as the district court denied it. The chief purpose of our recording statutes is to protect

from financial loss innocent purchasers and incumbrancers who have changed their position to their detriment without notice, actual or constructive, of prior liens, incumbrances and conveyances. Appellants ought not to use this shield as a sword. "The negligence of complainant in failing to procure proper searches should * * * be thus considered with reference to its effect on the rights of others, and so considered cannot be properly regarded as that type of culpable negligence which appropriately affords a bar to equitable relief"—citing cases. *Institute B. & L. Ass'n v. Edwards,* 81 N. J. Eq. 359, 367, 368.

Appellants object to the use of injunction in this action where they say the appellee had an adequate remedy at law to test priorities. The gist of the action was to quiet title as against the judgments and the injunction was ancillary thereto in order that matters might be held as they were. Under section 76-401, Comp. St. 1929, the court had jurisdiction, particularly by virtue of the words, "and canceling unenforcible liens, or claims against, or which appear to be against, said real estate, and quiet the title to real estate." When the former statute was repealed, most of these words were inserted as new matter. Laws 1921, ch. 130, sec. 1. The statute, by section 9 of this chapter, specifically requires the cause to be tried as other equitable actions. All parties were before the court and it had complete jurisdiction to make whatever injunctive orders were necessary to prevent appellants from proceeding at law until the rights of the parties were adjudicated.

The decree of the district court responded to the demands of equity in finding that merger did not take place contrary to the intention and interest of appellee and in favor of intervening judgment claimants who are now appellants. The right to redeem ordered by the decree protected the rights of appellants. That right to redeem as to the respective properties is hereby extended to the appellants, to be exercised at any time before the issu-

ance of the mandate. With this extension of the right to redeem, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF SAMUEL E. LODGE.
FANNIE L. PLOEHN ET AL., APPELLEES, V. CHARLES J. LODGE ET AL., APPELLANTS.

FILED JULY 12, 1932. No. 28219.

1. Appeal: NONPREJUDICIAL ERROR. A judgment will not be reversed for an erroneous ruling that is not prejudicial to the complaining party.
2. ———: ———. Error may not be predicated on remarks by trial judge in the presence of jury, unless such remarks tend to prejudice the complaining party.
3. Wills: TESTAMENTARY CAPACITY: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* sufficient to sustain a finding of testamentary capacity.
4. ———: SIGNATURE. Signature of testator may be affixed to his will by his holding a pen in his hand while another, at his request, holds and directs the testator's hand in writing the signature.
5. ———: UNDUE INFLUENCE: SUFFICIENCY OF EVIDENCE. Evidence examined and *held* sufficient to sustain finding that proponent and beneficiary under the will did not unduly influence testator in the making thereof.
6. ———: CONTEST: UNDUE INFLUENCE: BURDEN OF PROOF. In a will contest, contestants have the burden of proving that the will was procured by undue influence, except only when the person charged with exercising undue influence sustains a confidential relation to the testator and is a beneficiary under the will.
7. Instructions given and refused examined, and *held* that court's action in this respect is free from error.
8. Appeal: VERDICT: REVIEW. Objection that a verdict was irregularly received will not be reviewed in the appellate court, unless such irregularity is first called to the attention of the trial court and its ruling had thereon.
9. Trial: RETURN OF VERDICT. The verdict of a jury should be received only when the judge is present and the court is open for the transaction of business.

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

G. E. Hager and *M. S. McDuffee,* for appellants.

Boyle & Koenigstein and *F. M. Deutsch, contra.*

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

GOOD, J.

This is a proceeding seeking the probate of an instrument purporting to be the last will of Samuel E. Lodge, deceased. It originated in the county court. Fannie L. Ploehn, the proponent, is a sister of decedent. She filed a petition asking the probate of the instrument. Brothers, sisters, nieces and nephews of decedent filed objections to the probate of the instrument, wherein they alleged that Samuel E. Lodge did not execute the instrument; that, by reason of old age and illness, he was incompetent to execute a will, and that the instrument was procured by undue influence practiced by proponent and others. After a hearing in the county court, there was an appeal to the district court, and a trial there had upon the issues as presented by the transcript from the county court, without new pleadings having been filed in the district court. The trial resulted in a verdict and judgment, finding that the instrument was the last will of Samuel E. Lodge and directing that it be admitted to probate. Contestants have appealed.

At the outset of the trial, when the first witness was called, contestants entered a demurrer *ore tenus,* and contended that, since the petition filed in the county court did not allege that Samuel E. Lodge was of sound mind and competent to execute a will, it did not state a cause of action calling for the probate of the instrument. The demurrer was overruled, and this is assigned as error. In *In re Estate of Strelow,* 117 Neb. 168, it was held: "A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form."

Had the petition been attacked in the county court, no doubt the objection to its insufficiency would have been sustained and the proponent would then have had the opportunity to amend and insert the proper allegations. However, the mental capacity of Samuel E. Lodge was made a direct issue by the contestants, and both parties tried out that issue to the jury. In fact, the greater part of nearly 500 pages of testimony contained in the bill of exceptions relates to the question of the mental competency of Mr. Lodge to make a will. Both sides offered a large amount of evidence upon this particular question. It is possible, although not decided, that, had contestants stood upon their demurrer, the ruling would be held erroneous. Whether the trial court erred in overruling the demurrer *ore tenus* seems to be immaterial, because contestants have not been prejudiced thereby. Both parties tried that issue fully to the jury, and the trial court, by its instructions, placed upon proponent the burden of establishing the competency of Mr. Lodge. The ruling, therefore, if error, was not prejudicial. It is a general rule that a judgment will not be reversed on ground of erroneous ruling that is not prejudicial to complaining party.

Samuel E. Lodge was a bachelor and left surviving him several brothers and sisters and children of brothers and sisters who had predeceased him. He died possessed of 400 acres of land and about $18,000 in personalty. For several years he had lived on one of his farms with his mother. She died in 1921. A few weeks before the mother's death, Mrs. Ploehn, proponent herein, and her two daughters, at the request of Mr. Lodge, came into his home to assist in caring for the mother. After her death, Mr. Lodge requested his sister and her two daughters, to whom he seemed greatly attached, to stay with him, keep house and care for him. This they did until his death. Mr. Lodge suffered from diabetes and some disease of the heart. In December, 1928, he had an attack of influenza which lasted several days, but he recovered to an extent that he was able to be about, attending to or supervising the work of caring

for his live stock. He became quite ill again about the 19th of January, 1929. On the following day his family physician, Doctor Sonneland, was called, and, finding Mr. Lodge in a serious condition, inquired of him whether he had made his will. Ascertaining that he had not, he advised that he do so at once. Mr. Lodge consented. Doctor Sonneland then telephoned to Mr. Fred Deutsch, a lawyer, to go to Mr. Lodge's farm for the purpose of drawing a will. Both Deutsch and Doctor Sonneland visited Lodge on the 21st of January, when the will was drawn. At the time it was prepared, Mr. Lodge was lying upon a lounge or day-bed and after it was prepared he sat on the side of the bed, using a magazine for support, attempted to sign, but apparently was unable to do so. He walked over to a table in the room, and there sat down to sign the will, but, because of weakness and trembling of his hand, it was difficult for him to write his name. Doctor Sonneland inquired if he wanted help and he answered in the affirmative, whereupon Doctor Sonneland took hold of the hand in which he was holding the pen and guided his hand in writing the name "Lodge." In this instrument he devised to Mrs. Ploehn, the proponent, for her lifetime the 240-acre farm on which he resided, with remainder to her children. The 160-acre farm he devised to his sister, Ida Walton, for her lifetime, with remainder to her children. He made one small bequest, and then directed the remainder of his estate to be divided in equal shares among his brothers and sisters, and provided that the children of any deceased brother or sister should take the share that would have gone to such deceased brother or sister.

During the progress of the trial, one Wallace O. Shane, a handwriting expert, was called as a witness to testify relative to the signature of Mr. Lodge to the instrument in question. He was asked, after having examined a number of admittedly genuine signatures of Mr. Lodge, whether there were any discrepancies in the signature on the will and those admitted to be genuine. Thereupon, there was a colloquy between the court and counsel, in

which the court reminded counsel that the handwriting was really not that of Lodge, as his hand was guided by another. The court indicated that it failed to see where the testimony of the handwriting expert would be of any particular value. Subsequently, however, the court excused the jury, the matter was discussed, and Mr. Shane was permitted to testify regarding the signatures. Counsel complain of the remarks of the court and insist that they were prejudicial to the contestants.

We have carefully scrutinized all that was said by the trial court, and we fail to find therein anything that was in any wise prejudicial. It must have been apparent to the jury, as it was to the court, from all the evidence, that Mr. Lodge's hand, although holding the pen, was guided by another in writing the signature to the will. It is so apparent, under such circumstances, that the writing would be dissimilar to that of Mr. Lodge, that any person of reasonable intelligence could not help being aware of that fact. The remarks of the trial court certainly could not have been prejudicial to the contestants.

It is insisted that the evidence is insufficient to sustain a finding that testator had mental capacity to make a will. While there was a sharp conflict in the evidence, the great preponderance thereof tends to show that Mr. Lodge was capable of understanding what he was doing, knew and appreciated the extent and value of his property and knew who were the natural objects of his bounty, and in his will did precisely what he wanted to do. In any event, the question was one of fact for the jury, and their finding upon conflicting evidence is conclusive. Moreover, it appears from the testimony of a number of witnesses that prior to the making of the will Mr. Lodge had stated that it was his intention to leave to his sister, Mrs. Ploehn, and her children the 240-acre farm where he lived, and to his sister, Ida Walton, and her children the 160-acre farm. There is evidence that after he had made his will and had recovered from his illness he told a number of persons that he had made a will and fixed things as he wanted them, and out-

lined to a number of them the provisions that were incorporated in the will.

It is urged that Samuel E. Lodge did not, in fact, execute the will; that is, he did not sign it. The law is well settled that a testator may make his will and have another sign his name thereto at his direction; or he may make a mark which he adopts as his signature, or he may ask another to assist him in writing his signature. From the evidence introduced, no other finding, we think, could be sustained than that Mr. Lodge, himself, intended to sign the instrument as a will, and that he requested Doctor Sonneland to guide his hand in writing the name. This meets the law's requirements.

Contestants argue that the will was procured by undue influence practiced by Mrs. Ploehn and others. There is no direct evidence that Mrs. Ploehn, or any other person, exercised any undue influence to procure the making of the will. Counsel invoke the rule that where one, holding a confidential relation with a testator, receives a substantial bequest or devise under the will, undue influence will be presumed, and it is necessary, in this case, for Mrs. Ploehn to overcome the presumption. The evidence tends to prove that long prior to the making of his will Mr. Lodge had planned to do precisely what he did do in the instrument; that he had stated his intention and purpose to a number of his intimate friends and neighbors. After the will was executed he told a number of them what he had done, and that he had accomplished what he wanted to do. The record shows that the scrivener of the will, Mr. Deutsch, was a stranger to Mrs. Ploehn; that she never saw him until he appeared at Mr. Lodge's home for the purpose of drawing the will. The evidence also shows that Mrs. Ploehn did not request any of the provisions in the will, except that she said "don't forget me," and, at the request of Mr. Deutsch, she obtained some tax receipts so that he could, in preparing the instrument, have an accurate description of the land devised; also that testator suggested and directed all of the provisions in the will. The evidence shows that Mr. Lodge

and Fannie L. Ploehn, her children and his sister, Ida Walton, the principal beneficiaries under the will, sustained toward each other a much closer and more friendly relation than did his brothers and other sisters. In fact, there is evidence in the record tending to show that in his opinion they did not care much for him, and that some of them only visited him at rare intervals.

The will, under the circumstances disclosed, is not an unnatural one. From an examination of the entire record, we think the jury were amply justified in finding that the will was not procured by undue influence. If, under the circumstances disclosed, any presumption existed that the will was procured by undue influence because of the confidential relation existing between Mr. Lodge and Mrs. Ploehn, the jury were justified, from a consideration of all the evidence, in finding that such presumption was overcome. The trial court in its instructions placed upon proponent the burden of showing that the will was free from undue influence practiced by her. All the circumstances disclosed, we think, clearly tend to support the finding of the jury.

It is further argued that the instructions did not place upon proponent the burden of showing that undue influence was not practiced by others, particularly by Doctor Sonneland. The doctor was not a beneficiary under the will. Generally speaking, the burden of proving that a will is procured by undue influence rests upon him who alleges it. Certainly, that would be true as to any other than one holding a confidential relation with the testator, and who is a beneficiary under the will.

Contestants complain of the refusal of the trial court to give to the jury a number of requested instructions. We have examined the instructions requested and those given by the court, and in most instances those given are very similar to the ones requested. The instructions given by the court fully cover every issue presented by the pleadings and supported by the evidence. We find no error in the court's refusal to give the requested instructions.

Complaint is also made of a number of instructions given by the court. We have carefully examined all the instructions given, and, in our opinion, they correctly state the law applicable to the issues and evidence.

It is contended on behalf of contestants that no valid verdict was ever rendered upon which to base a judgment, because, in the absence of the judge, the verdict of the jury was received, read and filed by the clerk of the court, and that, in the absence of the judge, there could be no court.

Section 20-1124, Comp. St. 1929, provides: "When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk asking each juror if it is his verdict. If any one answer in the negative, the jury must again be sent out for further deliberation."

It is apparent that the statute contemplates that the verdict should be received when court is open for the transaction of business. The record discloses no objection made by counsel for contestants at the time the verdict was received. It does show that exceptions were taken to the verdict, but not to the fact that it was received, read and filed by the clerk in the absence of the judge; nor is this question presented in the motion for a new trial. The point raised was not presented to the trial court for decision and cannot be properly raised for the first time in this court. Furthermore, in the motion for a new trial contestants referred to the verdict; contested the sufficiency of the evidence to sustain it, and in other ways recognized the verdict as having been properly returned. Nothing is presented in the record that shows any prejudice to contestants in the irregular manner in which the verdict was received.

We deem it proper, however, to say that the practice of permitting the clerk of the court to receive the verdict of a jury, in the absence of the judge and when the court

is not in actual, open session, is not to be commended, even though it is done by agreement of the parties, as was apparently done in the instant case. The verdict of a jury should be received only when the judge is present and court is open for the transaction of business.

The record discloses no error prejudicial to the rights of contestants. The judgment is therefore

AFFIRMED.

O. M. CAMPBELL COMPANY, APPELLANT, V. CITY OF HARVARD, APPELLEE.

FILED JULY 12, 1932. No. 28296.

1. **Municipal Corporations**: CONTRACTS: VALIDITY. Where a city charter makes a city appropriation or the sanction of city electors a prerequisite to the incurring of a city indebtedness, a contract violating that provision of the law is void.
2. ———: ———: AUDIT. A city charter, making the treasurer custodian of city funds and requiring him to keep accounts and to report monthly to the city council the state of the treasury, implies power of the city to contract for an audit of his books and for the auditor's compensation.
3. ———: ———: ———. Unused and unappropriated money in a city treasury in the general fund at the time a contract for a necessary city audit is executed may, for the purposes of the contract, be available for payment of the auditor's stipulated compensation.
4. ———: ———: ———. Where unused and unappropriated money in a city treasury in the general fund and the annual appropriation therefor are sufficient to meet the expense of a necessary city audit and are available for that purpose at the time the contract for the audit is executed, subsequent depletion of the fund would not make the contract void.
5. **Evidence**: PRESUMPTION: OFFICIAL ACTS. In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed.

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

Sterling F. Mutz, for appellant.

D. B. Massie and *H. G. Wellensiek, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

EBERLY, J.

This is an action to recover stipulated compensation under a written contract obligating defendant to pay plaintiff $495 for auditing the accounts of the clerk and treasurer of the city of Harvard for the three-year period beginning May 1, 1924. For the compensation stated plaintiff also agreed to audit the accounts of all special improvement districts. Execution and delivery of the contract October 22, 1929, performance by plaintiff, acceptance of the audit by defendant, provision for payment under appropriations for the fiscal year beginning May 1, 1929, and failure to pay any part of the agreed compensation were pleaded in the petition, to which a copy of the contract was attached.

In addition to a general denial of unadmitted allegations in the petition, defendant stated in its answer, among other defenses, that the contract was void for want of a necessary appropriation to meet the expenditure—a statutory prerequisite to the making of such a contract. Comp. St. 1929, secs. 17-569, 17-572. A reply put in issue the facts pleaded in defense to the petition.

Upon a trial of the issues the district court excused the jury and dismissed the case on the sole ground that the contract was void for want of an appropriation to pay the stipulated compensation. Plaintiff appealed.

Execution of the contract, making of the audit, performance by plaintiff and nonpayment of compensation were conceded by defendant for the purposes of the trial in the district court. The contract, dated October 22, 1929, the ordinance or appropriation bill for the fiscal year beginning May 1, 1929, and a stipulation by the parties were admitted in evidence and considered by the trial court in connection with pertinent provisions of the city charter of Harvard. The sufficiency of the appropriation is the question presented by the appeal. The ordinance made provision for a $5,000 "General Fund," as follows: Salary

of marshal and street commissioner, $1,500; night watch, $1,080; councilmen, mayor, city attorney, treasurer and city clerk, $450; maintenance of streets, alleys and crossings, $500; elections, printing and stationery, $250; insurance, $255; charities and corrections, $40; general occupation tax, $25; police department and city jail, $30; rent for community club room, $120; library janitor, $52; paving tax, $225; purposes not specifically enumerated, $463; total for general fund, $5,000. Provision was also made for items not enumerated in the general fund and for the levying of taxes to meet the authorized expenditures. The city charter provides:

"The city council of cities and board of trustees in villages shall, within the first quarter of each fiscal year, pass an ordinance, to be termed 'the annual appropriation bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during that year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them or at a general or special election duly called therefor, and all appropriations shall end with the fiscal year for which they were made." Comp. St. 1929, sec. 17-569.

"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditures shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." Comp. St. 1929, sec. 17-572.

The expense of the audit was not sanctioned by a vote of the electors. Both sides concede the invalidity of the contract, unless the city council made in advance the necessary appropriation. This is obviously the law. *City of Blair v. Lantry*, 21 Neb. 247; *McElhinney v. City of Superior*, 32 Neb. 744; *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775; *City of Kearney v. Downing*, 59 Neb. 549; *City of Plattsmouth v. Murphy*, 74 Neb. 749; *Moore v. City of Central City*, 118 Neb. 326.

The power of the city to appropriate money for an audit of the accounts of the treasurer and clerk and to enter into a contract therefor seems clear. Those officers are accountable to the city council for the faithful performance of their official duties. The treasurer is custodian of city funds and is required by law to keep accounts and make monthly reports to the council, showing the state of the treasury. Comp. St. 1929, secs. 17-513, 17-514. The power of the council to see that these duties are performed, including an essential audit, is necessarily implied. The council may determine from an unsatisfactory condition of city records when an audit is necessary. Compensation therefor was an administrative expense within the purposes for which the general fund was created by ordinance. The sum of specific items enumerated in the general fund was not the limit of the appropriations therefor. This is recognized by the ordinance itself. The general fund includes an item of $463 for "purposes not specifically enumerated." This item alone would clearly include compensation for the audit if the amount had been $495, instead of $463, but, standing alone, the expense would exceed the appropriation by $32 and for that reason the contract would be void under the ruling in *Moore v. City of Central City*, 118 Neb. 326. In the case at bar, however, the parties stipulated:

"It is further stipulated that at the beginning of the fiscal year beginning May 1, 1929, and ending May 1, 1930, there was in the general fund unexpended from the preceding fiscal year the sum of $1,111.11."

This fund, unlike the items specifically enumerated in the appropriation bill, was in the city treasury at the time and therefore not to be raised by future taxation. At the beginning of the fiscal year it was available for general fund purposes. *Christensen v. City of Fremont,* 45 Neb. 160; *Carr v. Fenstermacher,* 119 Neb. 172. When the items of $1,111.11 and $463 are considered parts of the general fund available for the fiscal year beginning May 1, 1929, the appropriation was sufficient to meet the expense of the audit at the time the contract was executed, if not then reduced below $495 by payment of other claims. If then sufficient to meet the expenditure, subsequent depletion would not invalidate the contract. *Williams v. City of Stockton,* 195 Cal. 743; *Curtis v. Jersey City,* 82 N. J. Law, 250; *City of Woodward v. Manhire Grate & Equipment Co.,* 98 Okla. 83; *City of Chicago v. Berger,* 100 Ill. App. 158. In absence of evidence showing misconduct or disregard of law, regularity of official acts is presumed. *Kelly v. Broadwell,* 3 Neb. (Unof.) 617; *Paxton v. State,* 59 Neb. 460; *Meeske v. Baumann,* 122 Neb. 786. On the face of the record it is not presuming too much to infer that the mayor and city councilmen in entering into the contract considered the availability of $1,111.11 in addition to the item for $463 and that they did not intend to procure the audit without making lawful provision for payment. The record does not show depletion of these items below the agreed price for the audit when the contract was executed. In this view of the case there was no defense to the claim of plaintiff. The judgment is therefore reversed and the cause remanded, with directions to enter a judgment according to the prayer of the petition.

REVERSED.

ARNOLD VANDENBURG, APPELLANT, V. CENTER TOWNSHIP, BUTLER COUNTY, APPELLEE.

FILED JULY 12, 1932. No. 28305.

1. **Master and Servant:** WORKMEN'S COMPENSATION: BENEFICIARIES: TOWNSHIP OFFICERS. Where an officer of a township charged with the supervision of the work in which he engages seeks to recover compensation from a township for injuries sustained in performing such work, he cannot recover unless the evidence will sustain a finding that in the work he was doing he was an employee of the township under a contract of hire, express or implied. Evidence examined and *held* that appellant was not an employee of Center township when injured.
2. ———: ———: RIGHT OF RECOVERY: TOWNSHIP OFFICERS. In a county under township organization, the person receiving the largest number of votes in the township for justice of the peace becomes, by operation of law, an officer of the township and a member of the town board. Comp. St. 1929, sec. 26-221. Officers in township under township organization are charged with the supervision of road construction therein, and if injured while in performance of this duty, no recovery can be had under the workmen's compensation act.
3. **Towns:** TOWNSHIP OFFICERS. In the absence of evidence to the contrary, the official character of an officer of a township is not changed because he did some act not required by his office.
4. **Master and Servant:** WORKMEN'S COMPENSATION: RIGHT OF RECOVERY: TOWNSHIP OFFICERS. Where an officer of a town board, in a county under township organization, either alone or with the assistance of other members of the township board, engages in work of removing trees, stumps or other obstructions from a highway, necessary to the grading thereof, and while engaged in such work is injured, he cannot recover in the absence of evidence establishing that such official was an employee of the township; and the fact that such work was not part of such officer's official duty will not, in itself, give him a right to recover against the township under the workmen's compensation act.

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

Coufal & Shaw, for appellant.

A. V. Thomas and *Thomas & Vail, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

DICKSON, District Judge.

The appellant seeks to recover compensation from Center township, Butler county, this state, on account of injuries sustained by him while engaged in blasting out stumps on a public highway in said township preparatory to the grading thereof by the township. He bases his right of recovery from the township on the ground that when he was injured he was an employee of the township. If his contention in that regard be resolved in his favor, then his right of recovery is clear.

From the record it appears, without dispute, that the appellant when injured was, and had been for some fifteen years, a justice of the peace in the township; that during these years he attended and presided at every annual meeting of the electors, except one, and attended and presided at town board meetings, recognizing and performing all the duties of a member of the town board. The other members of the board were Zegers, the clerk, and Semen, the treasurer. Semen had been a member of the board for many years. Zegers succeeded Rerucha as clerk in 1929.

From the record it appears that in 1927 the supervision of the township roads was divided among the members of the township board. Treasurer Semen was given the east half of the township, the then clerk, Rerucha, the west half of the township, and the appellant the road dragging. This division of supervision seems to have been in keeping with a resolution of the board passed in January, 1927, which reads: "Moved by Rerucha, second by Semen, that we have the same road supervision the coming year as we had last year; Fred Semen to supervise the east half, Rerucha to supervise the west half of Center township, and Vandenburg to supervise the dragging." A similar resolution was passed in 1928, and in 1929, except that in 1929 the west half was given to Zegers who succeeded Rerucha as township clerk.

On the matter of road supervision in 1930, the record is silent. But the evidence is quite clear that the arrange-

ment for supervision of the township work for the previous years was continued, and proceeded in a manner similar to the previous years, that is, Semen had charge of the east half, Zegers the west half, and appellant the road dragging and dynamiting. The appellant assisted the other members of the board, and they assisted him, not only in road work, but in dynamiting trees and stumps.

From time to time the other members of the board and appellant filed bills for their work, which included charges by each and all of them for dynamiting, which were allowed and ordered paid by the township board.

It was the duty of the township board by law to supervise the road building of the township. This supervision included all things incidentally necessary to prepare the highway for grading, such as surveying and removing objects from the highway, and the many things necessary for the construction of the road. The town board had the right to contract for such labor as was necessary, and to that end could have entered into all necessary contracts.

Was the appellant an employee of the township? Our statute, section 48-115, Comp. St. 1929, defines an *employee* to be: "Every person in the service of the state or of any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written, but, shall not include any official of the state, or any governmental agency created by it, who shall have been elected or appointed for regular term of office, or to complete the unexpired portion of any regular term." It will be noted that this section excludes any person who shall have been elected or appointed for a regular term of office, or any official of the state or any governmental agency created by it.

A township in a county under township organization is a governmental agency created by the state, within the meaning of our workmen's compensation act.

Appellant contends that he was not an official of the town board. To this contention we cannot agree. It is provided by section 26-221, Comp. St. 1929: "The town clerk, the town treasurer and the justice of the peace who shall have received the largest number of votes for that office shall be and constitute the town board." By law, his election as justice of the peace of that township imposed upon him additional duties which the evidence conclusively shows that he performed. He, by law, upon election and qualification, became a member of the township board during his term of office as justice of the peace. His election was for a fixed, definite and regular term, and the law made him a member of the township board during his term of office as justice of the peace. Any other construction would do violence to a clear legislative enactment. Upon his election and qualification he became charged with all the duties and responsibilities of a township board member. His duties and responsibilities followed his election and qualification to the same extent as the other members of the township board.

That the appellant, as well as the other members of the board, rendered and received pay for work performed for the township is clearly established by the evidence, but whether by virtue of, or on account of, their office or as an employee of the township requires a careful consideration of all the evidence. The writer has read and reread the evidence, as contained in the bill of exceptions, and has reached the conclusion that the appellant, as well as the other officers, performed services for the township by virtue of his office, and not as an employee, and that the relation of employer and employee was not contemplated and did not, in fact, exist.

Under the law, it was the duty of the township board to supervise the road construction in the township. By resolutions in 1927, 1928, and 1929, this duty of supervision was, by the members, recognized and the supervision divided for these years. But in 1930 there was placed upon appellant the added responsibility of super-

vising the blasting, with the assistance of the other members of the board.

In 1930, under this arrangement, the appellant assisted, and was assisted, and alone engaged in blasting trees and stumps. The other members did likewise, and all filed bills therefor, as well as for other services rendered the township, and were paid therefor. In short, they, the township officers, agreed among themselves that one was to supervise the east half, one the west half, and appellant was to supervise the blasting and dragging, with the assistance of the others. And, from the bills presented by each of them, this arrangement seems to have been faithfully carried out. One was as much an employee of the township as the other, and no more. Each, from the record, thought that in the work done he was performing an official duty imposed, or self-imposed, upon him; in other words, that the supervisory powers gave them the right to do it themselves and charge therefor. Such an arrangement or agreement falls far short of creating the relation of employer and employee. Appellant, being an officer of the town, did not change his character because he did some act not required by his office.

Appellant contends that he is not excluded from the benefits of compensation where the injury sustained was inflicted in a service not rendered in the performance of any official duty, and relies on *Markham v. Town of Middletown*, 102 Conn. 571, 44 A. L. R. 1475. This, and other cases cited, is easily distinguished from the case under consideration. Markham, a tree surgeon, was appointed tree warden of the town of Middletown, and was injured while trimming trees, not in official supervisory duties, but while performing manual labor with the consent and approval of the selectmen, a body having power to contract with him for such work. He was injured while performing labor for the municipality under a contract of employment with the duly authorized representatives of the town.

If such a condition were reflected by the evidence in this case, then appellant's right of recovery would be clear. But the facts in this case will not sustain a recovery under the rule announced in the *Markham* and other cases cited by appellant. To sustain a recovery for the appellant, we must find from the evidence that he was an employee of the township under contract of hire, express or implied. The evidence will not sustain such a finding. From the record, the action of the appellant and the town board shows conclusively that the appellant was not employed by the township, which excludes him from recovery under our statute. The judgment of the district court is right and is AFFIRMED.

FRANK NOLAN, ADMINISTRATOR, APPELLANT, V. YOUNG MEN'S CHRISTIAN ASSOCIATION ET AL., APPELLEES.

FILED JULY 12, 1932. No. 28234.

1. **Negligence**: PUBLIC BATHING RESORTS: DUTY OF PROPRIETORS. "It is the duty of a bathing resort keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance." *Lyman v. Hall*, 117 Neb. 140.
2. ———: ———: ———: CARE REQUIRED. "Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect." *Lyman v. Hall*, 117 Neb. 140.
3. ———: QUESTION FOR JURY. "Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence." *Kelly v. Gagnon*, 121 Neb. 113.
4. ———: DIRECTION OF VERDICT. Where, as in this case, the facts upon the issues of negligence are not in dispute and are insufficient to support a finding of actionable negligence, *held* error was not committed by the trial court in directing the jury to return a verdict for the defendants.

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

Wilmer B. Comstock, for appellant.

Chambers & Holland and *Hall, Cline & Williams, contra.*

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

HASTINGS, District Judge.

On November 12, 1930, Rollin Nolan, 12 years of age, was accidentally drowned while engaged with a troop of Boy Scouts in using the swimming pool of the Young Men's Christian Association of Lincoln, Nebraska. Frank Nolan, as administrator of the estate of Rollin Nolan, deceased, brought this action against the Y. M. C. A. and Franklin Flagler to recover damages alleged to have been sustained by the death of Nolan.

Plaintiff alleged that the death of Nolan was caused by the negligence of the defendants, alleging eight specific acts of negligence.

The defendants filed separate answers. The defendant, Y. M. C. A., answered and admitted owning the swimming pool in its building in Lincoln, Nebraska, and alleged that said Rollin Nolan was on its premises and making use of the swimming pool under the exclusive care, custody and control of the Boy Scouts of America, and under the immediate direction, care, custody and control of the defendant, Franklin Flagler. Defendant further alleged that it is a corporation not organized for profit and is organized as a religious and charitable corporation under the laws of Nebraska; that the swimming pool is maintained by the defendant as part of the work for which it was organized and is not operated for gain or profit.

The defendant, Franklin Flagler, admitted that the defendant, the Y. M. C. A., maintained a swimming pool in the city of Lincoln as alleged, and that plaintiff's decedent came to his death in or about said pool from drowning or from accidental injuries or both. Defendant, further answering, alleged that, in taking plaintiff's decedent to the swimming pool, defendant acted without pay under the direction of the Boy Scouts of America and in

furtherance of the purpose of said Boy Scouts; that the Boy Scouts of America is an eleemosynary institution incorporated by an act of the congress of the United States of America and a charitable institution not engaged in business for profit or gain; that all arrangements for the use of said pool were made by said Boy Scouts and that life guards were furnished and maintained by said Boy Scouts. Defendant denied generally the other allegations of plaintiff's petition, and alleged that the decedent, Rollin Nolan, was guilty of contributory negligence directly contributing to and causing his death. The reply was a general denial.

At the close of the evidence the defendants, by separate motions, moved for a directed verdict. The motions were sustained and the jury instructed to return a verdict for both defendants. Judgment was entered on the verdict and plaintiff appeals.

The principal assignment of error relied upon by the plaintiff is that there was evidence of actionable negligence sufficient to require the submission of the case to the jury. There is no conflict in the evidence upon the issues of negligence. "Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence." *Kelly v. Gagnon,* 121 Neb. 113. It is the duty of the court in a suit for damages, based upon negligence, to direct a verdict for the defendant upon the conclusion of all the testimony if the evidence is insufficient to support a verdict for the plaintiff. *De Griselles v. Gans,* 116 Neb. 835.

Whether there was sufficient evidence of negligence to support a verdict in favor of the plaintiff requires a review of the evidence. The essential facts established by the evidence are: That plaintiff's decedent, while not a member of the Boy Scouts of America, had made written application, with the written approval of his father, to become a member of that organization about a month prior to his death. The Boy Scouts of America is a benevolent and charitable corporation organized under the

laws of the United States. The purpose of the organization is building character, training in citizenship, and in developing physical fitness in boys between the ages of 12 and 18 years. It operates through troops, each troop being under the charge of a scout master and each troop being under the jurisdiction of an institution, such as a church or school. The troops meet weekly under the direction of a scout master for normal scout activities, which consist, in part, of swimming, hiking, nature study, first aid, axemanship and camping. As an applicant for membership, decedent was attached to what was known as "Troop 19" which had for its headquarters the Trinity Methodist Church in Lincoln. It was necessary before plaintiff's decedent could become a scout to pass certain tests. He was in the process of taking these tests at the time of his death. From the time of making his application he had been meeting with the troop to which he was attached each week and had been at the swimming pool with the troop prior to the time of his death. Troop 19 was under the supervision of the defendant, Flagler, who had been its scout master, without compensation, for over a year prior to the time of the accident. Those in authority in the Boy Scouts had made arrangements with the defendant Y. M. C. A. for the exclusive use of the swimming pool on Wednesday evenings from 6:30 to 9 o'clock, for which no charge was made. Those of the scouts who did not bring their own towels paid 5 cents for the use of one. Young Nolan on the evening of the accident did not bring a towel and paid 5 cents for one. It was a part of the arrangement that each troop, while making use of the swimming pool, should be in charge of its scout master. The scouts were to furnish and did furnish life guards and swimming instructors, who served gratuitously. On the evening of the accident the guards were Marion Hestbeck and Alba Briggs. Hestbeck had been acting as life guard, instructor and examiner for the scouts for four years; he was a Red Cross life saver for five years and qualified to give life saving examinations and swimming

instructions to others. Briggs, his assistant, had worked in boy scout camps for three years, acted as assistant for three years, passed the life saving examinations given by the boy scouts and held the Red Cross senior life saving award. Both are shown to have been thoroughly competent life guards and swimming instructors. The qualifications of these guards were known to the defendant Y. M. C. A., and had been approved by it as qualified life-saving guards and swimming instructors.

On the evening of the accident Troop 19 met at the Trinity Methodist Church and was informed that those who did not desire to go swimming could stay at the church and receive instruction, and that, after the swimming was over, all would meet at the church and a meeting would be held. Eleven of the boys, including Rollin Nolan, expressed their desire to go swimming. Nolan and two of the other boys went to the swimming pool on their bicycles. The other eight, accompanied by the defendant Flagler, walked from the church to the swimming pool. They arrived at the Y. M. C. A. about a quarter to seven and the boys went into the locker room and disrobed and from there into the shower and then into the pool. The pool maintained by the Y. M. C. A. was built of white tile, was 60 feet long and 20 feet wide. At the east end of the pool and for some distance towards the west the water was shallow, for the use of those who could not swim. The room, in which the swimming pool is located, was lighted by 12 lights of 75 watt power each, two of the lights had been broken on the afternoon of the accident and the room was not as light as usual, although well lighted. It appears that it was necessary, every 48 hours, to use chlorine to purify the water in the pool to keep it free from colon bacilli. The custom was to put this chemical in the water at noon. On the day of the accident more than usual of the chemical had been put in the water rendering it a little more cloudy than ordinarily and more difficult to see the bottom. The part of the pool which the boys who could not swim were to use was about two and a half feet deep at the east end and

gradually deeper toward the west end, where it was of the depth of about eight feet. The decedent was among those who could not swim and was noticed by one of the boys toward the east end of the pool, where the water was about to his waist, about ten minutes after the troop entered the pool. So far as it is disclosed, this is the last time he was seen alive. Of all the persons present no one saw young Nolan when he disappeared. When and how he got into the deep water at the west end of the pool, where his body was found, is not disclosed.

At the time the boys out of Troop 19 entered the pool another scout troop went in. The other troop was in charge of a scout master. The number of boys in the pool from 7 to 7:30 o'clock was about 25. During all of that time both of the scout masters and two life guards were present. There is nothing in the evidence to indicate that any of the guards or the scout masters were inattentive to their duties. The boys all left the pool at about the same time. Before leaving, the defendant Flagler looked to see if all the boys had left the pool; he observed none there, but did observe the life guards inspecting the pool, as was their custom, before allowing another troop in. As soon as the boys who did not have wheels were dressed they and the defendant Flagler left for the church. Two of the boys who had come to the pool on their wheels with young Nolan dressed and stopped for a few moments in a room where bowling was going on, then went out to get their wheels to go to the church, and noticed the bicycle belonging to young Nolan where he had left it on his arrival. They immediately went back into the building and to the locker and found his clothes there and notified the young man in charge that Nolan was missing, and with him went directly from there to the swimming pool, where they informed the guard, Hestbeck, of that fact. Hestbeck immediately went along the north edge of the pool and, at the point where the water was deepest, he saw a dark object at the bottom of the pool. Hestbeck immediately went in, found this dark object was the body

of the decedent and brought the body out. It was not over 30 seconds from the time Hestbeck was notified until the body of Nolan was out of the pool. Immediately steps were taken to resuscitate him. A doctor was sent for, whose office was near, and came at once and administered a restorative. Approved methods to resuscitate him were kept up for an hour and a half or two hours without avail.

It is contended that the defendant Y. M. C. A. was negligent in that it failed and omitted to furnish any servants, employees, guards or attendants to warn, assist, instruct or supervise plaintiff's decedent. We have held:

"It is the duty of a bathing resort keeper who grants privileges for compensation to make reasonable provision to guard against accidents liable to befall bathers who indulge in aquatic sports for which he has provided facilities and this may require an attendant to render assistance.

"Ordinary care to provide a reasonably sufficient number of attendants for the protection of bathers at a public bathing resort conducted for private gain is a standard of duty in that respect.

"The duty to exercise ordinary care to protect patrons of a public bathing resort conducted for private gain does not make the proprietor an insurer of their safety." *Lyman v. Hall,* 117 Neb. 140.

No higher standard of duty is imposed upon the defendant Y. M. C. A., who granted the privilege of using its pool without compensation for a laudable purpose, than upon the keepers of bathing resorts for gain.

Competent guards and attendants were furnished with the approval of the Y. M. C. A. The fact that the Y. M. C. A. did not directly furnish the guards or attendants is not material nor is it evidence of negligence. There is no proof that the number of guards and attendants was insufficient. Taking into consideration the size of the pool the evidence establishes ample guards were provided.

In this connection it is also urged that the guards and the defendant Flagler failed and omitted to keep a proper

lookout to observe the peril in which Nolan had become involved. This contention is based upon the failure to notice the disappearance of Nolan and to miss him thereafter. Under the circumstances disclosed by the evidence such omission was not actionable negligence. In *Lyman v. Hall, supra,* in passing upon a similar contention it is said:

"Where many swimmers are engaged in aquatic sports in the same pool, it is common knowledge that divers disappear and return at other places without giving occasion for alarm or rescue. In the present instance no one knew exactly when or where the bather disappeared. Without resorting to speculation or conjecture the jury could not properly find that, except for the failure of the guard to miss the bather and to notice that he did not promptly reappear, there would have been no loss of life."

What is there said applies with equal force to the facts in the instant case.

When decedent was removed from the water he had two bruises upon his forehead, which might indicate that he had slipped and fallen against the edge of the pool as he went into the water and was in such a dazed condition as to prevent any outcry from him and to cause him to sink to the bottom of the pool without struggling so as to attract attention to his plight. This may account for the fact that he was not seen by the guards and scout masters and the numerous boys in and around the pool as he sank beneath the water to his death.

The contention is made that, owing to the fact that the water was darker than usual, caused by the use of more than the ordinary amount of chemical, and the absence of two lights, it was impossible, or more nearly so than usual, to see Nolan after he sank beneath the surface of the water and hindered his rescue before life was extinct, and that this was evidence of negligence and some proof that it was the proximate cause of his death. The proof is that, when notice was given that Nolan was missing, the guard was able to see his body at the bottom of the

pool and promptly recover it. There is no proof that, owing to the condition of the water and the lights, the body of a person could not be seen sinking beneath the surface of the water, nor that it would hinder rescue before life was extinct. To say that the defendants or either of them were guilty of actionable negligence would be to assume that, but for the absence of two of the lights and the discoloration of the water, young Nolan would have been seen as he sank beneath the surface of the water or his body seen upon the bottom of the pool in time to have rescued him before death. Without a resort to speculation or conjecture no such conclusion can be reached. It finds no support in the evidence nor any reasonable inference to be drawn therefrom.

It is insisted that the defendant Flagler should have ascertained before he left for the church that Nolan was missing, that his failure to do so was negligence. There had been nothing that had occurred that would indicate to any reasonable person that any of the boys might be missing. Flagler looked before he left the room and saw none of the boys in or around the swimming pool. As an ordinarily prudent man he had the right to assume, under the circumstances disclosed by the evidence, that none of the boys were missing. Had he counted the boys, as counsel urges that he ought to have done, and ascertained that young Nolan was missing, there is nothing in the evidence that indicates that he could have been rescued before life was extinct. Neither is negligence shown on the part of the defandant Flagler in taking young Nolan, in company with other members of his troop, to the pool and permitting him to take part in one of the activities of the Boy Scouts. The evidence shows that the pool was a reasonably safe place to take them for that purpose.

Regretable as the death of this boy is, we are constrained to hold that the evidence in this case fails to establish actionable negligence on the part of the defendants or either of them in respect to any of the acts of negligence alleged by plaintiff.

Having taken this view of the case, we do not find it necessary to determine whether the evidence is sufficient to establish that the defendant the Y. M. C. A. was a charitable and religious organization and as such exempt from liability for the acts of negligence of its officers, agents and servants.

The trial court was right in directing a verdict and the judgment is

AFFIRMED.

CARRIE A. PERRY, APPELLANT, V. JOHNSON FRUIT COMPANY, APPELLEE.

FILED JULY 12, 1932. No. 28257.

1. **Evidence**: RES GESTÆ. Under the facts and circumstances in this case, the statements made by the injured employee within a few minutes after his accidental injury, resulting in his death, relative to the cause of such injury, were admissible in evidence as a part of the *res gestæ*.
2. ———. "In a civil action, when a fact may be fairly and reasonably inferred from other and all the facts and circumstances proved, it may be taken as established." *Chicago, B. & Q. R. Co. v. Hildebrand*, 42 Neb. 33.
3. **Master and Servant**: INJURY TO EMPLOYEE: RIGHT OF COMPENSATION. The accidental injury to the employee in this case, resulting in his death, arose out of and in the course of his employment by the defendant, within the meaning of sections 48-101 and 48-152 of the Compiled Statutes of Nebraska for 1929, and his dependent, the appellant herein, became entitled to compensation for his death.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Reversed, with directions.*

Bernard McNeny, Herbert Smith, J. S. Gilham and *L. A. Sprague*, for appellant.

Stubbs & Stubbs, contra.

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

HORTH, District Judge.

By this proceeding, brought under the workmen's compensation law, the plaintiff, Carrie A. Perry, seeks to recover compensation from the defendant, Johnson Fruit Company, of Hastings, Nebraska, by whom her husband, Lew S. Perry, was employed and whose death while so employed resulted from accidental burns upon his body.

The principal question for determination is: Did the injury causing the death of Lew S. Perry arise out of and in the course of his employment by the defendant?

The compensation commissioner found in favor of the plaintiff and awarded her compensation in the sum of $15 a week for 350 weeks, the sum of $150 for burial benefits, $2.50 paid by plaintiff for hospital expenses, and ordered the defendant to pay to Dr. C. J. McMahon the sum of $10 for medical services rendered by him. Upon an appeal by the defendant to the district court for Nuckolls county, the award of the compensation commissioner was set aside and the plaintiff's action dismissed, and from this latter judgment plaintiff seeks relief by appeal to this court.

The admissions of the defendant and the evidence introduced upon the trial of the cause affirmatively establish that, on November 22, 1930, Lew S. Perry was in the employ of the defendant, Johnson Fruit Company, as a traveling salesman, covering a territory in southern Nebraska, approximating 800 miles; that, by agreement between the employer and the employee, the employee in making the territory on behalf of the employer furnished his own automobile; that as compensation for his services the employee received a monthly salary of $150 and in addition thereto was paid $35 a week for the use of his automobile and other expenses incurred by him; that the headquarters and home of the employee were at Superior, Nebraska; that upon the lot which the employee and his wife, the plaintiff herein, occupied as a home, there was a dwelling-house, a garage, a laundry building and a small tract of plowed ground; that at about the hour of 7 o'clock in the morning of said day the employee entered upon his duties in behalf

of his employer by leaving his home in Superior and in receiving orders for merchandise from customers on behalf of the employer; that returning to his home about an hour later the employee was informed by his wife that another customer of the employer had telephoned to the employee's home an order for some candy during his absence; that the employee had candy in his home belonging to the employer; that the employee went into a room in his home and brought forth the candy with which to fill the order; that the automobile the employee used in the employer's business was standing in the yard at the home of the employee; that the plaintiff saw the employee working on the automobile; that the employee asked plaintiff where he could get some tape to fix his car; that the employee went to the laundry and secured some tape and returned to the dwelling-house and was standing before a fire warming the tape when the plaintiff last saw him prior to the accident; the employee again went to the laundry and filled a pound Butter-Nut coffee can with naphtha gasoline and left; that about fifteen minutes later the employee was next seen with his clothing on fire lying on the ground at a point in the garden about fifty feet distant from the automobile; that the hood of the automobile was raised, the gas pipe was wound with new tape, the burs had been removed from the vacuum tank and the coffee can which had been filled with naphtha gasoline was on the ground about two feet distant from the automobile; the fire in the clothing of the employee was extinguished by others and the employee, with the plaintiff accompanying him, was rushed to a hospital in Superior, and upon reaching there the employee was in a semiconscious state, but soon revived, and upon reviving and within about fifteen minutes after the accident said, as testified to by the plaintiff, that the car exploded and he ran back to smother out the flames; and said, according to the testimony of Dr. Lathan, he was fixing the car and it exploded; and, according to the testimony of another, he said the car exploded and burned me. About three hours later the employee died from shock as a re-

sult of the burns received. There is no evidence in the record that the employee used the automobile for purposes other than those called for under his contract of employment with the defendant.

This court has said that the workmen's compensation act accepts as an inevitable condition of industry the happening of accidents; that its outstanding purpose is to shift from the employee to modern industry the burden of economic waste or loss, "arising out of and in the course of his employment," as a result of his injury or death; that the law is one of general interest, not only to the workman and his employer, but to the state as well, and being remedial in its nature it should be so construed that technical refinements of interpretation will not be permitted to defeat it.

So that the proceeding may not be burdensome to the workman, a simplified form of procedure is provided, for among other things section 48-157, Comp. St. 1929, states that, for the purpose of a hearing before him, the compensation commissioner shall adopt reasonable and proper rules to govern procedure, which procedure shall be as summary and simple as reasonably may be, and that he shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided, but may make the investigation in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the law; and section 48-137 provides for a simplified form of appeal from the award of the compensation commissioner to the district court of the county where the accident happened, where the cause shall be tried as one in equity, and if an appeal is had to the supreme court, the same shall be considered *de novo* and *final judgment entered determining all questions of law and fact in accordance with the provisions of this article.*

If the statements made by the injured employee upon his revival in the hospital a few minutes after the happening

of the accident relative to the cause of the accident were admissible in evidence as a part of the *res gestæ*—and under the authority of *Ridenour v. Lewis,* 121 Neb. 823, we hold that such statements were admissible—we have a complete word picture of all the material facts surrounding the accident upon which to base a conclusion as to whether or not the injuries resulting in the death of the employee arose out of and in the course of his employment by defendant, except the physical acts of the employee at the moment of the accident, and from the facts and circumstances proved, it may be fairly, reasonably and logically inferred that the employee was engaged in making some minor repairs and adjustments upon the automobile preparatory for its use on behalf of his employer.

Personal injuries arising out of and in the course of employment as defined by section 48-152, Comp. St. 1929, do not cover workmen, "except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen."

In *Coster v. Thompson Hotel Co.,* 102 Neb. 585, it is held: "A workman injured by collision with a street car while on the way to procure materials to be used in the work for which he was employed, *and the ordering and procuring of which materials was a common incident of his duties,* was injured 'by accident arising out of and in the course of employment.'" In the body of the opinion, Justice Letton says: "The next point argued by the defendant is that the death 'was not caused by accident arising out of and in the course of employment.' We cannot take this view. It was a part of Coster's duty to obtain materials. He was his own master as to his hours and place where he might engage in his master's service. When he ordered material by telephone from his house he was in the course of his employment, and when he was accidentally struck and killed upon the street while on the way to procure materials, the accident arose out of the employment.

Both the order for the goods and the going to procure them were strictly within his duties. The fact that he rode upon a motorcycle which he commonly used in performing errands and in going to and from his home, does not alter the case. He had the right to use such instrumentalities as were best fitted to perform his master's work."

In *Speas v. Boone County,* 119 Neb. 58, paragraph one of the syllabus reads: "Generally it may be said that an injury 'arises out of' an employment when there is a reasonable casual connection between the conditions under which the work is, in all the circumstances, required to be performed and the injury received while the employee is thus engaged; and that the injury is received 'in the course of' the employment when, at the time the injury is received, the workman is engaged at the work he is employed to perform *or in some duty incidental to that work.* If incidental, it must be incidental to the main character of the business on which the employee was engaged for the employer. It cannot occur independent of the relation of master and servant."

In *Derleth v. Roach & Seeber Co.,* 227 Mich. 258, cited with approval in *Speas v. Boone County, supra,* the employee was a traveling salesman. He furnished his own automobile in making trips for his employer and the employer paid the employee 10 cents a mile for its use. On December 20, 1922, the employee was to make a country trip in his automobile on behalf of the employer. He was fearful that his batteries were frozen and went home the afternoon of the 19th to try them out. It was admitted that he was found in the garage at his home with the motor of his automobile running, and that he died from carbon monoxide gas which was generated by the motor. The defense to the claim of the widow for compensation was that the accident did not arise out of and in the course of the employment of deceased. Held, compensable as arising out of and in the course of employment.

In *Leilich v. Chevrolet Motor Co.*, 40 S. W. (2d) 601, the supreme court of Missouri held that the death of a traveling salesman from carbon monoxide gas poisoning while changing a tire on the employer's automobile in a garage in the rear of the salesman's home arose out of and in the course of his employment. The facts in the Missouri case were that the deceased was employed by the Chevrolet Motor Company in the capacity of traveling sales representative. The employer furnished the employee with an automobile and paid all expenses incident to the operation and maintenance of the same in the prosecution of his work. At times the employee kept the car in a garage he rented in the rear of his home. On the date of the accident resulting in the death of the employee he arose as usual to go to work, dressed in his regular sales clothes, bid his family good bye for the day and went to the garage in the rear of his home for the automobile. A little later he returned saying he had a puncture and would have to change a tire, and to do so said he would change his clothes. He changed his clothes and returned to the garage. An hour later he was found dead on the floor of the closed garage, one wheel of the car was jacked up, and the bolts holding the flat tire and rim attached to that wheel were off and were lying on the running board, the windows and doors of the garage were all shut and the engine was running and the garage filled with gas and smoke. The doctor testified that death was caused by carbon monoxide poisoning. It was held that the death of the employee arose out of and in the course of his employment. In the body of the opinion it is said:

"Leilich was not employed to change tires, but to sell automobiles. But clearly the changing of tires in the circumstances shown by the evidence was *a task incident to his employment as salesman.* Out of the performance of that task the accident arose which caused his death. This being obviously true, why split hairs in trying to trace a 'casual connection' between his employment and his death.

"There can be no question but that the employee in this

case at the time of the happening of the accident which caused his death was engaged in, or about, premises where his services required his presence as a part of such services, within the meaning of section 7 of the act, now section 3305, R.S. 1929."

From the facts and circumstances disclosed by the record in this case, and the principles announced in *Speas v. Boone County, supra,* we find that, at the time of the accident by which the employee met with the injury resulting in his death, he was engaged in making minor repairs and adjustments upon the automobile used by him in the employer's business, and on premises where his services required his presence as a part of his service as such employee at the time of the injury, and during the hours of service as such employee; and that making of such repairs and adjustments was incidental to, and his injuries arose out of and in the course of, his employment by the defendant, within the meaning of sections 48-101 and 48-152, Comp. St. 1929, and that by reason of his death the plaintiff, his dependent, became entitled to compensation of $15 a week for 350 weeks, dating from the 22d day of November, 1930.

Appellant is also entitled to $150 for expenses attending the burial of the deceased employee and an attorney's fee of $200, for services in this court.

The judgment of the district court is reversed and cause remanded, with directions to enter judgment for the appellant in conformity with this opinion.

REVERSED.

ARNDT-SNYDER MOTOR COMPANY, APPELLEE, V. JESSE W. COULTER: GRANT LOTHROP, APPELLANT.

FILED JULY 12, 1932. No. 28273.

APPEAL from the district court for Washington county: CHARLES E. FOSTER, JUDGE. *Reversed and dismissed.*

Grant Lothrop, pro se.

O'Hanlon & O'Hanlon, contra.

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

RYAN, District Judge.

This is an appeal from a judgment rendered in a replevin suit. The replevin suit was appealed to this court and the judgment therein reversed in *Jackson v. Arndt-Snyder Motor Co.*, 122 Neb. 276.

In connection with this appeal there is a motion to reverse the judgment and dismiss the action. Inasmuch as the judgment in the replevin action has been reversed, the motion to reverse the judgment in this case and dismiss the action should be sustained. It would serve no useful purpose to write an opinion in the case.

REVERSED AND DISMISSED.

WILLIAM G. BARBER, APPELLANT, V. CHARLES W. BRYAN, GOVERNOR, ET AL., APPELLEES.

FILED JULY 19, 1932. No. 28353.

1. **Banks and Banking**: INSOLVENCY: REORGANIZATION. Under the Nebraska statute, an insolvent state bank closed by and in possession of the department of trade and commerce may be reorganized, recapitalized, restored to solvency and reopened.
2. ———: ———: ———: CONTINUITY OF CORPORATION. In the reorganizing and reopening of an insolvent state bank pursuant to statute, the change in capitalization, officers and management does not create a new or dissolve the old corporation.
3. ———: ———: ———: ———. A reorganized insolvent state bank operates under the original charter with the identity of the corporation unchanged.
4. ———: ———: ———: ———. An insolvent state banking corporation survives for the purpose of liquidation or reorganization.
5. ———: ———: ———: ———. Under the Nebraska statute, reorganization, recapitalization and reopening of an insolvent state bank in possession of the department of trade and commerce do not result in the dissolution of the old bank by liquidation or in the creation of a new bank.
6. ———: ———: REORGANIZATION CONTRACT: GUARANTY FUND ASSESSMENTS. Reorganization contract *held* to obligate the re-

organized bank to pay assessments levied in favor of the bank guaranty and final settlement funds before reorganization and to require a reserve fund created from old assets retained by the reorganized bank to meet the obligation, this requirement being a prerequisite to the reopening thereof.

7. ———: ———: LIABILITY FOR GUARANTY FUND ASSESSMENTS. An insolvent state bank openly receiving deposits and otherwise transacting a general banking business *held* liable for assessments levied during that period in favor of the bank guaranty and final settlement funds.

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

E. C. Finlay and *Robert M. Cordill*, for appellant.

C. A. Sorensen, Attorney General, and *L. Ross Newkirk, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

ROSE, J.

This is a controversy over unpaid assessments aggregating $7,215.06, which the department of trade and commerce levied at different times in favor of the bank guaranty and final settlement funds against the Bank of Florence while it was conducting a commercial banking business at Omaha under a charter from the state.

When insolvent May 9, 1930, the bank was closed by the department of trade and commerce after the assessments were levied, but it was never in charge of a receiver for purposes of liquidation. By virtue of a contract between creditors and reorganizers for the reopening of the bank when restored to solvency, it was regularly reopened for general banking June 21, 1930, under new management with the approval of the department of trade and commerce. As indemnity against the unpaid guaranty fund assessments, the reorganized bank, as a prerequisite to reopening, was required to enter and maintain on its books a reserve of $7,215.06, a fund created from assets in possession of the bank when reorganized.

Under the reorganization agreement the depositors and unsecured creditors devoted 60 per cent. of their respective claims to the purchasing of slow, doubtful and worthless bank assets which were assigned or transferred to trustees for the benefit of the purchasers. The trustees were charged with the duty of liquidating the purchased assets and of distributing the net proceeds to the beneficiaries of the trust. The remainder of the claims for deposits and unsecured credits, or 40 per cent., were held by depositors and unsecured creditors as unpaid obligations of the reorganized bank. To the extent of 60 per cent. of each deposit and of each unsecured claim a trust certificate of the bank was issued to each depositor and to each unsecured creditor. William G. Barber, plaintiff, received a trust certificate for $935.65 and brought suit for himself and for all other certificate holders.

The Bank of Florence and the officers who control the department of trade and commerce and who are custodians of the bank guaranty and final settlement funds are defendants.

Plaintiff prayed for a decree that the reserve fund of $7,215.06 in possession of the reorganized bank does not belong to the state guaranty fund or to the final settlement fund; that neither the bank nor plaintiff nor any other creditor became liable for the assessments aggregating $7,215.06; that the reserve fund and the assets comprising it belong to plaintiff and other depositors and creditors who are certificate holders and beneficiaries of the trust in their favor; that the officers in control of the department of trade and commerce be enjoined from collecting the assessments.

The state officers sued by plaintiff did not challenge the petition by answer. The reorganized Bank of Florence, defendant, denied liability to the bank guaranty and final settlement funds for the assessments, but prayed, in the event of a judicial decision to the contrary, for permission to pay the assessments with the reserve fund or assets retained in its possession for that purpose.

The district court heard the controversy on the pleadings, the reorganization contract, the facts stipulated by the parties and the arguments of counsel. From a judgment dismissing plaintiff's petition and declaring the assessments valid obligations of the reorganized bank, which the latter is entitled to discharge with assets retained in its possession, plaintiff appealed.

In presenting assignments of error, plaintiff argued that reorganization pursuant to statute is a step in the liquidation of an insolvent bank and does not make the new bank liable for obligations of the old; that the officers of the department of trade and commerce permitted the bank to remain open with knowledge of its insolvency long before the assessments were levied, without any entry of the statutory reserve on the bank books, thus creating an estoppel to enforce collections; that the assessments were void because they were illegally assessed against an insolvent bank, solvent banks only being subject to such burdens; that in exacting payment of assessments from funds of depositors, there was a futile departure from the sole statutory method of making collections from solvent banks; that the agencies of the state disregarded a reorganization agreement protecting the right of depositors to legal set-offs; that the statutory right of depositors to the first lien on assets is superior to claims of the guaranty and final settlement funds for assessments; that the reorganized bank did not obligate itself to pay the assessments; that there is a mutual mistake to be corrected, if the reorganization contract made provision for payment of assessments a prerequisite to the opening of the bank; that enforcement of the assessments would be an improper exercise of police power, a violation of statute, a prohibited class distinction, a taking of private property without due process of law and without just compensation, a denial of the equal protection of the laws, a confiscation of property—all in violation of constitutional inhibitions.

These propositions were argued by plaintiff at great length in his brief and the principal questions were also presented orally at the bar, but all may be determined by the solution of a few questions narrowed to the controlling factors.

The position that the insolvent bank was liquidated and a new bank created without incurring obligations of the old is untenable. Before and after the reorganization there was only one corporation. The change in capitalization, officers and management did not create a new corporation. The right to conduct a banking business depended on a charter from the state. There was only one charter and the reorganized bank operated under it. There was no other foundation for the reorganization or operation of a bank. The name was not changed. The identity of the corporation remained the same. The insolvent bank survived for liquidation or reorganization. The power to wind up its affairs and thus terminate its existence was not exercised. All interested persons united pursuant to statute in a reorganization plan and contract approved by the department of trade and commerce, the administrative body having supervisory control of state banks. The statute authorizing liquidation of insolvent banks contains the following provisions:

"If the secretary of the department of trade and commerce with a view of restoring the solvency of any bank of which the department has taken charge pursuant to law shall approve a reorganization plan entered into between depositors and unsecured creditors representing eighty-five per cent. or more of the total amount of deposits and unsecured claims of such bank on the one hand and the bank or reorganizers thereof on the other, then and in such case all other depositors and unsecured creditors shall be held to be subject to such agreement to the same extent and with the same effect as if they had joined in the execution thereof, and their claims shall be treated in all respects as if they had joined in the execution of such articles of reorganization, in the event of

restoration of such bank to solvency and the reopening of the same for business." Comp. St. 1929, sec. 8-181.

Reorganization and restoration to solvency were thus authorized. Liquidation and dissolution of the insolvent bank were avoided. The reorganizers and creditors pursued the statutory course and their action was regularly approved and the bank reopened. The executed contract recites in the preamble that "the undersigned depositors and unsecured creditors," of whom plaintiff is one, "believe it is to their advantage to have said bank reopened without the appointment of a receiver and liquidation as provided by law." The parties therefore understood reorganization was not liquidation in the sense that dissolution of the insolvent corporation would be effected. The reorganizers agreed to charge off the capital stock and other items aggregating $24,877.31 and pay into the bank $25,000 for capital stock and provide a surplus of $5,000. As narrated in the opening statement of the case herein, the creditors by contract devoted 60 per cent. of their respective claims against the insolvent bank to the purchasing of slow, doubtful and worthless assets to be held by trustees for liquidation, and retained the remainder or 40 per cent. as unpaid obligations of the reorganized bank. Among other provisions the reorganization contract contains the following:

"It is further agreed that the said reorganized bank shall for a period of twelve months from the date of reopening of the said bank own and maintain a first prior lien on all of the assets for the purpose of securing the notes accepted by the subscribers of the new capital as assets in the reorganized bank, and to indemnify the reorganized bank against possible concealed liabilities; and to cover special guaranty fund assessments levied and now in litigation of about $7,215.06, and also to cover taxes and unsecured bills of about $1,500, provided however that when, under the said lien, all items listed above shall have been paid or satisfied, the excess or balance of assets remaining at the end of the said twelve months

shall be fully surrendered to the trustee or trustees appointed by the depositors' committee, representing the original depositors, and the said lien right be thereafter waived and surrendered. It is expressly understood that the depositors in agreeing to the above reductions of their deposits reserve the right to all legal offsets to the same extent as if said reductions had not been made."

In addition to the contractual terms quoted, the stipulation of facts shows that a bank-book entry of the reserve fund created from bank assets retained by the reorganized bank was a prerequisite to the opening thereof. The true import of the contract as a whole and of the stipulation of facts is that the reorganized bank assumed liability for the assessments and that the depositors and unsecured creditors agreed to a lien on retained assets for the creation of the reserve fund.

The validity of the assessments was implied, if not affirmatively shown, by mutual agreement of all parties to the reorganization. The assessments were levied before the bank was temporarily closed. They were made when it was openly receiving deposits and otherwise transacting a general banking business and when its stockholders and officers were free to restore solvency without any action of creditors or of the department of trade and commerce. During that period the bank should not be considered solvent for the purpose of receiving deposits and insolvent for the purpose of assessments in favor of the bank guaranty and final settlement funds. The validity of the assessments was in litigation and consequently they were not enforced as levied, as shown by the stipulation of facts herein and by the opinions in *Abie State Bank v. Weaver,* 119 Neb. 153; 282 U. S. 765. Pending litigation the bank books failed to show the assessments as charges against the Bank of Florence, but the proper entry was made after the litigation ended. Viewed from any standpoint, there was nothing to prevent the parties to the reorganization contract from making payment of the assessments a condition of reopening

the bank when restored to solvency. When the *Abie* case was decided, the writer hereof was of the opinion that the entire bank guaranty law, through disastrous changes in economic conditions, had lost its character as a public measure and had become a private menace to solvent banks without any protection to their depositors, and then caused confiscation of private property of solvent banks to the extent of the assessments for the sole benefit of private depositors in insolvent banks that had been closed for liquidation. The dissent is noted in *Abie State Bank v. Weaver*, 119 Neb. 160. The majority of the state supreme court and the supreme court of the United States, however, did not disturb the assessments against the Bank of Florence. Provision for payment was made in the reorganization contract.

The question relating to the priority of claims or liens does not arise in the present case, because the insolvent bank was reorganized and opened after the creditors and the reorganizers adjusted claims and liens by a contract authorized by law and approved by the department of trade and commerce.

The facts and conditions with which the contracting parties dealt in entering into the reorganization plan were known in advance and the evidence does not prove a mutual mistake entitling plaintiff to relief.

A critical examination of the statute, the pleadings, the reorganization plan, the contract, the stipulation of facts, the approval of the department of trade and commerce and the argument and citations of counsel leads to the conclusion that the pleas interposed by plaintiff for relief were defeated by the contract into which all the interested persons entered with full knowledge of the pertinent facts.

AFFIRMED.

LEDRO CONZUELLO, APPELLEE, V. OTTO L. TEAGUE ET AL., APPELLANTS.

FILED JULY 19, 1932. No. 28419.

Master and Servant: INJURY TO EMPLOYEE: LIABILITY. Evidence examined, discussed in the opinion, and *held*, that the plaintiff sustained injuries during the course of his employment entitling him to compensation within the provisions of the workmen's compensation act.

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

Crossman, Munger & Barton and *Story & Thomas*, for appellants.

Troyer, Pardee & Felton, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

DEAN, J.

This action was commenced by Ledro Conzuello, pursuant to the provisions of the workmen's compensation act, against the defendants Otto L. Teague and Lewis L. Bowen, who are engaged in business under the firm name of Atlas Beverage Company, to recover compensation for injuries alleged to have been sustained by him in the course of his employment by the defendants as a janitor and truck driver. The injuries complained of were sustained on or about February 15, 1931, when the truck the plaintiff was driving collided with an automobile at the intersection of Eighteenth and Webster streets in Omaha while the plaintiff was returning the truck to the garage after having made a delivery of a product of his employers.

Upon appeal to the district court the order of the compensation commissioner was affirmed and the court thereupon decreed that the plaintiff recover $10 a week for 112½ weeks for 50 per cent. total permanent disability of the use of his right arm; $10 a week for five weeks

for temporary total disability; medical expenses; and $150 for attorney's fees. From the judgment so rendered the defendants have appealed, and the plaintiff has filed a cross-appeal.

The defendants' argument is that the plaintiff's injuries were not sustained in the course of his employment, but were sustained while he was driving the truck for his own convenience and pleasure. The record discloses that on February 14 the plaintiff had made certain deliveries during the day and that, about midnight, the truck was returned to the garage by the defendant and another employee. From thence a garage employee drove the plaintiff in the truck to the home of a man named Peterson, but the truck was returned directly to the garage. The plaintiff testified that at the Peterson home he overheard a man say he was going to the home of Francis Crawford, a policeman, and that this statement reminded him, the plaintiff, that Crawford had requested him to deliver a case of beer that evening. The plaintiff then went to the garage and drove in the truck to the Crawford home. It appears that the truck was not always unloaded when it was stored for the night, but that, for convenience, any remaining cases of beer were left thereon. Upon arrival at the Crawford home, the plaintiff delivered a case of beer and he was invited into the home and remained there with others until about 3 o'clock in the morning. He testifed that he then took a direct route to return the truck to the garage, and that it was on the return trip that the truck and an automobile collided and he sustained the injuries of which complaint is made herein.

One of the plaintiff's employers testified that Crawford was a regular customer and that he had credit with the company, but this employer testified that he knew nothing of the order for beer that Crawford left with the plaintiff. But it does appear that the drivers of the trucks carried order books and accepted orders for beer when they were out making deliveries. And it also appears that orders were often delivered in the nighttime, and

that, for convenience, the office of the company remained open until 11 o'clock every night. This witness also testified that, while the plaintiff was not a regular driver, he had on the day in question here taken the place of one of the regular drivers who was discharged, and that on other occasions the plaintiff had made deliveries of special orders.

Crawford, at whose home the beer was delivered, testified he returned an empty beer case to the Atlas Beverage Company on the morning of February 14, and that he saw the plaintiff in a room at the rear of the company's office and requested him to "drop me off another case." No written order was left, however, nor did Crawford see any other employee at the time. Crawford testified that February 14 was his birthday, and that a party was in progress when the plaintiff delivered the beer, and that they were eating and his wife invited the plaintiff to come in. It appears that Crawford did not pay for the beer that night, but he testified that he subsequently paid another of the company's drivers.

From a review of the facts it appears to us that the plaintiff's injuries were incurred in the course of his employment by the defendants and entitled him to compensation within the meaning of the workmen's compensation act. It has been stated that whether an injury is incident to or connected with a particular business, or arises out of the course of employment, "depends upon the peculiar circumstances of each case." *Railway Express Agency v. Lewis,* 156 Va. 800, 76 A. L. R. 350. While it is denied that the employers had any knowledge of the order for beer and the delivery thereof, it is admitted that the drivers of the trucks had authority and did in fact take orders away from the office and while they were making deliveries. And it is not improbable that Crawford, to whom the beer in question was delivered, stepped into a room at the rear of the office, as he testified, and spoke to Conzuello requesting him to deliver the beer that night. The delivery of the beer for his employer was the

important and determining factor causing the plaintiff to make the trip to Crawford's home that night, and the invitation to the plaintiff to partake of their hospitality was merely incident thereto. And the plaintiff was on his way to store the truck when the collision occurred and he was therefore still charged with a task incident to his employment. See *Fleischmann Co. v. Marshall,* 149 Va. 254; *Meyer v. Royalton Oil Co.,* 167 Minn. 515; *Royal Indemnity Co. v. Hogan,* 4 S. W. (2d) (Tex. Civ. App.) 93. We decline to disturb the finding made by the compensation commissioner and the trial court in the present case.

The defendants attempted to introduce evidence to show that the plaintiff was incarcerated in jail part of the time following the accident and during the period for which he seeks compensation, but objections to the admission thereof were properly sustained by the court. In view of the fact that the plaintiff's disability remains whether he was confined in jail or in a hospital, we can find no error in the court's ruling.

In respect of the injuries incurred by the plaintiff, it disclosed that his right collar bone became loosened and the movement of his arm is since restricted. There is evidence that the plaintiff, in his present condition, has a 75 per cent. total disability of the use of his right arm, and one physician testified that the plaintiff could not lift any considerable weight above his head. But there is also evidence that an operation could be performed to bring the outer end of the clavicle in the plaintiff's arm to its normal position, there to be held in place until it had united with the shoulder blade. The normal expectant disability following such an operation would be about two months, the success thereof depending largely on the knitting of the bones. According to two physicians, the operation would reduce the disability from 25 per cent. to 50 per cent. In view of the evidence of the plaintiff's physician, the basis of the salary received by the plaintiff at the time of the accident, and the fact that the petition contains a plea for the allowance of compensation for

33 1/3 per cent. permanent partial disability of the use of his right arm, merit does not appear in the cross-appeal filed by the plaintiff for an increase from 50 per cent. to 75 per cent. total disability. The judgment is affirmed, with an allowance of $100 as attorney's fees for services in this court.

AFFIRMED.

BLACKLEDGE, District Judge, dissents.

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. CLARENCE G. BLISS, RECEIVER, APPELLANT.

FILED JULY 19, 1932. No. 28031.

1. Mortgages: FORECLOSURE: VENUE. The only court possessing jurisdiction to foreclose a mortgage on realty is the district court for the county in which the mortgaged realty, or some part thereof, is situated.
2. ———: ———: RECEIVER. In an action for foreclosure of a mortgage on realty, the mortgagee, upon a showing that the mortgaged premises are probably insufficient to discharge the mortgage debt, is entitled to the appointment of a receiver for the premises.
3. ———: ———: ———. A mortgagee, in an action to foreclose his mortgage on realty, can have a receiver appointed for the mortgaged premises only in the foreclosure action and by the court in which such action is pending.
4. ———: ———: ———. A mortgagee of realty can only reach the rents and profits of mortgaged premises by the appointment of a receiver in the foreclosure action.
5. ———: ———: ———. It is a general rule that, where all the property of an insolvent debtor is in possession of a receiver, duly appointed, another court of concurrent jurisdiction will not, in a subsequent action, interfere with such possession. This rule is inapplicable where one holds a mortgage on a part of such property which, by statute, he is entitled to foreclose and to have a receiver appointed in the foreclosure action, and where such relief may be had only in another court. In such case, the mortgagee is entitled to the appointment of a receiver in the foreclosure action, regardless of the prior general receivership.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Reversed.*

F. C. Radke and *Moyer & Moyer*, for appellant.

Quintard Joyner, Williams & Williams and *Raymond J. Gibbons, contra.*

Heard before GOSS, C. J., DEAN, GOOD, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

GOOD, J.

This cause is before the court on motion for rehearing, orally argued, and will be treated as though a rehearing had been formally allowed. The former opinion is reported in 122 Neb. 561, reference to which is made for a statement of the facts.

Grave doubts have arisen as to the soundness of the principles announced in our former opinion, as well as those announced in *Wells v. Farmers State Bank*, 121 Neb. 462, and *Wells v. Farmers State Bank*, 121 Neb. 466. For that reason it is deemed proper to reexamine the questions there considered.

Foreclosure of a real estate mortgage can only be had in the district court for the county in which the mortgaged realty, or some part thereof, is situated. Comp. St. 1929, sec. 20-401. The district court only is vested with jurisdiction to decree foreclosure of a real estate mortgage, and only that court, sitting for the county where the mortgaged realty, or some part thereof, is situate.

Where title to mortgaged real estate is in an insolvent state bank which is under receivership, the district court for the county appointing the bank receiver is powerless to entertain a proceeding to foreclose the mortgage, unless the mortgaged premises, or some part thereof, is situate in that county, and such court, while having general jurisdiction of the bank receivership, is powerless to appoint a receiver for the mortgaged premises in a foreclosure proceeding pending in another county.

Section 20-1081, Comp. St. 1929, provides for the appointment of a receiver "In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt." The provision is for the receiver to be appointed in the foreclosure action, not in some other action or in some other court.

It is a well-recognized rule that the appointment of a receiver in a foreclosure action is ancillary to the main action. The receiver is appointed for the purpose only of conserving the mortgaged property and applying the rents and profits of the mortgaged premises to the satisfaction of the debt secured by the mortgage. While the mortgagee of the mortgaged premises is entitled to the appointment of a receiver for such premises under the conditions named in section 20-401, Comp. St. 1929, it has been held that rents and profits of mortgaged premises cannot be diverted from the mortgagor or tenant lawfully in possession, except by the appointment of a receiver, pursuant to the provisions of said section 20-401. *Huston v. Canfield,* 57 Neb. 345. The holding in that case is cited with approval in *Sanford v. Anderson,* 69 Neb. 249, 252, and in *City of Lincoln v. Lincoln Street R. Co.,* 75 Neb. 523, 527.

In *Armstrong v. Mayer,* 60 Neb. 423, it is held: "Where a right is given by statute and a specific remedy is provided designating the tribunal for the enforcement thereof, the jurisdiction of such tribunal is exclusive unless the law otherwise provides."

It is a general rule that, where property is in the actual or constructive custody of a court, another court will not, in a subsequent action, interfere with such custody. Ordinarily, the one first acquiring jurisdiction and custody of the property will retain it to adjudicate all rights with respect thereto; but such rule has its limitations and exceptions. Where a court has jurisdiction and custody of property, and one, not a party to the proceeding in that

court, has a superior right in or to such property which the court is powerless to adjudicate or protect, such party, to enforce his right, may apply to another court which has jurisdiction and power. A common illustration of such a situation is presented when an administrator or executor, duly appointed, has taken possession of the decedent's real estate which is subject to a mortgage. In such case the county court appoints the administrator or executor and has exclusive original jurisdiction in the administration of decedent's estate, but the county court is powerless to grant foreclosure of a mortgage on real estate or to entertain a proceeding therefor. When such a situation arises, the mortgagee may bring an action in the proper district court for the foreclosure of his mortgage. Notwithstanding the real estate may be said to be in the custody and control of the county court, that custody and control must yield where the mortgagee has a right superior to that of the administrator or executor. In such case the district court, at the suit of the mortgagee, necessarily interferes and takes from the county court the jurisdiction and custody of the mortgaged premises to the extent that it may be necessary to satisfy the mortgage. If there be a surplus after satisfaction of the mortgage and costs in the foreclosure action, such surplus, of course, would revert to, and should be placed in the custody and control of, the administrator or executor, and should be subject to the order of and disposition by the county court.

It is true that district courts for the various counties and districts have like jurisdiction, but, as respects certain classes of cases, only the district court for a given county is possessed of jurisdiction. One of these is for the foreclosure of a real estate mortgage. The district court for any county, other than that in which the mortgaged real estate, or some part thereof, is situate, has no jurisdiction to entertain an action for the foreclosure of the mortgage. In this sense, the jurisdiction of the various courts is not concurrent. The district court appointing a receiver for an insolvent bank, which holds legal

title to realty in another county, possesses no jurisdiction to entertain a proceeding for foreclosure of the mortgage. That the mortgagee of realty, when default has been made in the conditions of the mortgage, is entitled to a foreclosure thereof cannot be questioned. He can have foreclosure only in the county where the realty, or some part thereof, is situated.

In the instant case, the affairs of the insolvent Newman Grove State Bank were in process of liquidation under a receiver, appointed by the district court for Madison county in the ninth judicial district. The mortgaged land in controversy is situate in Boone county in the sixth judicial district. The legal title to this land was in the insolvent bank, and its receiver was in constructive possession thereof. Plaintiff was the owner and holder of a mortgage on said land, executed by the bank's grantor. There had been default in the conditions of the mortgage. Plaintiff exercised the right given it by statute to institute a proceeding to foreclose the mortgage in the district court for Boone county, that being the only court that had jurisdiction to grant such relief. The receiver was made a party, filed an answer, and filed a request for a stay of sale under the decree of foreclosure. The receiver recognized that that court had jurisdiction to hear and determine the foreclosure action. No one questions the right of the plaintiff to a foreclosure of its mortgage, nor that such foreclosure action must be prosecuted in the county where the realty is situated.

The pivotal question is: May the court, where the foreclosure action is pending, appoint a receiver for the mortgaged premises, when they are in the constructive possession of a receiver, previously appointed by the district court for another county in a proceeding for liquidation of the affairs of an insolvent state bank?

On behalf of the receiver of the insolvent bank, it is vigorously insisted that the mortgaged realty is *in gremio legis*, and that the district court for Boone county is powerless to interfere with the custody of the bank re-

ceiver. Many cases are cited and relied upon to sustain this contention. Upon a close examination, many of them are found not strictly in point. Most of them relate to applications for the appointment of a receiver when the property was already in the custody of a receiver, appointed by another court, and where the court, first appointing a receiver, had jurisdiction to grant full relief to the party seeking appointment of a second receiver.

The case most strongly relied upon is *Hanson v. Sogn*, 50 S. Dak. 44. In the course of the opinion in that case, in effect, it is said that, where a state bank is insolvent and in the hands of the superintendent of banks, no receiver may be appointed in an action to foreclose a mortgage on real estate, the title to which is held by the insolvent bank. It is further said (p. 47): "We can see no reason why a mortgagee, who, under the provisions of subdivision 2 of section 2475, Rev. Code 1919, would in an ordinary case be entitled to relief through the appointment of a receiver, may not get the same relief by application to the court in the insolvency proceedings. If he can, and we so hold, then the machinery provided for securing relief under that section must give way to the machinery provided for winding up the affairs of an insolvent bank." It will be observed that the court denied receivership in the foreclosure action, upon the ground that the mortgagee could obtain complete relief in the bank insolvency proceedings.

In the case of *Terrell v. Cheatham*, 200 Ky. 667, where the trial court, at the instance of general creditors of a debtor, had appointed a receiver or trustee to take charge of all the property of the debtor, and thereafter a mortgagee of a part of the property commenced foreclosure proceedings and asked for the appointment of a receiver for the particular property, the court said (p. 677): "We cannot see how such action by the court in one case can interfere with its power to appoint a receiver in another case to take charge of mortgaged property for the benefit of creditors having liens thereon, and as is expressly provided may be done under the provisions of section 299

of the Code. In fact, we are unable to see any reason why the court might not do this even where the two cases had been consolidated and heard together, or even if there had never been but one case in which the whole matter here involved in the two cases was being litigated. The two statutes are not repugnant to each other, and there could be no possible conflict even though in one case a general trustee was appointed under section 1910 of the statutes, and a special receiver was appointed under section 299 of the Code." In that case both proceedings appear to have been in the same court.

In *Leigh v. Green*, 62 Neb. 344, it is held: "The holder of a tax lien may bring an action for the foreclosure in a state court and prosecute the same to a decree and sale of the land, notwithstanding the pendency of an action between other parties, in the federal courts, wherein such lands have been levied upon under an order of attachment." In that case the rule is recognized that, where two courts have concurrent jurisdiction, that which first takes cognizance of the case has the right to retain it to the exclusion of the other. The reasons for the rule are stated with precision. In the course of the opinion it is said (p. 355): "A study of the cases cited shows that in each case the property was in the actual or constructive possession of the court whose jurisdiction was invaded. * * * In none of these cases was the question of the effect of a foreclosure of a mortgage, or other lien on real estate, and the sale thereof in a state court, pending an action between other parties in a federal court, wherein the same property had been levied upon under an order of attachment directly raised, nor was the determination of that question necessary to a decision in any of said cases. Hence, whatever expressions they may contain on that point are dicta." The opinion also cites with approval *National Foundry & Pipe Works v. Oconto City Water Supply Co.*, 105 Wis. 48, wherein that court held that the commencement of a suit in the federal court, to enforce a mechanic's lien or a materialman's lien on property, does not preclude the foreclosure of a mortgage on

the same property in the state court; that where there is no possession, other than constructive, a suit on a different cause of action may be commenced in the state court and carried to judgment and actual possession of the property obtained under it, notwithstanding the pendency of the action in the federal court. To the same effect is *Compton v. Jesup,* 68 Fed. 263.

In *Southern Hardware & Supply Co. v. Lester,* 166 Ala. 86, it is held: "Where a court which first takes jurisdiction of the cause has adequate jurisdiction to grant relief to which the parties are entitled, and the court's jurisdiction and plaintiff's right to proceed therein once attaches, it cannot be arrested or taken away by proceedings in any other court; this rule does not apply if the power of the court is too limited to afford relief to which the party is entitled."

In 15 C. J. 1140, it is said: "Where mortgaged personalty is levied on under an attachment against the mortgagor, the mortgagee may maintain an action in another court to protect his rights as against the attaching creditors, and the court in which such action is prosecuted may appoint a receiver to administer the property."

In the instant case, the statute gives to the plaintiff a right to the foreclosure of its mortgage upon default in the conditions thereof. The statute further prescribes the court in which such action must be brought, and also provides that in such action, if the court finds the mortgaged property insufficient to pay the mortgage debt, the mortgagee is entitled to the appointment of a receiver, to take charge of the property and receive the rents and profits. As above noted, no other court than the one in which the foreclosure action is pending could appoint a receiver in the foreclosure action. As heretofore pointed out, the court in which the insolvency proceedings were pending did not have adequate power or jurisdiction to grant to plaintiff the relief to which it was entitled by virtue of the statute. It must be further remembered that, prior to the appointment of the bank receiver, the plaintiff would have been entitled, without question, to the appointment

of a receiver in the foreclosure proceeding. When that receiver was appointed, he stepped into the shoes of the bank. He took possession of the land, subject to the mortgage and subject to the rights of the mortgagee. His rights were junior and inferior to those of the mortgagee. To give effect to the technical rule invoked by the receiver of the bank would be to deprive plaintiff of the rights guaranteed it by statute. This the court cannot do.

We are forced to the conclusion that, under the facts disclosed, plaintiff was entitled to the appointment of a receiver in the foreclosure action. The trial court did not appoint a receiver, but attempted to enforce plaintiff's rights in a way not authorized, namely, by directing the assistant to the receiver of the insolvent bank to collect and hold the rents, subject to the further order of the court appointing the receiver in the insolvency proceeding. The order entered by the trial court was erroneous. It should have appointed a receiver for the mortgaged premises.

Because of the conclusion now reached, our former opinion in this case and judgment entered pursuant thereto are vacated, and the opinions in *Wells v. Farmers State Bank*, 121 Neb. 462, and *Wells v. Farmers State Bank*, 121 Neb. 466, in so far as they are in conflict with the views herein expressed, are overruled.

The judgment and order of the district court is reversed and the cause remanded to that court for further action consistent with this opinion.

REVERSED.

BEGLEY, District Judge, dissents.

ROSE, J., dissenting.

I did not hear the oral argument on the motion for a rehearing, but I deem it my duty to make the record express my views of the law pursuant to the supreme court rule which permits a motion for a rehearing to be considered *ex parte*. I am prompted to pursue this course because the opinion of the majority, as I view it, departs from a sound principle of law and erroneously sets aside

the former decision which, when rendered, conformed to my convictions and which upon reexamination I consider to be right. On grounds that appear to me to be indefensible, the opinion of the majority overrules former opinions that justify themselves on reason and authority.

Before any court appointed a receiver in a suit to foreclose the mortgage, a court of competent jurisdiction appointed a receiver to take charge of the assets of the insolvent bank. One of those assets was the legal title to the mortgaged land, including the right to redeem it from liens and to collect the rents and profits. By a valid judgment with which there was no conflict, the bank receiver was required to collect the rents and profits of the mortgaged land. In the foreclosure suit before a court of equal rank in another jurisdiction, the appointment of a receiver to take charge of the rents and profits would be a judgment modifying the judgment of the court that first acquired jurisdiction and taking from an officer thereof the right to control property lawfully in his custody. The law does not create such a conflict of jurisdiction between district courts, and in my opinion a rule that authorizes such a conflict is fundamentally wrong and will be far-reaching in evil tendencies.

If the statute permitting the appointment of a receiver in a suit to foreclose a mortgage authorizes a conflict of jurisdiction between district courts, it is inapplicable to a case like the present. The jurisdiction of a court to appoint a receiver for an insolvent banking corporation comes from the Constitution—a higher source than an act of the legislature. *State v. State Bank of Minatare, ante,* p. 109. The court appointing a receiver for mortgaged land does not have jurisdiction superior to that of a court appointing a bank receiver having control of the same property under the earlier judgment. A receivership in a foreclosure suit is not necessarily required by legislation or rules of equity. The statute provides that a receiver "may" be appointed. The provision is not mandatory. The court acquiring jurisdiction in a foreclosure suit should decline to appoint a receiver to collect rents

and profits, where a bank receiver acting under a prior valid judgment is already performing that service. This would not prevent a foreclosure or prevent mortgagee from applying to the court having jurisdiction over the bank receiver for the protection of any right to rents and profits. A receivership in a foreclosure suit is an incident to the remedy for collecting a debt. The law puts a mortgagee to some inconvenience in collecting a debt by a resort to the courts, but this is a burden that falls on creditors generally. There is no exigency in foreclosure to justify a conflict of jurisdiction between district courts. It seems to me the majority opinion will not stand the test of analysis, reason or acceptable precedent. Entertaining these views, I am unwilling to allow the law stated by the majority to go on the record unchallenged.

CITY OF FAIRBURY, APPELLEE, V. FAIRBURY MILL & ELEVATOR COMPANY, APPELLANT.

FILED JULY 19, 1932. No. 27949.

1. Waters: DEDICATION: PRIOR RIGHTS. Dedication of water of natural streams to the use of the people of the state by Constitution and statutes does not divest one of the right to use the water acquired prior to the adoption of constitutional and statutory provisions recognizing such previously acquired rights.
2. Constitutional Law: WATERS: DEDICATION: VESTED RIGHTS. Right to use of water of natural stream acquired prior to enactment of chapter 69, Laws 1895, is a vested property right, which could not be taken away by legislative action.
3. Waters: APPROPRIATION. After an appropriation, the residue may be appropriated by others out of water of same stream, if there is no interference with or impairment of prior appropriation.
4. ———: RIPARIAN RIGHTS. "A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally." *Crawford Co. v. Hathaway*, 67 Neb. 325.
5. ———: ———. Owner of mill-dam, who secured the right to flow back the water of a natural stream and to use such

water to operate mill prior to the enactment of chapter 69, Laws 1895, has the right to use all the water, but a riparian owner of the stream within the mill-pond may make such use of the water as does not interfere with or injure the rights of the mill owner.

6. ———: DEDICATION: DEPARTMENT OF PUBLIC WORKS. Department of public works may grant such appropriation for the use of the water of a natural running stream as does not impair prior appropriations and rights to use the water. Said department may issue permits for improvements of streams, for the beneficial use of such water, but cannot determine damages or property rights involved.

7. Evidence examined, and *held*, that the permit to construct improvements and to use the water, issued to the city of Fairbury in this case, does not interfere with or impair the right to use the water heretofore acquired by the Fairbury Mill & Elevator Company.

APPEAL from the Department of Public Works. *Affirmed.*

John C. Hartigan, for appellant.

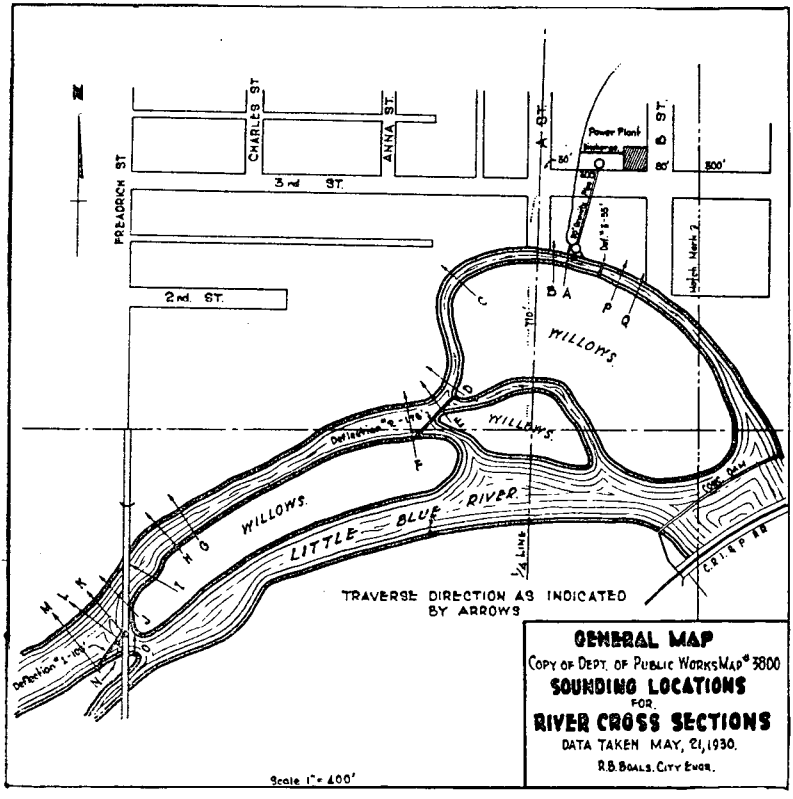
Frank L. Rain, contra.

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

DAY, J.

This is an appeal from an order of the department of public works, permitting the city of Fairbury to construct certain retards and deflectors in the Little Blue river near Fairbury, Nebraska. The appellant is the Fairbury Mill & Elevator Company, which has dammed and used the water of the Little Blue for more than 58 years, for manufacturing purposes. The city of Fairbury takes water out of the mill-pond about a third of a mile upstream for cooling its turbine engines used in connection with the municipal light and water plant. The city has appropriated 16.7 cubic feet per second of water subject to all prior rights of the mill company to the use of the water. After using the water it is returned to the stream and passes down to the mill-dam. The river now divides into two branches about one half mile above the dam, most of the water running down the south branch of the stream. Prior to 1901, when the south channel was cut by a flood,

all the water of the stream ran down the present north channel. The city takes its water out of the north branch. The branches unite above the mill-dam, which backs its pondage up both branches. The north branch did not carry enough water to supply the city's necessity and it sought to divert enough water into the north branch to meet its requirements. To accomplish this it sought to build a deflector where the stream branches and another at its intake. These furnish the basis of the mill's objections. Another was built at a point to keep the water in the north branch from running between two islands back into the south branch; but, since no objection is made to this deflector, it need not be mentioned again. In order that the situation may be more apparent to the reader, we reproduce a map from the record:



The first proposition advanced by the mill is that the department of public works has not the right or the jurisdiction to impair or interfere with appropriations of water existing under the law previous to 1895. Chapter 69, Laws 1895, dedicated the water of every natural stream, not heretofore appropriated to the use of the people of the state, subject to appropriation. Section 49 specially provided that the act should not interfere with or impair the rights to water appropriated and acquired prior to the passage of the act. These provisions have been carried down through the years into the present statutes. Comp. St. 1929, secs. 46-502 to 46-506. The legislature did not intend to interfere with prior acquired rights. *Black Bros. Flour Mills v. Umphenour,* 111 Neb. 218. Our investigation does not reveal any authority to the contrary. The right to the use of water acquired prior to the enactment of the statute of 1895 was a vested property right, with which the legislature could not have interfered. *Nine Mile Irrigation District v. State,* 118 Neb. 522; *Southern Nebraska Power Co. v. Taylor,* 109 Neb. 683. The extent of the appropriation of the mill is not decided here, as it is not necessary to a decision of this case. Assuming, for the purpose of this case alone, that the mill had appropriated for its use as a manufacturing plant all the water of the Little Blue river at this point, the department of public works could grant an appropriation of water, which did not interfere with or impair the right of the mill to the use of the water. The particular appropriation of water granted the city for use in cooling its engines is such that it does not interfere with the right to the use of water acquired by the mill. The testimony is substantially in accord upon this phase of the case. It is that the water is taken from the stream, used and then returned to the stream. The department of public works may grant an appropriation which does not interfere with a previous appropriation. Section 81-6307, Comp. St. 1929, provides: "The department of public works shall make proper arrangements for the determination of

priorities of right to use the public waters of the state, and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department." It has been determined that the department of public works is an administrative department having quasi-judicial functions. *Cline v. Stock,* 71 Neb. 79; *In re Application of Babson,* 105 Neb. 317; *Dawson County Irrigation Co. v. McMullen,* 120 Neb. 245. The mill does not own the water of the stream, for it is the general rule that such water is not the subject of private ownership. A right may be acquired for its use, which will be regarded as a property right, but the right carries no specific property in the water. *Kidd v. Laird,* 15 Cal. 161. The residue, after a prior appropriation, may be appropriated by others out of the water of the same stream, if there is no interference with a prior appropriator. 27 R. C. L. 1264, sec. 173; *Johnston v. Little Horse Creek Irrigating Co.,* 13 Wyo. 208.

Considering the rights of the parties as riparian owners, the use of the water desired by the city is reasonable and is not an interference with any use which the mill desires to make of the stream as a riparian owner. The mill owns the land for some distance above its dam on both sides of the river, including the islands, except 100 feet owned by the city at its intake. Both the city and the mill are riparian owners. "A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally." *Crawford Co. v. Hathaway,* 67 Neb. 325. See *Meng v. Coffee,* 67 Neb. 504. But the president of the milling company testified that the city's use of the water did not interfere with the use desired by the mill. It seems, however, that both parties to this litigation are relying upon appropriations of the water to a beneficial use more than upon their rights as riparian owners. But

whether we consider the rights as between two appropriators or two riparian owners, the outstanding fact that permeates this record is that the use made of the water by the city does not interfere with or impair the use to which the mill is entitled. The conclusion then follows naturally that the city has a right to use the water in the stream for the purpose of cooling its engines as long as it returns the water to the stream practically undiminished.

The rights of the mill company to maintain its dam and to use the water of the Little Blue river are determinable under the law as it existed prior to 1895. Chapter 69, Laws 1895, did not interfere with, impair or change the rights of the appellant to the use of the water. This court held in *Culver v. Garbe*, 27 Neb. 312, that the owner of the dam had a vested right in the stream and water within the land covered by the lease, and that appellee had no right or authority to interfere with it, and would be enjoined from changing the course of the stream, constructing the dam, or diminishing appellant's reservoir or supply of water. The owner of such mill, after procuring the right to dam a stream, and cause the water to flow back upon said stream, was held to have a vested right, not only in the water, which he would have by reason of his title to the land through which it runs, and to the fall caused by his dam, but to the reservoir of water created thereby, and in this right he is entitled to protection the same as in any other. The parties involved in the foregoing situation or their successors in interest had the same controversy passed upon in a later case, *Smith v. Garbe* (1910) 86 Neb. 91. In this case the court held: "The main question involved in the case is the right of defendant to maintain a certain ditch and two dams which the undisputed evidence shows were dug and constructed within the dead water zone of plaintiff's mill-dam. The rights of the parties with regard to this question we think were fully settled by this court in *Culver v. Garbe*, 27 Neb. 312." This case approved and followed the former case and quoted the following language: "A careful examination of the evidence

and plat of the river at the point where it is proposed to construct the ditch and dams satisfies us that the proposed improvement cannot be made without endangering plaintiff's property. This being true, the law will afford relief and protection." It is clear that these cases hold that the owner of a mill-dam has a vested right to the uses of the water, which could not be impaired. In *Eidemiller Ice Co. v. Guthrie,* 42 Neb. 238, this court held: "The owner of a mill who has the right to maintain a pond or flow back the water of a stream upon the land of another and to use such water to operate his mill possesses, as to the water, the dominant right, and while not the absolute owner of ice which may form on the pond, is entitled to have it remain there during the time and when its so remaining will be, or is, useful and necessary to the legitimate exercise of his right to use the water as motive power for the mill or to successfully operate the mill; but the owner of the land, if upon a non-navigable stream, may make any use he desires of ice which forms over and above so much of the bed of the stream to which his ownership extends as does not interfere with, or injure, the rights of the mill owner." The opinion in this case cites with approval *Culver v. Garbe, supra,* with the following observation: "The rights of a mill owner in the water of the stream upon which his mill is situated and in which he has constructed a dam, and to the full and necessary supply of water, have been recognized in this court." Paraphrasing the language of these cases, with reference to the case before us, the mill, which secured its right to flow back the water of the stream and to use such water to operate its mill prior to the law of 1895, has the vested right to use all of the water as motive power for the mill, but a riparian owner may use the water over and above so much of the bed of the stream to which his ownership extends as does not interfere with or injure the rights of the mill owner.

But the appellant complains about the permit issued by the department of public works for the construction by the city of certain retards, deflectors or dams in the river

in order to secure the use of the water to which it is entitled. The construction referred to as number 3 is a dam at the point of the city's intake. It is located on the north branch of the stream. It is constructed below the level of the water and does not retard the flow when the mill's dam is closed. In addition, it has a gate which is left open, thereby entirely obviating the possibility of its causing an interference with the flow. There is testimony in the record that, when the water in the mill-pond is so low that the dam will interfere with the flow, the water is too low anyway to run the mill. On the contrary, there is evidence that the water so retarded would run the mill a few hours. If on account of low water this situation were created, the mill company would have the undoubted right to the release of the water. But the evidence is that the city needs this dam to make available water, when the mill releases the water in the mill-pond for the purpose of cleaning. This controversy arose because the mill company let the water out of its mill-pond, which compelled the city to shut down its light and water plant.

The predecessor in title to the city, in 1887, acquired a perpetual right to remove water from the mill-pond, to which the city has succeeded. The city has been given an appropriation by the department of public works. The dam at the intake is necessary to an enjoyment of that right. It is not an interference with the right of the mill to use the water.

The deflector or dam, which it is proposed to construct at the point of the division of the two branches of the stream, presents numerous problems, many of which have been disposed of by this opinion. The appellant contends that it has a right to have the stream continue to run in its natural channel (*Flader v. Central Realty & Investment Co.*, 114 Neb. 161) and that the department of public works is without jurisdiction to change the course of a running stream. Both branches of the Little Blue river are natural courses of the running stream. *Clark v. Cedar County*, 118 Neb. 465. The north branch, having always

carried water of the stream, is as much a channel as the south. The most that could be contended is that it is proposed to change the proportion of water in the two diverging channels. In the absence of damage the appellant is not entitled to complain. But, again, the evidence establishes the fact that the north channel is filling up and that the deflector heretofore built and the proposed improvement has for its purpose the retention of the flow in the north channel without stopping the flow in the south channel. The construction approved by the department will not prevent the flow in the south channel. This is not such a case as cited by the appellant where the entire course of a stream is suddenly changed. In such a case, the riparian owner, if at all, must put the stream back in the old channel within a reasonable time. The mill suffers no damage to its right to the use of the water by the diversion of a part of the water into another channel of the stream which ultimately reaches its mill-pond, such diversion causing no damage. The gist of this decision is that, no damage resulting from the proposed improvements, the order of the department was a proper one.

The language of this opinion is clear, but in order to eliminate the possibility of a misunderstanding, this decision passes only upon the right to the use of the water in the Little Blue river. Only this is within the jurisdiction of the department of public works, and our jurisdiction upon appeal is likewise limited. Obviously, the question of damages from the flow back or the question of the acquisition of property upon which to build improvements is not determined.

AFFIRMED.

ORVILLE ZORN V. STATE OF NEBRASKA.

FILED JULY 19, 1932. No. 28307.

1. **Evidence** examined and *held* to be sufficient to sustain the verdict.
2. **Criminal Law**: NEW TRIAL: QUALIFICATION OF JURORS. Where the defendant had knowledge of an alleged bias and

prejudice expressed by a certain juror before trial and no objection was made to said juror at the trial by challenge or otherwise, and said juror denies said statements, it is not error for the trial court to overrule a motion for new trial based on this ground, not made until after verdict.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

John C. Mullen, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before ROSE, DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BEGLEY, District Judge.

This is a prosecution for forgery. Orville Zorn, plaintiff in error, hereinafter called the defendant, was convicted in the district court for Richardson county of forging the name of Jess Buckholz to a check for $7.50 with intent to defraud. He was sentenced to imprisonment in the state reformatory for an indeterminate period of not less than one nor more than two years and to pay a fine of $25 and the costs of the action. His motion for new trial was overruled and he has appealed to this court from said judgment and sentence.

The plaintiff in error has assigned two errors as grounds for reversal: (1) Insufficiency of the evidence; (2) bias and prejudice of a juror.

The evidence shows that on November 26, 1931, a young man representing himself to be Frank Kelley, entered the harness shop of Paul Hessler, in Falls City, Nebraska, and gave him a check for $7.50 drawn on the Nebraska State Bank of Falls City, in favor of Frank Kelley and purporting to be signed by Jess Buckholz. For the check Mr. Hessler sold him a halter for $1.50 and gave him $6 cash in change. The signature of Jess Buckholz was a forgery. Paul Hessler, the complaining witness, testified that he did not know the young man who gave him the

check, but that he resembled the defendant and in his opinion it was the defendant. He also testified that the next week after he had received the forged check a young man, who represented himself to be a brother of Frank Kelley, came into his store and wanted to pay for the check and take it up. The defendant testified in his own behalf and denied that he was the person who passed the check on Hessler and voluntarily permitted specimens of his handwriting to be submitted to the jury for purposes of comparison with the handwriting on the forged check.

On the evening of the same day, the defendant was arrested in Falls City for being drunk. His car was searched and, among other things, a halter was found in the car. On Sunday evening, September 27, the defendant remarked that the police officers had found a halter in his car and he was uneasy; "They might get him with that check though, being as he had the halter in his car." About the middle of October defendant had a conversation with one Pool, in which he was told that the officers were looking for him for the Hessler check, and defendant remarked that he thought he might leave town, and defendant also said that some one, either himself or his brother, tried to pay the check off.

We submit that the evidence adduced on behalf of the state was sufficient to sustain the verdict of the jury. 16 C. J. 774; *Mays v. State,* 72 Neb. 723.

The second assignment of error urged by the defendant is that one of the jurors, Ed Allen, was biased and prejudiced against the defendant. The *voir dire* examination of the juror Allen is not contained in the record, and the only evidence as to bias and prejudice of this juror is contained in an affidavit of Henry Zorn, father of the defendant, made on January 18, 1932, in support of the motion for a new trial, in which the affiant alleged that on or about October 25, 1931, he talked with said Ed Allen on Stone street in the city of Falls City, Richardson county, Nebraska, and that said Allen told him the following: "I see that your boy is in trouble again. That boy ought to be in the penitentiary."

The juror Allen made an affidavit denying the allegation of Henry Zorn's affidavit. If the defendant or his father knew on October 25, 1931, that Allen was a prejudiced juror, it was their duty to challenge him on *voir dire* examination. Ordinarily, the disposition of questions of this nature rest in the sound discretion of the trial court. Here the evidence of bias and prejudice was conflicting and the trial judge clearly was justified in rejecting the statement of the father of defendant in favor of that of the juror in question, particularly when the objection did not come until a motion for a new trial had been filed. 16 C. J. 1161; *Ogden v. State*, 13 Neb. 436.

We think that the defendant has had a fair trial and that the question of his guilt or innocence was fairly submitted to the jury and their verdict should stand.

AFFIRMED.

GEORGE BARTLETT, APPELLEE, V. ARTHUR EATON, APPELLANT: ARTHUR A. KNEELAND ET AL., APPELLEES.

FILED JULY 19, 1932. No. 28344.

1. **Master and Servant:** INJURY TO EMPLOYEE: BURDEN OF PROOF. The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment.

2. ———: ———: AWARD OF COMPENSATION. Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed and dismissed.*

Hall, Cline & Williams, for appellant.

Mockett & Finkelstein, for appellee Bartlett.

Field, Ricketts & Ricketts, for appellees Kneeland and Continental Casualty Company.

Heard before GOSS, C. J., ROSE, DEAN and EBERLY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BEGLEY, District Judge.

This is an action under the workmen's compensation act wherein George Bartlett, an employee, asked to invoke the provisions of the act because of injuries received by him while in the employ of Arthur Eaton. Arthur A. Kneeland, a general contractor, had the contract to remodel a store building at Fifteenth and O streets, Lincoln, Nebraska. Arthur Eaton, a plasterer, was employed to do the plastering. George Bartlett was one of the men employed by Eaton as a plasterer. On November 8, 1929, Eaton and men had brought a lot of scaffolding, preparatory to getting ready to plaster. Kneeland had promised some of the old shelving to a man and requested Eaton to have some one help him move the shelving. Eaton called Bartlett to assist in moving the shelving, which was placed on Eaton's truck. In making the delivery the shelving caught on another car and Bartlett, who was riding on the rear of Eaton's truck, was injured by shelving scraping his left leg between the ankle and knee. At Kneeland's direction, Bartlett was taken to Dr. Harry E. Flansburg, the physician employed by the Continental Casualty Company, Kneeland's compensation insurance carrier, and was treated by him for his injury for nine weeks, when he was discharged by the doctor. Compensation for nine weeks at $15 a week was paid Bartlett by Kneeland's carrier. Thereafter Bartlett worked until May, 1930, for the Chase Plow Company, and thereafter, until October or November, on an irrigated farm near Morrill.

In January, 1931, Bartlett came back to Dr. Flansburg, complaining of swelling at his left knee, which Dr. Thomson treated as a bursitis or inflammation of the bursæ or sacs at the knee joint. Bartlett filed his petition before the compensation commissioner, joining as defendants Arthur Eaton, Arthur A. Kneeland and the Continental Casualty Company. The defendants filed an answer, in

which they admit that the plaintiff had been injured by reason of the accident of November, 1929, and alleged that he was paid compensation from November 15, 1929, to January 7, 1930, at which time he had fully recovered and had received compensation benefits in full; that the injury and disability, if any, of which plaintiff now complains, was not a result of the accident sustained in November, 1929. The petition was dismissed by the compensation commissioner and same was appealed to the district court, where a finding was had in favor of the plaintiff and against the defendant Arthur Eaton, and in favor of the defendants Arthur A. Kneeland and Continental Casualty Company. A finding was made that the condition of the plaintiff's leg was a result of the accident of November 8, 1929; that the extent of the injuries were latent and unknown to the plaintiff until October, 1930; that the degree of disability suffered by plaintiff is 50 per cent. and that he was entitled to compensation at $15 a week for 17 weeks, commencing November 1, 1930, and ending February 28, 1931, and to receive from October 1, 1930, $8.66 a week until disability ends or until further order of the court, not however, beyond 300 weeks from the date of the accident. From this decree the defendant Arthur Eaton appealed.

The main contention of the appellant is that the evidence is insufficient to show that the condition of the knee in 1931 was caused by the accident of November 8, 1929. The burden of proof is on the appellee to show with reasonable certainty that the alleged injury was caused by the accident. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526.

Dr. J. E. M. Thomson, who performed the operation on Bartlett's leg on January 22, 1931, testified: "I found two large bursæ, one on either side of the large muscle here of the leg and its attachment to the knee cap. To the large muscle here on either side there were two large bursæ or sacs, the origin of which I was unable to determine. They normally extend and increase under certain circumstances.

One of them is hemorrhage and injury into the region or into the bursæ, and the other is due to infection. In either event the circumstances are much the same. If hemorrhage extensive enough to cause organization, that is changes that occur of a character that cause a new growth of tissue or a degeneration of such tissue and blood there is an increase in the synovia or lining of these bursæ and an increase in the secretion—the synovia is the secreting membrane and in the increase in the synovia and thickening of the membrane there is some fluid thrown out. Now in this instance there was a very thickened heavy membrane. These two bursæ connected with each other and there was considerable evidence of debris in there in particularly the larger bursæ and they had to be resected out. The entire mass was resected out with one incision, both bursæ at the same time."

In regard to the length of time it may have existed, the doctor said: "If he were quiet and did not move around very much and was not doing heavy work it might be possible that the bursæ would be there for a long time, say six months. I think it is very hard to tell when this thing occurred. I think it is very hard to connect anything of that kind. Such an injury might cause a condition of the leg I found in January, 1931. Really it is a guess on my part as to whether or not the accident of November 8, 1929, had anything to do with the condition I operated on. I assume there was an injury to the knee in November, 1929."

Dr. Harry A. Flansburg testified that Bartlett came to him in November, 1929, with an injury to his left leg; "He had an injury to his left leg which consisted of an abrasion or really scraping of the skin along the inside of the shin bone starting in the upper third of the leg and extending down practically to the ankle. He had considerable swelling along the ankle and some discoloration."

When he was treating Bartlett there was no evidence of any kind of a knee injury. He took an X-ray of the ankle and not of the knee because he did not complain of any knee injury.

He further testified: "He had absolutely no sign of injury to the knee. The accident in November, 1929, could not have caused a hemorrhage where the swelling occurred in 1931 without producing signs, such as immediate swelling, discoloration and limitation of motion. There could be no hemorrhage in November, 1929, without outward signs. If he had a hemorrhage at all he would have had signs of it at the time of the first injury. A blow on the side of the knee might cause such a swelling as I noticed in January, 1931, but it is pretty hard to realize that it would without definite signs following the injury. I would say in all probability it did not. There might be a slight possibility, I doubt it. There would have to be immediate signs of swelling and redness."

He further testified: "Q. What caused the thing he did have? A. The bursitis? Q. Yes. A. It might be an infectious thing; it might come on without ever an injury; and an examination of those hyperpapillæ reveals they are sometimes from infection or injury in type. It does not specify a traumatic thing at all."

This was the only expert testimony as to the cause of the bursitis and at most it establishes a mere possibility that the bursitis was caused by the accident of November 8, 1929.

As stated by Dr. Thomson, who testified in support of the Bartlett claim, it was really a guess on his part as to whether or not the accident of November 8, 1929, had anything to do with the condition he operated on. The evidence established that it could have been caused by either a hemorrhage or by an infection. No witness seemed able to tell from which cause. Bartlett was treated for nine weeks in 1929 by Dr. Flansburg and discharged as cured. Dr. Flansburg says there was no injury to the knee, and that in his opinion the bursitis could not have resulted from the accident two years later.

After Bartlett was discharged he went to work at very hard and confining labor, working for three months in the Chase Plow Company at bench work, and from March to May thereafter he did general farm work; drove teams,

did plowing, cultivating sugar beets, and did irrigating, and had very little pain in his leg until July. He did not go to a doctor until January when he was found to have **bursitis.**

In *Ginsberg v. Burroughs Adding Machine Co.*, 204 Mich. 130, the Michigan court said: "But the inferences drawn must be from established facts; inference may not be built upon inference, possibilities upon possibilities, or inferences drawn contrary to the established facts, contrary to the undisputed evidence. If an inference favorable to the applicant can only be arrived at by conjecture or speculation the applicant may not recover. So if there are two or more inferences equally consistent with the facts, arising out of the established facts, the applicant must fail."

In the case of *Standard Oil Co. v. Industrial Commission*, 339 Ill. 252, the Illinois court held: "Liability under the compensation act cannot rest upon the imagination, speculation or conjecture or upon a choice between two views equally compatible with the evidence, but must be based upon facts established by a preponderance of the evidence. * * * Awards for compensation cannot be based upon possibilities or probabilities but must be based upon sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment."

The testimony in this case is just as consistent with the theory that Bartlett's injury to his knee was caused by an infection during his work after the accident of November 8, 1929, as it is with the theory that his knee was injured at that time and the same resulted from a hemorrhage. The plaintiff has therefore failed to sustain the burden of proof that the injury was caused by an accident sustained in the course of his employment. Other errors are alleged, but in view of the above finding it is not necessary to consider them.

The judgment is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

R. T. COOPER V. STATE OF NEBRASKA.

FILED JULY 19, 1932. No. 28253.

1. **Forgery**: INFORMATION. In an information charging the forgery of the name of the payee of a check, it is not necessary to set forth a copy of the indorsement in the information. The purport is sufficient, and the information is not defective for failure to do so. Comp. St. 1929, sec. 29-1503.
2. **Criminal Law**: FORGERY: CHECKS: INDORSEMENT: ADMISSION. In this case, the defendant having admitted in open court that he, without the knowledge, consent or authority of the payees of the checks, signed the names of the payees on the backs thereof, no further proof of indorsement was necessary; and the defendant is estopped to complain of the failure of the state to offer the indorsements.
3. ———: INSTRUCTIONS. Instructions must be considered as a whole and together; and instructions numbered four and fourteen, when considered together and in connection with the stipulation and instructions numbered eleven and twelve, are a correct statement of the law in this case; and no error was committed by the trial court in the giving of these instructions.
4. ———: ———. Instruction numbered one informed the jury of that part of the criminal statute that the defendant was charged with violating, and the material allegations of the several counts of the information; and is without error.
5. **Forgery**: INFORMATION. An information that charges that the defendant falsely, knowingly, wilfully and feloniously, and with intent to defraud, forged and counterfeited the name of the payee of a check, is not subject to demurrer for failure to make use of the statutory word "signature." The law permits the use of words equivalent to, or inclusive of, the statutory language, provided the words used include the full signification of the statutory words.

   "The court will give the words used in the information their ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld." *Smith v. State*, 72 Neb. 345.
6. **Criminal Law**: INSTRUCTIONS. Error cannot be predicted in the giving of instructions where the defendant, by requested instructions, recognizes the correctness of the rule stated by the court in its instructions.
7. **Forgery**: DEFENSE. "Forgery is the false making, or materially altering, with intent to defraud, of any writing which,

if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." "And it is no defense that, by close observation, the victim could have detected the forgery. It does not lie in the mouth of the forger to claim immunity for his crime because, if the person he imposed upon had been vigilant or careful, he would not have been deceived." Nor is it requisite that the writing should bear any resemblance to that of the person whose writing it purports to be. "Whether the similitude of the signature with the genuine is such as would be likely to deceive is wholly immaterial." *Commonwealth v. Fenwick*, 177 Ky. 685.

8. **Evidence** examined, considered, and *held* to establish the guilt of the defendant beyond a reasonable doubt.

ERROR to the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

F. L. Bollen, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

DICKSON, District Judge.

The plaintiff in error, R. T. Cooper, hereinafter referred to as the defendant, was convicted of forgery in the district court for Saline county, and was sentenced to the penitentiary. To reverse this judgment he prosecutes proceedings in error in this court.

The facts upon which the state relied for a conviction are not in dispute. From the record it appears that the defendant was in the employ of Black Bros. Flour Mills Elevator, at De Witt, with authority to purchase grain and issue checks of Black Brothers, in payment therefor. The five checks set forth in the different counts of the information were issued by him as agent for Black Brothers. These checks on their face purported to have been issued for grain purchased from the payees by the defendant, and in payment thereof. Defendant admits in the record that he, without the knowledge, consent, authority or approval of the payees, wrote their names on the backs of the checks

and deposited them in the Farmers & Merchants Bank of DeWitt to his credit. The evidence shows that he had not, in fact, purchased the grain represented by the checks. The defendant offered no evidence in explanation of his admitted acts of writing the names of the payees on the checks, other than that they plainly showed to be the act of himself, and not the act of any other person. And, if an offense has been committed, it was not forgery as charged in the information. We are asked to reverse this case for the following reasons: (1) Because the facts set forth in the several counts of the information do not charge him with an offense punishable by the laws of this state. (2) The indorsements on the backs of said five checks were not set out in the information, and were not offered or admitted in evidence. (3) The court erred in giving instructions one, four and fourteen on its own motion. (4) Error in refusing to give instruction numbered six requested by defendant. (5) The verdict of the jury is not sustained by sufficient evidence. For the purpose of convenience, assignments of errors one and two will be considered together, and the others in their order.

The information contained five separate counts; count one charges in substance that the defendant, on or about the 19th day of December, 1928, had in his possession a certain check of Black Brothers for $73.60 payable to Alfred Sobotka. The information contains a copy of the check, and charges in part that the defendant did "falsely, knowingly, unlawfully and feloniously, and with intent to defraud, forge and counterfeit the name of Alfred Sobotka on the back of said check, and did then and there in said county, with intent to defraud, falsely, fraudently and feloniously publish and utter said check with said forged indorsement of said name thereon, as true and genuine, although it was false and counterfeit, as he, the said R. T. Cooper, real name unknown, well knew." The other four counts are similar and of the same legal force and effect, so only count one need be considered. None of the counts sets forth the indorsements on the backs of the checks. The

information charges in each count that the defendant forged the name of the payee on each check, and published and uttered the same as true and genuine. It will be observed that the charge is not the forgery of a check; it is the making of a false indorsement of the payee of a check. This is forgery. 26 C. J. 921. It was proper, but not necessary, to set forth in the information a copy of the indorsements on the backs of these checks; the purport was sufficient, and the information is not defective for failure to do so. Comp. St. 1929, sec. 29-1503; *Davis v. State*, 58 Neb. 465; 26 C. J. 939.

The contention that the information is not sufficient to inform the defendant of the offense charged is without merit. The information charges a violation of section 28-601, Comp. St. 1929.

It is urged that the conviction cannot be upheld because the indorsements on the backs of the checks were not offered in evidence, and that the offer and receipt of the checks in evidence did not carry the indorsements thereon. The record discloses that at the opening of the case a stipulation was entered into between the state and the defendant that the checks set forth in the several counts of the information were written by the defendant, and that the names of the payees on the backs thereof were all written thereon by the defendant, and without the knowledge, consent or authority of the payees. This was an admission of a false indorsement, an essential element of forgery. Following the stipulation the state offered the checks in evidence. Under the stipulation no proof of the indorsements was necessary, and the checks being offered and received in evidence, the indorsements were properly before the jury; and the defendant is estopped to complain of the failure to offer the indorsements. The rule in such a case is stated in 4 C. J. 706, as follows: "A party is estopped to complain of the judgment for insufficiency of evidence to sustain it, where he admitted the existence of the facts which such evidence would have established by stipulation."

It is contended that the court erred in giving instructions one, four and fourteen. Instruction numbered one is not subject to criticism. By this instruction the jury are informed by the court of that part of our criminal statute the defendant is charged with violating; and the material allegations of the several counts of the information. No possible error could be predicated on the giving of this instruction.

Instruction numbered four, when considered in the light of, and in connection with, the stipulation which eliminated evidence of the signing of the names of the payees by the defendant, and when considered in connection with instructions numbered eleven, twelve and fourteen, cannot be said to be erroneous. The defendant stipulated that he had signed the names of each of the payees on the backs of the checks, and having so stipulated he cannot now complain because the court, in its instructions, relieved the state from this burden. The state was not required to make further proof, nor was the court to treat in its instructions such fact as in controversy, under the rule stated in 22 C. J. 339: "An agreed statement of fact or other stipulation by counsel, as to matters of fact within the scope of their professional functions binds the party as a judicial admission." Again, "A judicial admission is conclusive on the party by whom it is made or to whom it is attributable." 22 C. J. 421. See *Meyers & Cox v. Western Union Telegraph Co.*, 98 Neb. 471.

Giving the intended legal effect to the stipulation, the intention of the defendant in doing the acts charged became the material element for the jury's consideration. On that question the jury were properly instructed, not only by instruction number four, but by instructions eleven, twelve and fourteen; and when taken and considered together, and in connection with instruction number one requested by defendant, which recognizes the correctness of the rule, as stated by the court in its instructions, it cannot be said that the trial court erred in giving any of the complained of instructions.

At first blush, instruction numbered six requested by defendant would seem to be a correct statement of the law; but a careful consideration convinces the writer to the contrary. This instruction omits the essential elements of forgery—"Forgery is the false making, or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." *Commonwealth v. Fenwick,* 177 Ky. 685—and substitutes therefor a proposition of law that it is not forgery to make a false indorsement of a payee of a check, "unless there is a similitude or an attempt at similitude of the genuine signatures of such persons, and the resemblance of such signatures must be such as would be reasonably calculated to mislead or deceive." This required a degree of proficiency on the part of the defendant not necessary to commit forgery. In other words, the instruction advised the jury that, unless the defendant was able to write, and did write, the signatures of the payees in such a way as would be reasonably calculated to mislead or deceive the person accepting the checks, the jury should find the defendant not guilty. Such a contention is preposterous, and would make the crooked straight and the straight crooked. Such a rule might be applied in a civil case under certain conditions. The making of a false indorsement of a check would not transfer the title thereto, and would be forgery if done with the intent to defraud. And similitude, or lack of similitude, would not be an element of the crime; and would not be a material inquiry. To say that the indorsements must be made in such a way as to mislead or deceive does not state the correct rule. "The essence of forgery is the making of a false writing with the intent that it shall be received as the act of another than the party signing it." *Goucher v. State,* 113 Neb. 352.

It is insisted that requested instruction number six finds support in *Marshall v. State,* 116 Neb. 45. In that case the question here involved was not presented or considered; and the rule there stated is not in conflict with the rule

hereinafter stated. The question involved in the *Marshall* case was one of variance between the name signed to the copy of the forged note set out in the information and the name signed to the forged note offered in evidence; not the similarity of a written signature with that of the genuine signature. This case is easily distinguished from the *Marshall* case, and presents an altogether different rule when applied to the facts in the case under consideration. The authorities at first glance would seem to be divided; but under statutes like ours the holdings may be said to be uniform. And the correct rule, in a case like this, seems to be: "Nor is it requisite that the writing should bear any resemblance to that of the person whose writing it purports to be." 26 C. J. 908. In *Commonwealth v. Fenwick,* 177 Ky. 685, L. R. A. 1918B, 1189, the court carefully considered and discussed this question, and the conclusions reached by Judge Clarke meet with our approval, and are not in conflict with *Marshall v. State, supra.* In reviewing this case Judge Clarke said:

"The indictment charges the offense denounced by the statute and describes with minute particularity the note, its forgery and utterance by the defendant, knowing it to be such, every allegation of which is sustained by the proof; and the defendant is held by the court to be immune from punishment, not because the commonwealth failed to prove that he committed the crime as charged, but because, in the opinion of the court, the forgery was so crude that it ought not to have deceived any one. This, fortunately, is not the law. Neither the negligence, nor the vigilance of the person defrauded or upon whom the attempt is made, affects the criminality of the act of one who forges or utters a forged paper of apparent legal efficacy, and it would be indeed an anomaly in the law if the guilty party could urge as a defense or demand immunity simply because he was lacking in skill, or that his victim was lacking in experience or prudence, or unsuspicious and therefore not vigilant. In 19 Cyc. 1388, the offense is defined thus: 'Uttering is offering a forged instrument, knowing

it to be such, whether such offer is accepted or not, with a representation, by words or actions, that it is genuine, and with an intent to defraud; and it is a public offense.'

"As the acceptance is immaterial, and constitutes no part of the offense, the crime is committed, even though the person, to whom the forged instrument is offered, discovers the forgery from the clumsiness of its execution or the behavior of the one offering it, and, for such reason, or any other, refuses to be defrauded. It is, therefore, patent that whether or not the forgery was such as likely to deceive is wholly immaterial, so far as the utterance is concerned.

"This is also true with respect to the forgery, as will be seen from the definition of that crime in Bishop, New Criminal Law, sec. 572, as follows: 'Forgery is a species of common-law cheat, which early was separated from the rest under this distinctive name. It includes as well the unsuccessful attempt as the accomplished fraud. It is the false making or materially altering with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.'

"In *Barnes v. Commonwealth,* 101 Ky. 556, this court said: 'It is a forgery, though the similitude of the signature with the genuine be not such as would likely deceive.'

"So also: 'It is likewise a forgery for one to sign a fictitious name to a writing which, if genuine, would be of apparent legal efficacy.' Bishop, New Criminal Law, sec. 543; and in subsection 2, sec. 572, of the same volume: 'Since a writing which falsely appears to be of efficacy is a symbol or token adapted the same as a genuine one to influence the mind contemplating it, the forgery may be as well of a mere fictitious name as of a real person's.'

"In Robertson, Criminal Law, sec. 393, it is said: 'Where the forged paper is such that it might, from its nature, and the course of business, deceive or mislead, to the prejudice of another person, the crime of forgery is complete. It is sufficient if the resemblance between the forged and genuine instrument is such as to deceive a person of ordi-

nary observation or business capacity, although experts or persons of experience could not be deceived by it. No matter how defective may have been the forgery, it is enough if there is a possibility of fraud. And it is no defense that, by close observation, the victim could have detected the forgery. It does not lie in the mouth of the forger to claim immunity for his crime because, if the person he imposed upon had been vigilant or careful, he would not have been deceived.' "

As further supporting this rule, see *Schmidt v. State*, 169 Wis. 575, and *State v. Chance*, 82 Kan. 388.

Error is sought to be predicated on the fact that the information does not follow the statutory language, in this, that the defendant is charged with forging the names of the payees of the checks, instead of forging their signatures. The law justifies the use of words equivalent to, or inclusive of, the statutory language, provided the words used include the full signification of the statutory words. 31 C. J. 704-707; *Whitman v. State*, 17 Neb. 224; *Peterson v. State*, 64 Neb. 875.

"The court will give the words used in the information their ordinary and commonly accepted meaning, and, when viewed in this light, if the words employed mean the same thing as those found in the language of the statute denouncing the offense, the information will be upheld." *Smith v. State*, 72 Neb. 345. In this case the use of the word "Name" in the information, instead of "Signature," was not only justified, but was required to express a violation of our statute. To say that he forged the signatures of the payees, instead of saying that he forged the names of the payees, on the backs of the checks is like saying: "McCarthy come out, or come out McCarthy." They mean the same thing and could not have been misunderstood or given a different meaning.

This disposes of all the alleged errors that merit consideration by a reviewing court, save the question of the suffiiciency of the evidence to sustain the verdict. The evidence conclusively establishes the guilt of the defendant.

To read the evidence is to be convinced of the defendant's guilt. To here review the same would answer no good purpose, and would unnecessarily extend this opinion. The record discloses that the defendant had a fair trial, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. THURSTON J. LONG, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED JULY 22, 1932. No. 28192.

1. **Municipal Corporations**: COMMUNITY NURSE: TAX LEVY: "REGULAR ELECTION." A November general election is a "regular election" within the meaning of that term as used in section 71-2407, Comp. St. 1929, ordering municipal authorities to submit to a vote of the electors the question of a levy to provide for a community nurse.
2. ———: ELECTIONS: NOTICE. When notice is in fact actually brought home to the great body of the voters, an election will not be held invalid for lack of notice, where it does not appear that enough voters to change the result failed to vote because of lack of notice.

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

Thomas E. Dunbar, for appellants.

D. W. Livingston, Edwin Moran and *Andrew P. Moran, contra.*

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

GOSS, C. J.

This is an appeal from a judgment allowing a peremptory writ of mandamus commanding respondents to include in the annual estimate for 1931, certified to the county clerk, an item of $1,800 for the annual salary of a visiting or community nurse.

The action was begun on August 8, 1931. On August 29, 1931, after a full hearing upon the merits, the district court granted a peremptory writ ordering the city officials to convene and certify the item to the county clerk within 30 days. The respondents were denied supersedeas but appealed to this court. However, on September 26, 1931, they obeyed the unsuperseded order, made an amended estimate, including this levy for the visiting nurse fund and delivered it to the county clerk. That official refused to place the levy on the tax books of the county. Nothing further was done until October 24, 1931, when the same relator brought mandamus to compel the county clerk to act. Upon trial to the court a peremptory writ was granted on October 30, 1931, directing the county clerk forthwith to enter the special levy. On appeal we reversed the judgment particularly because the additional item had been certified to the county clerk after he had completed the tax list duly levied by the county board of equalization and had delivered it to the county treasurer. We further called attention to the delay in seeking mandamus against the county clerk and to the disorder and confusion likely to result not so much from changes in the books of the treasurer as from rights and liabilities arising out of 1931 taxes already paid and receipts in full already issued by the treasurer. *State v. Barstler,* 122 Neb. 167. Notwithstanding their aforesaid compliance on September 26, 1931, with the writ in the instant cause, the respondents continue their defense here.

Section 71-2407, Comp. St. 1929, is as follows: "Whenever petitions signed by twenty-five per cent. of the electors of a city, county, or village shall be presented to the city council, board of supervisors or commissioners or trustees praying for the submission of the question of making a levy to provide for salary and expenses of said nurse, and stating the amount of the levy and the period of years in which the same shall be made, it shall be the duty of said council, board of supervisors or commissioners or village board to submit the question to a vote of the

people at a regular, or special election called for that purpose. If the question is submitted at a special election, three weeks' notice of said special election shall be given by publication in some newspaper of general circulation which said notice shall be published three consecutive weeks, if the election is in a city or village; or if in a village and no paper is published therein, then said notice shall be posted in three of the most public places in said village. If a majority of the votes cast at such election on said question be in favor of said levy, then the regularly constituted authorities of said city, county or village shall include the same in the estimate for expenses for each year during the period for which adopted unless the same shall be revoked and the tax shall be levied and collected in the same manner as other taxes are levied and collected."

A proper number of qualified electors presented their petitions for the submission of the question. The respondents recognized their duty and proceeded to do it. General city elections are provided by statute to be held on the first Tuesday in April. Comp. St. 1929, sec. 16-301. Respondents decided to submit the question at the imminent general election, which was done. Respondents assert that as a city election it was nugatory because there was no resolution of the city council or proclamation by the mayor relating to the submission. On October 21, 1931, the mayor and city commission duly passed a carefully detailed ordinance, consisting of eight sections, expressly providing for this election to be held on November 4, 1931, and for the ballots, devised so as to express the proposition submitted to the voters, to be printed and transmitted by the city clerk to the county clerk for distribution to the city polling places. The fifth section provided that the duly appointed and qualified judges of the general election should officiate as to the balloting on this proposition submitted to the electors of the city. The seventh section set forth a fully described notice of the election to be published in Nebraska Daily News-Press and to be posted in each of the described voting precincts in

the city. We think the ordinance which was passed by the city council, approved by the mayor and attested by the city clerk, was as sufficient in form as any resolution or proclamation.

Respondents seem to regard the election of November 4, 1931, as far as it affects the municipal question voted upon, as a special city election. They argue that, as it was impossible to give the three weeks' notice required by statute in the case of a special election, the election was therefore nugatory. The evidence shows that the notice was published only ten days. But the statute, above quoted, provides that the question may be submitted either at a "regular, or special election called for that purpose." Two questions suggest themselves: (1) Was the general election in 1931 a competent time to hold this election for this municipal purpose? (2) May the word "regular" be interpreted as having the same meaning as "general?"

The city charter of Lincoln provided that a proposition to authorize the issuance of utility bonds may be submitted either at "a general election," in which a majority vote would carry them, or at "a special election called for that purpose," in which a 60 per cent. vote was required to carry them. This court held: "A state-wide primary election is a 'general election' at which a majority vote is sufficient to carry a proposition to authorize the issuance of municipal bonds, within the meaning of the 'Home Rule Charter' of the city of Lincoln, though the general city election is held on a different date and 60 per cent. of the vote on such a proposition is necessary to carry it at a special election." *State v. Marsh,* 107 Neb. 607. Also a state-wide primary was held to be a "general election" within the meaning of that term as used in the Lincoln charter in the grant of power to issue municipal bonds upon a majority vote. *State v. Johnson,* 117 Neb. 301.

The adjective "regular" is defined by Webster's New International Dictionary, 1931, as "Governed by rule or rules; steady or uniform in course, practice, or occurrence; * * * returning or recurring at stated or fixed times

or uniform intervals." The times for state-wide and city general elections are so fixed and defined by statute that they meet the calls of the above definition of "regular." The legislature, in the use of the words "regular election," did not use either the word "city" or the word "state." The legislature must be deemed to have used the terms employed as defined above and as generally understood by intelligent persons. Such would either understand them or would seek a definition in or by an accepted authority. An election, to be a regular one, is such as is commonly known as a general election. On general reasoning and under the authority of the cases we have cited we are of the opinion that the general election in November was a competent time to hold the election and that the word "regular" in the statute has the same meaning as "general" when considered in the environment of this particular cause. Public policy, on economic grounds, looks with favor upon the submission of such questions at general elections rather than at special elections set for the particular purpose.

Another important question to be determined is that of notice to the electors. This municipal matter being submitted to a vote at a general election, the legislature did not provide any definite time for notice as it does in case of submission at a special election. The evidence shows that the notice was published ten days; that a total of 1733 electors residing in the city voted at the election but, as the canvass by the respondent officials showed, only 1638 of them voted for or against the proposition here involved. Assuming that all of the 1733 city electors received ballots on the proposition when they presented themselves to vote, it is evident that 95 of them failed to vote on the particular proposition. The canvass by the officials and the evidence fail to show other than the votes for and against the proposition. From this and from the large percentage of those who attended the general election and who voted on the city proposition, it is inferable that the voters generally had actual notice of this sub-

mitted question. The circulation of the petitions, the unusual nature of the question and the sharp division in the vote seem to indicate that the published notice was augmented by actual notice through publication by word of mouth throughout the community.

Where a vacancy occurred in the office of county commissioner more than thirty days before a general election, it is to be filled thereat; a failure of the county clerk to advertise it in election notices will not invalidate the votes cast to fill the vacancy, where the fact is generally known and acted on by the voters. *State v. Skirving,* 19 Neb. 497. See, also, *State v. Thayer,* 31 Neb. 82; *State v. Van Camp,* 36 Neb. 91; and *State v. Lansing,* 46 Neb. 514, wherein Irving, C. reviewed many cases. His opinion, adopted by the court, held that, in filling a vacancy in public office, the "election for that office is not invalid because the filling thereof was not included in the public notice of election, at least where it appears that the electors generally were appraised of the fact and voted on the question." The principle is stated in McCrary on Elections (4th ed.) sec. 177: "We have no doubt that where an election is held in other respects as provided by law, and *notice in fact* is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election will be valid." The principle running through the above citations is applicable here.

Respondents called one witness and tried to prove by him that he never knew of "any election held within the city of Nebraska City on the 4th of November, 1930." They did not show that he was an elector. The court properly sustained an objection to the testimony.

The result of the election as canvassed and declared by the respondents was never directly contested. It does not appear to have been questioned by other electors. While the majority was small it was still a majority. The duty of the respondent officials to certify the levy has never been revoked. That duty was imposed by law, was clear

and still existed at the time the writ was applied for and at the time the judgment of the district court was entered. The judgment is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIRST STATE BANK OF BETHANY, APPELLANT: CLARENCE G. BLISS, APPELLEE.

FILED JULY 22, 1932. No. 28399.

1. Receivers: ATTORNEY'S FEES. Reasonable fees for necessary services performed by attorneys for the receiver of an insolvent state bank may be allowed as an expense of the receivership.
2. Banks and Banking: INSOLVENCY: RECEIVERS: ATTORNEY'S FEES: REVIEW. The allowance of reasonable fees for necessary services performed by attorneys for the receiver of an insolvent state bank will not be reversed on appeal in absence of an abuse of discretion by the trial court in making the allowance.

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

F. C. Radke, Barlow Nye, Arthur F. Mullen and *G. E. Price,* for appellant.

C. M. Skiles and *I. D. Beynon, contra.*

C. L. Clark, for intervener.

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

ROSE, J.

This is a controversy between E. H. Luikart, present receiver of the insolvent First State Bank of Bethany, and Clarence G. Bliss, retiring receiver thereof, over the allowance of attorneys' fees for services performed for Bliss after his authority to act as receiver had been challenged and during the time occupied by him in making his final report, transferring assets to his successor and procuring his discharge. On pleadings putting in issue the validity

of the claim for attorneys' fees and on evidence adduced by both sides at the trial, the district court allowed the retiring receiver $50.43 for attorneys' fees and expenses and made the allowance payable out of assets of the insolvent First State Bank of Bethany. Luikart appealed.

This case, for the purpose of review, was consolidated with eight other cases pending in the supreme court on appeal from the district court for Lancaster county. Each of the nine cases was a receivership for an insolvent state bank of which Bliss had been receiver in the district court for Lancaster county. In each case he was allowed $50.43 for services and expenses of the same attorneys. In the judgment from which the appeal herein was taken attorneys' fees and expenses in all of the nine cases were estimated at $453.87 and one-ninth was allocated to each—$50.43. On appeal a decision in one case will determine all.

Bliss had been secretary of the department of trade and commerce, the branch of the government having supervisory control of state banks. While he was connected with that department, district courts throughout the state had appointed him receiver of 187 insolvent state banks. July 1, 1931, his authority as receiver was questioned and performance of his duties as such was then interrupted. With 54 of these banks in the course of liquidation July 8, 1931, Luikart was appointed secretary of the department of trade and commerce and took the position that his appointment automatically made him receiver of them. July 9, 1931, the district court for Lancaster county substituted Luikart for Bliss as receiver of each of the nine insolvent state banks in Lancaster county. The claim for attorneys' fees was based on legal services performed for Bliss from the time his services as receiver were interrupted until his final report was approved and his discharge as receiver herein ordered September 12, 1931.

The allowance of the attorneys' fees was assailed as erroneous on the grounds that Bliss as receiver was not entitled to services of counsel for making reports involving nothing more than an account of his receipts and disburse-

ments; that attorneys' fees were not allowable as an expense of the receivership because there was no necessity for the employment of attorneys; that the accounts and reports were properly made by auditors and other salaried employees of the department of trade and commerce without expense to the receiver; that a receiver had no authority to employ attorneys to perform ordinary duties requiring his personal services only; that inexcusable delay in closing the accounts of the receiver defeated allowance for attorneys' fees; that trust assets upon which depositors and other creditors had a first lien were not available for payment of unnecessary attorneys' fees; that in any event the fees allowed were excessive. These propositions in connection with the evidence were argued elaborately at the bar and in printed briefs, but the solution of all depends on the controlling facts and the rule of law that binds the supreme court in reviewing the allowance of fees fixed by the trial court, if necessary and allowable in any amount.

Bliss had been receiver of insolvent state banks in judicial proceedings in many of the district courts of the state. His authority to act in that capacity came from a court. He was not relieved of his duties as an officer of the court by his removal as secretary of the department of trade and commerce or by the appointment of Luikart as his successor in that executive position. Bliss could only be legally removed as receiver and discharged as such by an order of court. *State v. State Bank of Minatare, ante,* p. 109. It follows that prior to July 9, 1931, Bliss was receiver. Luikart had not previously been receiver. Prior to that date the status of Bliss as receiver, his duties and liabilities as such, and his relation to the courts, called for services of attorneys selected by himself under the circumstances disclosed by the record. The evidence will admit of no other conclusion. Furthermore, his duties as receiver did not terminate July 9, 1931, when his successor was substituted as receiver. Thereafter it was his unperformed official duty to the court and to the beneficiaries of

the trust to have his quarterly reports verified and approved and to have his final report prepared, checked and allowed, to turn the assets in his hands over to his successor, to procure a judicial order for his discharge and have it properly entered upon the journal of the court. Though salaried officers prepared his reports, it was still his duty to see that they were in proper form to protect him and the beneficiaries of the trust and that all necessary papers were legally executed. These duties, when honestly performed in good faith, as they were in the present instance, entitled the receiver to a reasonable allowance for services of the attorneys who aided him. The law sanctions an allowance for attorneys' fees under the circumstances disclosed by the evidence herein and courts generally so hold.

It is well-settled law that a reasonable allowance made by a trial court for necessary attorneys' fees payable out of assets in the hands of a receiver will not be disturbed on appeal except for an abuse of discretion in the action so taken. It is clear that Bliss was entitled to the allowance of attorneys' fees in some amount as an expense of the receivership. Witnesses upon whom the district court relied testified in effect that fees in excess of the amount allowed would be reasonable. The evidence fails to show that the trial court abused its discretion in allowing $50.43 for attorneys' fees and expenses and in making the allowance payable out of the assets of the First State Bank of Bethany.

The rulings herein apply to the other eight similar cases pending on appeal from the district court for Lancaster county and to all cases pending on appeal from other district courts where the same question as to attorneys' fees is involved.

AFFIRMED.

WILSON D. CHENEY, APPELLANT, V. COUNTY BOARD OF SUPERVISORS OF BUFFALO COUNTY ET AL., APPELLEES.

FILED JULY 22, 1932. No. 28323.

1. Highways: REPAIR: COMPETITIVE BIDS. Ordinary "resurfacing" of public gravel highways *held* to be in the nature of a "repair," and not to constitute an "improvement" as that term is employed in section 39-801, Comp. St. Supp. 1931.
2. ———: ———: ———. Though the extent of such contemplated "resurfacing" of highways in a county necessarily involves expenditures in excess of $500, such county's board of supervisors is not required by law to advertise and, on bids received, to let contracts therefor "to the lowest and best bidder."
3. Counties: COUNTY BOARDS: POWERS. A county board is clothed not only with powers expressly conferred by statute, but possesses such powers as are requisite to enable it to discharge the official duties devolved upon it by law.

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

O. A. Drake and *F. A. Nye*, for appellant.

E. G. Reed, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

EBERLY, J.

This is a taxpayer's action for an injunction restraining the defendants in continuing the "resurfacing" of certain improved public roads in Buffalo county with gravel, except by first advertising and awarding contracts as provided by section 39-801, Comp. St. Supp. 1931. There was a trial to the court upon pleadings and certain written stipulations of facts, resulting in judgment for the defendants. The plaintiff appeals.

There is thus no dispute as to the controlling facts. The county of Buffalo owns and operates certain gravel pits, from which gravel is supplied for use on its public roads. It is under township organization, has a population of between twenty-four thousand and twenty-six thousand inhabitants, has a highway commissioner vested with gen-

eral control, government, and supervision of all public roads and bridges under the authority and direction of the county board of supervisors, and was, and is, adequately supplied with articles of machinery and equipment needed to maintain and construct roads and highways as required by law.

Commencing in January, 1931, the highway commissioner of Buffalo county, without previously advertising for bids, or "letting contracts therefor to the lowest and best bidder" by the county board in the manner contemplated by section 39-801, Comp. St. Supp. 1931, for the purpose of "resurfacing," employed labor, men, teams and trucks to haul and convey gravel from the gravel pits, owned and maintained and operated by Buffalo county, to those portions of the public highways in this county described at length in plaintiff's petition, and the maintenance of which was properly chargeable to that county. Under the terms of their employment, the persons thus engaged thereafter worked from day to day, and week to week, subject to discharge without notice, and under the supervision and direction of the highway commissioner and the county board of supervisors. These employees were paid the compensation as was fixed by the county board of supervisors from time to time, the reasonableness of which is not in issue in this case as presented to this tribunal for determination. Immediately prior to the commencement of this litigation these workers received as compensation for their services a "certain sum per yard per mile." The individual claims of employees for services thus performed were presented to and allowed by the county board of Buffalo county at their usual meeting, ordinarily monthly. The services, so far as disclosed by the record, consisted wholly in hauling the county's gravel from the county's gravel pits and dumping the same on the county's roads where this gravel was to be used for the purpose of resurfacing the same. The cost of this transportation for the highways described in plaintiff's petition was many times in excess of $500.

The questions here presented are: Was the method outlined one which the county authorities of this county were justified in following? And were the expenditures entailed thereby such as they were empowered to make?

The determination of the proper scope of the powers vested in the subordinate divisions of the state, and the lawfulness of the exercise thereof by the statutory agencies concerned, necessitates recourse to the terms of the Constitution and the language of the statutes relating thereto.

A county is "a body politic and corporate" (Comp. St. 1929, sec. 26-101), whose powers "shall be exercised by a county board, to wit: In counties under township organization by the board of supervisors" (Comp. St. 1929, sec. 26-103), and which include "to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers" (Comp. St. 1929, sec. 26-104). Among the powers expressly conferred on county boards is the power "to manage the county funds and county business except as otherwise specifically provided," and "as a board, or as individuals, to perform such other duties as may from time to time be imposed by general law." Comp. St. 1929, sec. 26-105. So the county boards have "general supervision over the public roads of the county, with power to establish and maintain them" as provided by law, "and to see that the laws in relation to them are carried into effect." Comp. St. 1929, sec. 39-101. The duty of maintenance of county roads, including the duty of securing and purchasing and providing suitable and adequate graders and rollers and all other machinery, tools and appliances necessary for the efficient maintenance and repair of the county roads, is expressly imposed. Comp. St. 1929, secs. 39-230, 39-233. So, too, the county boards are expressly empowered and authorized to enter into contracts and use its machinery for the purpose of maintaining state highways. Comp. St. 1929, secs. 39-1404, 39-1408; *Saltzgaber v. Morrill County,* 111 Neb. 392. And in addition to this, it will be noted that when this court, in the case of *Lynn v. Kear-*

ney County, 121 Neb. 122, under the terms of the statute as then existing, held that "counties are without the power express or implied, to contract with townships, whereby, for an agreed consideration, the county will construct and maintain township roads," the succeeding legislature duly enacted chapter 80, Laws 1931, providing in part: "It shall be lawful in all counties under township organization, for such counties to make, alter, repair, and construct roads and /or highways for any township in said counties and to enter in and to execute written contract therefor." It is quite obvious that the terms of the legislation referred to and quoted above, so far as applicable to the subject of repair and maintenance of public highways, the history of the various enactments, as well as judicial pronouncements arising from failure of counties to properly exercise these powers, evidence the existence of a public policy to vest in these counties adequate and ample powers enabling prompt and necessary action to be taken in all matters of maintenance and repair of public highways, so far as essential to promote public interest, public safety and public security.

While conceding the lawful existence of power in the county authorities to "resurface" and gravel the highways involved in the instant case, plaintiff contends that the transactions set forth in his petition are embraced in, and controlled by, the provisions of section 39-801, Comp. St. Supp. 1931, providing in part: "The county board of each county has the power to repair or erect all bridges and approaches thereto and build all culverts and make improvements on roads the cost and expense of which shall in no instance exceed five hundred dollars. All contracts for the erection or reparation on bridges and approaches thereto, for the building of culverts and improvements on roads and for furnishing materials in connection with the same, the cost and expense of which shall exceed five hundred dollars, shall be let by the county board to the lowest and best bidder." Plaintiff also contends that as the total expenditures required in "resurfacing" the roads described

in his petition under the plan adopted by the defendant county board of supervisors are many times in excess of $500, and there being an absence of advertisement, bidding, and letting the contract to the lowest bidder, such plan contravenes the provisions of the statute quoted, and presents a case falling within the principles announced by this court in *People v. Commissioners of Buffalo County*, 4 Neb. 150; *Follmer v. Nuckolls County*, 6 Neb. 204; and *Merrick County v. Batty*, 10 Neb. 176. Further, plaintiff's position is that the case thus presented is one wherein injunction restraining the proposed acts of the corporate authorities is a taxpayer's right.

We do not agree with these contentions as applied to the facts before us. The statutory language is clear that, where the cost and expense involved "exceed five hundred dollars," contracts relating to the following subjects must be entered into by county boards in compliance with its terms, viz., contracts for (1) erection and reparation of bridges and approaches thereto; (2) for building of culverts; (3) making improvements on public roads; (4) for furnishing materials in connection with the same. It will be noted that the three authorities on which plaintiff relies, heretofore cited, are all concerned with the erection or reparation of bridges. But neither bridges nor approaches thereto are involved in the instant litigation. Nor are we concerned with either "culverts" or "improvements," as these terms are employed in this statute. And while in the section quoted from the word "repair" is found, and in the second sentence the word "reparation" appears, they are employed only in connection with bridges and the approaches thereto. There is nothing in the statutory language involved from which a legislative intent can be implied that "repair" and "reparation" are to be applied to terms other than bridges and the approaches thereto. This language suggests the application of the maxim *"Expressum facit cessare tacitum,"* and thus the force and effect of the words "repair" and "reparation" are necessarily limited to bridges and approaches thereto.

But the expenditures challenged and the services in dispute in the instant case were made and performed exclusively in "resurfacing" highways. "Resurface," as defined by the Century Dictionary is, "To put a new surface on; renew the surface of." To resurface, therefore, does not imply a new or additional construction, but the reverse. Ordinarily resurfacing occurs in highways when the original gravel surface, by reason of travel and the elements, has been in part worn, wasted, or destroyed by removal from, or being imbedded in, the highway. The original basic construction which constituted the highway "resurfaced" at all times remains; indeed, its continued existence is implied in the very use of the term "resurface." Nothing in the record before us tends to cast doubt on this conclusion. "Resurfacing" a gravel highway, in the absence of controverting evidence, is, in its essential nature, a repair, a term we have judicially defined, in relation to bridges in the road law, as "to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." *Brown County v. Keya Paha County*, 88 Neb. 117; *Platte County v. Butler County*, 91 Neb. 132, 134.

But, as we have seen, the subjects of "repair" and "reparation," excepting as to bridges and approaches thereto, are not within the purview of section 39-801, Comp. St. Supp. 1931. Therefore, its restrictions are inapplicable to the present case. Maintenance of highways is by statute, in terms, a duty expressly enjoined on county boards. This business includes the caring for, repairing, guarding, and maintaining the grade, roadbed, bridges and culverts and other improvements which together constitute public roads. As to the elements thus enumerated, which in combination constitute and measure the duty of maintenance of highways imposed on county boards, in the absence of statutory restriction, county supervisors in due performance thereof are clothed not only with the powers expressly conferred, but they also possess such powers as are requisite to enable them to discharge the official duties thus devolved upon them by law. *Berryman v. Schalander*, 85 Neb. 281;

Wherry v. Pawnee County, 88 Neb. 503; *Lancaster County v. Green*, 54 Neb. 98; *Lindburg v. Bennett*, 117 Neb. 66, 77; *Emberson v. Adams County*, 93 Neb. 823; *Buffalo County v. Bowker*, 111 Neb. 762. The duty to repair by resurfacing highways being one expressly enjoined on county boards of supervisors, and they having by implication such powers as are necessary to enable them to perform the duties thus expressly enjoined upon them (*Christner v. Hayes County*, 79 Neb. 157), and there being in the instant case no violation of statutory restrictions in the exercise of these powers, it follows that the action of the district court in the present case was correct in the denial of the injunction prayed for, and its judgment is

AFFIRMED.

IN RE ESTATE OF JOHN H. CHARLES.
HENRY H. FOSTER ET AL., APPELLANTS, V. T. T. BELL ET AL., ADMINISTRATORS, APPELLEES.

FILED JULY 22, 1932. No. 28255.

1. Wills: PROBATE: ATTORNEY'S FEES. Attorney's fees are not ordinarily allowed in an unsuccessful attempt to probate a will, and this is especially true where the proponent, even though he be named as executor, has a personal interest in securing the probate of the will.
2. Evidence examined and *held* to sustain the judgment of the trial court.

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

Cleary, Suhr & Davis, for appellants.

T. T. Bell and *Prince & Prince, contra.*

Heard before GOSS, C. J., DEAN, GOOD and EBERLY, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BEGLEY, District Judge.

This is an action brought to recover attorney's fees from the estate of John H. Charles, deceased, for services alleged

to have been rendered to one W. A. Johnson, executor, in an unsuccessful attempt to probate a will wherein Johnson was named as residuary legatee.

John H. Charles, a resident of Howard county, Nebraska, died on the 23d day of September, 1926. After his death W. A. Johnson, not a relative or connected in any way by personal or family ties, but who had been associated with him in business as his banker and otherwise, presented a purported will to the judge of the county court of Howard county, asking that it be admitted to probate.

John H. Charles owned an estate of about $125,000. The will presented for probate gave $15,000 to his brother, George Hogg, and the balance of the estate, amounting to more than $100,000, to Johnson. The heirs at law of Charles contested the will upon two grounds: (1) That it had been revoked; (2) that it had been executed because of undue influence exercised by Johnson over Charles. On the hearing in the county court the will was denied probate and was found to have been revoked and judgment was entered accordingly. Special administrators were appointed who took charge of the estate. Johnson was never appointed as executor, neither did he have anything to do with the administration of the estate. An appeal was taken by Johnson from the judgment and the findings of the county court to the district court and, upon trial before a jury, practically the same decision was rendered, and on appeal to this court the decision of the district court was affirmed. *In re Estate of Charles,* 118 Neb. 634.

On the first hearing of this case in the county court, Messrs. Taylor and Spikes of St. Paul and one Murphy of Omaha appeared as attorneys for Johnson. No charge for services in the county court is involved in this case. Johnson paid for the services rendered by his attorneys in that court. After the will had been denied probate in the county court, Johnson employed the appellants, Messrs. Ledwith, Foster, and Hall, Cline & Williams, as his attorneys and also retained as his attorneys Messrs. Taylor, Spikes, Dobry and Murphy, although Murphy subsequently withdrew from the case.

After the alleged will had been denied probate as aforesaid, the appellants herein, Foster, Ledwith, and Hall, Cline & Williams filed a claim in the county court of Howard county, Nebraska, alleging that certain attorneys' fees were due them as attorneys in attempting to probate said will; that they had requested the said Johnson to file said claim; that he had refused, and that they were entitled to have the same allowed against the estate. Said claim was disallowed in the county court, and on an appeal to the district court a trial was had to a jury, and at the close of the evidence both sides requested a directed verdict, which automatically took the case from the jury and placed the decision in the hands of the court. The trial judge thereupon sustained the motion of the appellees herein and directed a verdict in favor of the estate. The appellants have appealed.

The question involved in this case is whether or not the estate of John H. Charles, now in the hands of the administrator, can be chargeable with attorneys' fees of attorneys employed by the executor named in the will of said Charles in a contest wherein the will was found to have been revoked by a subsequent instrument.

Under the law of this state it is the duty of a person appointed as an executor in an alleged last will and testament to present said document for probate and to signify to the court his acceptance of the trust. Comp. St. 1929, sec. 30-215.

And it is also the duty of such executor to request the probate of his testator's will, and if he does so in good faith, attorney's fees and reasonable expenses incurred by him in doing so are a proper charge upon the estate. *In re Estate of Hentges*, 86 Neb. 75; 10 A. L. R. 783, note; 69 A. L. R. 1052, note.

But the appellees insist that Mr. Johnson had such a special interest as the beneficiary under the will that he was really in the position of a contestant, and that the contest was waged on his behalf and against the heirs at law of the deceased and therefore his contest was not in good faith.

Attorney's fees are not ordinarily allowed in an unsuccessful attempt to probate a will where the proponent, even though he be named as executor, has a personal interest in securing the probate of the will or where he is a legatee under the will. *Wallace v. Sheldon,* 56 Neb. 55; *St. James Orphan Asylum v. McDonald,* 76 Neb. 630; *In re Estate of Genuchi,* 104 Neb. 584; *Butt v. Murden,* 154 Va. 10; *Stover v. Wayne Probate Judge,* 219 Mich. 566; *Estate of Higgins,* 158 Cal. 355.

In *St. James Orphan Asylum v. McDonald, supra,* the court said: "Too often the counsel employed by the executors are in practical effect the ardent advocates of one side of the controversy between the individual interests, in which the executor, as such should have no choice. Obviously, such advocacy should not be compensated out of the common fund if its opposition is not to be also, and courts should be cautious in allowing for services ostensibly rendered to executors, but in spirit and effect rendered to one of the opposing interests, which should bear its own expenses. * * * In the case at bar, in this court at least, the services of counsel on both sides have been rendered, not to the executors, but to the respective claimants upon this estate, who should each bear the expense therefor which he has incurred."

In the case of *Butt v. Murden, supra,* the court said: "It is impossible to examine the cases and formulate therefrom rules which are applicable to all cases. Positive and dogmatic pronouncements should be avoided. Much depends upon the peculiar circumstances. If the executor acts in good faith, he is generally entitled to reasonable allowances. In most contests, however, it is merely a question between persons who take the estate if the will is established and those who will take it under the law of descents and distributions, if not established. In such cases the executor should leave these interested parties to conduct the litigation at their own expense and to abide its results without imposing substantial charges against the estate represented by the executor."

In this case, the appellants were not employed to seek probate of the will in county court but were only employed in the district court after probate had been denied in the county court. Mr. Johnson paid his attorneys for their services in attempting to probate the will in the county court. He was greatly interested in the estate as against the heirs. He had knowledge of the revocation which had been offered in evidence and he was not an heir at law or related to the deceased. On appeal to the district court he was attempting to sustain his legacy under the will. His efforts and the services of his attorneys were not beneficial to the estate. They did not by the litigation create or preserve a fund available for the payment of their expenses. There allowance would diminish the inheritance of the heirs under the statute of descent.

Under the circumstances of this case, we are of the opinion that the judgment of the district court is correct and the same is therefore

AFFIRMED.

I. A. KIRK, RECEIVER, APPELLEE, V. NELLIE E. FLETCHER ET AL., APPELLANTS: ISRAEL P. BAYNE ET AL., APPELLEES: SVEA FIRE & LIFE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

FILED JULY 22, 1932. No. 28138.

1. Insurance: SUBROGATION. A fire insurance company which pays a loss under a fire insurance policy issued to the assignee of a leasehold interest in public school lands, whose interest in the premises consists in the assignor's obligation to pay off a balance of a mortgage on other property which he has traded to the assignee for the school-land lease, is not in equity entitled to a judgment against the assignor for the amount it has paid under the policy to the insured, by way of subrogation of the latter's interest in the premises.
2. ———: INSURABLE INTEREST. Where a bank takes a void assignment of an interest in a lease on public school lands, the cashier of such bank has no insurable interest in the premises under a policy provision providing that the insurance shall be void "if the interest of the insured be on a building on ground

not owned by the insured in fee simple," and a fire insurance policy taken by and issued in the name of such cashier in his individual capacity is void and unenforceable as against the insurer.

3. **Public Lands: SCHOOL LANDS: LEASE: ASSIGNMENT: LIEN.** The assignee of an assignment of a lessee's interest in public school lands is not entitled to a lien on the premises to secure the repayment of money advanced under a void assignment.

APPEAL from the district court for Lincoln county: J. LEONARD TEWELL, JUDGE. *Affirmed in part, and reversed in part, and remanded, with directions.*

Hoagland, Carr & Hoagland, for appellants.

H. A. Dano, for cross-appellant.

Beeler, Crosby & Baskins, for appellee I. A. Kirk.

Halligan, Beatty & Halligan, Milton C. Murphy and *George N. Gibbs,* for appellees Israel P. Bayne *et al.*

Heard before ROSE, GOOD and EBERLY, JJ., and BROADY and CHASE, District Judges.

BROADY, District Judge.

This proceeding is in equity, and is a consolidation of a suit in equity brought by the plaintiff, Kirk, as the receiver of the Platte Valley State Bank, to impress a claimed assignment of an interest of defendants Fletcher in a lease in public school lands; and to also recover upon two separate policies of fire insurance issued upon the same property. One of these insurance policies was applied for and issued in the individual name of the cashier of the bank, and the other was issued to a former assignee of the school-land lease. Both the insured and insurer in each of the policies are made defendants in this action. Separate actions at law had been begun by the insured upon each insurance contract and all were consolidated in this proceeding over the earnest protest of all such defendants. The defendant Nellie E. Fletcher, by cross-petition, sought to cancel the assignment of the lease and to also recover a part of the benefits of the fire insurance policies.

The controversy is the outgrowth of a contract, dated November 21, 1925, between the defendants Bayne and Fletcher for the exchange of a lease of public school land, owned by the Baynes, for a residence property in North Platte, then owned by the Fletchers. Fletchers were bound to pay a mortgage on the town property in the sum of $1,000, at the rate of $16.50 a month, and held by the Mutual Building & Loan Association of North Platte. Fletcher and his wife entered upon the school land and Bayne and wife took possession of the town property. Bayne and his wife executed an assignment of his lease to Fletchers, and Fletchers executed a deed to Bayne to the town property which, together with the contract, was delivered to the Platte Valley State Bank to be held by it in escrow to be delivered to the parties upon Fletcher paying the mortgage on the town property.

On January 20, 1926, Bayne took out a policy of fire insurance in the Franklin Fire Insurance Company, one of the defendants herein, covering the house on the school land, in the amount of $1,200.

Early in 1927 the Fletchers were in default in the payment of their mortgage, and it is claimed by the plaintiff that Fletchers and the bank entered into an oral agreement whereby the former was to trade their interest in the school-land lease in consideration of a deed to an equity in a house and lot in North Platte and $200 in cash. The plaintiff claims this contract was consummated; that the bank gave Fletchers $200 by paying the defaulted instalments on the mortgage, $125 in cash, and also a deed to the town property. He also claimed that Mrs. Fletcher executed an assignment in blank of her interest in the leased premises. Thereafter Marshall E. Scott, cashier of the bank, took out a fire insurance policy on the dwelling-house on the leased premises in the defendant Svea Fire & Life Insurance Company in the sum of $1,500. Scott, individually, was named as the insured. Thereafter the bank failed and the plaintiff herein was appointed receiver, and as such brings this action.

The dwelling-house covered by these fire policies was totally destroyed by fire on June 30, 1927. The Franklin Fire Insurance Company denied liability on its policy on the ground that Bayne, the insured, was not the sole owner, and that his real interest was not disclosed to the company. Bayne brought an action at law upon this policy, but before trial the action was dismissed by Bayne with prejudice to another action. It is admitted that the Franklin Fire Insurance Company agreed to, and did, cause the sum of $776.80 to be paid to the Mutual Building & Loan Association for the purpose of paying the mortgage on the Bayne property that Fletcher was obliged to pay. Bayne then executed and delivered to the insurance company an assignment of his interest in the school land. The insurance company, in turn, assigned the above assignment to its attorney, the defendant Halligan. By virtue of these assignments defendant Halligan, by cross-petition, by way of subrogation, claimed a lien in the school-land lease. The trial court found in Halligan's favor and gave judgment to him against Fletchers in the sum of $870.63, with interest, the amount of insurance paid with interest, and decreed to him a first lien upon the Fletchers' lease.

The defendant Svea Fire & Life Insurance Company denied liability on its policy, and Scott, individually, brought an action at law on the policy; the company defended on the ground that Scott had no title, either legal or equitable, in the premises, had no insurable interest, and that he was not the sole owner, as provided by the terms of the policy. This action was also consolidated in the present proceeding. The court found in favor of the plaintiff in this controversy and rendered judgment against the Svea Fire & Life Insurance Company in the sum of $337.87 with interest, with right of subrogation to the company against the Fletchers, and impressed the lease interest to payment thereof.

The Fletchers claim an interest in both these insurance policies, in the amount of the balances remaining after the payment of the interests of Bayne or Scott, if any, assert-

ing that the Bayne policy was taken by him in pursuance to an agreement with Fletcher, and that the Scott policy had been taken out for the benefit of Fletcher. The trial court found that Fletcher had no right or interest in either policy. This finding is amply supported by the record, and is affirmed.

The court found the following items due to the respective parties against the Fletchers and held that the same in each instance constitute a lien on the interest of the Fletchers in the school-land lease in the order named: (1) Due to Halligan $870.63, with interest, as a first lien; (2) due to Svea Fire & Life Insurance Company, by order of subrogation, the amount that the company was held liable for to Scott, $342.30, with interest, as a second lien; (3) due plaintiff, as receiver, for money advanced under the void assignment, the sum of $284.69; and (4) due the plaintiff the sum of $92.86 under the claimed oral agreement with Mr. Fletcher for crop growing arrangements. Each of which were declared to be a lien upon the Fletchers' interest in the leased premises, and after satisfaction of the above the Fletchers had a homestead interest in the premises of the value of $2,000 which is to be satisfied after the payment of the previous judgments.

As to the findings and judgment upon the Scott fire insurance policy in the Svea Fire & Life Insurance Company this court is convinced that at the time the insured, Scott, had no interest of record or in equity in the premises, and therefore had no insurable interest. On the face of the policy Scott claimed the interest of an insured in his personal capacity. "A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject-matter of the contract." *Bassett v. Farmers & Merchants Ins. Co.*, 85 Neb. 85. Wherefore that part of the decree awarding the plaintiff (the bank) a recovery against the Svea Fire & Life Insurance Company is reversed and that action dismissed on condition that the insurance company return the premium paid by Scott in the

sum of $18.75. Likewise the lien in favor of that company against the Fletcher interest in the leased premises is canceled and dismissed.

As to the controversy growing out of the fire insurance policy issued to Bayne by the Franklin Fire Insurance Company, the facts which have been heretofore stated are, briefly, as follows: Bayne originally owned the school-land lease. This he traded to Fletcher who agreed to pay a mortgage of $1,000 on the property. In order to protect himself Bayne took out this fire insurance policy in the sum of $1,200. Upon the loss and destruction of the property by fire the insurance company first denied liability on the policy but later agreed upon an amount to be paid the insured, or for his benefit, by paying off the mortgage. As stated in the case of *Bassett v. Farmers & Merchants Ins. Co., supra,* "A contract of insurance is a contract of indemnity." The insurance company contracted to indemnify Bayne to the extent of his loss in the event the property should be destroyed by fire. This was wholly a matter of contract between the company and Bayne in which no other person was concerned or obligated. Bayne paid the price fixed by the company, in consideration of which the company promised to indemnify Bayne against loss. The company denied liability on the policy but later, by agreement, the suit was dismissed. The company gave Bayne $776 with which the mortgage on his town property was paid.

The company claims the right of subrogation to all of Bayne's rights in the school-land lease which the Fletchers now own. "The right of subrogation exists in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien, or when as the holder of such subordinate lien he has, through mistake or inadvertence, satisfied a prior lien upon the property covered thereby. The right of subrogation must in every case rest upon some recognized principle of equity jurisprudence, such as a mistake of fact, an agreement or understanding that the money advanced

was for the express purpose designated, or the like." *Seieroe v. Homan*, 50 Neb. 601. "The right of subrogation must in every case rest upon some recognized subject of equitable cognizance." *Chicago Lumber Co. v. Anderson*, 51 Neb. 159. And also: "While subrogation is not founded on contract, and is a creation of equity, existing solely for accomplishing the ends of substantial justice, there must in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some established principle of equity jurisprudence, as recognized and enforced by courts of chancery." *Meeker v. Larsen*, 65 Neb. 158. The last case is cited in 25 R. C. L. 1314, sec. 4, in support of the following statement: "Subrogation being of equitable origin * * * it is only when an applicant has an equity to invoke and where innocent persons will not be injured that a court can interfere." See, also, *Hayden v. Huff*, 60 Neb. 625. By entering into this insurance contract the Franklin Fire Insurance Company voluntarily, for the consideration of the premium, agreed to indemnify Bayne against loss of his interest in the property; there was no compulsion upon the insurance company to undertake that obligation. It seems to this court that as far as the claim of subrogation in this matter is concerned the rule announced in *Rice v. Winters*, 45 Neb. 517, directly applies, that is to say: "The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." And so believing, we hold that that part of the decree awarding subrogation to the Franklin Fire Insurance Company, and by assignment to the defendant Halligan, is erroneous and the same is reversed and the lien granted therein to the defendant Halligan is hereby canceled.

Some time early in 1927 Fletchers had fallen in default in the monthly payments to the building and loan association on its mortgage, and while it is disputed by the Fletchers, the bank claims that in order that Fletcher could save something out of the wreck they entered into an oral agreement with the bank, through its president, whereby the

Fletchers were to execute an assignment of their interest in the school-land lease to the bank, for which the bank was, by deed, to transfer its equity in certain town property in North Platte together with $200 in cash. The bank claims that it gave to the Fletchers $125 in cash and paid several past-due installments on the building and loan mortgage for the benefit of Fletcher, and further claims that the bank executed a deed to the town property which was delivered to Mrs. Fletcher who recorded the same. The bank also claims that Mrs. Fletcher in her own name signed an assignment, in blank, to her interest in the school-land lease. This Mrs. Fletcher denies, stating that she never did sign such an assignment, and she further asserts that the premises were, at the time, the homestead of the Fletchers and that the purported assignment upon which the plaintiff claimed title to the school-land lease was void, as not having been executed in conformity to the statutes for the transfer of such a lease.

Upon this issue the court found in favor of the plaintiff and found that the assignment was executed by James Fletcher, husband, as agent, and with the knowledge and consent of his wife, and further found, as a matter of law, that the agreement and assignment was void, but found in favor of the plaintiff as against Fletchers and that there was due the plaintiff for moneys advanced under the agreement the sum of $284.69 and impressed the same as a lien upon the interest of the Fletchers in the school-land lease. Disposing of the conclusion as found on this question it is sufficient to say that the evidence on this dispute is very conflicting. There is evidence in support of a finding either way, depending upon the credibility of the witnesses as the trial court might have been impressed from the advantage of personal observation of the witnesses while testifying. We agree, however, with the trial court that the purported assignment, if executed, was not executed in conformity with the express requirements of the statute, and for that reason we hold that the same is void. The finding of the trial court that the bank had advanced and

expended for the Fletchers under such void contract the sum of $284.69 and also the sum of $92.86 is affirmed, and that the bank should have judgment against Fletchers for that amount, but cannot agree that the same constituted a lien on the property other than such a lien as the ordinary judgment would acquire. To that extent the decree of the district court is reversed.

The bank, through the plaintiff, its receiver, also claimed that the Fletchers, who remained on the premises after the purported assignment, did so as tenants of the bank under an agreement whereby the bank was to furnish crop seed to Fletchers and that they were to divide equally the proceeds from the crop. As to this claim Fletcher denies any such agreement, denies that he ever surrendered possession of the property, and claims that he entered into a personal agreement with the bank, through its president, for the advancement of such moneys in the nature of a personal loan to be paid after he had harvested his crop. Among the items in this dispute are $60.50 for the erection of a windmill and other payments in the amount of $92.86, which the bank claims it put upon the premises as owner, while Fletcher claimed that the payments were made in the nature of a personal loan to him. Upon this item the court held in favor of the bank in the sum of $92.86. We think the finding on this last item is correct save and except there is no basis for holding the same to be a lien upon the premises. It was an obligation upon an oral agreement only, therefore the decree is reversed so far as attaching a lien for payment of the debt.

For the reasons above stated, (1) the decree of the district court is hereby reversed as to the judgment in favor of Halligan and the lien therefor is vacated and dismissed; (2) the judgment in favor of the Svea Fire & Life Insurance Company, growing out of its fire insurance policy to Scott, is reversed and the lien issued thereon is vacated and dismissed; (3) the judgment rendered in favor of the plaintiff in the sum of $92.86, also one in favor of plaintiff in sum of $284.69, is affirmed as a personal judgment

against the defendants Fletcher, and the liens applied under these two findings are vacated and dismissed; (4) the finding of the trial court on the homestead rights of the Fletchers in the leased property is affirmed and the cause remanded to the district court, with directions to enter a decree in conformity herewith.

JUDGMENT ACCORDINGLY.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. FIRST STATE BANK OF ALLIANCE, APPELLEE: CHARLES T. HAAS, INTERVENER, APPELLANT.

FILED JULY 22, 1932. No. 28036.

1. **Banks and Banking**: INSOLVENCY: DEPOSITS: PREFERENCES. Even though a deposit made in a bank by a clerk of the district court is made out of trust funds which are known to be such by an executive officer of that bank, still, when the representative of the beneficiaries of that trust fund asks the clerk to purchase a draft in payment thereof and in response he receives and accepts the draft so purchased, he becomes a creditor of the bank and loses his right to any preference which he may have had over the depositors.
2. ———: ———: ———: ———. A purchaser of a bank draft is a purchaser of a bank's credit and a holder of exchange, and, as such, is entitled to share *pro rata* with depositors and other holders of exchange in the assets of a failed state bank and in the depositors' final settlement fund, but, in the absence of special circumstances, is not entitled to have his claim allowed as a trust fund. Record *held* not to disclose special circumstances entitling the intervener or purchaser of draft to have his claim allowed against the insolvent bank as a trust fund.

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

Mitchell & Gantz, for appellant.

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

Heard before ROSE, GOOD and DAY, JJ., and FROST and MESSMORE, District Judges.

FROST, District Judge.

In this action Charles T. Haas seeks to collect a draft drawn in his favor upon its Omaha correspondent by the First State Bank of Alliance, Nebraska. It appears from the evidence that Haas represented certain nonresident heirs who were entitled to the sum of $6,994.89 under a decree in partition. There were other heirs whose rights had been established in the same decree to whom the referee had paid their share. The amount due the nonresident heirs apparently was not paid directly to them by the referee because the proper authority did not appear of record authorizing Haas to represent them. The amount due them was paid to the clerk of the court and deposited by him in the First State Bank of Alliance under the name of "W. C. Mounts, Clerk." Later, when Haas was able to establish his authority, the clerk drew a check upon his account in the First State Bank for the amount due these heirs and received from the First State Bank a draft drawn upon its Omaha correspondent. The draft was made payable to Haas and delivered to his local representative, Mr. Ira E. Tash, who had requested that payment be made in that way. The draft was forwarded by Tash to Haas at Portland, Oregon; but before it had made the rounds for proper presentation to the Omaha bank the First State Bank had failed. The payment of the draft was therefore refused, although there was at all times after its issuance funds in the Omaha bank sufficient to meet it.

Mr. Charles Brittain, vice-president of the First State Bank and one of its executive officers, took an active part in the distribution of the funds received by the referee in the partition suit, assisting that referee in figuring and paying out to the several heirs their distributive shares. He also knew of the payment into court of the part belonging to the foreign heirs and of its deposit by the clerk in his account in the First State Bank. He also was fully cognizant of the circumstances connected with the issuance of the draft by his bank in response to the check of the clerk of the court.

Charles T. Haas, in behalf of the nonresident heirs, intervened in the liquidation suit against the First State Bank and filed a claim in their behalf. This claim was allowed by the district court in a class along with the depositors, but a preference over them was denied. It is of this denial that the appellant and intervening claimant, hereinafter referred to as an intervener, complains.

Since the case was argued and submitted this court has decided two cases, each of which involves the claim of a preference in behalf of purchasers of drafts in banks which failed before the drafts could be collected. *State v. State Bank of Belvidere,* 122 Neb. 797, and *State v. First State Bank of Alliance, ante,* p. 23 In each of these cases the purchaser of the draft was denied a preference over other holders of exchange. These decisions materially limit the questions to be disposed of in this opinion.

In the case of *State v. State Bank of Belvidere, supra,* there were two interveners, each of whom sought a preference over the bank depositors; and their claims were allowed by the district court, a trust being declared in the funds payable to them. The receiver appealed to this court where the action of the trial court was reversed. In the case of one of the interveners a check was given in the purchase of the draft while in the other cash was paid therefor. Thus this court has already decided adversely that, if cash is paid to the bank for a draft and its funds are increased to the extent of the draft issued, a trust accrues in behalf of the owner of that draft. The court deems it immaterial whether the draft is paid for by check or by cash as the fact that the funds of the bank issuing the draft are not decreased is not sufficient in itself to create a trust in favor of the purchaser of the draft where the issuing bank fails before the draft is paid. The court in this opinion declares that the purchaser of a bank draft is a purchaser of a bank's credit and is entitled to share with the depositors and other holders of exchange in the assets of a failed state bank, but that such purchaser, in the absence

of special circumstances, is not entitled to have his claim allowed as a trust fund. It will be noted that under this decision the intervener's right to have his credit allowed as a trust fund depends entirely upon his ability to show some special circumstances giving him this right.

In the second Nebraska case, *State v. First State Bank of Alliance, supra,* Paine, J., in his opinion refers to the case of *State v. State Bank of Belvidere, supra,* and says a similar question is there presented for the determination of the court and the decision was rendered holding that the claimant's draft was not entitled to a preference over the claims of general depositors.

The intervener contends that the circumstances surrounding the payment of his clients' portion to the clerk of the court; of its deposit by that clerk in the bank, and, later, of the paying out of such funds by means of a draft on the bank's Omaha correspondent, all to the knowledge of an executive officer of the First State Bank, created a condition entitling the intervener to a preference over the other holders of exchange. We agree that the conditions surrounding the deposit of the money in the bank go a long way to establish the trust character of the funds so deposited. *Sallaske v. Fletcher,* 73 Wash. 593; 47 L. R. A. n. s. 320.

"Trust funds do not lose their character as such by being deposited in bank by the trustee to his own account." *Cady v. South Omaha Nat. Bank,* 46 Neb. 756.

"A depositary of a trust fund who parts with no consideration and is not misled to his prejudice by reason of the deposit, is bound to restore the fund to the true owner on demand, although such deposit was made by an agent or trustee and, until such demand, the depositary had no notice of its true character." *Union Stock Yards Nat. Bank v. Campbell,* 2 Neb. (Unof.) 72.

The intervener quotes at great length from *National Bank v. Insurance Co.,* 104 U. S. 54. In this case A. H. Dillon, Jr., was general agent at Baltimore, Maryland, for the insurance company. His account was carried on the

books of the bank under the name of "A. H. Dillon, Jr., Gen'l Ag't," and his checks were signed in that name. He was accustomed to remit to his company twice a month. Dillon later became heavily indebted to the bank and the bank charged up his indebtedness against this deposit. It thus appears the contest was not between depositors but between the bank and the insurance company who was the true owner of the deposit. The court, having in mind that the funds were those of his company and not those of the depositor, refused to sanction the claim of the bank over that of the insurance company whom the bank knew to be the principal, while Dillon was only the general agent of the company.

The different parties have filed extensive briefs in support of their several contentions. These have been carefully considered and the writer of this opinion has delayed its final draft while making an extensive search of the authorities as relates to the "special circumstances" shown in evidence as they bear upon the claim of the intervener. The conclusion reached is that the circumstances do not justify granting the intervener a preference over depositors. It is useless to cite a long list of authorities as this court has, in the case of *State v. State Bank of Belvidere, supra,* decided the main questions involved herein. Those who care to pursue the subject further are referred to Annotations, Trust or Preference in Respect of Money Used to Purchase Exchange or to be Transmitted, 16 A. L. R. 190, and a later continuation, 57 A. L. R. 1168.

Many of the cases which support the position of the intervener are where a special deposit had been made. Under those circumstances the title of the fund or whatever it was that was deposited remains in the depositor; while in the case of a general deposit the title passes to the depositary. The fact that a fund is subject to check implies it is a general deposit, in which case the depositor is a creditor and the bank a debtor. *Lamro State Bank v. Farmers State Bank,* 34 S. Dak. 417.

However, the intervener by asking the clerk to pay out the trust fund to him in the form of a draft and by accepting such draft after its issuance lost all right to claim a preference. By soliciting or accepting that draft he became a buyer of the bank's credit and from that time on was a creditor of the bank and his clients were no longer beneficiaries of a trust fund.

We therefore conclude that there are no "special circumstances" disclosed by the record that justify us in holding that the intervener is entitled to a preference over general depositors. The judgment of the district court is right and is hereby

AFFIRMED.

NICHOLAS GOERGEN, APPELLEE, V. DEPARTMENT OF PUBLIC WORKS OF THE STATE OF NEBRASKA ET AL., APPELLANTS.

FILED JULY 29, 1932. No. 28393.

1. **Eminent Domain:** DAMAGES: APPOINTMENT OF APPRAISERS. Under the statutes granting to the state department of public works the power of eminent domain for highway purposes, the authority to select and summon three freeholders to ascertain damages for land taken without the consent of the owner is granted to the sheriff, and the appointing power of the county judge is limited to freeholders so selected and summoned.
2. ———: PROCEDURE. Proceedings instituted by the department of public works to condemn land for highway purposes must be conducted in the manner prescribed by statute.
3. ———: DAMAGES: APPOINTMENT OF APPRAISERS. Award of damages for land needed for a highway *held* void because made by appraisers appointed by the county judge without having been first selected and summoned by the sheriff.
4. **Appeal:** Upon appeal a question presented but not necessary to a decision need not be determined.
5. **Attorney and Client.** The state department of public works is bound by the knowledge and legal services of a competent attorney employed by it to procure the condemnation of land for highway purposes, where he acted regularly in good faith in that capacity for his client, throughout the entire proceedings, in absence of fraud or notice of record that his employment had been terminated.

6. **Judgment Against State.** Where the state starts proceedings legally resulting in a decision which, as to it, is unsatisfactory, it should either appeal or abide by the consequences like other litigants.
7. **Eminent Domain:** INJUNCTION. Where employees of the department of public works enter upon land, against the will of the owner, under a void appraisement for damages and attempt to use his land for highway purposes without compensation either paid or tendered, they may be restrained by injunction.

APPEAL from the district court for Dakota county: MARK J. RYAN, JUDGE. *Affirmed.*

C. A. Sorensen, Attorney General, and *L. Ross Newkirk,* for appellants.

George W. Leamer, contra.

Heard before ROSE, DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

ROSE, J.

This is a suit for an injunction to prevent the state department of public works and its employees, defendants, from appropriating a strip of plaintiff's land in Dakota county for a public highway without paying therefor or depositing with the county judge the amount of a 1,200-dollar award which appraisers made December 15, 1930, in a condemnation proceeding instituted by the department of public works before the county judge August 4, 1930. The facts on which the suit is based are stated in the petition for the injunction.

The state of Nebraska by the department of public works appeared specially in the suit for an injunction and objected to the jurisdiction of the court over that department. The employees named as defendants admitted that the department of public works applied August 4, 1930, for condemnation of the land described in the petition and pleaded that appraisers regularly appointed by the county judge August 4, 1930, made a conclusive award of $500 August 19, 1930, after due notice to them and to plaintiff;

that the damages which plaintiff will sustain by the taking of his land for highway purposes were thus determined; that plaintiff did not appeal from the award of $500; that the amount of the 500-dollar award and the costs were duly paid by state warrant to the county judge for the benefit of plaintiff in November, 1930; that the alleged appraisement of $1,200 December 15, 1930, and all proceedings in the county court in the condemnation proceedings subsequent to the award of $500 August 19, 1930, were void; that plaintiff prevented employees of the state from lawfully entering upon the land condemned for highway purposes. The reply to the answer was a general denial.

There were two appraisements of damages and two awards. The first or 500-dollar award was made August 19, 1930, by appraisers or commissioners appointed by the county judge. The second or 1,200-dollar award was made December 15, 1930, by appraisers or commissioners selected and summoned by the sheriff and afterwards appointed by the county judge. Both awards were made in the same proceeding on the same application of the department of public works. The county judge entered upon his records September 18, 1930, an order setting aside the first award as void, but he received by state warrant in November, 1930, $557.50, the amount of the first award and costs. Plaintiff rejected $500 as compensation for his land. The foregoing facts were shown without dispute. Plaintiff relied on the invalidity of the first award and on the regularity and conclusiveness of the second award from which there was no appeal. Defendants relied on the validity of the first award, from which there was no appeal, and on the invalidity of the second award.

The district court found the issues in favor of plaintiff and granted an injunction enjoining defendants from entering upon plaintiff's land until the award of $1,200 shall have been paid. Defendants appealed.

In the supreme court defendants argued that damages for taking land for highway purposes, when not determined

by agreement, are ascertained by commissioners appointed by the county judge; that commissioners were so appointed in the first instance pursuant to statute on a sufficient application; that regular proceedings thereafter resulted in the valid award of $500, from which there was no appeal; that the award and costs were paid to the county judge; that defendants were entitled to enter upon the condemned land for the purpose of opening the highway; that the injunction was erroneously granted. These propositions require consideration of the statutes granting to the department of public works the power of eminent domain for highway purposes and prescribing the manner of exercising that power. The legislative grant contains the following language:

"For such purposes power is hereby conferred upon the department of public works to take, hold and appropriate so much real estate as may be necessary and convenient in the manner provided for appropriation and condemnation of real estate by counties for public use." Comp. St. 1929, sec. 39-1403.

The county method of condemning land for public use was thus adopted for the department of public works. One section of the adopted statute provides:

"The damages which shall be paid to the owner by a county for any real estate taken as aforesaid, when not agreed upon, shall be ascertained and determined by commissioners who shall be appointed by the county judge of said county as hereinafter provided." Comp. St. 1929, sec. 26-710.

This section does not confer on the county judge the unrestricted power of appointment. His appointing power is limited by the concluding phrase, "as hereinafter provided." The section next following that quoted reads in part:

"The county judge of the county in which such real estate may be situated, shall upon the written application of either party, direct the sheriff of said county to summon three disinterested freeholders of the county, and not

interested in a like question, whose duty it shall be to carefully inspect and view the real estate sought to be appropriated, and who shall hear either party interested therein in reference to the amount of damages when they are so inspecting and viewing said real estate and who thereafter shall assess the damages which the owner shall sustain by the appropriation of his or her land." Comp. St. 1929, sec. 26-711.

Prior to 1929, this section, referring to "freeholders," contained the phrase "to be selected by said judge." Comp. St. 1922, sec. 1019. The provision granting to the county judge the authority to select the three freeholders to be summoned by the sheriff was eliminated by the legislature. Laws 1927, ch. 56, sec. 3. The different provisions of the law as it now stands should be considered together and, thus construed, the county judge is without power to appoint or select the appraisers in the first instance upon application of the department of public works for condemnation of land for highways. According to the statutory method now provided it is the duty of the sheriff to select and summon three disinterested freeholders. Until this is done the county judge is without appointing power. Compliance with the statutory method is necessary to the taking of land for highway purposes without the consent of the owner.

The record under consideration shows conclusively that the county judge attempted to appoint appraisers August 4, 1930, before they had been selected and summoned by the sheriff as required by law, and that these were the appraisers who, August 19, 1930, made the 500-dollar award upon which defendants rely to justify their entry upon the land of plaintiff. For the reasons stated this award and the subsequent payment thereof to the county judge constituted no defense whatever to the suit for the injunction.

Defendants argued further that the county judge was without power to set aside the first award, since he exercised ministerial and not judicial powers in the condemnation proceedings. The determination of this question is

unnecessary, because the first award was void without any further action of the county judge or county court and afforded no defense to the application for an injunction.

Another argument was directed to the proposition that the second award was void because it was made without jurisdiction, the state having had no notice of the action taken to procure the 1,200-dollar award and no appearance having been made for the state or the department of public works by any authorized attorney. This position is clearly untenable. The department of public works of the state of Nebraska made the sole application for condemnation. For that purpose Malcolm R. Smith, a qualified attorney at law, was regularly selected by the department of public works and performed services in that capacity throughout the proceedings. On the application for the appointment of appraisers he made oath that he was the attorney for the department of public works in the condemnation proceedings. The evidence shows he continued to act in that capacity to the end. It was his duty as attorney to procure the condemnation. He verified and presented the only application therefor. After the void award was made he recognized its invalidity and continued to perform the duties of his employment, requiring him to procure a right of way. He took part in all subsequent proceedings. His duties did not terminate with the void award because he had not yet procured the condemnation required by his employment. There is nothing to show he had been dismissed or that his term of service had been otherwise terminated. He knew every material step in the proceedings. His knowledge was the knowledge of the department of public works and of the state itself. He was not guilty of misconduct or fraud. After making the entry of the order purporting to set aside the first award the county judge and plaintiff had a right to rely on the integrity of Smith's continued professional services on behalf of defendants. The clients were bound by the legal action of their attorney. The proceedings following the void award conformed to statutory requirements. The

1,200-dollar award was regular and valid and binds all parties to the condemnation proceedings, since there was no appeal.

Immunity of the state from suit without its consent is invoked to defeat the injunction. This point is also without merit. Where the state starts proceedings legally resulting in a decision which, as to it, is unsatisfactory, it should either appeal or abide by the consequences like other litigants. Under the Constitution the state cannot take private property for public use without just compensation. Damages of $1,200 were lawfully determined but never paid to plaintiff or the county judge. Employees of the department of public works were trespassers. As such they were not the state when they attempted to take plaintiff's land. As wrongdoers they were properly restrained.

In view of the conclusions reached on the questions decided, other propositions urged by defendants do not require discussion. The injunction was properly granted.

AFFIRMED.

ROSE RESNICK ET AL., APPELLEES, V. PAUL KAZAKES, APPELLANT.

FILED JULY 29, 1932. No. 28094.

1. **Quære.** In view of the preliminary foundation quoted in the opinion, is the testimony of unofficial land surveyors, as to location of disputed boundary, competent, and if admitted without objection, is it material for any purpose?
2. **Appeal: REVERSAL.** On rehearing, record examined, and *held* to require reversal of the decree of the district court.

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

Clement L. Waldron and *David O. Mathews*, for appellant.

H. L. Mossman and *Lower & Sheehan, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

EBERLY, J.

This case, now presented on motion for rehearing, was formerly determined by this court in an opinion reported as *Resnick v. Kazakes,* 122 Neb. 489. Reference is made to the statement of facts contained in that opinion.

It appears that by decree entered in the district court for Douglas county, the defendant, Paul Kazakes, at the suit of Rose Resnick and her husband, Hyman A. Resnick, was "permanently enjoined from maintaining an eave spout or cornice on his building, or any other thing or projection, except the brick wall now there," as fully described in this opinion, and was "ordered to remove any and all such projections forthwith," and to pay the sum of $700 damages. From this judgment, and the order of the trial court overruling his motion for a new trial, the defendant Kazakes appeals. By the original opinion adopted, heretofore referred to, this judgment was, in all respects, affirmed.

The propriety of the measure of damages as applied by the trial court, as well as the sufficiency of the evidence to sustain its decree, are now presented for our consideration. Upon a careful rereading of the record, in the light of the briefs and arguments of counsel, we have arrived at the opinion that in certain respects our former conclusion is not a correct disposition of the case and should be modified.

The *locus in quo* is situated on a portion of lot 4, in block 5, in Park Place, in Omaha, Nebraska, and is bounded by Cass street on the south and Thirty-third street on the east. The defendant is the owner of the north 20 feet of the south 100 feet of the east 43 feet of the west 65 feet of this lot. On this tract, in 1926, he erected a one-story brick building. In 1929 he added to this building a second story.

Plaintiffs are the owners of the south 80 feet of the east 43 feet of the west 65 feet of this lot. On these premises, in 1929, they erected a one-story brick building whose outside dimensions are 80 feet by 43 feet.

The plaintiffs claim, and the trial court found as the basis of its decree, that the defendant, in the erection of his two-story brick building, "built it in and upon" the real estate of the plaintiffs 2 1/2 inches at the sidewalk line on Thirty-third street; that the top of defendant's building projects over the mutual property line of these properties 4 1/2 inches; and that to this wall thus encroaching the defendant added an eave spout and cornice which project over the premises of the plaintiffs to the extent of 10 1/2 inches. These findings of fact, if to be sustained at all, must be sustained on the testimony of two surveyors, Murray Schwartz and E. M. Rohrbough. Neither are public officers, and both were evidently employed by the plaintiffs. The foundation established, as preliminary to the admission of the evidence of these parties, is essentially as follows:

"Q. State your name to the court. A. Murray Schwartz. Q. You are a civil engineer, are you not? A. Yes, sir. Q. And also a surveyor here in the city of Omaha? A. Yes, sir. Q. Did you make a survey of the property at the northwest corner of Thirty-third and Cass streets in the city of Omaha? A. Yes, sir. Q. When was that? A. Well, I made three or four surveys there. Q. I mean with reference to the encroachment of the Paul Kazakes property on the Resnick property? A. The survey was made on that to determine the line between this lot that is at the northwest corner, at the intersection of Thirty-third and Cass streets, and the piece of property that is north of it, and that was on September 25, 1929. Q. Have you got the notes of your survey here? A. Yes, sir. Q. Will you refer to them? A. Yes, sir. (Witness producing book of field notes) Q. At the time that you made that survey did you locate or run the north line of the property which is described as the south 80 feet of the east 43 feet of the west 65 feet of lot 4 in block 5 in Park Place, an addition to the city of Omaha, Nebraska? A. Yes, sir; I did. * * * Q. Did you make a survey to find out whether or not the two-story brick building that

is on the north was over the lot line, on the south? A. Yes, sir; I did."

"Q. You may state your full name to the court. A. E. M. Rohrbough. Q. Where do you live Mr. Rohrbough? A. I live here in the city of Omaha. Q. You are a civil engineer, are you not? A. Yes, sir. Q. And you have practiced your profession how long here in the city of Omaha? A. About 20 years. Q. Now, Mr. Rohrbough are you familiar with the north line of the property described as the south 80 feet of the east 43 feet of the west 65 feet of lot 4, in block 5, in Park Place, an addition to the city of Omaha, Douglas county, state of Nebraska? A. I am. Q. And did you make a survey of that to determine where the lot line was, and whether the two-story brick building to the north was over that lot line or whether it was not? A. I did. Q. When did you make that survey, as near as you can remember it, about when? A. It was about January 25. Q. That is of 1931? A. Yes, of 1931. Q. I now show you this blue print, which the reporter has marked exhibit 2, and will ask you if you made that blue print? (Handing the witness blue print marked exhibit 2) A. I made the tracing from which it was produced. Q. That is your blue print? A. Yes, sir. Q. Now, then, referring to the right of it, here, is that looking up the building from the sidewalk? (Handing same to the witness) A. It is looking directly towards the building. Q. From the sidewalk on Cass street? A. It is what we call the east elevation of the building; that would be on Cass street. Q. In other words, this line here, on which I put an X with my lead pencil, is supposed to be the wall of the two buildings, is that right? (Counsel placing a cross on elevation of exhibit 2) A. Yes, sir. Q. Which is the north wall of the Resnick building and the south wall of the Kazakes building? A. Yes, sir. Q. That is right, is it not? A. Yes, sir."

Upon the preliminary foundation thus established, to meet the burden of proof imposed upon them by the issues being tried, the plaintiffs offered in evidence the opinions

of these private surveyors as to the exact location of the true boundary line in controversy, and also introduced in evidence a map constructed by one of them showing its relative situation. In this, it is thought there was a substantial failure to conform to the procedure which usually obtains in a nisi prius court of this state, as to the necessity of a proper foundation preliminary to receiving the evidence of experts in their professional capacities, which includes that of land surveyors. "In admitting the testimony of surveyors the courts have been careful to confine them within the proper bounds." 5 Ency. of Evi. 601. On this subject, not only is the rule apparently universal that "a land surveyor may state the facts regarding a survey as a preliminary to stating his inference from them" (22 C. J. 690), but with reference to the necessity of so doing the supreme court of Michigan has employed the following language: "A surveyor cannot be allowed, under any circumstances, to fix private rights or lines by any theory of his own. Before a surveyor's evidence can be received at all, it must be connected with the starting points and other places or lines called for by the grants under which the parties claim. His duty is neither more nor less than to measure geometrically in accordance with those data, and his science goes no further. It is not his business to decide questions of law, or to pass upon facts that belong to the tribunal dealing with the decision of facts. His testimony, as a man of science, is never receivable except in connection with the data from which he surveys, and if he runs lines they are of no value unless the data are established from which they are run, and those must be distinctly proved, or there is nothing to enable any one to judge what is the proper result." *Jones v. Lee*, 77 Mich. 35.

The result of these surveys, which appear in the evidence in this case, is a decided and substantial conflict. Both cannot be correct, and it is obvious that one of the surveys is erroneous. The difference exceeds that of "permissible error." One of these surveyors locates the controverted boundary line as coinciding with the outer sur-

face of defendant's wall at the sidewalk level on the east boundary of his tract; the other, 2 1/2 inches south of that point. Likewise, a discrepancy of 2 3/8 inches appear on the western boundary of the two tracts. As already suggested, nothing appears in the record as to the manner of executing the respective surveys on which these divergent conclusions are based; for which reason it would seem that there is nothing presented which would "enable any one to judge what is the proper result," or logically evaluate their respective evidential values.

The maps in evidence are likewise subject to the same criticism. On this subject, the controlling rule seems to be: "The use of maps, models, diagrams, and photographs as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method. It follows, then, that the map or photograph must first, to be admissible, be made a part of some qualified person's testimony. Some one must stand forth as its testimonial sponsor; in other words, it must be verified. There is nothing anomalous or exceptional in this requirement of verification; it is simply the exaction of those testimonial qualities which are required equally for all witnesses; the application merely takes a different form. A witness must have had observation of the data in question, must recollect his observations; and must correctly express his observation and recollection. Here, then, is a form of expression ready prepared pictorially; he must supply the missing elements; in brief, it must appear that there is a witness who has competent knowledge, and that the picture is affirmed by him to represent it." 2 Wigmore, Evidence (2d ed.) sec. 793. The conclusion would seem to follow that unless the preliminary foundation established in evidence is ample to justify the reception of the oral opinion of the surveyor, it would be wholly incompetent to verify and render admissible the map prepared by him.

Fortunately, this question of whether the testimony of these surveyors is wholly without probative value is one which need not be determined at this time, and we may thus avoid basing this decision on the result of the application of a technical rule of evidence.

On cross-examination, witness surveyor Rohrbough further testified: "Q. At the base, at the ground level of the Kazakes building where it abuts the Resnick building, you say that the Kazakes building extends 2 inches over the lot line? A. That is according to my survey, yes, sir. Q. And that 2 inches remains practically the same all the way up the building until you reach the tile roof, is that correct? A. That is correct. In other words the building is plumb. Q. Did you plumb the Resnick building? A. I did. Q. Is the wall where it abuts the Kazakes building vertical? A. It is. Q. Now, then, did your survey extend to the rear portion of the Kazakes building? A. It did. Q. Did you find that there was any extension over and upon the Resnick building at the rear end of the Kazakes building? A. No. Q. There is none? A. There is none. Q. How far back from Thirty-third street towards the rear does the extension exist? A. It extends over not quite half way. In other words, in front, according to my survey the Kazakes building is over onto the property on the south 2 inches, and at the rear end of the Kazakes building it is 2 3/8 inches north of the building on the south. That extends practically half way. It is on an angle. Q. In other words, the Kazakes building is not up to the lot line at the rear of the Kazakes building? A. Yes, according to my survey that is correct. * * * Q. Did you make a survey of this brick building to the south of the Kazakes building? A. I measured the length of it. * * * Q. This building is a full 80-foot building? A. Yes, sir."

The surveyor, Murray Schwartz, also testified on cross-examination: "Q. Mr. Schwartz, you have indicated that from the southeast corner of Thirty-third and Cass streets to the Kazakes building there is a distance of 80 feet? A.

Yes, sir. Q. Is there an 80-foot building there? A. It is within half an inch. Q. It is within half an inch? A. Yes; it seems to me that the building is about half an inch short both ways. When I look at my notes it is only the one side that it is half an inch short. * * * It is half an inch difference in the width of the building. It is half an inch short on the west side of the full lot dimensions. * * * Q. Mr. Schwartz, did you measure the distance at the rear of the Resnick property—this 80-foot strip? A. Yes; both sides. Q. And is the Resnick building at the rear a full 80 feet? A. Well, 80 feet is the lot. Q. I am asking about the building? A. The building itself is half an inch short right here on the lot (indicating). Q. It looks a half an inch short of being full 80 feet? A. Half an inch of coming down to the Cass street front on the west side. Q. From your survey would you say that the plaintiff in this case has a building 80 feet long and 43 feet deep subject to this half inch discrepancy that you mention? A. No, there is no half inch discrepancy there. * * * Q. Now, then, Mr. Schwartz, at the time you made this survey did you also plumb the Resnick building? A. Which building is that? Q. That is the building to the south—the 80-foot building—did you plumb the north wall of the Resnick building to determine whether or not it was vertical? A. Well, it was vertical up almost to the top of the roof of itself. I did not make any special examination to determine that."

It is obvious, as the result of this evidence, that if plaintiffs possess a building situated wholly on the south 80 feet of the east 43 feet of the west 65 feet of lot 4, in block 5, in Park Place, in Omaha, of the admitted dimensions of 80 by 43 feet, the north wall of which is plumb, as testified to by Rohrbough, or as stated by witness Schwartz on cross-examination, "was vertical up almost to the top of the roof of itself," it must be conceded that there is no encroachment by the Kazakes building at the sidewalk level upon the premises of plaintiffs, and that the district court is wholly mistaken in at least one of the essential elements upon which its conclusions are based.

We are further convinced that encroachments on plaintiffs' premises, if any exist, are confined to that portion of the north wall of the Kazakes building situated above the height of the roof of the Resnick building. That these, if such exist, are due to causes wholly beyond the control of the defendant, and up to the time of the commencement of this action constituted no intentional impairment of plaintiffs' rights by Kazakes, and that no substantial damages accrued to plaintiffs by reason thereof.

The plaintiffs, however, are entitled to have that portion of wall, coping, and cornice attached thereto, if such exists, now projecting over their north boundary line removed forthwith, it appearing that the same are of a removable nature. The south wall of the Kazakes building at the sidewalk level and up to the height of the roof of the Resnick building is situated wholly on the land of defendant and does not encroach on plaintiffs' premises. It further appears that as to the damages to plaintiffs' building occasioned by the water, as claimed by plaintiffs, they were proximately due to a defect in the building of plaintiffs, and were not caused, nor the extent thereof increased, by reason of the discharge of the waters falling upon defendant's building, and then drained and discharged upon and over the building of plaintiffs.

The judgment of affirmance heretofore entered in this court will be set aside, and the decree of the district court is reversed and the cause remanded, with directions to the district court to enter a decree quieting the title and possession in the defendant of the south wall of his building, from the foundation to the height of the roof of the Resnick building, but permanently enjoining him from discharging the waters falling upon his building over or upon the building of plaintiffs, and from maintaining or permitting any eave spout or cornice on the south wall of his building, or allowing any portion of the brick walls thereof, to project over and upon the lands of plaintiffs, described as the south 80 feet of the east 43 feet of the west 65 feet of lot 4, in block 5, in Park Place, in the city of Omaha,

Nebraska; and that the defendant be ordered to remove any and all such projections forthwith; and that each party pay their own costs.

REVERSED.

CHRIST POLYZOIS ET AL., APPELLANTS, V. ROSE RESNICK ET AL., APPELLEES.

FILED JULY 29, 1932. No. 28097.

1. **Statute of Frauds:** EASEMENTS. An easement in land is created by parol, where the grant or permission has been accepted and fully acted upon by both parties, and the land has been so used for a considerable period of time.
2. **Easements.** One who purchases land burdened with an existing easement, of which he has actual or constructive notice, acquires an estate which is servient to the easement.
3. ———: ABANDONMENT. If an owner of an easement, by his own act, renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, the easement will be considered as abandoned by him.

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

Clement L. Waldron, David O. Mathews and *Chris Harvalis*, for appellants.

H. L. Mossman and *Lower & Sheehan, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

EBERLY, J.

This is a suit in equity to determine the respective rights of the parties plaintiffs and defendants in and to a certain easement, hereinafter described, and for appropriate relief for alleged violations thereof. There was a decree for defendants. From this decree and the order of the district court overruling the motion for a new trial, plaintiffs appeal.

The easement of right of way in dispute may be described as the east 5 feet of the west 22 feet of the west 65

feet of the south 100 feet of lot 4, and the west 5 feet of the south 100 feet of the east 43 feet of the west 65 feet of lot 4, all in block 5, in Park Place, an addition to the city of Omaha, Nebraska.

There is but little dispute as to the important facts leading up to the litigation. On or before August 7, 1925, one Arthur Theodore acquired the fee simple title to the west 65 feet of the south half of lot 4, and the east 15 feet of the south half of the east half of lot 5, all in block 5, in Park Place, an addition to Omaha, Nebraska. On or about October 21, 1925, Theodore, still being the owner in fee simple of the property above described, entered into a certain land contract with plaintiffs for a definite portion of the tract last described, expressly "reserving to the grantor, his heirs and assigns, an easement for a driveway over and upon the east 5 feet of the said west 22 feet of the said west 65 feet of said lot 4." Contemporaneous therewith, and in consideration thereof, a further verbal agreement was entered into by and between Arthur Theodore and plaintiffs that a similar strip of land adjoining and to the east of the strip of land last described, then owned by Theodore, would be reserved in like manner by him for an easement for a driveway, which lands together constituting a strip 10 feet in width then and thereby were devoted to the present use as an easement for a driveway for the benefit of plaintiffs and Theodore and their respective heirs, grantees and assigns forever. On January 23, 1926, Arthur Theodore, in conformity with the terms of the land contract so entered into, conveyed by warranty deed the premises in the land contract described, which deed contained a reservation of an easement, as provided for in such contract, and in pursuance of the oral stipulation of Theodore, and intended for the purpose of creating a 10-foot easement of right of way. Thereafter the lands as originally acquired by Theodore were further divided and the several portions thereof thus created, all being adjacent to the 10-foot easement of right of way, heretofore described, were severally conveyed to

grantees, pursuant to contracts, and with reservations in the instruments of conveyance substantially identical with those hereinbefore set out and referred to as made by plaintiffs and Theodore; and that plaintiffs herein, together with the grantees of such portions of this tract, from the date of their several conveyances, entered into the enjoyment of the use of the easement thus created, and thereafter continued in practically open and continuous enjoyment thereof down to the interruption made by the defendants which occasioned the commencement of this suit.

It further appears that the right of easement as heretofore described was infringed, and the use of the same interrupted, if at all, by the defendants in that portion thereof which is situated on the following portion of this original tract, viz., the south 80 feet of the east 43 feet of the west 65 feet of lot 4, in block 5, aforesaid. This was accomplished by the erection of a one-story brick building covering the entire premises described, including the easement situated thereon.

The admitted facts of the record in this connection are that the land last described was sold and conveyed by Theodore to Abraham Somberg. Somberg in turn sold and conveyed it to Peter Birbilis and Henry J. Hower. The latter, together with their respective wives, in turn conveyed the premises on January 24, 1929, to Sophia I. Siampaus and Rose Resnick. Sophia I. Siampaus, and her husband, then on March 12, 1929, by warranty deed, conveyed the legal title to the premises above described to Rose Resnick, one of the defendants herein. There is no question under this record that, excepting the Resnicks, wife and husband, all grantees appearing in this chain of title possessed actual and admitted knowledge of the claims of the plaintiffs to this 10-foot easement, and had actual notice of its existence prior to their respective purchases thereof, and thus dealt with the premises on the basis of this condition.

Plaintiffs alleged in their petition that the premises described were conveyed to Sophia I. Siampaus and to defendant Rose Resnick by a deed, and by the terms therein it was made "subject to all conditions of driveway agreements now of record." At the time of said conveyance all parties thereto well and fully knew of the continued existence of the easement above described, and were so informed and notified by said Somberg.

As their answer to these allegations, the defendants Resnick pleaded, "for further answer these answering defendants admit that during the spring of 1929, they erected a one-story brick building on the property described as the south 80 feet of the east 43 feet of the west 65 feet of lot 4, in block 5, in Park Place, the west wall of said building being on the west line of said plot of ground. That at said time these answering defendants had no knowledge or notice that the plaintiffs had or claimed to have any right of easement in or to any of the ground on which said building was erected." The plaintiffs replied by way of a general denial.

The defendant Rose Resnick does not appear as a witness. Her husband, Hyman A. Resnick, testified for defendants. It is quite evident that all business pertaining to the buying of the property was transacted by or for him; that he purchased the land which he took in his wife's name. He admits that Siampaus was interested with him in the proposition from the beginning, and is now; and that in the negotiations with Somberg or Kazakes or Polyzois, said Siampaus was his partner and agent. In this connection Siampaus testifies, in substance, that he had to do with the sale of the property by Somberg; that he transacted the business; that from the beginning he had an interest in the property and still has. He admits that a week or ten days before he bought the property he knew that Christ Polyzois, plaintiff, claimed the existence of the 10-foot easement and that he (Polyzois) was the owner thereof, and that Siampaus personally searched the public records and from this search, in view of the reservation

contained in the deeds, concluded, notwithstanding the claim made, that no legal easement existed. In addition to this plaintiffs, and other grantees of Theodore, were actually, openly and continually using this private way.

An easement in land may be created by parol where the grant or permission has been accepted and fully acted upon by both parties. Where adjoining landowners have orally agreed that a certain strip of land shall be left open for their common use, and for the use of their respective grantees or assigns, and the land has been so used for a considerable period of time, the contract is removed from the operation of the statute of frauds. 27 C. J. 326; *Newcomb v. Royce,* 42 Neb. 323; *Bailey v. Brown,* 125 Kan. 149; *Forde v. Libby,* 22 Wyo. 464.

So, too, one who purchases land with notice, actual or constructive, that it is burdened with an existing easement, takes the estate subject to the easement and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. 19 C. J. 939; *Seng v. Payne,* 87 Neb. 812; *Moll v. Hagerbaumer,* 98 Neb. 555; *McDonough v. Meany,* 108 Neb. 496; *De Conly v. Winter Creek Canal Co.,* 110 Neb. 102.

In the instant case the defendants are standing in the shoes of Theodore, a remote grantor, from whom they have derived the title to their purchased lands. They are also beneficiaries to the 10-foot easement for driveway purposes, which was created by this predecessor in title. In the erection of their building, covering the east 5 feet of this driveway, they have not only seriously marred it, but have practically destroyed the use for which it was created to serve. In view of the circumstances here presented, the controlling principle appears to be that this private way is to be regarded as an entire thing, and when divided or extinguished in part by the hostile act of one of the parties an extinguishment of the whole results. This rule has

an added force, when it is remembered that here the act of the defendants is a substantial destruction of the entirety, by rendering its enjoyment in the manner contemplated at its creation an utter impossibility. This case thus necessitates the application of the rule that, "if the owner of the easement by his own act renders the use of the easement impossible, or himself obstructs it in a manner inconsistent with its further enjoyment, * * * the easement will be considered as abandoned." 19 C. J. 950. See, also, *Brown v. Oregon Short Line R. Co.*, 36 Utah, 257; *Wooding v. Michael*, 89 Conn. 704; *Monaghan v. Memphis Fair & Exposition Co.*, 95 Tenn. 108.

We further find that the evidence in the record wholly fails to sustain the contention of the defendants as to the making of the contract by plaintiffs, under which the defendants caused the east 10½ feet of plaintiffs' lot to be paved with concrete, and we further find that upon the abandonment by defendants of their right to participate in the enjoyment of the 10-foot easement for driveway purposes, as hereinbefore determined, the plaintiffs succeeded to the title of their premises wholly relieved from the force and effect of the language of their deed creating and reserving to the grantor (Theodore), his heirs and assigns an easement for a driveway over and upon the east 5 feet of the west 22 feet of the west 65 feet of said lot 4; and that plaintiffs are entitled to have their title and possession of said land quieted, and to have the defendants, their agents, and servants, restrained from passing over and upon the same, or from trespassing over or upon it on any pretext whatsoever.

The judgment of the district court is therefore reversed and the cause remanded, with directions to find for the plaintiffs, and against the defendants, and to quiet the title and possession of the plaintiffs in and to the east 10 1/2 feet of the premises on which plaintiffs now reside (said premises being more particularly described as the east 15 feet of the south 100 feet of lot 5, and the west 22 feet of the west 65 feet of the south 100 feet of lot 4, in block 5,

in Park Place, an addition to the city of Omaha, Douglas county, Nebraska); and that a further decree be entered enjoining the defendants, their agents, servants, and representatives from passing over and across any portion of said plaintiffs' premises, or in any manner trespassing thereon; and requiring that the costs of this suit be taxed to the defendants.

REVERSED.

PHILIP SCHAFER, APPELLEE, V. MISSOURI VALLEY PIPE LINE COMPANY, APPELLANT.

FILED JULY 29, 1932. No. 28251.

1. Appeal: EXCESSIVE VERDICT. If a verdict is beyond any reasonable limit of compensation warranted by the facts, a presumption arises that such verdict was not based upon sober judgment of the testimony given by the witnesses upon the stand, but upon mistake, passion or prejudice.
2. ———: ———. If amount of verdict is not supported by sufficient competent evidence, and is so clearly wrong as to induce the belief that, under the most liberal interpretation of the plaintiff's evidence, it could not have been reached without partiality, such verdict and the judgment founded thereon will be reversed.

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

George A. Lee, W. A. Robertson, Fred C. Foster and *P. W. Morton,* for appellant.

D. O. Dwyer and *W. L. Dwyer, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and BLACKLEDGE, District Judge.

PAINE, J.

This is an action for damages caused by the construction of a pipe line across the plaintiff's farm and across a piece of rented land cropped by the plaintiff. The plaintiff asks for damages in the sum of $4,900, and the jury returned a verdict in his favor for $2,556.45. The defendant in the lower court appeals the action to this court.

The appellee, called the plaintiff hereafter, alleges that in July of 1930 the defendant company trespassed upon his land and laid a pipe line through, over and across said land, and that such pipe line is a continuing trespass upon his lands, and the plaintiff's title, by reason of said pipe line, has been incumbered so that its value is depreciated in the sum of $1,800, and that, by tearing down fences, destroying growing crops and pasturage, by use of heavy trucks and trampling over and upon a strip of land about 65 feet wide and about 91 rods long, 40 rods being through a pasture, the surface of said land and the crops thereon have been destroyed, to plaintiff's additional damage in the amount of $1,000. That one of the defendant's employees drove a truck through a gate, letting plaintiff's cows into a field of oats, and as a result one died, one was ruined and sold for $25, and a third recovered, and that these were purebred Holstein cows, and his total damage to the cows was in the sum of $500.

It is also charged by the plaintiff that there was a spring in his pasture, and that in running the pipe line through said pasture it interfered with said spring so that the spring has ceased to flow, and that plaintiff has been damaged by reason of the destruction of said spring in the sum of $1,500. That in constructing the pipe line over adjoining land rented by the plaintiff, the three-fifths interest of the plaintiff's corn, growing on a strip of land 65 feet in width and 80 rods in length, was destroyed, to his damage in the sum of $100, making a total damage in the sum of $4,900. The defendant filed a general denial.

The principal attack made upon the verdict of the jury by the appellant is based on the fact that the verdict is contrary to the evidence and is not sustained by sufficient evidence. There was introduced in evidence a written grant for a right of way and easement to construct, maintain and operate said pipe line, given by plaintiff to defendant for a consideration of 25 cents per rod, and a voucher for $20 for 80 rods was given to plaintiff in settlement upon July 9, 1930, by the right of way claim agent, which was

cashed by the plaintiff, and no objection was made by plaintiff during the construction of the pipe line across his land.

A large amount of evidence was taken in regard to the destruction of a spring, for which loss $1,500 was claimed as damages. Plaintiff testified on direct examination that he had a small spring in his pasture, about 40 feet south of his north line, and that the flow from the spring was about one inch in diameter, and that, in constructing the pipe line about 40 feet back of the outlet of the spring, they must have cut through it, for since that time the spring has not flowed. This evidence was supported only by the testimony of his brother, who testified to the existence of a spring before the pipe line was put through, and that it had not run since. Three old neighbors, called as witnesses by plaintiff to testify to other damages, knew nothing of any spring in this pasture. The first was H. F. Engelkemeier, who said that he had once farmed this same land for a couple of years. He knew there was some water down there in the pasture, but knew nothing of any spring when he farmed it. Parr Young, the next witness, who owned a farm within three miles of this place, never knew of the existence of a spring in this pasture. Otto Puls, who owns a farm one mile from the plaintiff, and who had lived in the vicinity for 20 years, also testified for the plaintiff, but did not know of any spring in this pasture. L. L. Frank, the right of way agent for the defendant company, testified that he had gone over the claim for damages several times with the plaintiff on his farm, but that the plaintiff had never mentioned any spring at any time, and that the first time that he had ever heard there was a spring was when the suit was filed in court.

Joe T. Innes, of Omaha, testified that he was the civil engineer in charge, and had been engaged in laying pipe lines for five years; that three surveys had been made through this land; that upon the field notes all natural obstructions are noted, such as hills, deep draws, and rock, as well as boggy land, sandhills and springs, and that these

field notes of this survey, of which photostatic copies are attached to the bill of exceptions, showed no spring in this pasture.

W. F. Bronsell, the chief inspector, who had charge of the construction work across the Schafer land, never heard of any spring on the place, and testified that the only water present in the pasture was seepage water, which was removed by a four-inch suction diaphragm pump, and that there was no more difficulty in laying pipe across this land than there was in going across any other low land.

It appears from the evidence that only the plaintiff and his brother testified they had ever seen the alleged spring; that possibly two other witnesses had heard that there was a spring in the pasture, but had never seen it. The civil engineer in charge, who testified that it was his custom to make a note of springs, said that there was no spring in the pasture, and the inspector in charge testified that all of the seepage was easily removed by the four-inch pump, which would not have been sufficient to remove a flow of water one inch in diameter from a spring. It is pointed out in the appellant's brief that, after the alleged spring was destroyed, neither the plaintiff nor his brother testified to anything that was done to provide water by pump and gasoline engine, or windmill, or from any other source whatever, to take the place of the water which they said was formerly produced by the spring, and plaintiff admits that in the conversations with the claim agent he had never mentioned the loss of this spring, and appellant insists that the evidence shows there was probably some seepage of water, but no spring in the pasture, for which $1,500 is asked in damages.

In reference to the item asked of $500 for foundering of cows, the evidence discloses it occurred by a pipe line employee driving a truck into a hedge post on the side of a field gate so the wire could not be fastened to the hedge post, and the cattle went through this opening into his field of oats. The plaintiff saw them go as he was plowing in a near-by field, and testified he continued plowing corn to the

end of the row, which was perhaps 30 rods, and then went over and ran them out, and the next morning he noticed that three were sick, and he thinks it was from eating too much oats. He gave them salts and oil. That in three weeks to a month afterwards one of these cows died; that he did not call his veterinarian for this difficulty, and that he secured a certificate of registration of two of these cows in the Holstein-Friesian Association on September 20, 1930, after the pipe line had gone through in July. Dr. W. H. Tuck, of Weeping Water, who was the veterinarian called by the defendant, denied that he had been called to see any foundered cows, but that the two cows that he had been called to see were affected with inflammation of the udder; that later on he was called to see one cow which had a case of chronic foundering, where her toes had grown out long and she walked on her heels, and that this was the cow which was shipped to Omaha and sold for about $25.

Appellant charges in its brief that the only evidence in regard to the damages to the cows is that given by the plaintiff himself; that neither his wife, his brother, nor any other person supported his testimony concerning the foundering of these cows by a truck breaking down a gate-post, which allowed cows to go into the oat field for a very short time before he drove them out.

Except for the damages to the cows, and the testimony of the plaintiff and his brother that there was a spring in the pasture which was cut off, which is positively denied by the engineer in charge of construction across the pasture, and not supported by three witnesses called by the plaintiff, who had known this land for many years, the other items of damage appear to have been only the usual damages which occur when heavy trucks are driven out across tilled land or low pasture land carrying these heavy pipes.

Under all of the evidence submitted in this case, we find that the verdict is beyond any reasonable limit of compensation warranted by the facts. A presumption is raised

that this verdict was not based upon sober judgment of the testimony given by witnesses upon the stand, but was based upon mistake or passion and prejudice. We are compelled to find that the amount of this verdict is not supported by sufficient competent evidence, and is so clearly wrong as to induce the belief that it could not have been reached without partiality. *Trute v. Holden,* 118 Neb. 449; *Garfield v. Hodges & Baldwin,* 90 Neb. 122; *Burge v. Adams Co.,* 98 Neb. 4; *Wiles v. Department of Public Works,* 120 Neb. 689; *Sternberger v. Sanitary District,* 100 Neb. 449; *Campbell v. Sutliff,* 193 Wis. 370, 53 A. L. R. 771, 779; 2 R. C. L. 199, sec. 170. The judgment is hereby reversed and a new trial ordered. Costs taxed to appellee.

REVERSED.

LYMAN-RICHEY SAND & GRAVEL COMPANY, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

FILED JULY 29, 1932. No. 28437.

1. Highways: CONSTRUCTION: CONTRACT: "FREIGHT RATES." The term "freight rates," used in a highway construction contract, may apply to the cost of transportation by truck, as well as to the cost of rail transportation.
2. Contracts: CONSTRUCTION. In construing a paragraph of a contract which is in dispute, the court must endeavor to place itself in the position of the parties, and ascertain their intention, as well as the object and purpose to be accomplished by the doubtful provision, and interpret it in the light of the actual facts and circumstances surrounding them at the time it was made.
3. ———: ———. It should be accepted as a rule that, when a contract is entered into which is upon the printed forms prepared by and regularly used by one of the parties as its established form of contract for such work, a disputed provision, of doubtful and ambiguous meaning, which appears in the printed portion thereof unchanged, should be construed more strictly against the party preparing such contract.
4. ———: ———. "Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such a construction as the party preparing the same at the time supposed the other party would

give to it, or such a construction as the other party would be fairly justified in giving to it." *Flory v. Supreme Tribe of Ben Hur*, 98 Neb. 160.

5. States: APPEAL: REVIEW. The legislature has provided a rule in section 27-322, Comp. St. 1929, to guide courts in determining appeals of disputed claims, which rule, as a matter of public policy, requires both the state and the parties contracting with it to deal amicably and fairly with each other, to the end that justice and right may prevail. Such rule forbids a court from construing a doubtful and ambiguous provision in a contract so that it will operate oppressively against one of the parties.

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

C. A. Sorensen, Attorney General, and *L. Ross Newkirk,* for appellants.

Abbott, Dunlap & Corbett, contra.

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

PAINE, J.

This is an appeal from a judgment rendered in the district court for Lancaster county for $4,006.46 against the state of Nebraska, together with an order directing the auditor of public accounts to issue and deliver a warrant to the appellee for said amount.

The extensive bill of exceptions in this case carries with it, as exhibit 5, the transcript of the proceedings had before the state auditor and secretary of state upon this claim, in which appears the original contract and specifications, making up a printed book of some 150 pages, which contract was entered into October 15, 1930, between the county of Douglas, by the chairman of its county board, and the department of public works of the state of Nebraska, by R. L. Cochran, its state engineer, as parties of the first part, and the Yant Construction Company, by its president, R. C. Yant, as party of the second part, for the paving by said construction company of state highway project No. 664-B, known as the Maple Street Road, which

paving extended five miles east from the intersection of that road with the Lincoln Highway, and lying northeast of the village of Elkhorn in Douglas county, Nebraska.

The case was brought to the district court on appeal from a decision of the auditor of public accounts and secretary of state, disapproving said claim of $4,006.46 to the amount of $2,643.49, but approving it as to the balance, of $1,362.97. Upon appeal, the case was tried in the district court for Lancaster county, without a jury, under the provisions of section 27-319, Comp. St. 1929, giving the district court jurisdiction to try appeals upon claims so disallowed.

It is admitted by the pleadings that this entire contract for five miles of paving was completed, according to its terms, within the time provided, and that the total contract amounted to the sum of $100,836.94, and that the deduction of $2,643.49, made by the state engineer from the last payment, without notice, is based upon the following provision of the contract, found in next to the last paragraph therein: "That it is mutually understood and agreed by the parties to this contract: That if the freight rates on materials required to complete this contract are increased after the date of the receipt of bids and before the date set for completing the work, the contractor will be paid extra an amount equal to the amount of the increase in freight rates on the materials required to complete this contract, likewise that deductions will be made should freight rates be decreased during said period." That soon after receiving the contract from the state for this five miles of paving, Mr. Yant had received a bid from the Lyman-Richey Sand & Gravel Company to deliver the proper mixture of sand and gravel, referred to hereafter as "sand-gravel," required under the contract, but, as Mr. Yant had leased a gravel pit in the vicinity, he did not finally decide whether to furnish the sand-gravel from his leased pit, or to contract with the Lyman-Richey Sand & Gravel Company until March 11, 1931, when he entered into a contract with that company to furnish all sand-gravel

for $11,599.72. At the time that it took the contract, the Lyman-Richey Sand & Gravel Company planned to haul the sand-gravel by truck from its Brown pit, which was directly west on the same section line and less than five miles in actual distance from this Maple Street job, from which Brown pit over 20,000 tons of gravel was trucked in the year 1931 to road construction jobs in the western part of Douglas county, and which would have required them to have paid 7 cents for transporting each cubic yard of sand-gravel each mile, or 35 cents per cubic yard to truck the same from the Brown pit. No railroad sidetrack was adjacent to the Brown pit, and the material from this, the nearest pit of the Lyman-Richey Sand & Gravel Company, would necessarily have been required to be transported by trucks.

The assistant general freight agent of the Union Pacific testified in the district court that the railroads had lost the greater part of the traffic in this commodity, as well as in live stock, stating that in 1930 and in 1931 90 per cent. of live stock going into South Omaha from a radius of 25 miles moved by truck, and that in March, 1931, the Union Pacific solicited the appellee to allow it to haul the sand-gravel for this Maple Street contract from its pits near Valley, Nebraska, which were upon the Union Pacific tracks at a distance of some 8.3 miles from the Maple Street job, for which haul the rate had been 90 cents per cubic yard, a cubic yard weighing about 3,000 pounds. The appellee company agreed to give this business to the Union Pacific if it could be hauled at the rate of $25 per 60-ton car, and thereupon the first emergency rate, to expire May 31, 1931, was put in by the Union Pacific to secure the hauling of sand-gravel for this particular job, and in the application to the state railway commission, of April 1, 1931, as set out in exhibit 3, the Union Pacific stated that they were publishing this emergency rate "only for the purpose of meeting truck competition there present." That the executive vice-president of the Burlington, Mr. Spens, asked Mr. George P. Abel, of the Abel Construction Company, to come to Chicago to tell them how the railroads

could obtain some of the gravel business, and after that conference it was decided that the Burlington would also install similar emergency rates between certain points, and the testimony discloses that Mr. Abel switched six or seven projects from truck to railroad haul under the emergency rates, but he testifies that no contractor gained anything by the change, for the railroads dropped their rates only just enough to meet the truck rates. Thereafter such emergency rates were extended to some 200 stations in Nebraska by the different railroads.

The appellant claims there were no established freight rates for shipping sand-gravel by trucks. The appellee denies this, and insists that practically all sand-gravel required for highway construction projects within ten miles of the Platte river during 1930 had been hauled by trucks, and that while the rates varied slightly, depending upon the length of the haul and the kind of roads over which it was to be transported, yet truck rates on sand-gravel had finally reached an average freight rate of 7 cents per cubic yard per mile upon all of such projects, and that this was well known to the highway department of the state.

It is conceded by all parties that the emergency railroad rate in this case, of $25 per 60-ton car, was still higher than the appellee could have had the sand-gravel hauled by truck from its Brown pit, but that there was a slight advantage in loading it at the Valley pits into railroad cars over loading it into trucks at the Brown pit, but that in dollars and cents it cost the appellee more to transport this sand-gravel to the Maple Street job by rail than it would have cost it to have transported it from the Brown pit by truck. The total shipment was 15,447 tons in 265 railroad cars.

The rail rate in force for the 8.2-mile haul from the Valley pit was, at the time of signing the contract, 60 cents per ton, or 90 cents per cubic yard, while the rate by truck for the five miles from the Brown pit was 35 cents per yard and 10 cents per yard for piling it in a stock pile, a total of 45 cents, or just one-half the rail rate then in force. The

emergency rail rate, of $25 per 60-ton car, was about 41 cents per ton, or 60 cents per yard.

1. The first proposition of law involved in the case is whether the term "freight rates," in the paragraph of the contract cited above, means only railroad freight rates, as contended for by the state, or freight rates generally of any carrier. The new Oxford dictionary, among the definitions for freight, says, goods in transit, the cargo, anything carried by sea or land. If the word "freight" covers commodities generally, why may not the term freight rate cover the cost of carriage by whatever means? The word "freight" has been used from the earliest times to mean the property or commodity which is carried, whether it was that which was carried in times past in Conestoga wagons drawn by ox teams across the plains, or whether it was carried upon canal boats, or is carried today by aeroplane, or by truck, as well as by rail. Quotations are given in appellee's brief from the Nebraska City News of November 28, 1860, showing the extensive freighting business of Alexander Major, who transported nearly three million pounds of freight that season across the plains, using 515 wagons and 5,687 oxen.

The legislature of Nebraska, in adopting section 20-406, Comp. St. 1929, recognized the increasing use of trucks in transportation of commodities, and provided that summons might be served upon trucking companies engaged in the business of common carriers, and the legislature of 1931, in chapter 107, mentioned "freight-carrying vehicles," covering a truck or a trailer used for freight. The first of these sections was held valid in *Schwarting v. Ogram, ante,* p. 76.

With the present network of lines of trucking companies running upon regular routes over practically the whole United States, it would seem to this court that the term "freight rates" would apply to and mean the compensation to be paid for conveying commodities by truck as well as by barge, aeroplane, or rail.

2. In construing the paragraph of the contract in dispute in this case, the judge must endeavor to place himself in the position of the parties, then to ascertain the intention of the parties and the object and purpose designed to be accomplished by the provision in dispute. Was it the intention of the parties that this section of the contract should be rigidly enforced, even when the contractor lost money by using an emergency reduced rate for shipment by rail, or was it not rather the purpose of this section of the contract to require the construction company to pay to the state any extra profit secured by an unexpected reduction in the haulage price after the contract had been signed up? *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693. See 4 Neb. Law Bulletin, 215, 228.

3. 4. It may be accepted as a universal rule that a contract upon a printed form prepared by and regularly used by the state for such highway contracts and containing a printed condition of doubtful meaning, such disputed provision should be construed more strictly against the party who prepares and furnishes such form of contract than against the other party.

"In construing a contract, if the language of the contract does not clearly express the intention of the parties, the character of the subject-matter and the circumstances surrounding the transaction must be considered in determining their intention." *Hardy v. Ward*, 64 S. E. 171 (150 N. Car. 385); *Farmers Nat. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309. In a contract prepared by one of the parties, language susceptible of more than one construction may be given such construction as the other party would be fairly justified in giving to it. *Flory v. Supreme Tribe of Ben Hur*, 98 Neb. 160.

5. The legislature has provided a rule to guide the courts in determining appeals of this nature. Section 27-322, Comp. St. 1929, provides that the courts shall hear and determine such matters according to justice and right, as upon the amicable settlement of a controversy, and shall render judgment against the state or the claimant as right

and justice may require. This can mean that the broadest equitable principles shall be applied and the decision pronounced shall be the result of applying as liberal rules as laymen apply in an amicable settlement of a dispute between them. After such a consideration of the case, we do not believe this provision was ever intended to force a highway contractor to suffer a loss by forfeiting to the state a sum of money under the conditions set out in the facts of this case. The emergency rates by rail from the Valley pit were still higher than the truck rates from the Brown pit, therefore the cost was not reduced to the contractor because he shipped by the emergency rail rate.

The state asks for a reversal because the term "freight" rates in the paragraph of the contract under discussion applies to and means only *rail* freight rates. The state further urges that the question whether the contractor intended to ship by truck if emergency rail rates had not been adopted to meet truck competition cannot be considered by the court in deciding the question at issue. The state finally insists that the facts as to whether the use of the emergency rail rates caused the contractor to gain an unlooked-for profit, or resulted in a loss, are entirely immaterial in this cause.

We have examined the state's brief with care on these points and we cannot bring ourselves to adopt a position which will operate oppressively in favor of the state and compel the payment to the state of money which we believe the state is not entitled to under the terms of the contract.

In our opinion, the clause in controversy in the contract would not apply unless there was an actual saving or an actual loss to the contractor by a change in the freight rates. The purpose of this clause was to do equity between the state and the contractor and force the contractor to forfeit to the state any unexpected gains he made by reason of an unforeseen lowering of freight rates, or, on the other hand, to require the state to add to the price of the contract any actual loss sustained by the contractor by reason of a raising of freight rates beyond what was

within the contemplation of the parties at the time the contract was signed.

After a careful consideration of the transcript, bill of exceptions and briefs filed, we find no error in the record, and the judgment of the district court is hereby

AFFIRMED.

ALFIO GARROTTO, APPELLANT, V. SAM BUTERA, APPELLEE.

FILED JULY 29, 1932. No. 28148.

1. Negligence: IMPUTED NEGLIGENCE. Prior to the adoption of chapter 105, Laws 1931, the personal negligence of the driver of an automobile was not imputed to a passenger riding with him, whether such passenger be a mere guest or a member of a joint enterprise.
2. ———: DRIVER OF AUTOMOBILE: CARE REQUIRED. The driver of an automobile with whom others are riding owes his passengers the duty of exercising ordinary care, in the operation of the automobile, for their safety, whether they are invited guests or proceeding on a trip for a purpose common and beneficial to all.

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

Rosewater, Mecham, Burton, Hasselquist & Chew, for appellant.

Gaines, McGilton, McLaughlin & Gaines, contra.

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

BROADY, District Judge.

This is an action for damages for personal injuries resulting from an automobile accident. The plaintiff and defendant had arranged for a rabbit shooting outing on a Sunday, and together with others drove to the shooting grounds in the defendant's automobile with the defendant driving. Upon the return trip, when the plaintiff was riding in the front seat with the defendant, the car struck a bump at the point where the pavement stops and the

graveled highway begins. The car was swerved to one side and ran for some distance in a swerving manner and then ran off the pavement into the side ditch and embankment, when the plaintiff received the injuries complained of. The jury returned a verdict in favor of the defendant, and plaintiff appeals and assigns as error, among other grounds, that the court erred in giving instruction No. 5, which in effect told the jury that if they found the parties were engaged in a joint enterprise there could be no recovery. Instruction No. 5 is as follows:

"The defendant has pleaded in his answer that he and the plaintiff were engaged in an joint enterprise at the time and place of the accident. In this regard you are instructed that, if there be a community of interest in the objects and purposes of the undertaking and an equal right to govern the movements and conduct of each other in respect thereto, then the enterprise would be a joint enterprise under the law. If you find from a preponderance of all the evidence in the trial that plaintiff and defendant were engaged in a joint enterprise, then plaintiff cannot recover and your verdict will be for the defendant."

In instruction No. 4 the court told the jury if they found plaintiff was merely the invited guest of the defendant then in that case the defendant "was bound to exercise due and reasonable care in the operation of said automobile for the safety of the plaintiff, and not to do any act that would increase or create any unnecessary danger; and if you find * * * the defendant was negligent and careless in the operation of the car, * * * your verdict shall be for the plaintiff."

From these two instructions it is plain that the jury were told that the plaintiff could recover if he were merely an invited guest of the defendant, but that he could not recover if he and the defendant were engaged in a joint enterprise.

The defendant pleaded and now insists that the plaintiff and the defendant were, at the time, engaged in a joint enterprise or common undertaking, and that any negli-

gence of the defendant would be imputed to the plaintiff and therefore preclude a recovery in this action.

This case arose before the adoption of chapter 105, Laws 1931, and our decision herein must be controlled by the law existing prior to that act. This act, however, precludes the recovery by a passenger from the driver of an automobile unless the latter was guilty of gross negligence or was intoxicated. Prior to the adoption of the act of 1931, above referred to, it was well settled in this state that a mere guest, at least, may recover against his driver for injuries resulting from such driver's negligence. *Judge v. Wallen,* 98 Neb. 154; *Jessup v. Davis,* 115 Neb. 1; *Toliver v. Rostin,* 120 Neb. 363. "Whether a person riding in the automobile of another is engaged in a common enterprise with the latter is a question for the jury, where it is an issuable fact." *Judge v. Wallen,* 98 Neb. 154. And, too, this court has said: "Except with respect to the relation of partnership, or of principal and agent, or of master and servant, or the like, the doctrine of imputed negligence is not in vogue in this state." *Andersen v. Omaha & C. B. Street R. Co.,* 116 Neb. 487, and cases cited therein.

We think the case of *Jessup v. Davis,* 115 Neb. 1, directly controls this case. In the *Jessup* case the plaintiff's husband was riding with Davis in the latter's car making a business trip for the purpose of making collections for a bank of which the defendant was cashier, and Jessup had, from time to time, been collecting bad paper for the bank, and at the time they were going to an adjoining county for the purpose of instituting criminal action against the maker of the note owing to the bank. It seems that Jessup had suggested this course and requested that they go in Davis' car. The plaintiff claims that while on this trip defendant Davis lost control of the car and jumped from the car which thereafter overturned resulting in the death of Jessup. Davis, among other things, claimed, as in this case, that the plaintiff was, at the time, engaged in a joint enterprise and therefore could not recover. The court gave an instruction to the jury to the same effect as is set forth

in instruction No. 5 in the instant case, that is, if the jury found that the parties were engaged in a joint enterprise, *"in which each had a financial interest,"* then any negligence of the defendant would be imputed to Jessup and preclude any recovery by the plaintiff. This court, on appeal, held that the facts in that case did not warrant an inference of a joint financial interest, or that they (Jessup and Davis) had joint control over the movements of the car. The court said: "It is true, both were desirous of going to Clay Center. Jessup was a gratuitous passenger. Both, in a sense, may have had some interest in the object of the trip. * * * Defendant, not Jessup, was in control of the car. Jessup had no authority over defendant and no authority to direct the movements of the automobile." The court held that the instruction given was erroneous, and partly, at least, for that reason reversed the verdict and judgment for the defendant. Under the law announced in the *Jessup* case we think the giving of instruction No. 5 in the instant case was, likewise, reversible error.

The rule of imputed negligence has been applied in cases almost exclusively in actions by or against third persons. The case of *Jessup v. Davis, supra,* is at least an exception in this state. In that case the court distinctly held that the plaintiff was an invited guest of the defendant, but this court, so far as we are now informed, has never directly passed upon the single question of whether the negligence of a coadventurer is imputed to his associate so as to preclude a recovery by the latter for the former's negligence, and both parties to this action now request a direct ruling upon that question. A search of authorities of other jurisdictions discloses a general like situation.

The defendant cites as authority a Michigan case, *Frisorger v. Shepse,* 251 Mich. 121, which holds, or at least states from the facts set forth, that the plaintiff and the defendant and others were going to a dance in the car owned by the defendant's father, and that under the circumstances the parties were all engaged in a joint enterprise and therefrom assumed both the plaintiff and the defendant to have common control and possession of

the automobile, and that the defendant was not liable to the plaintiff, even though the defendant was negligent in the operation of the automobile which he was driving; this on the stated theory of partnership or agency of one for the other.

Other jurisdictions hold that a joint adventurer is liable for the results of his own personal negligence to his coadventurer. "The doctrine of joint enterprise is peculiar to contributory negligence and has no application to actions brought by one joint adventurer against another to recover for injuries due to the latter's negligence." 45 C. J. 1020. "One must use ordinary care in his personal conduct so as not to injure another, whatever their relation. * * * Whether the relationship is host and guest or that which exists between joint adventurers in a common enterprise, the driver of an auto is liable for his negligence resulting in an injury to one riding with him." *Berlin v. Koblas,* 183 Minn. 278. Where the action is brought by one member of the enterprise against another there is no place to imply the doctrine of imputed negligence. *O'Brien v. Woldson,* 149 Wash. 192.

New York, in *Wilmes v. Fournier,* 180 N. Y. Supp. 860, holds likewise in an unanswerable argument, as we view it, as follows: "A joint enterprise or partnership is not for the purpose of permitting one of the parties thereto to commit a tort upon his associates. Suppose that this hunting party had reached its destination, and a member of the party had carelessly shot one of his associates; would the fact that they, to some extent, were engaged in a common enterprise, render the defendant, sued for the shooting, immune? I think not."

To hold that one engaged in a joint adventure or enterprise could escape liability from the results of his own personal negligence, however gross it might be, on the ground that a common enterprise imputed his negligence to his injured associate would permit him to take refuge behind his own wrong. We therefore hold that prior to the adoption of chapter 105, Laws 1931, the mere fact an injured

party may have been engaged in a joint enterprise does not preclude a recovery from his negligent associate unless the act complained of as negligent was a necessary part of, or the rendition of necessary assistance to, the common undertaking, or unless the party injured had authority over the driver to direct the movements of the automobile.

Instruction No. 5 as given by the court told the jury plaintiff could not recover if the parties were engaged in a joint enterprise. That is an incorrect statement of the law and presumably had some effect upon the jury's verdict. Therefore the judgment of the trial court is reversed and remanded for further proceedings.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, ET AL., RELATORS, V. ED FARLEY, RESPONDENT.

FILED JULY 29, 1932. No. 28095.

Quo Warranto: JUDGMENT OF OUSTER. Evidence *held* to sustain the findings of the referee, "That at the time of defendant's election in November, 1930, he was in default as collector and custodian of public money and ineligible to be elected to the office of clerk of the district court of Thurston county, Nebraska, and is now disqualified from holding said office."

QUO WARRANTO by the state on relation of the attorney general, and another, to oust respondent from the office of clerk of the district court for Thurston county. *Judgment of ouster.*

C. A. Sorensen, Attorney General, Clifford L. Rein and *Robert G. Fuhrman,* for relators.

McCarthy & McCarthy, Cecil R. Boughn and *James H. Hanley,* for respondent.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

DICKSON, District Judge.

This is a *quo warranto* proceeding brought in this court to oust and exclude the respondent from the office of the clerk of the district court of Thurston county, Nebraska. The relators are the attorney general of Nebraska and the county attorney of Thurston county. The information charges in substance that at the November, 1930, election the respondent was a candidate without opposition in Thurston county for the office of clerk of the district court, receiving 2,533 votes for said office; that the votes were officially canvassed, and the respondent was officially declared elected to said office; and that the respondent entered upon the duties of said office, and has since assumed the powers and duties thereof, and claims the right, authority and power to exercise and discharge them.

The information further charges that continuously since January 8, 1919, by virtue of various elections, the respondent has held said office, and has exercised the duties and powers thereof; that during said period of time, and up to and until March 31, 1927, the compensation of that office was the sum of $2,000 a year, payable out of the fees of the office; and that during said period it was the duty of the respondent to pay all fees of said office earned or collected in excess of said sum into the county treasury; that after March 31, 1927, the compensation was $2,000 a year, payable by warrant on the general fund of the county; and that it was the respondent's duty, since that date, to pay all fees collected and earned by his office into the county treasury; that the office of the clerk of the district court is an office of public trust, and that the respondent, as the clerk thereof in so far as his duties relate to the collection of fees which are the property of the county, is a collector and custodian of public funds; that on November 4, 1930, at the time of the election of the respondent to his present term of office, and when he entered upon and assumed to exercise the duties of said office under the election of November 4, 1930, he was in default as a collector and custodian of public money, which, under the provisions of sec-

tion 2, art. XV of the Constitution of Nebraska, rendered him ineligible to act as clerk of the district court of said county; and that the election of the respondent on November 4, 1930, was null and void by reason of the fact that the respondent was in default as a collector and custodian of public funds, and not elgible to hold office under the laws of the state of Nebraska; that for the years 1919 to 1930, both inclusive, the fees earned in said office by respondent amounted to $30,166.32; that respondent during said time paid into the county treasury $9,582.72; that his salary for that period was $16,500, leaving a balance due the county from the respondent of $4,083.60; that of this amount the respondent negligently and carelessly failed and refused to collect $2,387.88, that sum being due for services rendered by him as clerk of the district court; that the remaining $1,695.72 was collected and received by respondent and converted to his own use, and the respondent wholly failed, neglected and refused to pay the same to the county treasurer of Thurston county, Nebraska, upon demand made by the proper county authorities and is in default with respect thereto; and that the same remains unpaid, and that the respondent unlawfully withholds the same from the county, the lawful owner.

The relators demand judgment against respondent, that he be adjudged guilty of usurpation of, and intrusion into, and unlawfully holding the office of clerk of the district court of said county; and that the respondent be excluded from the same, and from the privileges and franchises therein, and for such other relief as may be proper.

To the information filed against the respondent he answered, and among the allegations of his answer admits that, since January 1, 1919, and up to the time of answering the information, he has been clerk of the district court of said county, and exercised and discharged the duties of that office; and that his salary was as set forth by the relators. Respondent denies that on November 4, 1930, when elected as clerk of the district court of said county, or when he took office under said election, he was in default as

a collector of public moneys; pleaded that more than ten years have elapsed since the transaction complained of by the relators during the years 1919, 1920 and the first half of 1921; denies that he negligently and carelessly failed or refused to collect any items of fees for services rendered by him; and charges that it is a custom and usage in Nebraska for clerks of the district court, and of the supreme court, to extend credit and charge fees, and admits that he did so in certain cases where he considered it safe so to do.

Answering further, the respondent says that he made frequent reports to, and settled with, the county board of Thurston county, and that each and all of said reports and settlements were full and complete; that if any inaccuracies or errors occurred therein it was the result of oversight, mistake or inadvertence, and not through any wilful or corrupt intention on his part; and that it was not his intention to withhold or appropriate any funds or moneys belonging to Thurston county.

The reply of the relators to the answer of the respondent is a general denial.

William T. Thompson was by the court appointed referee to take the testimony and report his findings of fact and conclusions of law; which were accordingly done by Mr. Thompson, and appear herein in full.

To the report of the referee the respondent took exceptions, and filed objections thereto. In substance the objections are: That the findings of fact by the referee are not sustained by competent or sufficient evidence, and are contrary thereto; and that the report is conflicting and contradictory, and contrary to law.

From the record it appears that previous to the hearing before the referee the county had employed Gillin-Holland Company to make an audit of the county offices, and that this audit included the office of the clerk of the district court from January, 1920, to December 31, 1929, inclusive; that after the audit of Gillin-Holland Company was made, the respondent employed H. A. Blomquist & Company to check and reaudit the audit of Gillin-Holland Company.

The evidence in this case seems to center around these different audits. One of these audits seems to have been made with the object and end in view of reflecting the official doings of the respondent from the records as kept by him in his office. Not so much can be said of the other. The auditing company was privately employed by the respondent to confuse rather than enlighten, to hinder rather than assist, to obscure rather than reflect the facts; and to aid the respondent to escape the consequences of years of misadministration in office, commencing as early as 1920.

Matters are included in the Blomquist audit that were foreign to the issues, and have been properly excluded by the referee in determining the amount of respondent's shortage in fees earned and collected and not paid to the county treasury, as by law required. When these two audits are considered, after excluding such matters as were not in issue, there is no substantial difference; and they sustain the findings of the referee. There seems to be no question as to the correctness of the preliminary findings of the referee, and it might be omitted; but that a better understanding may be had of the facts, it is thought best to give them in full, and they are as follows:

"In the findings following, no account, except incidentally, is taken of trust funds coming into the hands of defendant, in contra-distinction to the legal fees of the office, resulting from official services rendered by him; nor has notice been taken of the failure of defendant to pay into the school fund of the county unclaimed fees and costs incident to the office, in compliance with section 33-154, Compiled Statutes of Nebraska 1929, which has been declared unconstitutional. *State v. Moores*, 52 Neb. 770. Neither has account been taken of uncollected fees, except as circumstances tending to throw light upon the question of defalcation. In other words, in determining or finding, as a mixed question of fact and law, whether defendant is or is not a defaulter, as collector and custodian of public moneys under section 2, article XV of the Constitution, only collected fees have been charged herein to defendant, as dis-

tinguished from uncollected fees. The question whether, in this class of cases, uncollected fees of the office should be charged to defendant, your referee has deemed it unnecessary to determine.

"1st. It is either admitted or proved, and your referee finds, that the defendant was elected clerk of the district court of Thurston county, at the general election in November, 1918; that he qualified therefor and entered upon the duties of the office on the first Thursday after the first Tuesday of January, 1919; that he was subsequently elected to the same office from term to term down to and including the year 1930, or, at least, received votes sufficient to entitle him to be declared elected by the election officers, assuming him to have been then eligible to election. For each of the several terms, he entered upon the performance of the duties of the office, and received the compensation or salary by law provided. From the time he first took office in January, 1919, to March 31, 1927, he received from the fees of the office $2,000 a year, or $16,500 in the aggregate. Subsequent to said date a yearly salary of $2,000 was due him, payable by warrant drawn upon the general funds of the county.

"During the years 1919 and 1920, defendant kept a fee book showing, or purporting to show, the fees of his office. Thereafter no fee book appears to have been kept.

"By reason of the provisions of section 2369, Compiled Statutes of Nebraska 1922, defendant made to, and filed with, the county board quarterly reports of the fees of his office for the first two quarters of the year 1919, but none was made or filed for the last two quarters of that year. Quarterly reports were made to and filed with the board for the years 1920, 1921 and 1922, but for the years 1923, 1924, 1925, 1926 and 1929 no quarterly report was filed. For the year 1927 reports were filed for the first three quarters; but none was filed for the fourth quarter. For the year 1928 quarterly reports were made to and filed with the board for the first three quarters, but none was made or filed for the last quarter of the year. None of the re-

ports were made out as the statute, section 33-108, Compiled Statutes of Nebraska 1929, requires, and none of them is sworn to or made under oath as the statute demands. Only eighteen of the forty quarterly reports required by law were made to the county board by defendant, of the fees of his office for the ten years from 1920 to 1929, inclusive.

"2d. It is shown by the evidence and found from the facts that defendant made and filed quarterly reports of the fees of his office to, and with, the county board during the first four years of his incumbency and other facts and circumstances proved that he knew that it was his lawful duty to make quarterly reports and that he purposely and intentionally failed to continue to do so.

"3d. The evidence shows and your referee finds that, during the year 1920, defendant collected of the fees of his office and so reported to the county board the sum of $2,273.80. From this sum he deducted his yearly salary of $2,000, which left a balance of public moneys due and payable to the county January 1, 1921, of $273.80, which sum at this time remains unpaid. In regard to this item, diligence has been used to ascertain, from the evidence, if this may or may not have been subsequently paid into the treasury by overpayments, and it is found that only two overpayments during the ten-year period involved were made, one in 1927, of $66.83, and one in 1928, of $5.55, and that during the same period underpayments of fees amount in the aggregate to $3,404.60. In arriving at this sum the item of $157.50 in fees earned during the year 1919 and not accounted for is not included.

"In this connection, notice has been taken of, and due consideration given to, the testimony of Frank M. Bowen, one of the examiners employed by defendant to audit the records of his office, the obvious purpose of his testimony being to show that $273.80 of the fees reported to the county board by defendant as collected, or as coming into the office, for the year 1920, were not collected. It is conceivable how the records of the office might fail to show

that the fees for that year had been paid, but it is difficult to understand how such failure would warrant the conclusion testified to by their witness that they were in fact not paid. Such testimony cannot properly be considered sufficient to impeach the truthfulness of plaintiff's exhibit No. 7, defendant's own signed report to the county board, especially since defendant, although testifying in his own behalf, failed to testify that his report to the board for that year was incorrect, an oversight or an inadvertence.

"4th. The evidence shows, and your referee finds, that during the defendant's several terms of office he extended unlimited credit to persons obtaining his official services, and that at no time did he require security for the payment of such services, and at no time after credit had been given for costs made or fees earned did he issue and cause to be served on any one owing fees to the office a fee bill for the collection of costs so earned, which acts were done and neglected to be done in flagrant disregard for his known duty, as clerk of the court.

"5th. It is further found that during defendant's ten-year incumbency in office, and both prior and subsequent to March 31, 1927, when defendant's salary was changed from payment out of the fees to payment by warrant on general fund of county, he deposited the fees of the office and commingled the same with his private funds and account, and drew checks against the commingled funds for both official and private business.

"6th. There is competent evidence to show and your referee finds that, for and during the year 1923, the fees of the office actually earned amounted to the sum of $2,791.30, and after deducting salary of $2,000 there remained unaccounted for by defendant the sum of $791.30.

"7th. There is competent evidence to show and your referee finds that during the year 1924 the fees of the office earned amounted to $2,585.40, and for which no quarterly reports were filed with, or made to, the county board, which, after deducting $2,000 for salary, left a balance remaining of $585.40, of which defendant paid over to the

treasury the sum of $250, leaving a balance of $335.40 of earned fees.

"8th. The evidence shows, and your referee finds, that during the year 1925 the fees of the clerk's office earned amounted to the sum of $3,202.75, and defendant received in salary therefrom the sum of $2,000 and paid into the treasury for the same year the sum of $1,004.24, leaving a balance of $198.51 of such fees earned but not paid to the county treasury.

"9th. The evidence shows, and your referee finds, that for the year 1926 the fees of the office earned amounted to $2,677.80, and that for the year defendant paid into the county treasury $400, and received $2,000 as salary, leaving of the fees for the year, and not paid into the county treasury, $277.80.

"10th. The evidence shows, and your referee finds, that during the year 1927 the fees of the office earned were $2,192.92, of which amount defendant received as and for the first quarter's salary $500 (the office going onto a flat salary basis, payable by warrant on the general fund April 1, 1927) and paid over to the county treasury the sum of $1,759.75, or $66.83 in excess of the fees earned during the year.

"11th. The evidence shows, and your referee finds, that during the year 1928 the fees of the office earned amounted to $2,111.88, and for the same year defendant paid over to the county treasury the sum of $2,117.43, or $5.55 in excess of the fees earned and collected.

"12th. The evidence shows, and your referee finds, that during the year 1929 the fees of the office earned amounted to $1,639.80 for which year defendant paid into the county treasury $1,371.53, or a deficit of $268.27.

"13th. The evidence shows, and your referee finds, that for the year 1923 defendant made no report to the county board of the fees of his office, and apparently kept no account thereof, while the fees of the office amounted to $2,791.30 during the year. Allowing him credit of $2,000 from the fees for the year, there remained $791.30 un-

accounted for, no part of which has been covered into the county treasury.

"14th. The evidence shows and your referee finds that, in addition to the sum of $273.80 collected by defendant for the year 1920 and not accounted for, there is a further sum of $1,200, or more, which defendant has collected of fees of the office and has not accounted for and paid into the county treasury during the ten years involved.

"15th. The evidence shows, and the referee finds, that for the ten years beginning with the year 1920 and ending with the year 1929 the fees of the office earned amounted to $28,147.45; that during the same period defendant was entitled to the following credit: $8,142.85 paid into the county treasury and $16,500 as his salary, aggregating $24,642.85, leaving a difference of $3,504.60 between the fees of the office earned and the credits to which defendant is entitled to receive and has been given.

"16th. The evidence of defendant's conduct in his not keeping a true and accurate account of the fees of his office, in not making to, and filing with, the county board the required quarterly reports of such fees; in not collecting, or taking security therefor; in not reporting and paying into the treasury of the county annually the fees of his office collected, in excess of the amount of his salary; in commingling the fees of his office with his private funds, and in drawing checks against such commingled funds in payment of his private accounts as well as official demands, warrants the inference, and it is therefore found, that such conduct was wrongful, wilful and done, or omitted to be done, with the intent to misappropriate the public moneys of Thurston county.

"Conclusions of Law.

"1st. The office of clerk of the district court is an office of trust and profit, under the laws of the state of Nebraska.

"2d. The clerk of the district court, as to moneys received by him for official services rendered, or to be rendered, is a collector and custodian of public money, within

the intent and meaning of section 2, of article XV of the Constitution.

"3d. The word 'eligible,' as used in the Constitution, means the capacity or qualification to be elected to an office of trust or profit, as well as to hold such office.

"4th. Prior to April 1, 1927, the law required the clerk of the district court of Thurston county to collect in advance of service rendered, or take security therefor, all fees earned, or to be earned, by him for all official services demanded; to report the same quarterly, under oath, to the county board, and to pay all such fees, in excess of $2,000, into the county treasury, at the end of each year.

"5th. Subsequent to the 31st day of March, 1927, the law requires the clerk of the district court to collect the fees of his office, for services rendered, or to be rendered, in advance, or to take security therefor, to report the same quarterly, under oath, to the county board, and to pay all of the fees into the county treasury at the end of the year.

"6th. The compensation provided for the clerk of the district court prior to April 1, 1927, should be figured on a yearly basis, and not upon a term basis, and a clerk of the district court is not entitled to retain an excess of fees earned by him in any one year, above the maximum amount allowed per annum, to make up for a deficiency in amount of fees earned by him during preceding years of his term of office. *Buffalo County v. Bowker,* 111 Neb. 762.

"7th. The manifest purpose of section 2, article XV of the Constitution, was and is, to demand of and secure from all persons holding office of trust or profit in this state as collectors and custodians of public money or property honesty and faithful service, by proving that such as are recreant of their trust, by becoming defaulters, shall not be eligible to any office of trust or profit under the Constitution or laws of the state.

"8th. Neither the statute of limitations, enacted by the legislature, nor a custom running counter to the fundamental law, pleaded by defendant, can be successfully urged as a defense to the 'default' of a collector and custodian of

public money, denounced by section 2, article XV of the Constitution.

"9th. The provision of the Constitution involved is penal in its nature, and to render defendant in 'default' and ineligible, there must have been such wilful misconduct, omission of duty, or wrongful action, that the intent to misappropriate the money belonging to the county is fairly inferable therefrom.

"10th. The defendant as clerk of the district court who has knowingly and intentionally deposited the fees of his office in bank together with his private funds in one account, checked against them for both his private use and for official matters; who has knowingly, intentionally and wilfully failed to report to the county board quarterly the fees of his office, under oath, for more than half of the time of his incumbency; who knowingly, wilfully and intentionally has failed to pay into the county treasury at the end of the year the fees of his office collected, during the year, in excess of his salary; who has wilfully and intentionally failed to pay such fees when requested so to do by the proper officers, is in default, as collector and custodian of public money, within the meaning of section 2, article XV of the Constitution, and was at the general election in November, 1930, ineligible to be elected to office and is disqualified to hold the office of clerk of the district court or any other office of trust or profit under the Constitution or laws of the state.

"11th. It is concluded that at the time of defendant's election in November, 1930, he was in default as collector and custodian of public money and ineligible to be elected to the office of clerk of the district court for Thurston county, Nebraska, and is now disqualified from holding said office, and that his expressed willingness now to pay to the county any shortage in his accounts that may exist does not acquit or exculpate him of the act condemned by the Constitution. *State v. Moores,* 56 Neb. 1.

"12th. It is finally concluded that the relief prayed for by plaintiff should be granted."

The record in this case consists of three volumes; the oral testimony contains nearly 300 pages, and the exhibits exceed the oral testimony. The Gillin audit reproduced in detail the official transactions of the respondent during his term, excluding the year 1919, and is traversed by the Blomquist audit. To read and check the record in this case has been no small undertaking. Realizing the importance of the case, not only to the citizens of Thurston county, but to respondent as well; realizing that a wilful omission to account and pay over, with a corrupt intention, or such a flagrant disregard of duty as to fairly justify the inference that the respondent's conduct was wilful and corrupt, must be established by clear and satisfactory evidence; and further realizing that the right to hold an office is just as sacred in the eyes of the law as the right to hold property; and that the people have the right to elect their county officers, and to have such officers serve out the terms for which they were elected; and that it is not in contemplation of the Constitution that the officers should be removed but for grave reasons; the writer has checked and rechecked, read and reread, and reexamined the evidence on some questions many times, and has reached the conclusion that the referee's findings of fact are fully sustained by clear and satisfactory evidence, and that the referee's conclusions of law are sustained by the former holdings of this court in *State v. Moores*, 52 Neb. 770, and *State v. Moores*, 56 Neb. 1. The findings and recommendations of the referee are approved, and judgment will be entered accordingly.

JUDGMENT OF OUSTER.

JOE DIEHL, APPELLANT, V. BENJAMIN E. JOHNSON ET AL., APPELLEES.

FILED JULY 29, 1932. No. 28288.

1. **Banks and Banking: SIGHT DRAFT: DEPOSIT SLIP.** The issuing of a deposit slip for a sight draft merely indicates the receipt of a collection item.

2. ———: ———. A bank receiving a sight draft for collection does not owe the amount thereof to the sender until collected, and, even though it should enter a credit on its books for the same, such credit may be canceled afterward, if the sight draft is dishonored.
3. ———: ———: SPECIAL DEPOSIT. The mere fact that the bank had knowledge of the general purpose for which funds to be derived from a sight draft were to be used is insufficient to prove a special deposit.
4. Estoppel, to be available, must be pleaded.

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

J. E. Porter, for appellant.

F. C. Radke, Barlow Nye, P. E. Romig and *Mitchell & Gantz, contra.*

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

RYAN, District Judge.

This action is brought to recover upon three checks, totaling $1,230, drawn by B. E. Johnson Company upon the First State Bank of Alliance, on October 5, 1923, in payment of certain horses and mules purchased by B. E. Johnson Company from the plaintiff and two other farmers in Dawes county; these other two checks having been assigned to the plaintiff for the purpose of collection.

B. E. Johnson Company was a partnership composed of Benjamin E. Johnson and Fred W. Melick. The B. E. Johnson Company was in the business of buying horses and mules and shipping them to Omaha Horse & Mule Commission Company, at Omaha. The evidence discloses that the partners bought small lots of horses and mules from various ranchers and made a small payment on each purchase by means of a check on the First State Bank of Alliance. When a carload of stock had been purchased, the animals would be brought into the shipping point, which in this case was Marsland, Nebraska, and the balance of the purchase price would be paid by checks on the

First State Bank of Alliance. It appears that the partnership had sufficient funds on deposit to meet the small checks given at the time of purchase. At the time of shipment B. E. Johnson Company would draw a sight draft on the Omaha Horse & Mule Commission Company for the aggregate amount of these final payment checks and deliver it to the First State Bank of Alliance, which would immediately forward the draft to Omaha for presentation. The bank would then proceed to honor the checks on the B. E. Johnson Company account, given for the final purchase price of the horses and mules.

In this particular instance, the sight draft was for the amount of $4,450. It had been made out the day before the horses and mules were shipped from Marsland and left in the possession of Charles Brittan, the vice-president of the bank, with instructions to fill in the amount, which would be telephoned from Marsland on the following day after the purchase of the live stock had been completed. Upon receipt of the information, Brittan filled in the amount of the draft, made out a deposit slip for a draft for $4,450 in favor of B. E. Johnson Company and forwarded the draft immediately to the Packers National Bank of Omaha for collection.

This draft was sent to Omaha on Friday. In the usual course of business, the bank would expect returns on it on Monday. Checks totaling $2,081.28 on the B. E. Johnson Company account were presented on Saturday and were paid. On Monday the Packers National Bank reported to the First State Bank of Alliance that the Omaha Horse & Mule Commission Company refused to pay the draft, because they claimed the shipment of stock was not up to representation. The First State Bank of Alliance then refused to pay any more checks on the B. E. Johnson Company account, because of lack of funds.

The three checks involved in this suit were presented to the First State Bank of Alliance on Monday, after having been deposited in the First National Bank of Crawford, and were returned unpaid. They were again presented by

the Crawford bank on Wednesday and were returned unpaid because of lack of funds.

The exact manner in which the B. E. Johnson Company account was handled is not disclosed by the record. It does not appear whether the amount of credit shown by the deposit slip, defendants' exhibit 1, was ever credited to the account of the B. E. Johnson Company. It does appear, however, that after the checks presented on Saturday had been honored the account was overdrawn to the extent of the amount of these checks, $2,081.28. On October 10, 1923, the Packers National Bank of Omaha collected $2,500 from the commission company upon this carload of stock and on October 11, 1923, a further collection of $646.38 was made, making a total of $3,146.38, which was the net sale price of the carload of horses and mules. These amounts took up the overdraft and left a balance of $1,065.10 to the B. E. Johnson Company account. This balance was paid into court in a garnishment proceeding against B. E. Johnson Company, the nature of which was not definitely disclosed by the record. The partners in the B. E. Johnson Company were prosecuted for drawing no fund checks, but were acquitted.

Practically the only disputed point in the evidence concerns the arrangement made by the B. E. Johnson Company with Brittan at the bank, at the time the deal was first discussed. Both partners testify that they borrowed the money at the bank to cover the transaction, but it does not appear that either of them ever signed a note, and the only tangible evidence in the record is the deposit slip, defendants' exhibit 1. Charles Brittan, the vice-president of the bank, testifies that when the sight draft was deposited he took it for collection, and that the credit extended to the B. E. Johnson Company was a conditional credit, and that the B. E. Johnson Company was given the right to draw against this conditional credit in anticipation of the receipt of funds from the commission company to cover the amount of the withdrawals, and that it was understood that the B. E. Johnson Company should make good any overdrafts.

The plaintiff, however, contends that an unconditional credit was given by the receipt of the draft, and that the moneys so credited to the B. E. Johnson Company were deposited by them and accepted by the bank for the special purpose of paying certain checks to be issued in payment for horses and mules to be purchased, and included the three bank checks which are the subject-matter of this action, and that this deposit became at that time, and ever since has been, a trust fund in said bank for this particular purpose.

The only definite testimony with reference to the circumstances of the bank's receiving this draft was that of Charles Brittan, the officer of the bank with whom the transaction was had. He testifies: "On Thursday Mr. Melick came down to the bank and said, 'I am buying some horses,' and he signed a sight draft, and he said, 'I will call you up in the morning and let you know the amount to fill in,' and he drew it on the Omaha Horse & Mule Commission Company, that they had been buying and shipping horses to before. So, on Friday morning, he called me up and told me to fill in that draft for $4,450 which I did, and I sent the draft out on 44, and it should have been in Omaha Friday morning and should have been presented for payment on Saturday morning, and on Saturday we gave them credit, of course subject to the final payment of this draft." The testimony above quoted is corroborated by the events that followed the transmission of the draft to Omaha. On Monday, when the bank learned it had not received credit from its Omaha correspondent for the amount of the draft, it made inquiry and learned that the Omaha Horse & Mule Commission Company had refused payment, that as it had already cashed checks in the amount of $2,081.28, it urged its Omaha correspondent, the Packers National Bank, to press the collection, and $2,500 was paid by the commission company upon the draft, which took up the overdraft in the First State Bank of Alliance. The checks sued upon by the plaintiff had been presented in the meantime and dishonored. Only a small further payment

was received upon the draft and there was never sufficient money in the account to pay these checks at any time when they were presented for payment.

This is the second appearance of this case in this court. When the action was originally commenced, a general demurrer to the petition was sustained in the trial court. Upon appeal this ruling was reversed and the cause remanded to the district court for trial upon the merits. The appellant contends that, under the law of this case as laid down in the commissioner's opinion, a trust fund should be declared in favor of these checks. This contention is based upon the following language in that opinion:

"The appellant, plaintiff, contends that since it is alleged in the petition and admitted by the demurrer that deposit was made and accepted by the bank for the particular purpose of paying checks which B. E. Johnson Company had given for horses and mules a trust relation was created and the case should be ruled by the decision of this court in *Gruenther v. Bank of Monroe,* 90 Neb. 280, and the decisions of the supreme courts of Iowa and North Dakota in *Hanby v. First Savings Bank,* 197 Ia. 150, and in *Morton v. Woolery,* 48 N. Dak. 1132, wherein it is held that, where a person makes a deposit in a bank for a specific purpose of meeting checks to be thereafter issued, the bank on accepting the deposit with that knowledge becomes bound by the conditions imposed and, if the money so deposited is misapplied, it can be recovered as a trust deposit.

"It is elementary that all facts well pleaded must be taken as admitted by a general demurrer. Hence, we have the condition presented by the allegations of plaintiff's petition that a deposit was actually made in the bank and accepted by it for the specific purpose of paying these and other like checks issued in payment of the purchase price of horses and mules. Whether these allegations are true, we have no means of knowing, but we do know that the bank's demurrer admits that they are true."

The record, however, falls far short of proving a special deposit. The taking of the sight draft by the bank and

the issuing of the deposit slip indicate nothing more than the receipt of a collection item. As is said in 6 Michie, Banks & Banking (Perm. ed.) p. 7: "A bank, having received a paper for collection, does not owe the amount thereof to the sender until collected, and though it may enter a credit in its books therefor, such a credit may be treated as provisional if the paper is afterwards dishonored, and it may cancel the credit." It is true that the bank knew the general purpose for which the funds to be derived from the sight draft were to be used, but there is no proof whatever that the funds so derived were to be restricted to the payment of checks given for the purchase price of horses and mules, and, moreover, there is no proof that the bank gave the B. E. Johnson Company an unconditional credit of $4,450, as indicated by the deposit slip. On the contrary, the evidence is that the credit given was conditioned upon the payment of the sight draft by the Omaha Horse & Mule Commission Company. This conclusion is borne out by the testimony adduced at the trial and also by the testimony of Charles Brittan given in the case of State of Nebraska v. B. E. Johnson and F. W. Melick, a transcript of which is contained in the record. The testimony heretofore quoted is taken from the case of State of Nebraska v. B. E. Johnson and F. W. Melick. It is true that Brittan did testify in that case that, had all the checks, including the three checks concerned in this suit, been presented on Saturday, they undoubtedly would have been paid, as he had no knowledge at that time that the draft would not have been honored as he expected.

Appellant further contends that this case comes within the well-established doctrine of estoppel *in pais;* that a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another, who, having the right to do so under all the circumstances of the case, has in good faith relied thereon. It is equally well established, however, that, in order for a litigant to avail himself of an equitable estoppel, that estoppel must be pleaded and relied upon in the trial of the

case, and the plaintiff, having neglected to raise the question in the lower court, cannot now be heard on that issue here.

The facts in this case are very similar to those in the case of *Andrew v. Waterville Savings Bank*, 205 Ia. 888, except that in that case the draft was honored; but, before the checks issued against the credit given the depositor for the draft had been paid, the bank closed, and the receiver applied the proceeds of the draft on the note of the depositor held by the bank. In that case the court said: "Here, interveners' relationship to Hart was that merely of holder of Hart's checks, with no other agreement with him than that shown on the face of the check. The relationship between Hart and the bank was (1) that of drawer and holder of a draft, and (2) that of depositor to general checking account in the bank, with the mutual understanding that checks had been drawn and checks might be drawn, which, as presented, would be paid, with no agreement that the funds should be held for and used in the payment of particular checks—merely the common understanding that checks drawn and to be drawn should be paid. There was no trust. The deposit was a general one. Hart's are the rights of a general depositor. The interveners' rights are the rights of check holders only, not rights in the fund. See, further, *Andrew v. Marshalltown State Bank*, 204 Ia. 1190; *Border v. State Savings Bank*, 202 Ia. 27; *In re Security Savings Bank*, 211 N. W. (Ia.) 233 (not officially reported); *Leach v. State Bank of Redfield*, 212 N. W. (Ia.) 390 (not officially reported)."

The judgment of the trial court was correct and is

AFFIRMED.

JOHN S. JOHNSON, APPELLANT, V. HARRY MALLORY, APPELLEE.

FILED JULY 29, 1932. No. 28200.

1. **Automobiles: COLLISION: NEGLIGENCE: QUESTION FOR JURY.** Defendant parked a truck after darkness on the roadway with-

out red tail light but with a bright light behind the cab that threw its rays downward toward the rear of the truck. *Held*, that the question of whether or not such act constituted negligence was submissible to the jury, in an action for injuries growing out of a collision with the rear of such truck.

2. ———: ———: ———: PROOF. A charge of negligence to the effect that a truck was parked in the roadway where it could not be seen by one driving on such highway until within a short distance from it is not supported by evidence that shows such truck to have been visible at all points on the roadway for a distance of at least 300 yards.

3. Negligence: QUESTION FOR JURY. The question of whether or not an act or omission is negligence is for the jury to decide when reasonable minds may honestly say from the evidence under a proper definition of negligence that it was, and is not to be submitted to the jury if there is not sufficient evidence to support a finding in the affirmative.

4. ———: LIABILITY. No liability for an injury attaches to one on account of his negligence, unless such negligence was the proximate, rather than a remote, cause of such injury.

5. ———: PROXIMATE CAUSE. Whether or not an act of negligence is the proximate cause of an injury is determined by ascertaining whether or not, in the natural and continuous sequence of events, there was a causal connection between such negligence and the injury, without some efficient independent cause, wrongful or otherwise, that was disconnected from such negligence and self-operating, intervening to produce such injury.

6. ———: ———. Two acts of negligence acting contemporaneously may concur to produce the proximate cause of an injury if the injury would not have happened in the absence of either, and, in such case, one is not relieved of liability for such injury merely because he is responsible for only one of such acts.

7. ———: ———. Two acts of independent source are not concurrent in causing an injury, if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting and independent operation of the other.

8. ———: LIABILITY. The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury.

9. **Automobiles: COLLISION: NEGLIGENCE: QUESTION FOR JURY.** Plaintiff was injured when a passenger car in which he was riding collided with the rear of a truck parked on the right-hand side of the roadway without red tail light but with a bright light located behind the cab and throwing its rays toward the rear of the truck. *Held*, that the question of whether or not the condition of such lights was the proximate cause of the plaintiff's injury was for the jury to decide under a proper definition of proximate cause.
10. ———: ———: PROXIMATE CAUSE. Failure to have a spare tire, parking a truck upon the roadway at all, and parking such truck for two or three hours' time, each *held* not to be a possible proximate cause of an injury to plaintiff received in a collision of an automobile in which plaintiff was riding and the rear of such truck.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Reversed.*

Gerald J. Hallstead, Frank A. Anderson and *Perry, Van Pelt & Marti*, for appellant.

Thomas J. Dredla and *Hall, Cline & Williams, contra.*

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

TEWELL, District Judge.

Plaintiff brought this action to recover damages arising from personal injuries that resulted from an automobile, in which the plaintiff was riding, striking the rear end of a truck owned by the defendant. At the close of the introduction of evidence by the plaintiff, the trial court, upon motion of the defendant, directed the jury to return a verdict for defendant, and entered a judgment dismissing the action. The plaintiff appeals.

The defendant was engaged in hauling merchandise by truck. On the day of the collision in question, one Eggert, an employee of the defendant, accompanied by one Edward Hladky, was driving the defendant's truck from Lincoln to Crete, when a tire on the right rear wheel of the truck was punctured. Near the point where the puncture occurred, Eggert drove the truck to the extreme right-hand side of

the road and there stopped. At this point, which is some four or five miles northeast of Crete and on the mainly traveled highway between Crete and Lincoln, the graveled surface of the road is about 30 feet wide, and runs from east to west. The truck was parked fronting west, and far enough to the extreme north side of the road to cause its two right wheels to stand approximately at the north edge of the gravel and near a small ditch along the north side of the road-bed. Cars traveling westward on the north half of the roadway were compelled to turn to the left a few feet to clear the south side of the truck. The portion of the roadway that was south of the parked truck was about 20 feet in width. No curves existed in this portion of the road. The roadway at this point slopes gradually downward from the high point of a small ridge, such high point being some 900 to 1,000 feet east of the point where the truck was parked. Nothing existed either upon or near the roadway to obstruct the view of the road-bed during daylight by one driving thereon for at least a few hundred yards west or a like distance east of the parked truck. No spare tire existed on the truck, and Eggert went to Crete to secure one, leaving Hladky in charge of truck. This was about 6 o'clock in the evening. Eggert returned to the truck accompanied by the defendant, with repairs to patch the inner tube. Not being able to repair the tube, the defendant returned to Crete to secure a new tube and left Eggert and Hladky with the truck. About 8 o'clock in the evening, when darkness had ensued, the passenger car in which plaintiff was riding in the right side of the front seat, collided with the rear end of the parked truck, causing the plaintiff severe physical injury. Plaintiff's son, Tannies Johnson, owned and was driving the passenger car in a westerly direction at the time of the collision. The front lights of the truck were lighted. There is evidence to the effect that the red light at the rear of the truck was not lighted, and we assume, for the purpose of this opinion, that it was not. A spot light, not red in color, was erected about the middle of the body of the truck and back of the

cab. This spot light was lighted and was so adjusted as to shed its rays to the east and downward over the rear of the truck. The location of the spot light was about four feet above the bottom of the truck bed and about seven feet above the ground. At the time of the accident Eggert and Hladky were seated upon a bank some 30 feet to the northeast of the truck. Plaintiff and his son, Tannies Johnson, with the wife of each and a son of Tannies Johnson were going to their homes in Phelps county, Nebraska, after attending the state fair. Many cars traveling westward passed the parked truck after darkness ensued and before the collision in question. No car other than the car in which plaintiff was riding and the parked truck was near plaintiff at the time of the accident. Plaintiff's son, driver of the passenger car, observed at least the spot light upon the parked truck when he was three or four hundred yards from it, and claims that it appeared to him as a car with one head light coming toward him. He testified that he drove his car on the right-hand side of the road under the rays of the spot light until he was within 30 feet of the truck, and then, for the first time, realized that the truck was parked as it was, and that upon such realization, he turned to the left to try to avoid hitting the truck, but hit the left-hand rear corner thereof with the radiator of his car. Witnesses of the accident estimated the speed of the passenger car at speeds varying from 30 to 45 miles an hour. The truck was driven forward several feet and against a bank by the force with which it was struck.

The charges of negligence against defendant are to the effect (1) that he had no red light on the rear of the truck; (2) that he displayed a bright light on the back of the cab that failed to disclose the position of the truck, and that was blinding and confusing to one in another car driving westward; (3) that he did not have a spare tire; (4) that he parked the truck at all upon the highway when traffic was so heavy; (5) that he allowed the truck to remain so parked for so long a time, and (6) that he parked the truck where it could not be seen by one driving westward until

within a short distance from it. The trial court in directing a verdict for defendant stated in effect that he did so upon the ground that no act or omission on the part of the defendant, if it constituted negligence, was the proximate cause of the plaintiff's injuries.

Section 39-1105, Comp. St. 1929, prohibits any four-wheeled motor vehicle being operated on the highways without a red light visible from its rear, and provides that spot lights shall not be used except when projecting their rays directly upon the ground and at a distance not exceeding 30 feet in front of the vehicle. The evidence in this case establishes a state of facts, rebuttable in nature, with relation to the lack of a red light, and to the use of the spot light, upon which reasonable minds could honestly draw opposite conclusions upon the questions of whether either or both of such acts constituted negligence. The charge of parking where the truck could not be seen until within a short distance from it, which, if true, might have been negligence, is not supported by the evidence and was properly withdrawn from the jury. No reasonable mind could conclude that defendant's servant failed to exercise ordinary care in choosing the place of parking, as distinguished from the condition of the thing parked, when, aside from darkness, the place chosen was visible at all points for at least 300 yards from it, occupied only a few feet of the roadway and left ample room on the roadway for other cars to pass. It could not be anticipated that any one would drive into the parked truck solely on account of not seeing it in time, assuming perfect visibility, which must be assumed in deciding this particular charge of negligence. The question of whether or not an act or omission is negligence is for the jury to decide when reasonable minds from the evidence may honestly say, under a proper definition of negligence, that it was, and is not to be submitted to the jury if there is not sufficient evidence to support a finding in the affirmative. *Boomer v. Lancaster County,* 115 Neb. 295; 45 C. J. 1289. Charges of negligence given numbers 3, 4 and 5 in the above enumeration are discussed later in this opinion.

Assuming negligence on the part of the defendant in his act or omission with relation to the red light and bright light, or to either, could his acts with relation thereto be reasonably said to be the proximate cause of the plaintiff's injuries? Although the defendant may have been negligent, no liability attaches to him on account thereof, unless such negligence was the proximate, rather than the remote, cause of the plaintiff's injuries. 45 C. J. 901; *Johnson v. City of Omaha,* 108 Neb. 481.

Various definitions of the phrase "proximate cause" have been given by courts. It is difficult to state a definite and invariable rule whereby a line may always be drawn between the proximate cause of an injury and some cause thereof too remote to be the foundation of an action therefor. Whether or not an act of negligence is the proximate cause of an injury is determined by ascertaining whether or not in the natural and continuous sequence of events there was a casual connection between such negligence and the injury, without some efficient independent cause, that was disconnected from such negligence and self-operating, intervening to produce the injury. *Spratlen v. Ish,* 100 Neb. 844; *Berlo v. Omaha & C. B. Street R. Co.,* 104 Neb. 827; 45 C. J. 897.

Two acts of negligence acting contemporaneously may occur to produce the proximate cause of an injury, if the injury would not have happened in the absence of either, and in such case one is not relieved of liability for such injury merely because he is responsible for only one of such acts. *Bosteder v. Duling,* 115 Neb. 557; 45 C. J. 920. The plaintiff's injuries resulted from the collision between the passenger car and the truck, and the collision was immediately preceded by the negligence of Tannies Johnson in driving the passenger car as he did. If, by virtue of the condition of visibility, Tannies Johnson was apprised, in time to avoid the collision, of the nature of the obstruction in the road formed by the parked truck, then the negligence, if any, of the defendant did not concur with that of Tannies Johnson in causing the collision, as the acts of Tannies

Johnson and the defendant would in such event be successive and unrelated in operation. The truck would then have presented an obvious existing condition. Two acts of independent source are not concurrent in causing an injury, if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. In such case the latter and not the former is the proximate cause of such injury. *Steenbock v. Omaha Country Club,* 110 Neb. 794; *Geisen v. Luce,* 242 N. W. (Minn.) 8; 45 C. J. 931, note 55. The case of *Geisen v. Luce, supra,* involved a state of facts in which a passenger car was upset on account of being turned to the left to avoid striking the rear of another car parked on the highway, the latter portion of the opinion assuming that the parked car was parked negligently and in violation of a statute. The facts in that case, like those in the case of *Steenbock v. Omaha Country Club, supra,* occurred during daylight. In each of those cases, the thing negligently placed in the highway was, in time to avoid the accident, perfectly obvious to the driver of the car that furnished the efficient intervening cause of the injury, and did nothing more than furnish the condition by which the injury was made possible.

A situation, different than that assumed in the last preceding paragraph, exists if the lack of a red light and the existence of a bright light upon the rear of the defendant's truck were of such a nature that the defendant reasonably should have anticipated that they would mislead some driver, and if they did mislead Tannies Johnson as to the nature of the obstruction in the highway, and continued so to do until, driving as he did, negligently or otherwise, it was too late to avoid the collision after becoming aware of the nature of the obstruction. The parked truck, under such latter assumption, would present an active and unforeseen force, operating upon and setting in motion the acts of Tannies Johnson, and aiding their continuance by concealment of its nature until the collision was unavoid-

able. In such event, the parked truck would present more than a mere condition, and the intervening cause would not be disconnected therewith and self-acting. The doer of an original wrongful act that should reasonably cause one to anticipate an injury therefrom is not relieved from liability for an injury immediately brought about by an intervening cause, wrongful or otherwise, that is set into operation by such original wrongful act, and that alone would not have caused the injury, but which with the aid of the original wrong does cause such injury. 45 C. J. 932. The case of *Camp v. Wilson,* 258 Mich. 38, is one in which the owner of a truck parked on the highway at night without a red tail light, but with green rear lights, and also the driver of a passenger car, who injured plaintiff in trying to avoid such truck, were both held liable. Another case involving a collision in the nighttime with the rear end of a parked truck is *Olson v. Purity Baking Co.,* 242 N. W. (Minn.) 283. In *Bielke v. Knaack,* 242 N. W. (Wis.) 176, both the driver of a truck parked on the highway with a tail light but without clearance signals and the driver of a passenger car colliding with the rear of the truck were held liable to the plaintiff for injuries received in the collision. In the case of *Edblad v. Brower,* 178 Minn. 465, both the owner of a car parked on the left-hand side of the road with both head lights burning and the driver of a car colliding with the front end of the parked car were held liable for injuries received by the plaintiff in the collision.

In the case, either of the two assumed sets of facts above mentioned may reasonably be drawn from the evidence, and we are therefore unable to say as a matter of law that the negligence of the defendant, if any, with relation to the lights on the rear of his truck was not one of two concurring acts forming the proximate cause of the plaintiff's injuries. We therefore hold that the question of whether or not such negligence, if any, with relation to said lights, on the part of the defendant was the proximate cause of plaintiff's injuries should have been submitted to the jury with instructions properly showing under what state of facts

the defendant's acts could be found to be the proximate cause of the plaintiff's injuries.

Charges of negligence given numbers 3, 4 and 5 in the foregoing enumeration, even if supported by the evidence, and even if the acts charged be negligence, which we do not hold, could not be any portion of the proximate cause of the plaintiff's injuries under rules above announced. Jointly or severally they were not submissible to the jury as a possible proximate cause of plaintiff's injuries. If the defendant's truck had been parked only a moment or more before the collision in the same condition in which it was parked at the time of the collision, this case would present the same questions it now presents. The defendant committed no wrongful act proximately causing plaintiff's injuries in parking where he did, when he did, and as long as he did, but may have committed a wrongful act that was one of two concurring acts forming the proximate cause of the plaintiff's injuries in parking his truck in the condition in which he did. The parking merely created a condition that made the collision possible, and the failure to have a spare tire was merely a remote cause of the condition.

Whether the plaintiff was himself guilty of contributory negligence barring his recovery or whether the negligence of Tannies Johnson was imputable to plaintiff are questions not decided in this opinion. Giving the evidence that construction that is most favorable to the plaintiff, we have treated him as a guest free from contributory negligence.

For reasons above stated, the judgment of the trial court is reversed and this cause remanded for further proceedings.

REVERSED.

FRANK JOHNSTON, APPELLEE, V. BEN H. SMITH, APPELLANT.

FILED JULY 29, 1932. No. 28245.

Master and Servant: WORKMEN'S COMPENSATION ACT: "EMPLOYEE." One who undertakes to obtain contracts for advertising for another for no other remuneration than a percentage of the gross amount of the contracts, to pay all of his own traveling expenses, to choose his hours of labor, and to select the prospective customers upon whom he should call in his territory, without any right of such other to control the manner or method of his work, is not an employee, within the meaning of the term "employee" as used in the workmen's compensation act, even though assigned to a specified territory, and furnished a list of prospective customers and supplies for writing the contracts.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed and dismissed.*

Brome, Thomas & McGuire and *G. H. Seig*, for appellant.

O. M. Olsen, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

TEWELL, District Judge.

This action was brought under the workmen's compensation act. The plaintiff, Frank Johnston, recovered an award before the compensation commissioner, and the defendant filed his petition on appeal in the district court for Douglas county, where a decree was entered allowing compensation. The defendant appeals to this court.

One question presented is that of whether or not the plaintiff was an employee of the defendant at the time of the injury. At the trial in the district court witnesses for the plaintiff only were examined, the defendant offering no witnesses. The evidence is without substantial conflict.

The defendant conducts a business at Omaha, Nebraska, under the name of Western Advertising Association. In

February, 1931, the plaintiff and the defendant entered into an oral agreement, whereby the plaintiff was to sell newspaper advertising to banks and building and loan associations for the defendant upon a strictly commission basis of 25 per cent. of the gross amount of his sales. The plaintiff paid his own expenses and furnished his own automobile. During a short period of time after the agreement the plaintiff called upon prospective customers at Valley, Council Bluffs, and places near Omaha, for the reason, he says, that he then had no car. After purchasing an automobile the plaintiff worked in towns in Iowa, came back to Omaha for the week-end, and then went to southern Minnesota, working in two or three towns in Iowa on his way to Minnesota. The plaintiff testifies that the defendant directed him to call upon certain prospective customers that he did call upon while working near Omaha, and furnished the plaintiff with a list of prospective customers in southern Minnesota. If a sale was made by the plaintiff, he, by the terms of the agreement, collected a portion of the sale price and remitted all collected to the defendant, and the defendant looked after collection of the balance. The plaintiff was required to report all sales to defendant. At the various towns visited the plaintiff says he called upon those customers from whom he thought he might secure an order. Two letters from the defendant to plaintiff written while the plaintiff was engaged as such salesman are in evidence and are what might be called letters of encouragement. These contained suggestions relative to securing business, such as calling upon bankers at their homes or going into the side door of the bank just after banking hours. One of these letters tells of an order secured by another salesman for $2 a week and says that the salesman had said that "if he had had the guts to say $4 he would have gotten it." Apparently the salesman had some discretion in fixing the price for which the advertisement would be furnished. The defendant furnished the plaintiff with supplies for taking orders, and assigned him southern Minnesota as a territory in which to work. The plaintiff re-

ported his whereabouts to the defendant, according to the plaintiff, from one to three or four times a week. He was supposed to report the names of persons and concerns upon whom he called, even though no sale was made, especially of those who gave promise of later giving an order, presumably to allow the plaintiff to follow up by letter. Apparently the plaintiff chose the manner in which he worked, the persons upon whom he would call, his hours of labor, and to what towns in his territory he should go. He was free to quit when he chose and the defendant was free to terminate the relationship between them when he chose. The terms of the contracts written with customers secured or who were the parties thereto are not shown by the evidence.

On April 23, 1931, while driving his car from Sleepy Eye, Minnesota, to Sanborn, Minnesota, to call upon banks at the latter place, the plaintiff was injured on account of his car striking some loose gravel and going into a ditch.

Under cases heretofore decided there seems to be no single test as to what kind of an agreement will constitute one an employee within the workmen's compensation act. The measure or method of payment, who it is that selects the place and hours of labor, the particular plan of the work and liability for wrongful failure to properly perform it are often significant, though not necessarily controlling. Generally, the questions of whether or not the alleged employee, by the terms of the agreement, is understood to retain the right to direct the manner and method of the work as it proceeds, and what work shall be done and what not done, are important factors in determining whether or not the one doing the work is an employee. The plaintiff having undertaken to obtain contracts for advertising for no other remuneration than a percentage of the gross amount of the contracts, to pay all of his own traveling expenses, to choose his hours of labor, and to select the prospective customers upon whom he should call in his territory, without apparent right of the defendant to control his work, was not an employee within the mean-

ing of the workmen's compensation act at the time of his injury, even though he was assigned a territory in which to work and given a list of prospective customers and supplies with which to write the contracts. *Christensen v. Protector Sales Co.*, 105 Neb. 389; *Petrow & Giannou v. Shewan*, 108 Neb. 466; *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198.

It is not necessary to decide the issues raised relative to the amount of compensation allowed for temporary total disability, relative to whether any permanent partial disability should have been allowed, and relative to whether the amount allowed for medical and hospital expenses was more than was justified by the evidence, since the plaintiff is not entitled to recover any compensation.

For reasons above stated, the decree of the trial court is reversed and this cause dismissed. All costs taxed to the plaintiff.

REVERSED AND DISMISSED.

GEORGE W. PLATNER, APPELLANT, V. DEWITT ELLINGWOOD ET AL., APPELLEES.

FILED JULY 29, 1932. No. 28281.

Vendor and Purchaser: RESCISSION: LACHES. Whether the right of one party to a contract to rescind the same arises on account of fraud inducing the contract or on account of a breach by the other party of a dependent covenant, such right is barred by failure of the one party, for an unreasonable time after knowledge of the facts giving rise to such right, to declare a rescission and disclaim the benefits of the contract.

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

Johnson, Rine & Marshall, for appellant.

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

Heard before GOSS, C. J., DEAN, EBERLY and PAINE, JJ., and DICKSON and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun to foreclose a contract for the sale of real estate. The plaintiff, George W. Platner, appellant, entered into a contract in writing under date of June 3, 1929, with the defendant Dewitt Ellingwood, hereinafter designated as Ellingwood, one of the appellees herein, whereby the plaintiff agreed to sell and convey to Ellingwood lots 7, 8, and 9, in block 7, Cedarnole, an addition in Douglas county, Nebraska. By the contract Ellingwood agreed to pay Platner the sum of $13,230.72, payable $1,000 in cash on the date of the contract, $4,230.72 by agreeing to pay the unpaid balance of a debt secured by a first mortgage to the defendant Omaha Loan & Building Association, hereinafter called the association, and the balance of $8,000 by delivering to Platner within a period of three years, at such times and in such quantities as Platner should later designate, sand, sand-gravel or road-gravel, at the market price at various times of delivery as quoted by Lyman-Richey Sand & Gravel Company, until such sum of $8,000 had been paid. The debt to the association was payable in monthly payments of $45 a month, and payments by Ellingwood were to begin on June 15, 1929. The contract provided that Ellingwood should pay taxes for the year 1929 and subsequent years, take immediate possession, and keep the property insured, and that Platner should give deed and abstract of title when the consideration was fully paid. Provision is made in the contract to the effect that, if the vendee fails or refuses to make deliveries of the sand and gravel, he may either pay the unpaid portion of the said sum of $8,000 in cash or by monthly payments of $80 a month, in which latter event the unpaid balance should draw interest at 6 per cent. per annum, due at stated times. A clause is contained in the contract to the effect that if the vendee fail to perform he shall forfeit his rights in the property, and that if he fail to make the payments the whole amount of the unpaid principal shall become due. Platner, vendor in the contract,

brought this action and made Ellingwood, Ellingwood's wife, Eleanor, and the association defendants. Ellingwood and his wife filed a joint answer to the plaintiff's petition, in which they admit the execution of the contract, deny default on the part of Ellingwood, and allege that on September 22, 1930, the plaintiff refused to accept any further deliveries of sand or gravel, and that Ellingwood thereupon rescinded said contract and orally tendered the property back to the plaintiff. Said answer further pleads that Ellingwood was induced to enter into said contract through false and fraudulent representations of the plaintiff, the representations alleged to have been made being that the residence on said lots "was well built, was a good house and would make Ellingwood a good home." It is further alleged in the answer that, prior to the execution of the contract, a fire occurred in the basement of the residence upon the property involved, and so weakened the subfloor and floor joists immediately above the basement as to cause the house to settle, the floors to become unlevel, and several doors uncloseable, and that all evidence of fire had been hidden by lining the basement with plaster-board, and that Ellingwood did not discover the fact that such fire had occurred until just before September 22, 1930. Ellingwood prays for judgment against the plaintiff for $1,000 paid in cash upon the contract, $1,079.42 for sand and gravel delivered under the contract, $308.74 paid to the association and $143.81 paid for permanent improvements upon the items of upkeep of the property, or a total of $2,531.97, and tenders return of the property on condition that such sum is paid to him. Neither by answer, evidence nor by offer at the trial does Ellingwood offer to account for the value of his use and occupancy of the property. The allegations relative to defects in the house and concealment of evidence of the fire are pleaded in such manner as to cause them to be a statement of why the representations above mentioned were false and of why Ellingwood did not sooner discover the fact that such fire had occurred, and are not made a part of an action for fraudulent concealment.

The trial court found that rescission of the contract had been had, and that Ellingwood had paid under the contract $1,000 in cash to plaintiff, $917.90 by delivery of sand and gravel and $308.74 in cash to the association, or a total of $2,226.64, and that plaintiff should be allowed $70 a month for twenty-nine and one-half month's use of the property, or a total of $2,065, leaving a balance in favor of Ellingwood of $161.64. Ellingwood was denied recovery of the item of $143.81 above referred to and given until December 1, 1931, to vacate the property. Judgment was rendered in favor of Ellingwood for the sum of $161.64 and the association was decreed to have a first lien in the sum of $3,452.17. Platner appeals.

The evidence discloses that the defendants Ellingwood made their private home in the premises from immediately after the date of the contract to the date of the trial, and that sand and gravel were delivered at various times under the contract from soon after the date of the contract up to and including September 19, 1930, the total price of all deliveries being $1,915.85. Schellberg Sand & Gravel Company obtained a judgment against the plaintiff for the purchase price of a portion of the sand and gravel that had been delivered to plaintiff by Ellingwood and credited upon the contract, and plaintiff paid in satisfaction thereof $997.93, leaving a balance of $917.92 as the amount paid by delivery of sand or gravel. No taxes on the property were ever paid by Ellingwood. Platner paid taxes assessed in 1929. A fire occurred in the basement of the house in August, 1926, and plaintiff had had the same repaired by a contractor at a cost of about $2,500. The plaintiff, and also the tenant, Mr. Henderson, who was living in the house on the date of the contract, and Mr. Keener, an employee of the plaintiff at the time of the sale, each testify that Ellingwood was told of the fire prior to the execution of the contract. Ellingwood denies knowledge of the fire prior to August 4, 1930, when he claims to have discovered it through an incident that occasioned removal of a part of the plaster-board in the

basement. After August 4, 1930, Ellingwood continued delivery of sand and gravel under the contract to as late as September 19, 1930. On September 22, 1930, the plaintiff wrote Ellingwood a letter in which he refused to accept any more sand and gravel, giving as a reason that the quality was unmarketable. The quality of the sand and gravel had been a subject of complaint by the plaintiff to Ellingwood for some time prior to the date of this letter. A letter by the plaintiff to defendant on August 26, 1930, and one of September 5, 1930, complain of failure of defendant Ellingwood to make deliveries. Ellingwood testifies that a day or two after the receipt of the letter of September 22, 1930, he called the plaintiff by telephone and said to him: "You don't think my material is any good, and I don't think your house is any good, and as long as you want to rescind on my contract I will rescind, and all you have to do is to give me what I paid in this, and pay me for my gravel and I will move out." The letter of September 22, 1930, makes no mention of rescission, but states: "You will have to find some other way to take up your obligation with us." The statement above quoted is the only act that Ellingwood is shown to have done toward rescinding the contract prior to the filing of his cross-petition. After August 4, 1930, he collected upon an insurance policy for a storm damage to the property. He inspected the house prior to making the contract. Both he and Platner had lived in Omaha a long number of years. A preponderance of the evidence shows that at least some of the sand and gravel furnished plaintiff under the contract was unfit for the uses contemplated by the parties at the time of making the contract. After receipt of the letter of September 22, 1930, Ellingwood made no offer to deliver sand or gravel of such quality as to comply with the contract, and at the time of such receipt he himself was in default at least in the payment of taxes on the property.

To arrive at the conclusion reached in this case, it is not necessary to determine whether or not the representa-

tions to the effect that the house was a good house, well built and would make the Ellingwoods a good home may be made the basis of an action to rescind on account of fraud having induced the contract. It is unnecessary to determine whether or not such representations were made, and, if made, whether or not they were false, or whether or not the defendants relied thereon, or were damaged thereby. It is unnecessary to determine whether or not the evidence would sustain a finding to the effect that fraudulent concealment induced the contract. It is likewise unnecessary to determine whether or not the plaintiff breached such a dependent covenant of the contract in refusing to accept further deliveries of sand as to allow Ellingwood to rescind for breach of a dependent covenant, he being at the time of such breach himself in default. Whether the right of one party to a contract to rescind the same be on account of fraud having induced the contract, or on account of a breach by the other party of a dependent covenant, such right is barred by failure for an unreasonable time after knowledge of the facts giving rise to such right to declare a rescission and disclaim the benefits of the contract. After Ellingwood, according to his own testimony, had discovered all facts giving rise to the alleged fraud on August 4, 1930, he made about twenty-five deliveries of sand or gravel under the contract, and collected upon a policy of insurance upon the property for damages done by a storm, and after receipt of the letter of September 22, 1930, continued to live in the property as his own. He was still living in it at the time of the trial, and then only tendered its return in his answer on condition that the plaintiff pay a greater sum of money than would be due had rescission been accomplished and had the value of the use of the property for which he has never offered to account been disregarded. If the right to rescind ever existed in Ellingwood upon either of the grounds above mentioned, points we need not decide, it was waived prior to the commencement of this action.

The evidence does not show how many payments the plaintiff paid to the association after the date of the contract, but does show that the full principal of the debt to it is not paid Upon the defendant's default, the plaintiff merely debted Ellingwood with the unpaid portion of the amount due the association, and claims the amount due him is the same amount that would be due if he had paid the association. Ellingwood must be given the right of redemption, and protection in securing a good title in case he redeems. The parties to the contract contemplated that in case the plaintiff was paid in full he would convey subject to any unpaid balance of the debt to the association. The contract does not specifically provide to the contrary. It makes no provision for interest upon the item of $8,000 so long as such item is paid by deliveries of sand and gravel.

For the reasons above stated, the decree of the trial court is reversed and this cause remanded, with directions to allow the plaintiff to make pleading and proof of the number, dates and amount of his payments to the association and for taxes, and to enter a decree in favor of the plaintiff against the defendant Dewitt Ellingwood for the difference between the sum of $8,000 and the sum of $917.92, with interest on such difference at 6 per cent. per annum from September 22, 1930, plus the total of the payments by plaintiff to the association and for taxes, with interest on each of such payments from its date to the date of such decree at 6 per cent. per annum, such decree further to provide for a sale of said property to satisfy the amount due, if redemption is not made within twenty days from the entrance of such decree, and to further determine the amount due the association on the date of such decree, and to provide that, if redemption is made by payment into court, the plaintiff shall not be entitled to withdraw the redemption money until proper deed and abstract is furnished.

REVERSED.

THOMAS E. GLEDHILL, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

FILED AUGUST 11, 1932. No. 28169.

1. **Eminent Domain**: HIGHWAYS. "Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." *Johnson v. Peterson*, 85 Neb. 83.
2. ———. One whose land is damaged temporarily for public use by the construction of a public improvement by the state constitutes such a damage as requires compensation under section 21, art. I of the Constitution.
3. **Waters**: HIGHWAYS: BRIDGES: FLOODING. Bridges constructed over a stream must be so built and maintained as to provide for the flow of all the water which can be carried in the channel, including its natural flood channel. Failure to make proper provision imposes liability, although it may have been constructed according to approved principles of engineering.
4. ———: ———: ———: ———. If such a bridge obstructs the flow, it is evidence that it was not properly constructed, regardless of the principles upon which it was built.
5. **Eminent Domain**: HIGHWAYS: BRIDGES: FLOODING. Where the state, in the improvement of a state highway, builds a cheap temporary bridge, which obstructs the flow of water in a watercourse causing temporary damage to the owners of private property, just compensation must be made for such damage.
6. ———: ACTION FOR DAMAGES. In a suit to recover damages under the constitutional provision for damage to property for public use, it is immaterial whether the petition states a cause of action *ex delicto* or *ex contractu*. If the fact is established that property has been damaged for public use, the owner is entitled to compensation.
7. ———: ———: MEASURE OF DAMAGES. Where land, no part of which is taken, is temporarily damaged by a temporary public improvement, the measure of compensation is not the market value but the value of the use for the period damaged.
8. ———: ———: DAMAGES. "Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured." 17 C. J. 785.

9. ———: ———: ———. When there is evidence of the actual matured value of other crops of a like kind grown during the same period, in portions of the same or adjoining land under similar conditions, there is sufficient data to determine with reasonable certainty the probable value of an unmatured crop if it had matured.
10. ———: TENANTS. A tenant for a term has a property right in land, which is protected by section 21, art. I of the Constitution.

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

C. A. Sorensen, Attorney General, L. Ross Newkirk and *Homer L. Kyle,* for appellant.

Patrick & Smith, contra.

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

DAY, J.

The plaintiff seeks to recover damages from the state, sustained by himself and as assignee of the claims of 19 others, by reason of the construction of a temporary bridge by the state across a watercourse on a state highway. The state appeals from a judgment of approximately $25,000 in favor of plaintiff.

The suit was brought against the state under the provision of the state Constitution which prohibits the taking or damaging of private property for public use without just compensation. In September, 1928, a steel span bridge at the location involved washed out by a heavy rainfall and replacement was necessary. The drainage ditch follows the general course of the Papillion creek, drains over 600 square miles, and carries a large volume of water in flood time. The highway involved is designated as U. S. 75 and is an important one, carrying heavy traffic from Omaha to Kansas City. At the time, the state was engaged in paving and otherwise improving the highway. It was necessary to replace this bridge quickly to avoid inconvenience to the public. Since a change in the location of the road was contemplated but

not definitely determined, the state, in order to save money, erected a temporary wooden pile bridge. In order to support this bridge, piles were driven within the ditch, and to reinforce it other piles were driven in the ditch upstream. Thereafter on March 5, 1929, a thaw caused the ice in the ditch to break up and, together with water draining in the ditch from melting snow, began to move downstream. The ice lodged against the piling of the bridge causing a gorge or dam which held back the flow of ice and water above the bridge and flooded the land for which plaintiff claims damage. The plaintiff alleges that said land was rendered useless during the crop season of 1929.

The property of the plaintiff and his assignors was damaged without actual taking by the construction of this temporary public improvement. It was the purpose of those representing the state to construct a temporary bridge as cheaply as possible. The bridge constructed was the cause of the damage to the plaintiff and his assignors who owned land upstream from the bridge. The evidence in this case is overwhelming that the beginning of the flood was caused by the floating ice cakes in the ditch being held at the bridge. From this point the ice and water backed up for a considerable distance until the ditch was filled, when it overflowed the land and destroyed the dikes which had been constructed at private expense by the landowners. There is evidence in the record of engineers to establish the various levels along this ditch which tends to prove that the bridge was not the cause of the flood. However, this evidence is not impressive in view of the fact that there was no flooding until the ice cakes lodged against the bridge and that the flood started from that point. The bridge was so constructed that it obstructed the flow of ice and water and caused the flood. There was other evidence that this ditch had overflowed prior to the building of this bridge. The finding of the trial court that this temporary highway bridge was the cause of this flood and the consequent

damage is the only finding possible from the evidence in this case.

Is the damage resulting from the construction of this bridge such as would entitle the plaintiff to just compensation? The property of the plaintiff and his assignors was damaged without actual taking by the construction of a temporary public improvement. Since the insertion of the words "or damaged" in section 21, art. I of the Constitution of 1875, it has been the well-settled law in this state that one whose property was damaged without actual taking was entitled to just compensation. *Omaha & R. V. R. Co. v. Standen,* 22 Neb. 343; *City of Omaha v. Kramer,* 25 Neb. 489. In the latter case, it was said: "The words, 'or damaged,' in section 21, art. I of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." At a later date, in *Johnson v. Peterson,* 85 Neb. 83, this court said: "Private property in Nebraska cannot be taken or damaged for public use without just compensation therefor, and this rule applies to public authorities exercising the right of eminent domain in establishing and opening public highways." This latter case was cited with approval in *Weinel v. Box Butte County,* 108 Neb. 293. Recently this court held, in *Nine Mile Irrigation District v. State,* 118 Neb. 522, to the same effect. These few cases, cited out of the many, indicate in outline the established law in this state.

The fact that the damage in this case was of a temporary nature and caused only by a temporary bridge constructed for the use and convenience of the public does not prevent a recovery. 1 Nichols, Eminent Domain (2d ed.) p. 309, says: "An entry on private land may constitute a taking, though temporary in its nature and for only a temporary purpose. A city could not, for example, while it was building a new city hall on the site of an old one, formally divest the owner of a neighboring building of the use of his property for a year and employ it

for a temporary seat of government without compensation for depriving him of the use of his land and building. Accordingly it is held that land or other property cannot be actually put to use by public authority for a temporary purpose without compensating the owner." The authority cites the following cases which support the rule. *McKeon v. New York, N. H. & H. R. Co.*, 75 Conn. 343, 61 L. R. A. 730; *Brigham v. Edmands*, 7 Gray (Mass.) 359; *Alexander v. United States*, 39 Ct. Cl. 383, and other cases. In line with this authority and the amendment to our Constitution by the adding of the words "or damaged," where one's land is damaged temporarily for public use by the construction of a public improvement by the state, it constitutes such a damage as requires compensation under section 21, art. I of the Constitution.

1 Lewis, Eminent Domain, sec. 78, says: "Works of public utility must be so constructed as not to interfere with the accustomed flow of the stream, otherwise there is a right to recover for any consequent damage to private property. Authority to bridge or cross a stream does not imply authority to interfere with its current." Section 80 states: "Where works are constructed below the land of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made."

Another authority, 27 R. C. L. 1105, sec. 39, states the rule thus: "Bridges, trestles or culverts which are constructed over a stream must be so built and maintained as to provide, not only for the flow of all water that can be carried in the channel, but if the probabilities are that the stream to be crossed will at times overflow its banks, there is as much occasion to provide an outlet for the surplus water as for that which is confined within the channel. * * * Failure to make proper provision for the flow of water under a bridge or culvert has been held

to impose liability, although such bridge or culvert may be constructed according to approved principles of engineering; the fact that it does materially obstruct the flow being held to be in itself evidence that it was not properly constructed, regardless of the principles upon which it was built"—citing *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854, 13 L. R. A. n. s. 542; note 28 L. R. A. n. s. 156. See, also, *Clark v. Cedar County*, 118 Neb. 465, a comparatively recent Nebraska case. The constitutional provision embraces the damages which affect the value of a person's property and includes such damages as were sustained in the case under consideration.

No good reason suggests itself which would prevent the plaintiff recovering the damages sustained in this case. The cheap temporary wood piling structure with which the state bridged the drainage ditch was erected for the public benefit and use; such a bridge was erected because it was economical and because it was thought to best serve the interests of the state. It is not just and equitable for the state to save money in the erection of a temporary bridge for public use which from the very nature of its construction damages private property without giving the private owners just compensation for the damage. Such a course would not be in line with our constitutional provision, our judicial decisions, or the general policy of the state.

The state contends that the pleadings and the evidence establish an action in tort for negligence or nuisance, and that therefore the plaintiff is not entitled to recover, for that the state is not liable upon such a cause of action. The pleadings in this case allege that the state built this temporary bridge in a negligent manner and that, as a result of the method of construction, the damage resulted. It is unimportant in this case whether the construction of said bridge was negligent or not. The construction by the state resulted in damage to the plaintiff and under the constitutional provision he is entitled to recover. As

was said by Chief Justice Maxwell in *Omaha & R. V. R. Co. v. Standen*, 22 Neb. 343, the constitutional provision "was intended to furnish an additional remedy, not to curtail or restrict any right which previously existed." It is true that numerous cases in this state for damages arising from an improvement for public use have been based upon negligence. This was especially true at a time when the Constitution only provided that damages should be awarded to the owner for property taken for public use; then a suit for damages based upon negligent construction was the only remedy afforded to one whose property was not taken. In *Douglas County v. Taylor*, 50 Neb. 535, this court held "that it was immaterial what technical name might be given to Taylor's action; for whether his petition stated a cause of action *ex delicto* or *ex contractu*, the averments thereof, if true, established the fact that his property had been taken and damaged for public use, and that by virtue of section 21 of the Bill of Rights (Const. art. I, sec. 21) he was entitled to compensation therefor." It would be unconscionable for the state, which ought to set an example of just and fair dealing, to save money by the erection of a cheap, inadequate, and temporary bridge for the public use, thereby causing great damage to the owners of private property without compensation.

The plaintiff sought to recover and the court allowed recovery for the damage occasioned to the upstream owners of land for the damage to the dikes, which had been constructed at private expense, and for the temporary loss of the use of the land. The destruction of the dikes was a damage to the land for which the plaintiff could recover. In *Nine Mile Irrigation District v. State*, 118 Neb. 522, this court permitted a recovery of the cost of the restoration of the right to use the water. In that case, the state had destroyed the right to use the water of the North Platte river by placing an obstruction in the branch of the river in which the intake of the irrigation district was located. The damages in that case

were the actual expenditures which the public improvement made necessary in order to place the irrigation district in the situation in which it was before the improvement was made. The plaintiff and his assignors had constructed these dikes to protect their land from flooding. They were entitled to have them remain as they were constructed prior to the damage caused by the state. The trial court therefore properly allowed certain owners of land damages for the destruction of these dikes.

The question of the measure of damages for the loss of use of the land is more difficult. The state contends that, where property has been taken or damaged for a public use, the owner is entitled to receive as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. The following cases support this rule: *Lowell v. Buffalo County*, 119 Neb. 776; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239; *Wiles v. Department of Public Works*, 120 Neb. 689; *City of Omaha v. Flood*, 57 Neb. 124, 133; *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90; *Omaha S. R. Co. v. Todd*, 39 Neb. 818; *Chicago, R. I. & P. R. Co. v. Sturey*, 55 Neb. 137; *Churchill v. Beethe*, 48 Neb. 87; *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205; *Gillespie v. City of South Omaha*, 79 Neb. 441; *Stehr v. Mason City & Ft. D. R. Co.*, 77 Neb. 641; *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228; *Mohler v. Board of Regents of University of Nebraska*, 102 Neb. 12. This is unquestionably the rule in this state, but is not applicable where the damage is temporary, as in this case. In such a case, the rule is stated in 20 C. J. 740, to be: "Where land is taken, not to be held permanently, but only for temporary use, the measure of compensation is not the market value, but what the property is fairly worth for the time during which it is held, and the same rule applies where property, no part of which is taken, is temporarily injured." In support of this rule the following cases are cited: *Vincent v. New York, N. H. & H. R. Co.*, 77 Conn. 431;

Illinois Central R. Co. v. Elliott, 129 Ky. 121; *Doremus v. Mayor, etc., of City of Paterson,* 73 N. J. Eq. 474. In the *Elliott* case, *supra,* the court said: "Where a railroad obstructs * * * a street by construction of its road, but afterwards removes the obstruction, * * * the measure of damages * * * is the diminution in the value of the use of it during the continuance of the obstruction caused thereby." In *City of Cape Girardeau v. Hunze,* 314 Mo. 438, 47 A. L. R. 25, the court held: "The measure of damages for temporary use of land in an eminent domain proceeding is what the property is fairly worth for the time during which it is held." Quoting from the last case: "In substance it told the jury that they shall award to appellants the reasonable rental value of the land temporarily acquired for the time which plaintiff proposed to use it absolutely * * * and the damages which the jury might find from the evidence will result to appellants' remaining land because of such temporary use." The Missouri court then quotes and follows the rule above quoted from 20 C. J. 740, and concludes with this statement: "Our own court seems to have followed the foregoing rule. *Chicago, S. F. & C. R. Co. v. McGrew,* 104 Mo. 282; *St. Louis v. Brown,* 155 Mo. 545." The damages which may be recovered by one whose property is damaged by public improvement is the reasonable value of the use of the land which is temporarily destroyed.

Again, we are confronted with the difficult problem of determining the value of the use of land which was damaged. In some instances courts have held that the value of the use of the land was the rental value. *In re Condemnation of Lands,* 250 Fed. 314; *St. Louis v. Brown,* 155 Mo. 545; *Brown v. Pierce County,* 28 Wash. 345; *Tait's Exr. v. Central Lunatic Asylum,* 84 Va. 271; *Williams v. Brooklyn Elevated R. Co.,* 126 N. Y. 96; *Leigh v. Garysburg Mfg. Co.,* 132 N. Car. 167; *City of Corning v. Holmes,* 167 N. Y. Supp. 746; *Welsch v. Elk River Power & Light Co.,* 157 Minn. 451. On the other hand,

it has been held that the rental value is not the proper damage.

In the instant case, the plaintiff's claim is represented by the loss of the use of the land for the crop season for 1929. The trial court assessed the damages for the loss of the use of the land for that year. Much of this land involved was rented to tenants who gave the owner a share of the crop as rental. The trial court determined the value of the use of the land from evidence tending to prove the value of the crop which would have been raised on the land but for the damage caused by the flood. "The general rule is that damages, to be recoverable, must be direct and certain. Contingent, remote, or speculative damages, such as the loss of speculative profits, will not be allowed." 20 C. J. 764. The state argues that the damages allowed in this case are speculative and will not be allowed. A recognized authority says: "Damages based upon the value of unmatured crops are analogous to profits lost, and are governed by the same rule precluding recovery in cases of either uncertainty or remoteness. The question of whether damages based on the result of an unmatured crop are speculative must be determined by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if matured." 17 C. J. 785. The determination of the value of the loss of the use of this land can be made almost certain in this case if based upon the evidence of the value of the crop which could have been raised upon this land but for the flood. The owner of the land under most of the leases was entitled to a share of the crop produced. No better way could be devised to determine the rental value of this land than to determine the value of the crop they could and would have produced except for the flooding. The evidence in this case shows that the cultivation of similar crops on portions of the same or adjoining lands under similar conditions furnishes sufficient data to remove the uncertainty as to damage of the unmatured crops. When there is

evidence of the actual value of other matured crops of a like kind grown during the same period, in portions of the same or adjoining land under similar conditions, there is sufficient data to determine with reasonable certainty the probable value of an unmatured crop if it had matured. *Malone v. Hastings,* 193 Fed. 1, affirmed 201 Fed. 1020, mem. In the above cited case, the crop was planted, but due to inferior seed furnished by defendant the plaintiff claimed damage. In this case, the plaintiff was prevented from planting, due to the flooded condition of the land. When the water overflowed, it carried huge chunks of ice, the melting of which kept the ground wet until late in the summer. The discussion of the rule in the *Malone* case, *supra,* is pertinent and applicable to this case. It is: "The objection that the principle is liable to abuse in its application, especially in jury trials, would apply with force to cases in which sufficient data are wanting to determine with reasonable certainty the probable value of the matured crops; but to such cases the rule has no application. Likelihood of abuse in cases where sufficient data are in evidence is no greater than in many cases of well-recognized elements of damage, which can only be assessed with approximation. The remedy for such abuse lies, not in rejecting altogether this class of damages, but in the exercise of the reviewing power of the court in each case in which they are allowed. Their entire rejection would cause manifest injustice, which would be remediless."

In this case, there was nothing left to conjecture or speculation as to the probability of the crop or the extent of it dependent upon the rainfall or unfavorable conditions. Every element surrounding the production of a crop was then known and was applicable alike to the land that was flooded and that which was not. The trial court made this finding: "The court further finds that said lands so flooded, set apart for the raising of corn in 1929, but for said flooding would have produced an average of 50 bushels per acre, of the value of 90¢ a bushel, and that

the cost of raising, harvesting and marketing an acre thereof was $11.75." In this particular case, there is no more accurate way of determining either the rental value or the value of the use than the determination made in this case from the evidence. The evidence is direct and certain that the owner of this land lost the amount calculated upon this basis from the flooding of the land.

The right of the tenants to recover has been challenged. Most of them were tenants from year to year, and at the time of the construction of the improvement, they were lessees of the land. A number of them, however, were not lessees until March 1, 1929, and the right of these to recover will especially be challenged for the reason that at the time of the construction of the improvement they had no interest in the land. Sufficient answer to this contention is the language of the opinion in *Omaha & R. V. R. Co. v. Standen,* 22 Neb. 343, which is as follows: "In such case there could be no recovery until actual damages had been sustained. Thus, suppose the owner of the land at the time the bridge was built had brought an action, could he have recovered for anticipated overflows? We think not. There must be actual injuries resulting from the unlawful obstruction to justify a recovery." No cause of action had accrued until the land was damaged. At the time of the injury to the property, the tenants involved in this case were in possession of the land for the year. A tenant from year to year has an interest in the property so as to be classed as an "owner" in the constitutional sense and to be entitled to be compensated as to damage for his property right. This is especially true in this case as to the tenant of one tract who paid cash rent. Ordinarily, the damages which should be paid to a tenant are not easily ascertainable. He is often held to be entitled to recover the decrease in the market value of his unexpired term. To fix the market value of an unexpired term is not easy, since a leasehold falls within the class of property not commonly bought and sold. It cannot be questioned that the lessees in this case had a

property right and were entitled to the use of this land which was flooded. The best available test as to the damage which they sustained is what they could and would have made if the flood had not deprived them of the use of the land. Anticipatory profits are ordinarily not considered because they are too uncertain and speculative, but as pointed out heretofore in this opinion what portions of the same land and adjoining land produced in the given year, it furnishes evidence which is reasonably certain what the crops on this land would have been. The best available test of the value of the use of the land to the lessee is the value of the crops which could and would have been grown upon this land, particularly where it is removed from speculation and remoteness and made definite and certain by proof as to what portions of the land and similar adjoining land produced.

There were a number of tracts of the land involved which were suitable for and used for truck-gardening which it was alleged and there was testimony tending to prove the amount of the damage to the use of the land. This testimony is not contradicted or questioned and no objection is made to the claims except the general objections heretofore discussed.

And, finally, the state senate by the adoption of a resolution (Laws 1931, ch. 171) authorized this suit to be brought in the district court for Sarpy county. Such authorization to bring suit does not create a liability, which does not heretofore exist.

"A resolution by one branch of the legislature, authorizing an individual to maintain action against the state to recover damages caused by the negligence of a state employee, does not render the state liable for the negligent acts of its employee, in the absence of a statute making the state liable therefor." *Shear v. State,* 117 Neb. 865; *Kent v. State,* 118 Neb. 501. See *Benda v. State,* 109 Neb. 132.

The senate authorized the suit to be instituted under authority of section 27-319, Comp. St. 1929. In such a

case, section 27-322, Comp. St. 1929, provides: "The court in which such action may be brought shall hear and determine the matter upon the testimony according to justice and right, as upon the amicable settlement of a controversy, and shall render award and judgment against the claimant, or the state, as upon the testimony right and justice may require." In *Lancaster County v. State*, 97 Neb. 95, the court referring to these sections of the statutes said: "Under this direction it is the duty of the court to brush aside technical defenses and to act in like manner as if the parties were seeking to amicably settle their controversy." In *Commonwealth Power Co. v. State*, 104 Neb. 439, this court said: "The purpose of these sections is to take such cases out of the ordinary rules of law and to place their determination upon a much higher and broader ground, * * * and to make justice and right, as viewed by the court, the basis of its decision."

With this rule as our guide, how should this case be decided? The state, in order to save money, built a cheap, temporary, and inadequate bridge. This bridge obstructed the flow of water in a watercourse and flooded the plaintiff's land to his damage. He lost the use of his farm land for the crop season of 1929. The Constitution protects him against damage for public use without compensation. Thus analyzed, justice and right, as well as the law of the state, require the plaintiff's compensation.

We have examined carefully each one of the twenty claims presented, which have not been delineated here in detail for the reason that it would extend this opinion to an unwarranted length. We find no error on the part of the trial court and its finding is adopted as the judgment of this court.

AFFIRMED.

HASTINGS, District Judge, dissents.

STATE, EX REL. CITY OF FRIEND, APPELLEE, V. FRIEND RECREATION CLUB, APPELLANT.

FILED AUGUST 11, 1932. No. 28425.

Licenses: BOWLING ALLEYS. Cities of the second class have authority, under the provisions of section 17-122, Comp. St. 1929, to enact ordinances to license, regulate or prohibit bowling alleys; and a bowling alley open to the public upon payment of a fee or charge is not exempt from the provisions of such ordinance because it is incorporated and operated under the name or guise of a "Recreation Club."

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

Robert R. Hastings, for appellant.

F. L. Bollen, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BLACKLEDGE, District Judge.

The city of Friend is a city of the second class, and under the provisions of section 17-122, Comp. St. 1929, is authorized to enact ordinances to license, regulate or prohibit billiard halls, pool halls and bowling alleys. The city duly adopted and, at the time of the transactions here under consideration, had in force an ordinance known as ordinance No. 71 of that city, which provided it should be unlawful for any person to operate a bowling alley without first making application and procuring a license therefor, and containing certain provisions for the regulation of places of that kind, in reference to their management, the hours of closing, and other matters.

The case is presented here as a case stated, from which it appears that the defendant, Friend Recreation Club, is duly incorporated and maintains and operates a bowling alley in a place of business in the city of Friend without having obtained any license therefor; and it here contends that, because of its system of organization and operation, it is not subject to license or regulation under

the provisions of the ordinance. The questions here submitted for decision are whether the defendant club is subject to the provisions of the said ordinance requiring a license for its operation and maintenance, and whether the judgment of the district court which assessed a fine for its operation without a license is proper.

It appears from the record that the corporation was organized having both common and preferred stock. The common stock was issued to the defendants Hungerford and Armogast in the amount of 100 shares of $10 each, and the common stockholders have the exclusive rights of voting and management of the affairs of the corporation. The preferred stock is issued to those who desire to become patrons of the club and is in the form of a membership card which states that the recipient is the holder of one share of preferred stock of the value of 50 cents and upon which he is guaranteed a dividend of 4 per cent. per annum. The qualifications for membership are that the applicant be of lawful age and possess the 50 cents, which may be paid in cash or property at a fair cash value. The institution is operated as an ordinary place of that kind in a room on the ground floor of a business building, the front part of which is used as a cigar and confectionery store and is said to be the exclusive property of the manager of the club, which manager has been selected from the common stockholders and receives a salary of $25 a week. Up to the time of trial the income from the club's activities had not been sufficient to meet the overhead expenses and the manager's salary, so that no question is presented of the actual disposition of the surplus except it is to be presumed that the dividends on the preferred stock will be paid. The bowling alley part of the institution is to the rear of the confectionery department and is separated therefrom by a partition approximately six feet in height reaching part way to the ceiling, entrance being by a door from the confectionery room, and it is said that none except members are admitted, who are charged a standard fee of 20 cents a game for bowling.

It is contended that the recreation club is therefore a private club exclusively, that the authorities of the city have no right to interfere with it in the matter of license, and that the constitutional rights of the members and patrons holding the preferred stock certificates are being invaded, but we conclude from the statement of the organization and operation of the club as here presented that it is palpably a device to evade or avoid the requirement for a license and the regulatory provisions of the ordinance, and that it is fundamentally to all intents and purposes such a business as is subject to license and regulation, and that the judgment of the district court in assessing a fine for operation without a license was right and proper, and it is therefore

AFFIRMED.

WILLIAM R. PATRICK, APPELLANT, V. WILLIAM J. SHALLCROSS, APPELLEE.

FILED AUGUST 11, 1932. No. 28258.

1. **Libel and Slander: WORDS NOT ACTIONABLE PER SE.** The alleged words spoken of the plaintiff by the defendant, and set forth in plaintiff's petition, *held* not to be actionable *per se*.
2. ———: ———. "An oral charge of an attempt to commit a crime will not be actionable *per se* where such attempt does not of itself constitute a distinct substantive offense." 36 C. J. 1198.
3. ———: ———. The use of the defamatory words "thief" and "criminal" must be construed in connection with all that was said; and if it appears that they relate to the taking of property not a subject of larceny, they are not actionable.
4. **Appeal.** *Held*, that under the pleadings and evidence the verdict of the jury for defendant was the only verdict that could be upheld.
5. ———. "Where the verdict returned by the jury is the only one justified by the evidence, alleged error in the instructions of the court will not be considered." *Christen v. Schreiner*, 82 Neb. 446.
6. ———. "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial." *Advance Thresher Co. v. Kendrick*, 91 Neb. 645.

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

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

Fischer, Fischer & Fischer, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and DAY, JJ., and DICKSON and TEWELL, District Judges.

DICKSON, District Judge.

The appellant and appellee were plaintiff and defendant in a slander action brought in the district court for Sarpy county. A jury trial was had resulting in a verdict for the defendant. From an order overruling a motion for a new trial and judgment for defendant, plaintiff has appealed.

The record discloses the plaintiff had been for many years a practising attorney in the city of Omaha and surrounding communities; that he lived in the city of Omaha and maintained an office in the Omaha National Bank Building. The defendant lived in the village of Bellevue, and owned property there, as did the plaintiff; the properties being on opposite sides of Bluff street. A controversy had arisen between the plaintiff and defendant over the occupancy of a part of Bluff street by the defendant. Defendant insisting on his right of occupancy; and the plaintiff resisting and going so far as to remove, or cause to be removed, defendant's fence and grapevines from the street, engendering some feeling between the parties. While this controversy was still on, the plaintiff and defendant met at the entrance of the Omaha National Bank, and the matter of the rights and privileges of the parties in and to Bluff street was discussed at length and became quite heated. At this juncture Mr. Erion appeared on the scene and was asked by defendant to witness what he was about to say to the plaintiff. Whereupon the defendant said to Mr. Erion, "Pat (meaning plaintiff) is trying to steal twenty feet of my land;" that the plain-

tiff replied to defendant by saying, "You mean to say I am a thief;" that defendant replied to plaintiff by saying, "If you take that land, yes. * * * The idea of you having the nerve to go into a church like you did last Sunday night and preach a sermon about the crime conditions of this country when you are no better than a criminal yourself." Plaintiff, feeling aggrieved, sought redress in court. The petition is bottomed on the proposition that the accusations of the defendant accused him of a crime, and of being a criminal, and were actionable *per se*. If the plaintiff be correct in his contention, then the judgment of the district court should be reversed; but, if the defamatory words used were not actionable *per se*, then the judgment of the district court should be affirmed.

Conceding that the defendant made use of the words charged in the petition, were they actionable *per se?* It will be noted that the defendant said to Erion, "Pat is trying to steal twenty feet of my land." This does not charge the plaintiff with a criminal offense, as the property was not the subject of larceny, either at common law or under our statute. The rule seems to be: "Words, otherwise actionable *per se* as charging larceny, if spoken in relation to a subject of which no larceny was capable of being committed, are not actionable *per se*." 36 C. J. 1206.

At most, the words charged the plaintiff with an attempt to steal the land, not a criminal offense. "An oral charge of an attempt to commit a crime will not be actionable *per se* where such attempt does not of itself constitute a distinct substantive offense." 36 C. J. 1198.

The use of the words, "thief" and "criminal," standing alone, would be actionable *per se;* but the words must be considered in connection with all that was said; and if it appears that they related to the taking of property not a subject of larceny, they are not actionable. "Although the words spoken amount of themselves to a charge of larceny, yet if accompanied with a specification

of acts upon which the charge is based, which show that no such crime was committed, the person of whom the words were spoken has no cause of action." 36 C. J. 1206.

On the trial of the case the plaintiff limited his proof to the speaking of the alleged defamatory words, and based his right of recovery upon the proposition that they were actionable *per se;* and that proof that they were spoken of the plaintiff by the defendant entitled him to damages; and instructions were offered by plaintiff in support of his contention.

In the trial of the case the defendant conducted his own defense, which is unusual, unsatisfactory, and embarrassing at times to the trial judge, and subjects him to unjust criticism which he has no way of avoiding. The defendant asked, and was given leave, to amend his answer; and, although not amended in conformity to his request, the trial seems to have proceeded as if amended. On the trial some testimony was admitted on both sides that was foreign to the issues, but without prejudice or advantage to either party. The greater part of such testimony was explanatory of the conditions that gave rise to the controversy between the parties as to the rights of abutting owners of property on Bluff street; and the plaintiff was not prejudiced by its reception; in fact, it sustained the plaintiff's contention that any possession or occupancy by the defendant of the street was unlawful. Much fault is found with the instructions of the court. They embodied the contentions of the plaintiff, as stated in his requested instructions, and plaintiff should not now complain. The court's instructions are much more favorable to the plaintiff than he was entitled to; and were prejudicial to the defendant to such an extent that, if the verdict had been against him, he would have been entitled to a new trial. Had the defendant moved for a directed verdict at the close of plaintiff's evidence, it would have been error to have refused it. The verdict of the jury for the defendant was the only verdict that could be upheld, under the plaintiff's own petition

and proof. Under such conditions, errors occurring at the trial could not have been prejudicial to the plaintiff.

"Where the verdict returned by the jury is the only one justified by the evidence, alleged error in the instructions of the court will not be considered." *Christen v. Schreiner*, 82 Neb. 446.

Again, in *Advance Thresher Co. v. Kendrick*, 91 Neb. 645: "Where the conclusion reached by the jury was the only one permissible under the pleadings and evidence, the judgment will be affirmed. In such case, errors occurring at the trial could not have been prejudicial."

Under the rule above stated, the judgment of the district court must be upheld.

AFFIRMED.

WILLARD I. KORTRIGHT, APPELLEE, V. MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

FILED AUGUST 11, 1932. No. 28086.

1. Insurance: AGENCY CONTRACT: CONSTRUCTION. The word "recall," as used in the agency contract involved herein between a life insurance company and its agent, is not the equivalent in meaning of rescind.
2. ———: POLICY: CANCELATION: COMMISSION. Where an insurance company has rescinded a contract of insurance and canceled the policy without a legally sufficient cause therefor and returned to the insured the unearned premium thereon, *held*, it cannot recover from the agent who negotiated the contract any part of the commission previously paid to him, in the absence of an express agreement providing therefor.

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

Frederick L. Allen and *Brown, Fitch & West*, for appellant.

Lovely & Lovely, contra.

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

HASTINGS, District Judge.

On January 16, 1917, the Mutual Life Insurance Company, appellant, and Willard I. Kortright, appellee, entered into a contract in writing whereby Kortright was appointed its agent for the purpose of soliciting insurance and collecting and remitting first year premiums thereon under the rules and regulations of the defendant company. For his services the defendant company agreed to pay him commissions on first year premiums secured and remitted by him in cash. The contract prohibited rebating in any form, directly or indirectly, by Kortright. Later, on December 30, 1929, that contract was superseded by another almost identical in terms. Sometime prior to the 20th day of July, 1929, the plaintiff entered into negotiations with one Rufus E. Lee for a life insurance policy of $150,000. Lee at that time had $665,000 of life insurance in the defendant company on which a large amount of dividends had accumulated. As an inducement to Lee to take out an additional $150,000 life insurance policy the plaintiff advised him how he could take out such additional life insurance by using his accumulated dividends on other policies, then held by the defendant company, to pay the premium. On the 20th day of July, 1929, Lee made written application to the company for a $150,000 ordinary life insurance policy and at that time gave the plaintiff an order on the defendant company for the first year's premium, amounting to $9,108, payable out of the dividends then accumulated on his other policies. On the 20th day of August, 1929, the defendant company issued and delivered to Lee a life insurance policy for $150,000 which was accepted by Lee. Under the terms of the contract of agency then in force between Kortright and the defendant company his commission amounted to $4,554, which was paid to him by the defendant company. Some time after the policy was issued and accepted by Lee, Kortright was called to Lee's office by Lee, and Lee then demanded that all of the commission received by Kortright in excess of $1,000 be re-

bated to him, it being contended by Lee that at the time the application for the insurance was made Kortright promised to rebate all of his commission in excess of that sum. Kortright denied that any such agreement had been made. Lee thereupon went to the manager of the defendant company in Omaha and insisted that the manager bring pressure on Kortright to give him the rebate. Lee made it plain that if he was given the rebate he would be satisfied; if not, he would take the matter up directly with the defendant company and ask that his policy of insurance be canceled. Failing to get his rebate, Lee, on November 16, 1929, wrote the defendant company that he was induced to take the policy in question by reason of an agreement he had with Kortright to rebate all of his commission except $1,000 and that he would not have taken the insurance but for such agreement; that he had other similar transactions with Kortright and Kortright had always carried out his part of the agreement. He asked that the policy be canceled and that the unearned premium should be returned to him on a *pro rata* basis. The defendant company then instituted an investigation to determine the truth of the charge made by Lee and, after receiving the statements of the manager of its Omaha office and Kortright, wrote its manager that in view of his statements and those of Kortright it would seem there was no foundation for the claim made by Lee, and asked their manager to see Lee and relieve his mind of any thought that there was anything that could be done. Thereafter Lee employed a lawyer to present his claim to the company and on January 22, 1930, the company wrote its manager at Omaha that from their investigation through correspondence they found that the insured's contention was supported by abundant testimony and the transaction should be undone, after providing for a *pro rata* charge for the insurance, the policyholder placed where he was before the new insurance was undertaken, and instructed the manager to proceed with undoing the transaction. The policy was canceled as of

the date of December 3, 1930, and the defendant company refunded to Lee the sum of $6,502.10 and proposed to allow the plaintiff a commission in the sum of $1,302.95 instead of $4,554. The defendant company demanded of the plaintiff that he pay to it the balance of the commission received by him, in the sum of $3,251.05, which he refused to do. He was then notified that commissions as they became due under his contracts would be applied to the payment of that sum. The plaintiff thereupon resigned as the agent of the company and thereafter brought this action on his contracts, copies of which he attached to his petition, to recover commissions then due him upon renewal premiums amounting to the sum of $1,086.89.

The defendant company answered admitting this amount was due the plaintiff under his contracts, and alleged, by way of counterclaim, in substance, that certain rules and regulations of the company, which were set out, were, by the terms of the contracts, made a part thereof, and alleged the issuance of the policy of insurance to Lee, the payment of the first year's premium by him, and that plaintiff was entitled to receive and did receive, as commission therefor, the sum of $4,554. Defendant further alleged that, on complaint of Lee that misrepresentations had been made to him in procuring the insurance and that plaintiff had refused to carry out an agreement that he had made with Lee, the company had recalled the policy and canceled it as of December 3, 1930, refunded Lee the sum of $6,502.10 of the premium paid by him, and that plaintiff was entitled to a commission on said policy in the sum of $1,302.95 instead of $4,554, and that by reason thereof plaintiff was indebted to the defendant on account of said transaction in the sum of $3,251.05.

The reply and answer of the plaintiff denied all allegations of the answer and counterclaim not admissions of allegations of plaintiff's petition.

On the trial the verdict was for the plaintiff for the amount claimed and against the defendant on its counterclaim. From the judgment thereon defendant appeals.

The defendant assigns as error: (1) The overruling of the motion of the defendant for a directed verdict; (2) the giving of instruction No. 4.

A consideration of the errors assigned requires a construction of the contract of agency between the plaintiff and defendant in force at the time of the issuance of the policy to Lee. The right of the defendant to recover on its counterclaim for the part of the commission paid plaintiff and later returned to the insured is to be determined according to that contract. The defendant company predicates its right to recover on its counterclaim upon two rules which were a part of the contract in question. We do not find it necessary to set out the entire contract.

The rules upon which the defendant relies are as follows:

"216. When Paid. Commissions are paid on first year premiums collected on policies delivered and accepted by applicants and not recalled by the company.

"217. Commission not Allowed. Claims for commissions on applications on which policies have not been issued, or on policies recalled for cancelation, will not be allowed."

In the case of the *People's State Bank v. Smith,* 120 Neb. 29, we held: "An ambiguity in a written contract prepared by one of the parties should ordinarily be resolved in favor of the party who did not prepare it and had no choice in the selection of the words used nor in the arrangement of the sentences and punctuation."

The rule announced in that case will be applied in construing these rules.

It is the contention of the defendant company that, since Lee, a large policyholder with the company, made complaint to it that plaintiff had agreed to rebate to him a large part of the commission, was dissatisfied because plaintiff failed to carry out such agreement and had presented evidence tending to establish such agreement, it was proper and necessary, as a matter of good business

and to its best interests, to recall and cancel said policy, and that it had a right, under the rules in question, to recall and cancel said policy for that reason and recover from the plaintiff the *pro rata* share of the commission included in the premium returned. We cannot give our assent to this contention.

It is evident that rule 216 was intended to fix the time when commissions on first year premiums would be paid. Under the rule commissions were to be paid when the premium had been collected, the policy delivered and accepted by the applicant, and was not to be paid on policies that had been recalled before becoming effective as a contract.

Rule 217 was intended to make clear that claims for commissions would not be allowed on policies which had not been issued, although applications had been made therefor, or on claims for commissions on policies which had been recalled for cancelation prior to the time the policy became effective.

Obviously this rule was not intended to apply to those instances where the policy had become effective pursuant to the terms of the application and the commission had been paid. A claim for a commission would not exist where it had been paid. These rules deal exclusively with claims for unpaid commission and as to when commission is allowable and payable. The "recall" of policies referred to in the rules means the recall by the company where the policies had not become effective as contracts of insurance. The printed part of the application in this case is presumably like all other applications for like insurance in defendant company and provides:

"The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health, except in case a conditional receipt shall have been issued as hereinafter provided."

These provisions of the application fix definitely when a policy becomes effective as a contract of insurance. It is contemplated that a policy might be issued on an application and received by the insured but would not be effective until the premium is paid. Until a policy became effective as a contract of insurance, as provided in the application, the right to recall resided in the company and it was such a recall by the company as the rules cover. The policy in this case contains no provision giving the defendant company the right to cancel it after it became effective as a contract of insurance.

"The right of an insurance company to cancel one of its policies is altogether different from a right of rescission. The latter right can be exercised only when some legally sufficient cause for it exists, such as fraud or false representations. But a right to cancel may be exercised at the mere option of the company and without assigning any reason. This right, however, exists only when it is expressly reserved to the company in the policy, and then can be exercised only in such a manner and on such terms as are prescribed in the policy." 2 Black, Rescission and Cancelation (2d ed.) 1207, sec. 480.

If the recall and cancelation referred to in the rules was intended to cover a case where a policy had become effective as a policy of insurance, then some provision would have been made in the policy for its recall and cancelation by the defendant company at its election. The policy contains no such provision, and, having become effective as a policy of insurance, the right to recall ceased. Thereafter the right of the defendant company to cancel would be dependent on rescission for some legally sufficient cause.

In the instant case the policy was not recalled by the defendant company, before it became effectual, for cancelation; but the contract was consummated and thereafter rescinded and canceled at Lee's request on the terms proposed by him, on the sole ground that he claimed he had been promised a rebate of a part of the commission

which had not been paid to him by the plaintiff. While the defendant company and Lee might agree to a rescission of the contract of insurance and the cancelation of the policy for any reason or no reason at all, they could not thereby deprive the plaintiff of the commission paid to him by the company unless such rescission was for some legally sufficient cause from which an agreement to repay the commission would be implied by law. An agreement to rebate, such as Lee claims was made, is expressly forbidden by section 44-1105, Comp. St. 1929, and by section 44-1120, Comp. St. 1929, is made a misdemeanor punishable by fine or imprisonment. The claimed agreement to rebate was illegal and no recovery could be had thereon by Lee against the plaintiff, nor could Lee compel a rescission of the contract of insurance or a cancelation of the policy on that ground. Such an agreement is not a ground recognized in law or in equity whereby the defendant company might maintain an action for a rescission or cancelation of the policy. There is nothing in either rule providing that, after the policy became effective as a contract of insurance and the commission is paid to the agent, on a rescission and cancelation the agent was to refund to the defendant any part of his commission included in the unearned premium returned to the insured. The company prepared the rules, which are a part of the contract, and if it desired to cover cases of this kind it should have so provided therein in specific terms. The parties having failed to contract in this respect, we cannot remake the contract for them.

Where, as in this case, the plaintiff, as agent of the defendant company, had earned and been paid his commission under his contract with the defendant company and the contract of insurance is rescinded and the policy canceled by the mutual consent of the insurer and insured without any legally sufficient grounds for a rescission of the contract or cancelation of the policy, no agreement will be implied that the plaintiff will repay to the in-

surer the portion of his commission included in the unearned premium returned to the insured.

We have not been cited to any case, nor have we been able to find any, which supports defendant's contention.

We have been cited to the following cases by the defendant as supporting its contention: *Milwaukee Mechanics Ins. Co. v. Warren,* 150 Cal. 346; *Ryder-Gougar Co. v. Garretson,* 53 Wash. 71; *National Union Fire Ins. Co. v. Nason,* 21 Cal. App. 297; *Salley v. Amicable Life Ins. Co.,* 4 S. W. (2d) (Tex. Civ. App.) 35; *Hill v. Aetna Ins. Co.,* 180 Ark. 401. A careful examination thereof shows the cases not to be in point. In each of the cases cited the contract between the agent and the insurance company expressly provided that the agent should repay to the company the amount of the commission on premiums returned to the insured by the insurer on canceled policies.

In 14 R. C. L. 871, sec. 42, it is said: "But when a policy has been canceled and the unearned premiums returned to the assured, the insurer cannot recover from the agent who negotiated the insurance any part of the commission paid, unless it was so agreed." See, also, *Hay v. Insurance Co.,* 167 N. Car. 82, Ann. Cas. 1916A, 1129, and note.

We hold that, where an insurance company has rescinded a contract of insurance and canceled the policy without a legally sufficient cause therefor and returned to the insured the unearned premium thereon, it cannot recover any part of the commission paid to the agent included therein, in the absence of an express agreement to that effect.

It follows from what has been said that the judgment entered in this case is the only judgment warranted in law. That being true, the defendant was not entitled to a directed verdict on his counterclaim, nor was there prejudicial error committed in the giving of the instruction complained of. The judgment is therefore

AFFIRMED.

ANTON GRESECK, APPELLEE, V. FARMERS UNION ELEVATOR COMPANY, APPELLANT.

FILED AUGUST 11, 1932. No. 28293.

1. **Statutory Provision.** The workmen's compensation law provides: The term "injury" and "personal injuries" means only violence to the physical structure of the body and such disease or infection as may naturally result therefrom. Comp. St. 1929, sec. 48-152.
2. **Master and Servant: WORKMEN'S COMPENSATION LAW: INJURY TO FINGER: COMPENSATION.** Under the workmen's compensation law, where an injury is to the finger only, and the effect of such injury is the usual and natural one, the compensation must be fixed upon the basis of loss of use of a finger, and not upon the basis of the loss of use of a hand.
3. ———: ———: ———: ———. Under the facts in this case, the appellee, who is the employee, in addition to the compensation allowed him by the trial court for temporary total disability, is entitled to compensation for a 75 per centum permanent partial loss of use of the second finger of his right hand, and is not entitled to compensation for permanent partial loss of the use of the hand.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed in part, and reversed in part.*

Story & Thomas, for appellant.

George M. Harrington, contra.

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

HORTH, District Judge.

This controversy arises under the workmen's compensation law.

That the second finger of the right hand of Anton Greseck, plaintiff and appellee, was accidentally injured while he was in the employ of the Farmers Union Elevator Company of O'Neill, Nebraska, defendant and appellant, and that such injury arose out of and in the course of his employment, is conceded by appellant. It

is the classification of appellee's disability by reason of his injury and the amount of the compensation to which he is entitled, concerning which the parties are in disagreement, appellee urging that he is entitled to compensation for permanent partial loss of the use of his right hand, while appellant contends that, in no event, is appellee entitled to compensation for more than permanent partial loss of the use of the second finger of his right hand. Appellee's daily wage was $3.50.

Relative to his injury and disability, appellee states in his pleading that, while he was filling a revolving bucket with dust from grain, the second finger of his right hand caught in the bucket, and as a result he received a fracture of said finger between the first and second joint, and that said finger was crushed, bruised, mangled and injured, that there is a stiffness of the joints, that he only has a partial grip with his right hand as a result of such injury, that such injury has caused plaintiff a 75 per cent. loss and impairment of the use and functions of his right hand, that said injury to the second finger is permanent, and that subsequent to November 29, 1930, plaintiff developed a latent inflammation in said finger which is progressive in nature and known as an inflammation of the periosteum.

Upon the trial of the cause in the district court the appellee and three doctors were called and testified concerning appellee's injury and the disability resulting therefrom, and each confined such injury to the second finger of the right hand, but further testified that the injured finger had become stiff, affecting appellee's ability to grip with his right hand, and thereby causing a permanent partial loss of the use of the hand.

One of the outstanding purposes of the workmen's compensation law is to establish a uniform system for measuring compensation for specific accidental injuries that any employee, coming within its provisions, may encounter in the course of and growing out of his employment, and to simplify the procedure in such cases. Keeping in

step with this laudable purpose, the legislature of the state of Nebraska has, by enactment, taken the amount of recovery, in such cases, out of the realm of speculation, by fixing the amount of compensation that shall be paid by the employer to his employee who meets with a specific injury; and to promote a speedy and inexpensive recovery, it has done away with the technical rules of pleadings and evidence and hastened the time for hearings and for the determinations upon such hearings. It is essential, in interpreting this law, that simple words be simply construed and that definite terms be not opened up to indefinite construction; and while compensation statutes are to be liberally construed in favor of the employee, the courts are not at liberty to extend their application beyond the limits fixed by their terms, nor to amend them by judicial construction.

The Nebraska schedule of compensation for injuries to the finger and hand is found in section 48-121, Comp. St. 1929, and, in so far as pertinent to this case, provides:

For the loss of the second finger, sixty-six and two-thirds per centum of daily wages during thirty weeks.

For loss of a hand, sixty-six and two-thirds per centum of daily wages during one hundred seventy-five weeks.

Permanent total loss of the use of a finger shall be construed as equivalent to the loss of such finger.

In all cases involving a permanent partial loss of the use or function of a finger or a hand, the compensation shall bear such relation to the amounts named as the disabilities bear to those produced by the injuries named.

It is provided by section 48-152 of the same statute that, the term "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as may naturally result therefrom.

It is a matter of common knowledge that, when one's finger is severely lacerated and fractured, a consequential impairment of the usefulness of the hand follows, at least during the healing period. The same finger injury exerts

a similar influence upon the arm, but in a lesser degree. In such cases, barring unexpected complications, the disability to the injured finger is greater than to the hand, and greater to the hand than to the arm, and in those states where workmen's compensation laws have been adopted, with classification of injuries and schedule of compensations similar to those in Nebraska, it is generally held that it is the disability to the injured finger, and not the consequential disability to the hand, which governs the compensation to be paid, and such in effect has been the holding of this court. Thus, in *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, it is held that under a statute providing:

"'For all disability resulting from permanent injury of the following classes, the compensation shall be exclusively as follows: * * * For the loss of a leg, fifty per centum of wages during two hundred fifteen weeks'—and providing also that permanent loss of the use of a leg shall be considered as the equivalent of the loss of a leg, the compensation for the permanent loss of the use of a leg, unaccompanied by other physical injury or loss of health, cannot exceed the amount specified."

In *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, it was held: "Where the employers' liability law fixes the amount of compensation, such compensation can be measured only in the manner directed by the statute."

In *Schroeder v. Holt County*, 113 Neb. 736, it is said: "An employee who receives an injury not affecting any other part of his person, but totally and permanently destroying the use of one leg, is only entitled to recover as if the leg had been removed by reason of such injury, under subdivision 3 of section 3044, Comp. St. 1922, and not under subdivision 1 thereof."

In *Freyn Bros. v. Jameson*, 85 Ind. App. 363, the second finger of the employee's right hand was bruised and fractured causing it to be more or less stiff. The employee testified that the only injury was to the second finger. Two physicians, witnesses of the employee, testi-

fied there was a total permanent loss of the use of the finger, and considering the employee was a steam fitter and plumber the injury to the finger resulted in a 50 per cent. impairment of the use of the hand. Held, the injury was compensable for permanent loss of the use of the finger, and not for permanent partial loss of the use of the hand.

In *Cox v. State Industrial Commission,* 140 Okla. 59, the employee suffered the loss of the index and second fingers and the partial loss of his ring finger. He claimed compensation for the partial loss of his hand. Held, "The workmen's compensation act provides for specific amounts of compensation for loss of the various fingers, and compensation cannot be fixed upon the basis of partial permanent loss of the hand where the only injury is to the fingers." In *Matter of Dowling v. Gates & Co.,* 253 N. Y. 108, it is said: "A claimant who has suffered a schedule injury * * * is entitled only to an award of the amount specified in the schedule for such injury in case the effect of the injury is the usual and expected effect. If, however, some unusual and extraordinary condition develops as a result of the injury the fact that the original injury is covered by the schedule does not prevent an award for the actual, although unusual and unexpected, condition which has developed as a result of the accident. The amputation of a foot may result in blood poisoning, paralysis or death. They are not the usual result of the injury and operation, although they may be the natural and unavoidable results in particular cases. When such an unusual and unexpected result occurs, an increased award should be made." Chief Justice Cardozo concurred in this opinion and cited it with approval in writing the opinion in *Matter of Flicker v. Mac Sign Co.,* 252 N. Y. 492, decided at the same time.

In the present case, the injury to the appellee was confined to the second finger of the right hand. There were no unusual or unexpected complications attending the injury, and appellee's disability resulting from the injury

is compensable on account of permanent partial loss of the use of the finger, and not for permanent partial loss of the use of the hand.

Upon the question of the percentage of permanent partial loss of the use of appellee's finger, the evidence is conflicting and not entirely satisfactory, but, upon careful consideration thereof, we find that the appellee has suffered a 75 per centum permanent partial loss of the use of the second finger of his right hand, and as compensation therefor appellee is entitled to recover from appellant $14 a week for 22½ weeks, commencing as of the 30th day of November, 1930.

The weekly amount allowed appellee by the trial court for temporary total disability, and the time for which the allowance was made, is supported by the evidence and does not appear to be in serious dispute.

That part of the judgment of the district court requiring appellant to pay to appellee the sum of $14 a week during 12 weeks for temporary total disability is affirmed, and that part of said judgment allowing appellee compensation for permanent partial loss of the use of his hand is reversed, and the district court is instructed to enter judgment in favor of the appellee and against the appellant for the payment of $14 a week during 22½ weeks, commencing as of November 30, 1930, as compensation for the permanent partial loss of the use of his second finger of his right hand, and it is ordered that appellant and appellee pay the costs incurred by them, respectively, in this court.

AFFIRMED IN PART, AND REVERSED IN PART.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1932

OMAHA LIFE INSURANCE COMPANY, APPELLANT, V. GERING & FT. LARAMIE IRRIGATION DISTRICT, APPELLEE.

FILED SEPTEMBER 23, 1932. No. 28246.

1. **Waters:** DRAINAGE. The remedy provided by section 46-132, Comp. St. 1929, for the drainage of lands within an irrigation district is exclusive.
2. ———: IRRIGATION: LIABILITY FOR SEEPAGE. Irrigation districts, having no control over the application of water to lands appropriated for and applied by the owners thereof within the district, are not liable for damages resulting from such landowners' negligence in the use of the water.
3. **Eminent Domain:** IRRIGATION: DAMAGES: WAIVER. One who petitions for the organization of an irrigation district under the statutes unequivocally waives right to compensation under the Constitution for damage to property and accepts in lieu thereof the statutory remedy.
4. **Evidence** examined and found to be insufficient to support a verdict for plaintiff.

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

Raymond & Fitzgerald, for appellant.

Mothersead & York, contra.

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

DAY, J.

The plaintiff, as owner of land within the irrigation district, seeks to recover damages for seepage to his land. At the close of plaintiff's testimony, the trial court sustained defendant's motion to direct a verdict in its favor.

From a judgment entered upon the directed verdict, plaintiff appeals to this court.

The plaintiff alleges that its land was seeped by the water from the defendant district due to the negligence of the defendant. It is also sought to recover under section 21, art. I of the Constitution, which requires payment for property damaged for public use. There is a statutory provision which requires an irrigation district to drain seeped lands within its district. Section 46-132, Comp. St. 1929, is, as far as applicable: "Any irrigation district * * * shall have the power to and it shall be its duty to provide for the proper drainage of any and all lands embraced within its limits which are or have been subirrigated by reason of the lawful use of water from its canal by the owner or lessee of the lands subirrigated or from any cause not the fault or by the consent of such owner or lessee." The right to drainage provided by this statute is in the nature of a contractual right arising by operation of law. It is not based upon negligence, and the question of the damage to property for public use without just compensation is not involved. In effect, the parties organizing the district engaged in the common enterprise of conducting water through ditch for delivery to the various landowners of the district for irrigation purposes. In addition to the delivery of water, another purpose and duty of the organization is to drain all land within the district seeped or subirrigated by reason of the lawful use of water or by leakage from any canal of the district. In other words, the landowners of the district collectively through the organization of a district have agreed to drain the land of any one in the district which may become seeped. At the time of the organization of the district or at the time of the construction of the works, it is impossible to determine which lands may be seeped, although it seems to be certain that some will become wet. It is usually not until the irrigation system has been in operation for some time that the water table under the ground is raised sufficiently to

seep some of the land. In turn, the individual landowner by participating in the organization is bound to accept the provision made for him by statute. In this case, the records of the department of public works of the state, of which we take judicial notice, show that the then owner of the land involved in this suit signed the petition for the organization of this irrigation district. Therefore, the owner of the land, having entered into a contractual relation which provides for drainage, he is bound to the terms of that contract, and he may require the district to drain his lands upon demand. Having in mind this contractual relationship between the individual landowner and the district, this court has said that the remedy provided by section 46-132, Comp. St. 1929, for the drainage of lands within an irrigation district is exclusive. *State v. Farmers Irrigation District,* 116 Neb. 373; *Spurrier v. Mitchell Irrigation District,* 119 Neb. 401; *Livanis v. Northport Irrigation District,* 121 Neb. 777. Therefore, the court properly instructed the jury to return a verdict for the defendant.

It is unnecessary to decide here as to the liability of a district for damages resulting from its failure to perform its statutory duty to drain all lands in the district, because the evidence establishes that the land was not seeped until 1929, and thereafter the defendant district has made or is making an attempt to drain. A decision upon this point will be required when and if a case is presented wherein the district has refused or neglected to take proper action upon demand.

The plaintiff claims the right to recover under section 21, art. I of the Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The public use involved herein is the carrying of water through the canals, ditches, and laterals for delivery to the landowner for whose benefit the water was appropriated. In this function, it partakes somewhat of the nature of a common carrier. *McCook Irrigation & Water Power Co. v.*

Burtless, 98 Neb. 141. Failure to perform its duty creates a liability for resulting damages. *Meier v. Bridgeport Irrigation District*, 113 Neb. 344; *Clague v. Tri-State Land Co.*, 84 Neb. 499; *Wade v. Belmont Irrigating Canal & Water Power Co.*, 87 Neb. 732; *Six v. Bridgeport Irrigation District*, 105 Neb. 254; *Peden v. Platte Valley Farm & Cattle Co.*, 93 Neb. 141. Upon delivery to the landowner, its duty and control of the water is ended. The evidence in this case is that much of the damage was caused by the application of water to the land by the plaintiff itself. Some of it was caused by the irrigation of other land within the district.

The use of the water, after delivery, was a matter over which the district had no control. The district is not liable for damages for negligence resulting from a use of the water for irrigation, which use is not subject to its control. This is true whether the damage was caused by the use of water by the plaintiff herein or by other irrigators. Therefore, the only liability of an irrigation district to a landowner within the district, either under the constitutional provision or on account of negligence, would be for seepage caused by the leakage from the canals, ditches, or laterals of the district, which are built by and operated under the control of the district.

The owner of the land involved in this case, by petitioning for the organization of the irrigation district, waived the right to damages to his land by reason of seepage. When the district was organized, its rights, duties, powers, and liabilities were fixed by statute. Section 46-132, Comp. St. 1929, became a part of the contractual relationship of the parties. A petition for a public improvement does not of itself amount to a waiver of compensation for property taken or damaged; but where, as in this case, the owner of the property petitioned for the organization of the irrigation district, such as was authorized by law, he accepted the remedies provided by statute for any resulting damage. It was such an unequivocal act as is required to waive his right to

any other remedy. *Hogsett v. Harlan County,* 4 Neb. (Unof.) 310; *Hodges v. Board of Supervisors of Seward County,* 49 Neb. 666; *Propst v. Cass County,* 51 Neb. 736; *Lewis v. City of Lincoln,* 55 Neb. 1. See Nichols, Eminent Domain (2d ed.) p. 1273.

Even though the plaintiff had neither contracted for the remedy nor waived its right, if any, to recover under the Constitution, the evidence in this case is not sufficient to support a verdict, whether the cause of action alleges a right *ex contractu* or *ex delicto.* The only evidence in this case that any water seeps from the canal and laterals causing the damage herein is of an expert witness who gives opinion evidence. He testifies that in his opinion the leakage from the ditch contributes to the damage, although he is also of the opinion that the irrigation of land in the district contributes most of the seepage. On cross-examination, he points out a single place in the district's canal where water might leak because the ditch is not properly lined, but there were "no holes or cracks—well, fine cracks, but that occurs all over the ditch." And again: "Well, I saw no place where water was escaping, but I saw places where in my opinion water could escape, but not in large quantities."

The evidence is insufficient to establish that the leakage from the works of the irrigation district contributed to the seepage and consequent damage or increased in any manner the seepage, independent of the other contributing factors—rainfall and the irrigation of lands within the district. It is unnecssary to submit a case to the jury unless there is sufficient evidence to support a verdict. *Anderson v. Chicago, B. & Q. R. Co.,* 84 Neb. 311; *Sattler v. Chicago, R. I. & P. R. Co.,* 71 Neb. 213.

Finally, in view of the conclusions reached, it seems unnecessary to determine the relationship between the district and the federal government with respect to the irrigation works. In *Livanis v. Northport Irrigation District,* 121 Neb. 777, we construed a similar, though slightly different, contract to the effect that the district was

the fiscal agent for the United States, the owner, builder, and operator of the irrigation works, and that the district was not liable either for the negligence or the damaging of property for public use by the federal government in the construction, maintenance, and operation of the works. Since there could be no recovery from the district in this case, even if the district owned and operated the canal, it is unnecessary to construe the contract here.

The judgment of the district court is the proper one.

AFFIRMED.

REINHOLD WIEGAND, APPELLEE, V. LINCOLN TRACTION COMPANY, APPELLANT: WESTERN UNION TELEGRAPH COMPANY, APPELLEE.

FILED SEPTEMBER 23, 1932. No. 28321.

1. Jury: SEPARATION. It is provided in section 20-1109, Comp. St. 1929, that a jury during its deliberations may, at the discretion of the trial judge, be permitted to separate temporarily during the night. This is a salutary provision for the comfort of the jury, and the district judge was right in directing it to be done.
2. ———: COMMUNICATIONS. By direction of the trial court, there is clearly set out in the bill of exceptions all communications received by the trial judge from the foreman of the jury during its deliberations, the formal remarks made by counsel and the court relating to requests for reading of evidence. This procedure is commended.
3. Appeal: TRANSCRIPT: TIME OF FILING. In cases where a motion for a new trial is necessary and proper, it is sufficient to confer jurisdiction upon this court if the required transcript is filed within three months from the overruling of such motion for a new trial.
4. Witnesses: EVIDENCE OF CONVICTION OF FELONY. Section 20-1214, Comp. St. 1929, provides that a witness may be interrogated as to his *previous* conviction of a felony, and that a record thereof may be introduced.
5. ———: ———. Under such section, if testimony of a witness given at a first trial is, in his absence from the state, read in evidence at a second trial, it is not error for the trial court to permit a certified record of his conviction of a felony to be

received in evidence, although such conviction occurred 14 months *after* he originally gave such testimony, if his conviction occurred four months *previous* to the time when the evidence is read to the jury.

6. New Trial: NEWLY DISCOVERED EVIDENCE. It is a presumption of law that a verdict is right, and motions for new trial on the ground of newly discovered evidence are usually overruled, but are granted in exceptional cases.
7. ———: ———. To make a sufficient showing on such a ground, the proof should show that neither litigant nor his counsel could have discovered the evidence by exercise of due diligence; that the new facts are not only competent, relevant, material and contradictory, but that they render clear and positive that which was before equivocal and uncertain, and are of such a trustworthy character as will probably bring about a different result in case a new trial is granted.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reversed.*

Leonard A. Flansburg, George A. Lee and *John O. Sheldahl,* for appellant.

Sanden, Anderson & Gradwohl, contra.

Heard before GOSS, C. J., ROSE, DEAN, EBERLY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

PAINE, J.

The plaintiff, who was a Western Union messenger boy, brought this action for personal injuries suffered by him when, in riding his bicycle east on O street in Lincoln on Armistice Day, 1929, he was crushed between an automobile and a street car. A verdict was returned against the Lincoln Traction Company, and, upon the overruling of the motion for a new trial, it was brought to this court.

This is the second appearance of this case in this court. The first opinion was entered April 24, 1931, and can be found in 121 Neb. 130. This first opinion, which states the facts briefly, reversed the district court for directing a verdict for the defendants, and held that the issues of negligence and contributory negligence should have been submitted to the jury.

1. Upon a retrial of the case, the jury returned a five-sixths verdict for the plaintiff upon October 3, 1931, and a judgment thereon was entered the same day, as provided by section 20-1313, Comp. St. 1929, and approved in *Crete Mills v. Stevens*, 120 Neb. 794. The record discloses that the jury were instructed to deliberate until 10:00 p. m. in the evenings, and then were excused by the court until 9:00 a. m. the following mornings, when they returned into court, answered roll call, and continued deliberating, as provided in section 20-1109, Comp. St. 1929, which salutary provision is recommended for the purpose of giving the jury a night's rest.

2. The record also discloses that communications to the judge from the foreman of the jury were at once directed by the court to be marked as exhibits and made a part of the record, and formal entries made at the court's direction of such requests for the reading of testimony and the remarks of counsel making no objection thereto, and all statements of the foreman of the jury and the court were recorded, for it is generally understood that any communication between the judge and the jurors after they have retired to deliberate are improper except such as are made in open court. 20 R. C. L. 257. The full record is shown of exactly what procedure was followed each time the jury were called back into the room during their deliberations. This formality on the part of the trial judge is to be commended to the end that no unauthorized communications be had by or with jurors. 20 R. C. L. 255; *Hopkins v. Bishop*, 91 Mich. 328; *Taulborg v. Andresen*, 119 Neb. 273.

3. Upon October 5, 1932, a motion for a new trial was filed, and upon October 16 a supplemental motion for a new trial was filed, based upon new evidence to be given by newly discovered witnesses, as set out by the affidavits of the defendant's attorneys engaged in the trial of the case, as well as in the affidavits of the new witnesses, whose evidence was also taken in the form of depositions in the case of two witnesses. *Draper v. Tay-*

lor, 58 Neb. 787. Upon December 28 the motion for a new trial was overruled, and on December 31 notice of appeal was given, and upon March 1, 1932, præcipe was filed in this court, setting out in the printed portion thereof that it was an appeal from a *judgment* entered October 3, 1931, some *five* months previously. Appellee therefore contends that, more than three months having elapsed from the date of the judgment, no issue is presented to this court by this appeal.

It may be admitted that section 20-1912, Comp. St. 1929, does so provide, but there is also in the same section the provision, "or within three months from the overruling of a motion for a new trial in said cause."

In the case relied upon by the appellee, *Huffman Automobile Co. v. Moline Plow Co.*, 110 Neb. 279, the appeal was dismissed because it was not filed until some four months after the date of the entry of the judgment, and while it was filed within three months of the overruling of the new trial, as it was in the case at bar, yet this fact could not avail to save the appeal, for a motion for a new trial was held improper, as there was no trial of an issue of fact upon the pleadings. *Horton v. State*, 60 Neb. 701; *Algermissen v. Crete Mills*, 118 Neb. 72; *Bowers v. Raitt*, 96 Neb. 460; *Payne v. Garth*, 285 Fed. 301; *Dodge v. Healey*, 103 Neb. 180; *Clapper v. Putnam Co.*, 70 Okla. 99.

In the case at bar, the transcript having been filed within three months of the overruling of the motion for a new trial, the court has jurisdiction to pass upon all errors presented by such ruling.

4, 5. The appellant sets out as prejudicial error the ruling of the trial court in admitting a record of the conviction of Sidney M. Graham, principal witness for the defendant at the first trial.

The evidence in reference to this contention will be briefly set out. This witness was an employee of Woods Brothers Company, entirely disinterested in the case, and was standing in a safety zone a short distance ahead of

the approaching street car, waiting to become a passenger upon the particular street car involved in the accident. He was perhaps in the best position of any person to see exactly what happened at the moment of the accident. He watched the street car and the automobile travel parallel just before the accident. He testified that the messenger boy, going faster than either, attempted to pass between them. He saw him caught in the wedge-shaped triangle as the automobile swerved towards the street car. This testimony was given by him at the first trial upon March 27 and 28, 1930. Upon September 30, 1931, while examining witnesses for the defendant, Judge Flansburg made this statement: "I make the statement in the record that Mr. Sidney Graham was last in Des Moines, Iowa, and is now outside of the state and outside of the jurisdiction of the court so he can't be subpœnaed, and we offer in evidence his former testimony, the testimony given in the former trial." There was no objection, and the same was read from the bill of exceptions by Judge Flansburg.

The plaintiff, for the purpose of impeaching this testimony, so read to the jury, introduced in his rebuttal two sections from the Code of Iowa, showing that the false drawing of checks was a felony, and then introduced a certified copy of an indictment and a plea of guilty entered by said Sidney M. Graham upon May 20, 1931, of uttering a false check drawn upon the Omaha National Bank for $50, and of his sentence to the county jail for 60 days. It will be seen that the sentence took place some 14 months after he was sworn at the first trial and gave the evidence read at the second trial, but took place some four months prior to the time of the trial at which this former testimony was read.

It is insisted that section 20-1214, Comp. St. 1929, provides that a witness may be interrogated as to his *previous* conviction of a felony, and the only competent proof thereof is the record thereof, unless he admits such previous conviction. *Bosteder v. Duling,* 115 Neb. 557. It

is clear that the testimony given in the first trial was long prior to his conviction, but reading that testimony is the same as if a deposition was offered, and such evidence, the jury may be instructed, is to be considered the same as if the witness had personally appeared and testified in court. If he had so appeared and testified at the second trial, the evidence of his conviction would have been proper. It was held in *State v. Painter,* 96 W. Va. 401, that, although the witness was competent when his deposition was taken, his testimony cannot be read if he has become incompetent to testify before the trial. *Le Baron v. Crombie,* 14 Mass. *234; *Federal Coal Co. v. Royal Bank of Canada,* 10 Fed. (2d) 679. And in *Messimer v. McCray,* 113 Mo. 382, it was held that a deposition stands for a witness, and his competency to testify can only be determined when it is offered.

Although the point is new in this state, we are convinced that the district court was right in permitting the record of the conviction of a felony by this witness to be introduced in evidence.

6. The last error which will be considered is that of not granting a new trial on the ground of the newly discovered evidence of five additional eye-witnesses to the accident.

In the bill of exceptions, 130 pages are used to set forth the proceedings and record on the motion for new trial. Affidavits are set out of the attorneys conducting the trial for the defendant, showing the strenuous efforts they had made, with little results, to find additional eye-witnesses of the accident, and setting out that there was no possibility of discovering them until the verdict of $14,125 was given general publicity in the newspapers. They indicate that the news of this large verdict at once resulted in discussion generally, and at once brought them information of this additional and highly important new evidence.

The court has examined each of the affidavits signed by 35 affiants, several signing more than one affidavit, and has examined the depositions of 66 pages given by Frank

Mishek and his wife, Gladys Mishek, taken before Dale P. Stough, notary, upon December 15, 1931.

In the former opinion, it is set out that the plaintiff and a high school girl testified that the plaintiff was riding his bicycle on the street car track directly in front of the oncoming street car, which he testified gave him a terrific blow from behind and pushed him into an automobile. The opinion states that the defendant's evidence, on the other hand, was to the effect that the plaintiff rode up from behind until he was alongside the street car, when he was caught and rolled between the street car and an automobile which had veered over towards the street car to avoid hitting an automobile backing out from the curb. This was the vital difference between the litigants.

At the two trials in the district court, the defendant produced two eye-witnesses, the policeman at the corner and Sidney M. Graham, who had heard the crash of the handle-bars breaking through the glass of the automobile and looked and saw all that could be seen. Each of these witnesses testified what they had seen from their positions in front of the street car.

The newly discovered evidence of the five eye-witnesses may be briefly set out, as follows: Mr. and Mrs. Frank Mishek were driving in their automobile, which was immediately behind the automobile of Carl Goldenstein, involved in the accident, and it is shown that they were driving slightly to one side of the car ahead, so that they had a clear view of all that took place. There is also the evidence of W. S. Derr and his grown son, Donald, both of Dodge, Nebraska, who were sitting in a car parked along the south side of O street and about two car lengths to the rear or west of the place of the accident. The fifth of the new witnesses discovered since the trial is H. E. Wilson, who was driving his car immediately behind that of Frank Mishek, and describes new facts about the accident, and never disclosed that he had seen the accident until he read of the large verdict returned

against the defendant traction company, whereupon he immediately telephoned the manager of that company that he had seen the accident.

These witnesses are able to disclose just where and how the plaintiff rode down that street on his bicycle for a considerable distance before the accident happened, and disclose that there were spaces in the line of automobiles in which he could have ridden in comparative safety, and positively testify that the plaintiff never at any time reached a position in front of the street car. This evidence appears to be definite and clear, and is of considerable importance in arriving at the truth upon the questions of negligence and contributory negligence.

The record discloses that the reputation for truth and veracity of two of these new witnesses has been attacked by other affidavits, and this fact is a question of credibility which a jury might well determine.

For many years applications for new trials on the ground of newly discovered evidence have not been favored by our courts. *Smith v. Goodman,* 100 Neb. 284; *Fitzgerald v. Brandt,* 36 Neb. 683.

The reason is that the moving party had ample opportunity to carefully prepare his case and to secure all of the evidence before the trial. After the case is lost he is always aroused to diligent activity, which should much better have been put forth before the trial.

While smarting under defeat and disappointment, he is under the strongest temptation to make a plausible showing for a new trial and thus reopen the case. *People v. Taminago,* 35 Cal. App. 238. But it has always been the policy of the law to make such efforts well nigh hopeless and to grant a new trial only in exceptional cases, to the end that counsel will expend more vigorous efforts in making the fullest preparation before the trial and be vigilant and diligent in securing all their evidence without a mental reservation that, if anything is overlooked now, I can easily get a new trial in case of defeat.

Verdicts would rarely stand if courts permitted any claim of newly discovered evidence, no matter how baseless, to win a new trial. This is true because, in the trial of every important lawsuit, when a large crowd attends the trial and newspapers publish the details, an aroused public interest leads to a general discussion which invariably brings out many additional facts, often of little value. It has been held that additional facts in support of evidence already taken can rarely support a new trial. *Schlencker v. Risley*, 3 Scam. (Ill.) 483, 38 Am. Dec. 100.

But, on the other hand, the South Carolina court, as early as 1798, held: "In very intricate and doubtful cases, notwithstanding the finding of a jury, the court will, in the exercise of its extraordinary discretion, order a new trial in some cases, for the better attainment of justice." *Brown v. Frost*, 1 Am. Dec. 633 (2 Bay. [S. Car.] 126).

Let us examine our own legislative enactment on this subject. Section 20-1142, Comp. St. 1929, reads in part: The former verdict shall be vacated and a new trial granted for any of the following causes: "Seventh. Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." It is clear that in a proper case the right to a new trial shall be granted, and that it is the duty of a trial court, as well as of the appellate court, to carefully examine, weigh, scrutinize, and analyze such applications and all the proofs in support thereof.

It is first required that the evidence be competent, relevant and material to the issues. It must not be additional proof of a fact already proved, and merely cumulative or impeaching in some respects, nor is it sufficient that the testimony will contradict or discredit former witnesses.

What is reasonable diligence? Facts and circumstances must be clearly set out by the affidavits of the attorneys as well as of the party appealing, from which the court

may determine whether the party did in truth use reasonable diligence in searching for this newly discovered evidence before the former trial. *Todd v. City of Crete,* 79 Neb. 677. In fact, the party must negative every circumstance from which a lack of diligence might be inferred. *Axtell v. Warden,* 7 Neb. 186. He must show that all proper efforts had been made to discover it before the first trial. *Brazil v. Moran,* 8 Minn. 236, 83 Am. Dec. 772. It has even been held that it must be shown that the witness will give the newly discovered evidence if a new trial is granted and he is called. 14 Ency. Pl. & Pr. 790.

Defendant must show that the evidence came to him since the trial, and was not equally available to him previous to that trial, and was not simply discovered by exercise of belated diligence.

The hardship of a particular case cannot weigh against the rule preventing one who has had a full and fair opportunity to prepare his case from dragging out the litigation by bringing in evidence which, with due diligence, he ought to have discovered before the trial. *Toledo Scale Co. v. Computing Scale Co.,* 261 U. S. 399.

Newly discovered evidence on an issue not prominent in the case, and which was only a minor issue, is not ground for granting new trial. *Dishman v. Whitney,* 121 Wash. 157, 29 A. L. R. 460.

It is claimed that the new evidence is merely cumulative. This court has held many times that, when the new evidence is merely cumulative, it will not warrant a new trial. *Hoffine v. Ewings,* 60 Neb. 729; *Hill v. Helman,* 33 Neb. 731. For it is clear that, if the new evidence will simply add a few more witnesses to the same question of fact to which others have testified, it does not warrant a new trial, for the jury should not be controlled by the mere number of witnesses who testify to any given fact.

But, if the probable result of the new evidence would be a different verdict, a new trial should be granted. *Williams v. Miles,* 73 Neb. 193; L. R. A. 1916C, 1162,

note; Freeman, Judgments (5th ed.) 508; *McDonald v. Brown,* 90 Neb. 676; 24 Mich. Law Review, 731; *Jones v. Wellcome,* 141 Minn. 352.

It has been held that new cumulative evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. *State v. Hawkins,* 121 S. Car. 290, 27 A. L. R. 1083.

Such new evidence must be of such a nature as to render clear and positive that which was before equivocal and uncertain, and be so important to the issues involved as to indicate that upon another trial a different result will probably be reached.

It must, however, be kept in mind that a party will not be granted a new trial where he went to trial knowing of the absence of this particular party and the evidence he would give, and yet took no proper steps for a continuance on that ground. *Benge's Adm'r v. Marcum,* 194 Ky. 121; *Ebaugh v. Burns,* 65 Mont. 15.

The courts of various states have put forth rules within which they hold the particular application must be brought or it will not avail. Some of these rules were enumerated in the case of *Berry v. State,* 10 Ga. 511, as early as 1851, and this old case is still referred to by many textwriters.

It has been said by one court that newly discovered evidence should be positive, conclusive and capable of definitely settling the controversy. *King v. Swanson,* 216 Ill. App. 294.

It is a presumption of law that a verdict deliberately reached by the jury is right, and a court is slow to set it aside. It may be granted that motions for new trial, based on the ground of newly discovered evidence, are not favored and are usually overruled, to the end that litigation may not be dragged out interminably. However, justice sometimes requires that in exceptional cases such a motion should be sustained.

Many attempts have been made by courts, as well as textwriters, to formulate rules designed to prevent in-

justice to the losing party, and at the same time to guard against giving him an unwarranted advantage. The defeated party, to make a showing on this ground sufficient to entitle it to be given serious examination and careful consideration by the court, should comply with section 20-1142, Comp. St. 1929, and in the case at bar the affidavits filed were further sustained by depositions taken of the evidence of newly discovered witnesses.

In rebutting the presumption that the verdict is right, the following guides should be borne in mind:

1. To deny that he went to trial knowing of the evidence in question and took no steps to continue the trial;

2. To offer proof that neither the litigant nor his attorneys could have discovered such evidence before the trial by the exercise of due diligence, sufficient to rebut any claim of laches;

3. To show clearly that the evidence offered is not simply additional facts in support of evidence already taken;

4. To set out the time and the manner of the discovery of the new evidence offered, bearing in mind that forgotten facts never constitute newly discovered evidence;

5. That the evidence offered is not only competent, relevant, material, and contradicting, but that it goes much farther and renders clear and positive that which was before equivocal and uncertain;

6. That the evidence offered is not on a minor issue, and is of such trustworthy character that its admission would probably bring about a different result in case a new trial was granted.

If the evidence offered fully meets the conditions set out, and it presents important facts germane to the issue in controversy, which, considered with the evidence presented on the trial, might cause a jury to take the other view, then justice requires that a new trial should be granted, for in such a case it is essential to the administration of substantial justice that another jury pass upon the issue in controversy, with the added light which

such new evidence will throw upon the case. *Nelson v. State,* 121 Neb. 658. The recognition of the right to a new trial in such case meets the demands of justice, and the legislature has clearly provided that a defeated litigant should, under the conditions set out, be given this right. When such a showing is made, the trial judge must examine, weigh and analyze the application and the proofs submitted, and with deliberation act in accordance with good judgment, controlled by sound principles of law, to the end that substantial justice may be done.

This court is forced to the conclusion that the defendant, having clearly complied with our statute and with the rules announced herein, is entitled to a new trial, and therefore the order of the district court in overruling the motion therefor is reversed and a new trial is ordered.

REVERSED.

UNION NATIONAL BANK OF FREMONT, APPELLANT, V. VILLAGE OF BEEMER, APPELLEE.

FILED SEPTEMBER 23, 1932. No. 27956.

1. **Assignments**: CHOSES IN ACTION: DEFENSES. Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor at the time of the assignment, and such defenses and equities accruing thereafter in the absence of notice to the debtor of such assignment.
2. **Municipal Corporations**: WARRANTS: ASSIGNMENT: IMPUTED KNOWLEDGE. Knowledge of the president and cashier of a bank who are also mayor and village clerk of a village, in the absence of actual notice or knowledge on the part of the village, will be imputed only to such bank when it appears that such officers are acting only for and in the interest of themselves and of the bank.
3. **Banks and Banking**: VILLAGE DEPOSITS: TRUST FUNDS. A bank receiving a deposit of funds of a village, the mayor and village clerk of such village then being the president and cashier of such bank, hold such funds as trustee for the village.
4. **Municipal Corporations**: VILLAGE WARRANTS: PURCHASE BY BANK: SET-OFF. When a bank, acting through its president and cashier who are at the same time mayor and village clerk

of a village, purchases warrants of the village which are irregular on their face, the bank holds the claims represented by such warrants subject to the rights of the village to offset any claim it has against the bank.

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

Courtright, Sidner, Lee & Gunderson, for appellant.

John P. Breen and *G. F. Nye, contra.*

Heard before ROSE, GOOD and DAY, JJ., and CHAPPELL and LANDIS, District Judges.

CHAPPELL, District Judge.

This is an equity action for trial *de novo* in this court. In the early summer of 1927 the defendant village of Beemer commenced proceedings to construct a sewer under the statutory provisions now found in sections 17-528 to 17-540, Comp. St. 1929. These proceedings culminated in two contracts with H. J. Peterson Company, one dated July 8, 1927, for the construction of a sewer in District No. 1, and the other dated November 18, 1927, for the construction of a short connected additional sewer in District No. 2. The contracts were completed by the contractor and the work accepted in December, 1927. Special assessments therefor were not levied until January 23, 1928. However, the board of trustees allowed the contractor partial estimates and payments on the contracts and issued to him and to others for incidental expense of the sewers certain warrants in controversy during the summer of 1927 to bear interest under the statute as it then existed at 7 per cent. On March 22, 1928, an ordinance authorizing the issuance and sale of bonds to pay the additional costs of sewer construction was passed by the village board.

At the time that the warrants in controversy were issued there was neither a special benefit assessment levy made nor a bond issue ordinance passed; hence, no fund whatever existed against which the warrants might be

drawn. Each warrant in controversy provided appropriate spaces where there should be inserted the amount of the fund levied against which the warrant was drawn, and also the amount of the warrants previously issued against such fund, but these spaces were never filled out. The warrants, immediately after being issued, were purchased by the Beemer State Bank from the various payees named in the warrants, which bank presented them to the village treasurer, Charles S. Albright, who registered them in the name of the original payees, "Not paid for want of funds." During all of this period and thereafter one Paul Wupper was the president of the Beemer State Bank and the mayor of the defendant village, and one J. S. Severa was the cashier of the Beemer State Bank and the clerk for defendant village.

In February, 1928, after a levy of the special benefit assessments, various property owners began to pay the village treasurer their respective special assessments, and the assessments were received by the treasurer, who took them to the Beemer State Bank and deposited them in that bank, the same being the bank designated by the village board as their depository. Each deposit of such special assessments was made by the treasurer with a deposit ticket or slip with notations written thereon that such deposits were "Sewer fund" or "Sewer assessments," and the bank officers then signed duplicates of these deposit tickets which they delivered to the treasurer. Special assessment deposits so made amounted on March 26, 1928, to $6,713.31. On June 11, 1928, the proceeds of the sewer bond sale came into the hands of the village treasurer and, as in the case of the special assessments, a deposit ticket or slip was made out by the bank cashier himself and a duplicate delivered to the treasurer, and the cashier himself entered on the face of such tickets the words "Sewer bonds, $17,497," and thereupon the treasurer deposited the draft, stating as he did so that this draft money made enough sewer fund with special assessment deposits already made to take up all the war-

rants then held by the bank, and in reply to such statement the president of the bank, then mayor of the village, and the cashier of the bank, then village clerk, replied in substance that they were glad that the money was there, that they would get the warrants and figure them up and give them to him, the village treasurer.

On March 1, 1928, two separate demands were made upon the bank for the warrants. On March 2, 1928, March 13, 1928, and June 12, 1928, respectively, demands were made by the village treasurer for the canceled warrants.

The Beemer State Bank, without defendant's knowledge and before any such deposits had been made by defendant, had sold or transferred for credit most of the warrants to this plaintiff. Defendant did not learn of this fact and plaintiff gave no notice of such transfer until after the deposits had all been made and until after the Beemer State Bank had become insolvent and gone into receivership, and until long after the sum of $24,210.-31, enough money to have paid all warrants and interest in full, had been deposited in such bank, as they allege, for that purpose. After the Beemer State Bank had become insolvent on September 18, 1928, the plaintiff notified the defendant's treasurer for the first time and defendants learned for the first time that plaintiff had purchased these warrants or had possession of them, claiming to hold them as assignee and transferee of the Beemer State Bank.

Thereafter plaintiff filed its petition in equity praying that plaintiff be decreed to be owner and holder of the warrants, describing them and the indebtedness represented by such warrants and upon the contracts merging in said warrants, and that each of the defendants (payees) other than the defendant village of Beemer be decreed to have sold their respective claims against the defendant village of Beemer in the amount represented by said warrants, and the plaintiff be decreed to be the owner and holder thereof, and that plaintiff's title in and

to said warrants and the indebtedness represented thereby be quieted as against each of the defendants other than the defendant village of Beemer, the respective amounts with interest thereon, and such other and further relief as equity may require. Upon issues joined and trial thereof in the equity court, the trial judge found generally for the defendants, and it comes to this court upon appeal therefrom.

The trial court made many findings in its decree and assigned many reasons for its decision. Counsel for appellant and appellee have both filed voluminous briefs in this court citing many well-reasoned authorities and presenting clear cut and logical arguments in opposition to and in support of such decree. This court, after a careful perusal of the record and a reading of the authorities presented by counsel, believe that there are, in fact, but two questions presented for disposition by this court, and will, therefore, confine itself to those questions. They are: (1) Did the plaintiff take as assignee or transferee of these warrants subject to all defenses which defendant might have against the Beemer State Bank? (2) If so, did the defendant have the right to an equitable set-off against plaintiff for the amount of such deposits in the Beemer State Bank at the time it closed?

Both of these questions are answered in the affirmative in a similar case by a recent decision of this court entitled *Nebraska State Bank v. School District,* 122 Neb. 483. In that case this court said: "Ordinarily, an assignee of a chose in action takes the same right as was possessed by, and subject to the same defenses and equities which could be enforced against, his assignor."

In other Nebraska cases this court has said: "It is well settled that such instruments (warrants) are not negotiable instruments, and that a purchaser thereof does not take the same discharged of any equities existing against the original holder." *State v. Cook,* 43 Neb. 318. See *School District v. Stough,* 4 Neb. 357; *Union P. R. Co. v. Buffalo County,* 9 Neb. 449; *Burlington & M. R. R.*

Co. v. Clay County, 13 Neb. 367; 19 R. C. L. 1036, sec. 326; Comp. St. 1929, sec. 20-303.

It is admitted that plaintiff gave defendant's village treasurer, Charles S. Albright, no notice of its alleged purchase of the warrants from the Beemer State Bank until after the deposits were all made and the bank was in receivership. Therefore, every defense which defendant could have made against that bank or its receiver in a suit on the warrants is available to defendant as against the plaintiff herein. 5 C. J. 934; 2 R. C. L. 687, sec. 42; 8 C. J. 600; *Gaullagher v. Caldwell,* 22 Pa. St. 300; *North Bergen v. Eager,* 41 N. J. Law, 184; *American Bridge Co. v. Boston,* 202 Mass. 374.

The fact that the president of the Beemer State Bank and the cashier thereof, who were mayor and clerk respectively of defendant village, knew of the assignments to plaintiff would not be imputed notice or knowledge of the defendant village. The mayor and village clerk as president and cashier of the Beemer State Bank evidently purposely kept what they knew about the assignments from the village treasurer at all times, even when inquiry and demand for them were made by him, and they acted at all times for themselves and the bank. The village treasurer was the village official "without whose consent the money may not properly be paid out."

Many authorities have rightly said: "Where the public is the debtor, notice should be given to those officials without whose consent the money may not properly be paid out;" and, further, that notice to the debtor must be certain and specific that the debtor may be properly and fully advised that a new creditor has been substituted by the assignment. 5 C. J. 935. See 14-a C. J. 490; *Exchange Bank of Wilcox v. Nebraska Underwriters Ins. Co.,* 84 Neb. 110; *Swan v. Craig,* 73 Neb. 182; *Houghton & Co. v. Todd,* 58 Neb. 360; *Buffalo County Nat. Bank v. Sharpe,* 40 Neb. 123; *Koehler v. Dodge,* 31 Neb. 328; *Bankers Building & Loan Ass'n v. Thomas,* 3 Neb. (Unof.) 758; *First Methodist Episcopal Church v. Thompson,* 22 S. W. (2d.) (Tex. Civ. App.) 346.

It may be conceded that plaintiff took the warrants without actual knowledge of the facts other than disclosed by the instruments themselves, although there is some evidence that they simply held them for collection. The president and cashier respectively of the Beemer State Bank, trusted mayor and village clerk for defendant, however, throughout all the transactions were evidently acting in the interest of themselves and the bank without any regard for the rights of the defendant. Plaintiff now, however, contends that, if they took subject to defense, certainly they only took subject to such defenses as existed at the time of the purchase. However, in the case of *Nebraska State Bank v. School District,* 122 Neb. 483, this court said: "Plaintiff contends that, the warrants being irregular on their face, (the warrants in this case were irregular, if not void, in and of themselves) the treasurer could not legally pay the same; that it is in the position of assignee of the several claims, subject in its hands only to the equities in force between the original parties at the time it took the assignment, and not to equities accruing thereafter; that, being a remote assignee, it is not affected by equities between the maker and an intermediate indorsee where there could have been no defense to the action against the original payee, and inquires: 'Does a nonnegotiable chose in action in Nebraska gather defenses as it rolls along, and must the next holder investigate the transaction between the payor and every intermediate indorsee?' Whatever the rule may be in other jurisdictions, we think this court has already determined that as a general rule it does. In *Henefin v. Live Stock Nat. Bank,* 116 Neb. 331, where the question of right of an assignee of a chose in action was involved, the court expressly held: 'Ordinarily, an assignee of a chose in action acquires no greater right than was possessed by his assignor, but simply stands in the shoes of the latter.' We see no reason for declaring a different rule, and under the facts and circumstances here presented have no hesitancy in holding that the plaintiff, by

its several assignments, took no greater right than that possessed by the Pierce State Bank and simply stands in its shoes. Where no rule of expediency or necessity controls, such as prompts some of the arbitrary rules pertaining to negotiable instruments, an assignee takes no greater or better right than his assignor. The supreme court of Illinois announces the same rule in *Commercial Nat. Bank v. Burch,* 141 Ill. 519, and in the course of the opinion say: 'Each successive assignee of a chose in action takes it subject to the equities existing between the original assignor and his immediate assignee.' "

What were the rights of the Beemer State Bank under which plaintiff claims? If, under the circumstances, the defendant could have asserted an offset against that bank, then it follows that plaintiff is subjected to the same right and stands in the shoes of the Beemer State Bank. This court suggests further that, if the plaintiff stands in the shoes of the Beemer State Bank, legally defendant Beemer State Bank could never have purchased or taken title to the warrants, as it would be against public policy and in violation of law, and plaintiff, assignee or transferee of the Beemer State Bank could obtain no title to the warrants. Comp. St. 1929, sec. 17-517; *People's Savings Bank v. Big Rock S. & C. Co.,* 81 Ark. 599; *James v. City of Hamburg,* 174 Ia. 301; *City of Bristol v. Dominion Nat. Bank,* 153 Va. 71; *Grand Island Gas Co. v. West,* 28 Neb. 852.

Under the circumstances in this case, the knowledge of both Wupper, president of the bank, and J. S. Severa, cashier of the bank, which they had regarding the entire transaction should be imputed to the Beemer State Bank. *Brownell v. Ruwe,* 117 Neb. 407; *State v. American State Bank,* 108 Neb. 92; *Emerado Farmers Elevator Co. v. Farmers Bank,* 20 N. Dak. 270.

The entire management and control of the Beemer State Bank and its transactions, so far as the matters involved in this litigation go, were in the hands of the president and cashier thereof. While occupying the positions

of mayor and village clerk of defendant, they placed in the hands of the bank the funds belonging to the village of Beemer. The Beemer State Bank, by receiving such deposits with knowledge that they belonged to the defendant, they having never given notice to the defendant that the warrants were then in the hands of this plaintiff, such bank held it as trustee for the defendant village. *State v. Midland State Bank,* 52 Neb. 1.

It is established beyond doubt that defendant, in the issuance of the warrants in question, intended that they should be paid from the funds deposited in the Beemer State Bank, and that defendant believed at all times that the warrants were then held by the Beemer State Bank and would be paid with those funds. The purchase of such warrants by the plaintiff was not intended to and did not benefit the defendant but was intended to and did benefit the bank.

There is no doubt that, had the Beemer State Bank brought suit on these claims, the defendant could have insisted that it apply the trust funds then in the bank's hands and belonging to the defendant towards the satisfaction of such debt.

Under the law and the equities of this case, the relief granted to the defendant by the trial court was correct, and the judgment is

AFFIRMED.

CITIZENS STATE BANK OF CEDAR RAPIDS, APPELLEE, V. R. A. YOUNG, APPELLEE: ALICE R. Y. HARRIS, APPELLANT.

FILED SEPTEMBER 23, 1932. No. 28256.

1. Judgment: VACATION. "A judge of the district court has the right and power to set aside and vacate any judgments or orders made by him during the term at which the vacating order is made." *Douglas County v. Broadwell,* 96 Neb. 682.
2. ———: ———. When, during the same term of the district court at which a judgment is rendered against a defendant in an action wherein no one appears upon the trial thereof to pro-

tect the rights of such defendant, it is brought to the knowledge of the court that, at the time of the trial of the cause and the rendition of the judgment, the defendant was mentally incompetent to transact business, it is the duty of the court, upon application of the guardian of such incompetent defendant, to set aside and vacate the judgment.

3. ———: ———. Under the facts in this case, the district court erred in refusing to set aside and vacate the judgment rendered against the incompetent defendant.

APPEAL from the district court for Boone county: LOUIS LIGHTNER, JUDGE. *Reversed.*

Howard Kennedy and *R. D. Flory,* for appellant.

Williams & Williams, contra.

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

HORTH, District Judge.

The only question presented by this appeal is: Did the district court err in refusing to set aside the judgment previously entered by it in this cause against the defendant Alice R. Y. Harris, upon the application of Howard Kennedy, her guardian?

The facts are that plaintiff filed its petition in the district court for Boone county on January 23, 1931, seeking to recover judgment against the defendants upon a promissory note for $2,000, dated May 6, 1929. Messrs. Frost, Hammes and Nimtz, attorneys of Omaha, filed an answer in the action in the form of a general denial, on behalf of the defendant Alice R. Y. Harris, also a resident of Omaha. On May 13, 1931, that being one of the days of the May, 1931, term of said court, the cause came on for trial, in pursuance to a previous order of the court, of which Messrs. Frost, Hammes and Nimtz had been notified. The defendant Alice R. Y. Harris did not appear at the trial, nor did any one appear in her behalf. Judgment was entered against both defendants for the amount of the note with accrued interest and costs. Thereafter, on August 28, 1931, that still being one of the

days of the May, 1931, term of said court, Howard Kennedy, as guardian of the defendant Alice R. Y. Harris, an incompetent, filed his verified application to set aside and vacate the judgment entered against her, alleging, among other things, that on the 24th day of August, 1931, he was duly appointed as guardian of the said Alice R. Y. Harris by the county court of Douglas county, Nebraska; that said defendant had a good and valid defense to said action, in that at the time of the execution of the note sued on she was, and ever since has been, mentally incompetent to transact business. In response to this application the plaintiff filed what it designates a "special appearance," the material part thereof being an allegation that the time in which said judgment could be vacated had expired. On October 7, 1931, that still being one of the days of the May, 1931, term of said court, the cause came on for hearing upon the application of the guardian to set aside and vacate the judgment as against Mrs. Harris, and in support thereof the guardian introduced in evidence the affidavits of Dr. George E. Neuhaus, psychiatrist, of Omaha, who attended and observed Mrs. Harris for several weeks in 1927 and again on July 26, 1931, the affidavit of Dr. George L. Dewey, of Cedar Rapids, Nebraska, who attended and observed Mrs. Harris from 1925 to May, 1928, and the affidavit of Dr. Frank Luikhart, of Omaha, who attended and observed Mrs. Harris for the last seven years, and each expressed the opinion that Mrs. Harris had been mentally incompetent to transact business for several years last past and that her ailment was chronic and progressive. These affidavits are convincing and satisfactorily establish that, at the time judgment was entered, Mrs. Harris was mentally incompetent to transact business. For the purpose of controverting these affidavits the plaintiff introduced in evidence the affidavits of H. W. Jackson and C. B. Gibb. They recite a conversation had with the defendant Rolland A. Young, a son of Mrs. Harris, in the year 1929, in which the son stated that in his opinion Mrs.

Harris was competent mentally and knew what she was doing when she signed the note sued on. These affidavits are of no assistance in determining the mental capacity of Mrs. Harris to transact business on May 13, 1931, the day the judgment was rendered against her. What may have been her mental state on May 6, 1929, the date she signed the note, is not before us for determination. That is the question which the guardian is seeking an opportunity to litigate in asking that the judgment against his ward be vacated.

"A judge of the district court has the right and power to set aside and vacate any judgments or orders made by him during the term at which the vacating order is made. Such vacating order may be made upon the court's own motion, if satisfied that an error has been committed." *Douglas County v. Broadwell,* 96 Neb. 682.

From the showing made by the guardian, we reach the conclusion that, on May 13, 1931, the date the judgment was rendered against her, the defendant Alice R. Y. Harris was mentally incompetent to transact business, that the rights of said defendant, upon the trial of said cause, were not protected, and that the trial court erred in refusing to set aside and vacate the judgment as against her, upon application of her guardian.

In *Simmons v. Kelsey,* 72 Neb. 534, it is said: "Section 45 of the Code expressly enacts that an action shall not abate by reason of the disability of a party happening during its pendency. If before the termination of the litigation she shall become incapacitated, a duty will devolve upon the court, as the general conservator of the estates of all persons under disabilities, to see to it that her rights and estate are protected and preserved, either by a general guardian * * * or guardian *ad litem* appointed by the court for the purposes of the action."

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

FRANK L. WILLIAMS, APPELLEE, V. ALLA LANTZ: HETTA R. MCDOWELL ET AL., APPELLANTS: MATTIE C. WILLIAMS, APPELLEE.

FILED OCTOBER 7, 1932. No. 28049.

Appeal. A question not presented by the record on appeal may be disregarded in the appellate court, though stated in an assignment of error and argued in the briefs and at the bar.

APPEAL from the district court for Lancaster county: ELWOOD B. CHAPPELL, JUDGE. *Reaffirmed.*

C. J. Campbell, J. Jay Marx and *Harry R. Ankeny,* for appellants.

T. F. A. Williams, contra.

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

ROSE, J.

This is an action involving conflicting claims to rights in a private alleyway opening from the west into Sixteenth street between R and S streets in the city of Lincoln. From a decree of the district court Gamma Phi Beta Building Association and Hetta R. McDowell, defendants and cross-petitioners, appealed to the supreme court. An opinion containing a statement of the case and the rulings therein is reported in *Williams v. Lantz, ante,* p. 67, to which reference is made to avoid a restatement of the facts and questions presented by the appeal.

On motion by Gamma Phi Beta Building Association, a reargument was granted on the ground that the supreme court did not consider or determine an assignment of error to the effect that the trial court erred in finding and adjudging that Hetta R. McDowell acquired a right to a private walk and driveway from her premises across the lot of the Gamma Phi Beta Building Association to the alley described. Should there have been a ruling on this assignment of error?

The record shows that the sorority did not appeal as against McDowell. On this feature of the case the judgment was in favor of McDowell and she did not appeal as against the sorority. They were joint appellants. Neither was designated as appellee or as cross-appellant pursuant to the rules of the supreme court. The appeal, therefore, did not present a controversy between the sorority and McDowell. Consequently that matter was properly disregarded in the former determination of questions presented by the appeal.

REAFFIRMED.

GEORGE F. TOWNSEND, APPELLANT, V. ALBERT LOEFFELBEIN ET AL., APPELLEES.

FILED OCTOBER 7, 1932. No. 28430.

1. **Master and Servant**: INJURY TO EMPLOYEE: BURDEN OF PROOF. "The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment." *Bartlett v. Eaton, ante*, p. 599.
2. ———: ———: AWARD OF COMPENSATION. "Awards of compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton, ante*, p. 599.

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

Harry Grimminger, Lloyd W. Kelly, Arthur E. Perry and *Perry, Van Pelt & Marti*, for appellant.

Kennedy, Holland & De Lacy and *Prince & Prince, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and PAINE, JJ.

ROSE, J.

This is a proceeding under the workmen's compensation law. George F. Townsend, employee, plaintiff, was a mechanic in the garage of his employer, the Ideal Gar-

age, defendant, at Grand Island, and while there engaged in the duties of his employment March 12, 1930, he inhaled vapors from a gasoline spraying machine operated by other employees. He was ill later the same day, left the garage during working hours and was taken to a hospital March 14, 1930, with pneumonia. He attributed pneumonia to the vapors from the spraying machine and presented to the compensation commissioner a claim for compensation, which was allowed. Defendant appealed to the district court for Hall county. Upon a trial there the proceeding was dismissed. Plaintiff appealed.

Did plaintiff prove by a preponderance of the evidence that the gasoline spray from the spraying machine caused pneumonia? This is the determining question on appeal. On the affirmative, attention is directed to testimony tending to prove that plaintiff went to work in good health at 8 o'clock in the morning March 12, 1930; that in the afternoon between 3:30 and 4:30, while he was repairing a used car in a room about 40 by 40 feet, two other employees, eight or ten feet away in the same room, cleaned a motor with the spraying machine and with the latter threw gasoline vapor where plaintiff inhaled it; that almost immediately he became sick and dizzy and left the garage; that the odor of gasoline on him was noticeable at his boarding house where he called later the same afternoon; that he was sick and did not eat supper; that from his room he was taken to the hospital with pneumonia March 14, 1930, where he remained until April 19, 1930. The physician who attended him testified in substance that pneumonia is a germ disease; that gasoline might produce a lung irritation; that anything that will produce a lung irritation will produce pneumonia; that all he wanted to tell the court was it was possible for the inhaling of gasoline to produce pneumonia and that it might have brought it on, but declined to say what did cause it.

A physician called by defendant expressed the opinion, in answer to hypothetical questions, that the inhaling of

the gasoline vapor did not cause the pneumonia. Other employees who used the spraying machine at close range were not injured by the fumes. Rules of law applicable to the present inquiry were recently stated as follows:

"The burden of proof is on the employee to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment.

"Awards of compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton, ante,* p. 599.

Upon consideration of the evidence outlined herein and all other evidence in the record, the supreme court is unanimously of the opinion that plaintiff did not prove by a preponderance of the evidence that the inhaling of vapors from the spraying machine was the cause of the pneumonia which afflicted plaintiff.

AFFIRMED.

ROBERT MILLER, APPELLEE, V. CENTRAL COAL & COKE COMPANY OF OMAHA, APPELLANT.

FILED OCTOBER 7, 1932. No. 28462.

Master and Servant: WORKMEN'S COMPENSATION ACT: COMPENSABLE INJURY. Where an employee in the course of his employment suffered an injury to his back and shoulder, causing a dormant disease to flare up, and the resultant disability is attributable to the injury, he is therefore entitled to compensation within the provisions of the workmen's compensation act.

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

Stewart, Stewart & Whitworth, for appellant.

Rudolph Tesar and *Bartos, Bartos & Placek, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and DAY, JJ.

DEAN, J.

Robert Miller began this action pursuant to the provisions of the workmen's compensation act to recover for certain personal injuries which he alleges he sustained, on or about March 28, 1931, while in the course of his employment as a night watchman by the Central Coal & Coke Company of Omaha. From an award in Miller's behalf by the compensation commissioner, the company appealed to the district court. The court decreed that the plaintiff should receive $14 a week from and after April 16, 1931, the payments to continue as provided for a total disability under section 48-121, Comp. St. 1929, and that the plaintiff also recover for hospital and medical expenses and for attorney's fees. The company has appealed.

It is argued that the evidence is insufficient to establish an injury to the plaintiff in the course of his employment.

The record fairly discloses the following facts: The plaintiff was on his knees under a counter engaged in cleaning the office floor, on the night in question, and while so occupied he thought he heard some one enter the office. He arose quickly and in so doing struck his back and shoulder on the corner of the counter. Subsequently he discovered that his back was swollen and discolored and that two lumps had developed thereon. It appears that he continued working until April 16, but, owing to his injury, he was unable to perform any labor thereafter. The plaintiff was under the care of various physicians during the time intervening between the above date and September, when notice of his injury was filed, but none of them determined the real cause of his disability until some months after the injury was sustained.

The record discloses that the plaintiff was in the employ of the company for some time prior to the accident, and that, while so engaged, he had never been incapacitated except on one occasion when he suffered an injury to one of his feet, for which he was compensated by the company.

One of plaintiff's physicians testified that the facts incident to the injury were related to him substantially as they were presented at the trial by the plaintiff. Upon an examination of the plaintiff, he found a fixation of the right scapula, a loss of power of adducting the arm, or moving it in back and in front of his body, and some atrophy in the muscles of his arm. Certain X-ray pictures revealed an inflammatory condition of the bone which, in the opinion of this physician, is progressive and permanent, so far as he could ascertain. He also testified that blood tests disclosed a syphilitic condition in the plaintiff's system, and that this became aggravated by the injury and caused the disability complained of herein. In fact, the physician testified that if he had not obtained the history of the accident from the plaintiff he would have questioned him about a probable injury to his shoulder.

As stated above, the condition in the plaintiff's arm is progressive and the entire shoulder bone may be taken or destroyed by the diseased condition. Nowhere, however, does it appear that the plaintiff, previous to the disability herein, had suffered from or was unable to work because of the disease revealed by the blood tests. In the opinion of the physician above mentioned, and that of one other, the condition prevents him from doing any physical labor and it fairly appears from the weight of the evidence that the plaintiff is totally disabled.

A physician called by the company testified that the plaintiff related to him that his shoulder and one arm were hurt in the course of his employment by the defendant. This physician removed a portion of the bone in the shoulder to obtain material for a diagnosis. The operation disclosed an area of chronic inflammation and bone destruction in the tip of the scapula or shoulder blade, and he testified that a trauma or injury such as sustained by the plaintiff is apt to "light up" the type of infection from which the plaintiff suffers. In his opinion, the plaintiff's shoulder may be restored to almost normal

with an antisyphilitic treatment or by surgery, although he could not say for certain that it would clear up entirely.

The evidence of an interne in a hospital where the plaintiff was treated was introduced by the company in an effort to prove that the injury was not sustained in the course of his employment. This witness testified that the plaintiff informed him that he was injured when he was jolted against the side of a car on a bumpy road. The plaintiff was recalled, however, and denied having told the interne that he received the injury in this manner. But he testified that he told the interne, instead, that while riding with his landlord, after the injury to his shoulder, he was compelled to ask him to return home from the fact that the jolting of the car hurt his shoulder.

As noted above, written notice of the accident was forwarded to the manager of the company some time in September, or about five months after it occurred, but all within the time prescribed by statute. And the plaintiff testified that he told the yard foreman about his injury not long after it happened and that the foreman visited him at his home and afterward at the hospital. On April 16 the plaintiff stated that he "laid off" on account of his condition, but when he reported for work the following Monday, namely, on April 18, he was informed that his services were no longer needed because of lack of work and that the foreman was replacing him. The foreman denied any knowledge of the injury to plaintiff, notwithstanding he and the plaintiff lived across the street from each other. It appears, however, that the foreman testified before the compensation commissioner that he, the foreman, was a "kind of a boss around the yard" and that he knew of the plaintiff's injury.

The superintendent of the company testified that he did not know of the accident until some time in August or September. From his evidence it appears that he left his office every evening before the plaintiff came on duty as a night watchman, and that the foreman was author-

ized to and did give orders to plaintiff in the absence of this superintendent. We think the evidence fairly discloses that the plaintiff did apprise the foreman of his injury and, in such case, notice to the foreman was notice to the company. *Glenn v. Reynolds Spring Co.*, 225 Mich. 693.

In *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, where an employee accidentally suffered a slight bruise upon his shin, which was not sufficient of itself to cause disability, but which three days later, owing to the diseased condition of his blood, formed an ulcer, we held that the accident was the proximate cause of the disability resulting from the existence of the ulcer, and that such disability was caused by an accident arising out of and in the course of his employment. Other jurisdictions have held to the same proposition in similar cases where the employee there in question had a syphilitic condition of the blood that caused the disability after the accident there involved. *Crowley's Case*, 223 Mass. 288; *Pinyon Queen Mining Co. v. Industrial Commission*, 59 Utah, 402; *Bongialatte v. H. Wales Lines Co.*, 97 Conn. 548; *Indianapolis Abattoir Co. v. Coleman*, 65 Ind. App. 369; *Hanson v. Dickinson*, 188 Ia. 728; *Finkelday v. Heide*, 230 N. Y. 598. And where an employee, as in the present case, suffered an injury to his back and shoulder, causing a dormant disease to flare up, and where the resultant disability is attributable to the injury, such employee is entitled to compensation within the provisions of the workmen's compensation act.

As noted above, the court decreed that the plaintiff should receive $14 a week from and after April 16, the payments to continue as provided for total disability. The company contends that the court erred in failing to find whether the plaintiff's disability is temporary or permanent or to make a finding as to the period during which he shall be paid compensation. But no motion was made by the company to make the decree more certain. And where the evidence establishes that the condition of

the plaintiff's shoulder totally disables him from performing physical labor and that, so far as his physicians are apparently now able to ascertain, such condition will be permanent, we cannot, of course, allow technicalities to prevent the plaintiff from receiving the compensation due him in the premises. But the company is not prevented from seeking a modification of the judgment at some future date should the plaintiff's condition improve.

We are not unmindful of the fact that it is the duty of this court, where the evidence upon a vital point is conflicting, to try such cases *de novo*, and where the trial court saw the witnesses and heard them testify and must have accepted one version rather than the other, the judgment will not ordinarily be disturbed. *Jones v. Dooley*, 107 Neb. 162; *Southern Surety Co. v. Parmely*, 121 Neb. 146.

Complaint is also made that the amount allowed as attorney's fees by the trial court is excessive. We are inclined to agree with counsel on this feature in view of the fact that, as pointed out in both briefs, only one day was required for the trial of the case. The amount of the attorney's fee is therefore fixed at $100, with an allowance of an additional $100 for services in this court. The plaintiff is not entitled to a penalty for waiting time as he filed no claim for about five months after the injury and there was some dissension in respect of the merits of the claim herein.

AFFIRMED AS MODIFIED.

DAY, J., dissenting.

It is my opinion that the appellee's disability is not compensable. The disability is not due to any injury resulting from an accident occurring in the course of his employment.

CLARENCE WITT V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1932. No. 28282.

1. Trial: WITNESSES: DISCRETION OF COURT. The trial court is vested with a sound discretion in determining the number of character witnesses that a defendant in a criminal action may call. There is no abuse of such discretion in limiting the number to six.
2. Witnesses: IMPEACHMENT. The credibility of a witness may not be impeached by proof that she has been committed to the state training school for girls.
3. Criminal Law: INSTRUCTIONS: REASONABLE DOUBT. An instruction in a criminal action, which informs the jury that one may be convinced of the truth of a thing beyond all reasonable doubt, and yet be fully aware that possibly it is not so, and that absolute or mathematical certainty is not requisite to proof beyond a reasonable doubt, is a correct statement of the law.
4. ———: ———: PENALTY. In a criminal action, an instruction which informs the jury that they have nothing to do with the punishment of the defendant and that they have no right to take into consideration what punishment he might or might not receive, in event of his conviction, is proper in the cases where the punishment is left to the trial court.
5. ———: REFUSAL OF INSTRUCTIONS. It is not error to refuse instructions correctly stating the law, where the substance of such instructions has been given by the court on its own motion.
6. ———: REFUSAL OF CAUTIONARY INSTRUCTION. An instruction, directing the jury's attention to the evidence of a particular witness and cautioning them to scrutinize his evidence with caution, is properly refused.
7. ———: CORROBORATIVE EVIDENCE. Evidence examined, and *held* to show sufficient corroboration of the prosecutrix, and that the evidence is sufficient to sustain the verdict of the jury.
8. ———: WITNESSES: EVIDENCE: QUESTIONS FOR JURY. In a criminal action, the credibility of witnesses and the weight to be given to the evidence of the respective witnesses are questions solely for the jury.

ERROR to the district court for Richardson county: JOHN B. RAPER, JUDGE. *Affirmed.*

John C. Mullen, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

GOOD, J.

Plaintiff in error, hereinafter designated defendant, was convicted of the offense of rape, committed upon a 13-year-old female child, and was sentenced to a term of three years' imprisonment in the state reformatory for male prisoners. He brings the record of his conviction to this court for review.

While a great many errors are assigned, we shall consider only those relied on in oral argument or in the briefs.

Defendant put in issue his reputation as a law-abiding citizen; called and examined six witnesses to sustain his reputation in this respect, and, by other witnesses, offered evidence of the same tenor. The offer was excluded. Of this ruling defendant complains. The evidence upon this point was not controverted by the prosecution.

It is a general rule that the number of witnesses that may be called upon a question of this kind is committed to the sound discretion of the trial court. Certainly, there was no abuse of discretion in limiting the number of character witnesses to six.

Defendant complains of a ruling of the trial court in excluding from the evidence court records showing that two of state's witnesses had been committed to the state girls' training school at Geneva. No authorities are cited, and we know of none that would sustain defendant's contention. The proffered evidence was not relevant to any issue in the case. It neither tended to prove nor to disprove any issue. We think it was properly excluded.

Complaint is made of the ninth instruction, given by the court, wherein it defined reasonable doubt. The instruction, among other things, told the jury: "One may be convinced of the truth of a thing beyond all reasonable

doubt, and yet be fully aware that possibly it may not be so," and "absolute or mathematical certainty is not requisite to proof beyond reasonable doubt."

The first of the propositions needs but a simple illustration to show the fallacy of the criticism. Suppose the identity of a person is in question, as frequently occurs in criminal prosecutions, and that a half-dozen witnesses testify positively to the person's identity. It is a possibility that each may be mistaken; yet the evidence may be sufficient to convince the jury beyond any reasonable doubt. Criticism in this respect is devoid of merit. As to the second proposition criticized, it may be said that this court approved an instruction that contained almost the identical language. *St. Louis v. State,* 8 Neb. 405.

Again, the instruction is assailed because it did not inform the jury that a reasonable doubt might arise from the want or lack of evidence. This criticism is disposed of by the holding of this court in *Trimble v. State,* 118 Neb. 267, wherein it was held: "An instruction that a reasonable doubt is 'such a doubt as, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge,' is not erroneous as excluding a doubt arising from a want of evidence."

The instruction is assailed on other grounds. While the instruction may not be commended as a model, yet, from a careful consideration of the instruction, in connection with the entire charge given, we are convinced that it was not prejudicial to the rights of the defendant.

The defendant criticizes another instruction, which informed the jury that they had nothing whatever to do with the punishment of the defendant, and that they had no right to take into consideration what punishment he might or might not receive, in the event he was convicted.

In *Trimble v. State, supra,* it was held: "It is not error for the court, in a criminal case where the penalty upon conviction is to be fixed by the court, to instruct the

jury that they have nothing to do with the punishment and are not to consider it in arriving at their verdict." In the instant case the jury had no duty to perform with respect to the punishment to be inflicted. That was for the court and for the court alone. The criticism of the instruction is groundless.

Error is alleged in the refusal of the court to give a number of instructions requested by the defendant. Several of them embodied questions of law that were fully and clearly covered by the court's instructions. It was not called upon to repeat them in different language because so requested. Two of the instructions called attention directly to the testimony given by two witnesses, and the court was requested to inform the jury that the evidence of these witnesses should be scrutinized with caution and subjected to careful examination in the light of all the other evidence. This court has repeatedly held that it is improper for the trial court to give undue prominence to certain portions of the evidence, and, in so far as the requested instructions stated accurately principles of law, they were embodied in other instructions of the court. We find no error prejudicial in any of the instructions requested by defendant and refused by the trial court.

Finally, it is contended that there is not sufficient corroboration of the testimony of the prosecuting witness and that the evidence is insufficient to sustain the verdict.

From the record it appears that defendant was 25 and prosecuting witness 13 years of age; that, previous to the time of the alleged offense, defendant had met the prosecutrix but once; that on the night of the alleged crime, at about 10 o'clock, he was in Falls City with his automobile; that at that time and place the prosecuting witness and a girl companion entered his car; whether by his invitation or of their own accord is in dispute. They drove about the city for a short time and picked up another young man, the four driving about for a short time, and then to the home of the defendant, several miles

distant, where the party partook of wine, or, as defendant contends, sweet unfermented grape juice, furnished by him. They then drove a short distance from defendant's home and parked the car at the side of the road. A little later, they were joined by four other young men, or boys, and all again repaired to defendant's home, and defendant again furnished wine or grape juice, a gallon, in all, being consumed. Shortly thereafter, all returned to the place where they had first parked defendant's car. Prosecuting witness became sick and vomited. There is some evidence indicating that she was intoxicated. Defendant and prosecutrix alighted from the car and "walked down the road." Prosecuting witness testifies to the act of sexual intercourse with defendant. The other girl in the party and one of the boys also went down the road a little later, and she testifies to finding the defendant and prosecutrix on the ground, indulging in sexual intercourse. Her companion testifies to facts indicating that such was the case. It is true there are other witnesses who testify differently, and there is ample evidence that would have justified the jury in finding defendant not guilty, had they believed the evidence offered by him; but the credibility of the witnesses and the weight to be given to the evidence of the respective witnesses are questions solely for the jury. The testimony of prosecutrix is amply corroborated. The evidence is sufficient to sustain the verdict.

The record appears to be free from prejudicial error.

JUDGMENT AFFIRMED.

ABRAHAM ROSENBERY, APPELLANT, V. DOUGLAS COUNTY ET AL., APPELLEES.

FILED OCTOBER 7, 1932. No. 28423.

Taxation: ASSESSMENT: INCREASE: NOTICE. The provision of section 77-1612, Comp. St. 1929, requiring notice to the landowner of any increase in assessed value of his realty over the last previous assessment is mandatory. A tax levied on

such increase, made without notice to the owner, is void, and its collection may be enjoined.

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

B. N. Robertson, for appellant.

John F. Moriarty, Harry B. Fleharty, Thomas J. O'Brien, B. J. Boyle, Henry J. Beal and *John W. Yeager, contra.*

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

GOOD, J.

This is an action to enjoin the collection of an alleged void tax on realty. The district court denied any relief to plaintiff, and he has appealed.

Plaintiff is the owner of two lots in the city of Omaha. It is conceded that at the regular quadrennial assessment in 1930 the county assessor increased the assessed valuation of the two lots over the last previous assessment to the extent of $5,500; that no notice of such increase was given to plaintiff; that he had no knowledge of such increase in valuation until after the county board of equalization had finally adjourned, and that the tax was levied on the basis of the increased value.

Prior to 1921 the owner of real estate listed the same for taxation purposes and placed a value thereon. In 1921 the legislature provided for the biennial assessment of real estate, and in 1925 again amended the law and provided for quadrennial assessment of real estate in the year 1926 and every fourth year thereafter, and provided that such assessed valuation, with certain exceptions, should be used for the basis of taxation until the next regular assessment. The law of 1925 did not require any notice to the landowner of an increase in the assessed valuation of his realty. In 1927 the law was again amended, and now appears as section 77-1612, Comp. St. 1929, which section, in so far as applicable, reads:

"The county assessor shall complete his revision of the same (lists and returns of the precinct assessor) and shall file them with the county clerk on or before the second Monday of June of each year. In years in which real estate is assessed for taxation purposes, it shall be the duty of the county assessor, before such filing, to notify the record owner of every piece of real estate which has been valued at a higher figure than at the last previous assessment. Such notice may be given by post card, addressed to said owner's last known address. It shall describe said real estate, and state old and new valuation thereof and the date of the convening of the board of equalization."

Plaintiff contends that the taxing authorities were without power to increase over the last previous assessment the value of his real estate for taxation purposes without first giving him notice of such increase, as provided by said section. Defendants contend that such notice is not jurisdictional; that failure to give the notice does not render void the tax on the increase in value, and that plaintiff may not be heard to complain in a court of equity, unless he alleges and proves that his realty is, in fact, assessed higher than its actual value or at a greater proportion of such value than other realty generally. Plaintiff seeks to enjoin the collection of that part only of the tax represented by the increase in valuation of his lots.

This is the first time that this court has been called upon to place a construction on that part of section 77-1612, Comp. St. 1929, which provides for a notice to the landowner of any increase in the assessed valuation of his realty over the last previous assessed valuation thereof. Kindred questions have been frequently before this court, and the rules announced were doubtless known to the legislature. At a time when the law provided for the listing of property, both personal and real, by the owner for taxation, it has been held on numerous occasions that any increase by the taxing authorities of the

value so listed by the owner, without notice to such owner, was invalid and could not be enforced.

In *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30, it was held that the county board of equalization could not at any time increase the assessed valuation without notice to the person whose rights and interests were affected thereby. In that case, an increased value was placed upon the property without notice, and was held invalid. Similar holdings have been made in the following cases: *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Dixon County v. Halstead*, 23 Neb. 697; *Spiech v. Tierney*, 56 Neb. 514; *Grant v. Bartholomew*, 57 Neb. 673; *Bankers Life Ins. Co. v. County Board of Equalization*, 89 Neb. 469; *Brown v. Douglas County*, 98 Neb. 299; *Farmers Co-operative Creamery & Supply Co. v. McDonald*, 100 Neb. 33; *Crane Co. v. Douglas County*, 112 Neb. 365; *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment*, 119 Neb. 138.

In *Grant v. Bartholomew, supra*, this court held: "A board of county commissioners, sitting as a board of equalization, without notice to the landowner and without a complaint that his real estate was assessed too low, raised the value placed thereon by the assessor. *Held*, that the board was without jurisdiction and its action a nullity."

In *Brown v. Douglas County, supra*, it was held: "A county board of equalization cannot raise the assessed valuation of the real estate of an individual taxpayer without a complaint and without notice to the person affected thereby.

"So much of the taxes as are levied upon the valuation above that fixed by the county assessor is void, and its collection may be enjoined." And such is the effect of all the decisions above noted.

It may be observed that under the law of 1925 the owner of real estate had no means of knowing what assessed valuation would be placed upon his real estate at the quadrennial assessment, except by going to the county

assessor's records and examining and ascertaining for himself the valuation placed upon each particular tract that he owned. No doubt the legislature deemed this a burden upon the owner of real estate, and that it would cast a great burden upon the county assessor to be obliged to submit his records to every landowner in the county, in order that he might know the assessed valuation placed upon his realty. Having this in view, the legislature enacted section 77-1612, Comp. St. 1929, as it now exists, and provided that no increase should be made over the last previous assessment without notice to the landowner, advising him also of the date when the board of equalization would meet. The legislature no doubt intended that the owner of realty might rely upon the last previous assessed valuation of his real estate as being that at which it would be returned again, unless he received notice of increase and was afforded an opportunity to appear before the board of equalization and contest such increase in value, if he felt that the increase was unwarranted.

The legislature was undoubtedly advised of the construction placed upon the former statutes relative to the increase in assessed valuation of property without notice to the owner, and we think it is clear that it intended that the owner of realty could rest secure against any increase over the last previous assessed valuation of his realty unless he was given notice of an increase. This view is supported by the decisions of other states.

In *Goldsmith v. Standard Chemical Co.*, 77 Colo. 1, it was held: "Failure of a county assessor to give notice and opportunity to be heard on the question of increased valuation of property, as required by sections 7291 and 7292, C. L. '21, *held* to invalidate the increased levy."

In *County Commissioners of Allegany County v. Union Mining Co.*, 61 Md. 545, quoting from Cooley on Taxation, it was said: "The courts have been particularly careful to see that revisory tax tribunals did not change assessments to the prejudice of taxpayers, who, under the

circumstances, had no reason to look for or anticipate any such change. * * * If authority is conferred upon the board of review, to change assessments under any specified circumstances, the existence of those circumstances is a condition precedent to their action."

In *Clark & Wilson Lumber Co. v. Weed,* 137 Or. 186, it was held: "Procedure prescribed by legislature in respect to levying tax must be strictly observed.

"Statutory provision relating to tax levy, object of which is protection of taxpayer and safeguard against excessive levies, is mandatory."

Upon reason, as well as under the authorities cited, we are forced to the conclusion that the provision of section 77-1612, Comp. St. 1929, regarding notice is mandatory, and failure to give the notice required is fatal to the tax levied on the increase in valuation of the property.

Defendants suggest that plaintiff may not be heard in a court of equity unless he pleads and proves that the value placed on his lots by the county assessor is in excess of its actual value, or that it has been assessed at a higher percentage of its actual value than other real estate generally. This contention is without merit. This court has specifically held that so much of the tax as is levied upon the value above that fixed by the county assessor is void and its collection may be enjoined. *Northwestern Bell Telephone Co. v. State Board of Equalization and Assessment, Brown v. Douglas County,* and *Farmers Co-operative Creamery & Supply Co. v. McDonald, supra.*

It follows that collection of the taxes levied upon the increase of $5,500 in the value of plaintiff's lots for the year 1930 and any subsequent years, based on such assessment, should be and is enjoined until said assessment has been lawfully changed.

JUDGMENT REVERSED.

JUANITA HAMAKER, APPELLANT, V. ABRAHAM L. PATRICK, APPELLEE.

FILED OCTOBER 7, 1932. No. 27986.

1. **Appeal:** REVIEW. This court, in the exercise of statutory authority, may, at its option, consider a plain error not specified in appellant's brief.
2. *Netusil v. Novak*, 120 Neb. 751, and *First Nat. Bank v. Broyles*, 122 Neb. 414, reexamined, approved and distinguished.
3. **Judgment:** JUDGMENT NON OBSTANTE VEREDICTO. It is settled that the purpose of section 20-1315, Comp. St. 1929, was to take over and adopt the common-law practice as to rendering judgment *non obstante veredicto*.
4. ———: ———. Under our Code, as at common law, judgments *non obstante veredicto*, if granted at all, can be granted only upon the pleadings. Evidence is not considered.
5. ———: VACATION. In a case wherein a party is entitled to a jury trial, and the pleadings do not confess the right to judgment, and in which a jury's verdict is returned and judgment entered thereon, the district court, at a subsequent term, cannot disregard this verdict and judgment, or set the same aside and, without a new trial, proceed to enter such judgment as the evidence warrants.
6. **Pleadings** examined, and, in view of the ultimate facts therein appearing, *held* ample to support the verdict returned and judgment as originally entered thereon.

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

Herman Aye and *L. J. Te Poel*, for appellant.

William Baird & Sons and *L. C. Hupp, contra.*

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

EBERLY, J.

This is an action at law, brought in the district court for Douglas county by Juanita Hamaker against Abraham L. Patrick. Plaintiff sets forth in her petition two counts to recover for loss occasioned by the occupation and use of lands of plaintiff held by the defendant for three years. The first count sets forth an oral contract by defendant to

pay the plaintiff the sum of $1,275 a year for said occupancy, and the second count sought a recovery of the same use and occupancy, to be determined and fixed by the reasonable value of the use of these lands for the same period of time covered by the first count. The obvious intention of the pleader was to meet the conditions which the evidence as finally introduced on the trial might establish, and is permitted by the Code.

To this petition the amended and substituted answer of the defendant was filed, and the plaintiff filed a reply.

A trial was had to a jury, both parties introducing evidence to sustain the allegations of their respective pleadings.

At the close of all the evidence, a motion was orally made by the defendant for an instructed verdict in his behalf. This motion the trial court then overruled, and submitted the case to the jury on the pleadings, the evidence, and the instructions of the court. This jury, on January 8, 1931, it being one of the days of the October, 1930, term of that court, returned a verdict for plaintiff as prayed in the first count of plaintiff's petition, and judgment was entered thereon. On January 9, 1931, defendant filed his motion for a new trial.

On the 28th day of February, 1931, in the February, 1931, term of the district court for Douglas county, the motion for new trial was sustained by the court, and the verdict of the jury and judgment rendered thereon set aside. In addition thereto, at this time the district court further adjudged "that the order of the court overruling the motion of the defendant for a directed verdict or a dismissal of the action made at the time of the closing of the evidence in the trial of this case, be and is hereby vacated and set aside, and said motion be and is hereby sustained, and the above entitled action be and is hereby dismissed," etc. From this order, without filing a motion for a new trial, plaintiff prosecutes error by availing herself of her statutory appeal.

At the former hearing of this cause at the bar of this

court both parties united in presenting the questions involved as necessitating for their proper determination a reference to the evidence contained in the bill of exceptions, which had been duly allowed and constituted a part of the record then before us. But the "aggrieved party" in the district court had filed no motion for a new trial. On the basis of submission thus made the judgment of the district court was affirmed. *Hamaker v. Patrick,* 122 Neb. 688. However, thereafter plaintiff's motion for a rehearing was allowed.

Now, for the first time, is presented by the appellant a question of the power (in a sense, jurisdiction over the subject-matter) of the trial court, after having sustained a motion for a new trial at a term subsequent to that at which the jury's verdict was returned and judgment entered thereon, to then enter the final judgment in favor of the appellee appealed from. This question involves no examination of the evidence adduced in the trial court.

Appellee challenges the right of the appellant to at this time raise this question, basing his objections upon the rule that "A party cannot, by filing a brief after the submission of the cause, bring to the notice of the court points not suggested either in the original briefs or on oral argument." He cites in support thereof *State v. Omaha Nat. Bank,* 59 Neb. 483, and *Batty v. City of Hastings,* 69 Neb. 511. The essential difference between the facts of the record in the instant case and the facts in the cases cited, and to which the rule quoted is applicable, are such as render the authorities on which the appellee relies not in point. In the instant case the motion for rehearing has been heretofore sustained by this court, the judgment of affirmance set aside, and a reargument ordered. Under the rules of this court, this cause is now in the same situation as though no previous argument or submission of the cause had been had. The entire record is open to our consideration. And while it is true that the controlling question now presented was not included in the first brief of appellant filed in this cause,

it is contained in appellant's "brief on rehearing." The appellee thus had full opportunity to discuss it.

The question now before us involves the inherent power of the district court, not over persons, but over subject-matter. Very respectable authorities sustain the proposition that "The appellate court will, without any assignment of error or specification in the grounds or reasons of appeal, notice * * * the lower court's want of jurisdiction over the subject-matter." 3 C. J. 1343. The reasoning upon which the authorities collated in support of the text quoted are based afford ample justification of the exercise by this tribunal of its statutory power to, "at its option, consider a plain error not specified in appellant's brief." Comp. St. 1929, sec. 20-1919.

As suggested, the sole question presented for our determination in the present case is the power of the district court in a law case, at a term subsequent to that at which a jury trial was had, to sustain a motion for a new trial seasonably filed, and thereupon, on its own motion, and without intervention of a second jury, enter a final judgment of dismissal therein.

It is obvious that no authority for so proceeding is to be found in *Netusil v. Novak,* 120 Neb. 751, or *First Nat. Bank v. Broyles,* 122 Neb. 414, here cited.

The controlling principle announced in these cases is not new to the jurisprudence of this state. The ancient common-law authorities phrased the rule as follows: "During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judge shall direct; but when the term is past, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary." 2 Coke's Littleton, 260a; 3 Lewis' Blackstone's Commentaries, *407.

In *Smith v. Pinney,* 2 Neb. 139, Lake, J., in delivering the opinion of this court, employed the following language: "But it is said that the power of the district

court over its own judgment is entirely discretionary, and not subject to review by this court. This is true of its orders made during the term at which the judgment is rendered; but this discretion ends with the rising of the court. Thereafter this power must be exercised within the limits prescribed by the statute, and governed by fixed principles of law. To these the courts must confine their action; and any substantial departure therefrom, resulting in an injury to a suitor, may subject their judgment to review and reversal by proceedings in error. *Huntington & McIntyre v. Finch & Co.*, 3 Ohio St. 445; *Taylor v. Fitch*, 12 Ohio St. 169."

This rule, as thus limited, this court has consistently followed. *McCann v. McLennan*, 3 Neb. 25; *Wise v. Frey*, 9 Neb. 217, 220; *Hansen v. Bergquist*, 9 Neb. 269, 277; *Volland v. Wilcox*, 17 Neb. 46; *Harris v. State*, 24 Neb. 803; *Symns v. Noxon*, 29 Neb. 404; *Bigler v. Baker*, 40 Neb. 325; *Bradley v. Slater*, 55 Neb. 334; *Young v. Estate of Young*, 103 Neb. 418; *Douglas County v. Broadwell*, 96 Neb. 682; *Winder v. Winder*, 86 Neb. 495; *Coxe Bros. & Co. v. Omaha Coal, Coke & Lime Co.*, 4 Neb. (Unof.) 412; *Coulton v. Pope*, 77 Neb. 882; *Citizens State Bank, v. Young, ante*, p. 786.

In *Colby v. Maw*, 1 Neb. (Unof.) 478, Justice Sedgwick, then Commissioner, in an opinion unanimously approved by this court, announced the principle in a law case that "The district court, after entering a judgment not supported by the evidence in an action tried by the court, may *at the same term* set aside such judgment and enter the proper judgment without again hearing the evidence."

In *Netusil v. Novak*, 120 Neb. 751, Day, J., applied this well-established principle to the facts disclosed by the record then before the court, in the following language: "During the trial of a case, the court overruled a motion to direct a verdict for defendant and submitted the case to the jury. The jury returned a verdict for plaintiff and judgment was entered thereon. A motion for new trial was filed and argued, whereupon, at the same term,

the court, on its own motion, set aside the verdict of the jury and the judgment and dismissed the action. *Held,* that the trial court had the right and power to vacate, set aside, amend or correct any judgments or orders made by it at the same term."

The principle so announced was reaffirmed in *First Nat. Bank v. Broyles,* 122 Neb. 414.

It will be noted that, in each of the cases cited, the court has consistently and expressly limited the exercise of this judicial power, now under consideration, to the term at which the judgment whose vacation or modification is sought was entered. In view of this controlling limitation, this principle may not in the present case be applied to sustain the action of the district court.

As already suggested, the instant case was not one in which the verdict returned was special; neither did the court order the case reserved for future consideration, but judgment had been entered on the verdict, as required by section 20-1313, Comp. St. 1929. The only matter undisposed of in this case, when the February, 1931, term of the trial court convened, was a pending motion for a new trial in which the sole relief sought was "to vacate and set aside the verdict of the jury and for a new trial." This motion does not expressly assign as one of its grounds that, upon the statements of the pleadings, he, the defendant, is entitled by law to a judgment in his favor (Comp. St. 1929, sec. 20-1315); neither does the district court disclose in its order of February, 1931, whether it is based on a defect of pleading, or because of insufficiency of the evidence.

Nevertheless, as we have already seen, this final judgment appealed from is sustainable, if at all, upon the insufficiency of the pleadings to support the verdict. At common law, judgments *non obstante veredicto,* if granted at all, can be granted upon the record alone. The evidence is not considered; the pleadings only are looked to. 14 Stand. Ency. of Proc. 958, 959. Nebraska has adopted this rule as applicable to her statutory provisions relat-

ing to this subject. This governing statute, in the light of which the Nebraska decisions hereinafter referred to were made, is in the following language: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Comp. St. 1929, sec. 20-1315.

In this connection, it is to be remembered that section 20-2225, Comp. St. 1929, provides for and contemplated the continuance of existing common-law remedies, available at and prior to the adoption of the Civil Code, where substantial rights which are to be protected are clearly outside of the provisions of our statutory procedure. *Smithson v. Smithson,* 37 Neb. 535. No express statutory method appears to have been provided to secure the rights confirmed by the language of the statutes above quoted; and Pound, C., in rendering the opinion, approved by this court, in *Barge v. Haslam,* 65 Neb. 656, says: "It is settled that the purpose of section 440 (now section 20-1315, Comp St. 1929) was to take over and adapt the common-law practice as to rendering judgment *non obstante veredicto. Manning v. City of Orleans,* 42 Neb. 712; *Johnston v. Spencer,* 51 Neb. 198."

As applicable and mandatory at the stage of the proceedings set forth in the instant record, without reference to the bill of exceptions, this court has long announced, as the doctrine controlling, that, "If the trial court is of the opinion that, in view of plaintiff's evidence, it erred in submitting the case to the jury and should have directed a verdict for the defendant, the proper course is to grant a new trial." *Barge v. Haslam,* 65 Neb. 656.

So, too, in reviewing a record involving the limitation under consideration, we have said: "In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial

on that ground." *Manning v. City of Orleans,* 42 Neb. 712. See, also, *Kenesaw Mill & Elevator Co. v. Aufdenkamp,* 106 Neb. 246; *Slocum v. New York Life Ins. Co.,* 228 U. S. 364.

But the trial court, after expressly sustaining the motion for a new trial in the instant case, without further hearing, immediately entered judgment dismissing plaintiff's action. The situation thus created suggests as a serious question the possibility of sustaining this judgment without reference to the state of the pleadings as a judgment entered *non obstante veredicto.* The rule appears to be that, where a judgment *non obstante veredicto* is desired, a motion therefor should be made. *Coonrod v. Benson,* 2 Greene (Ia.) 179. The present record discloses no such motion tendered, or in behalf of defendant. So, too, it appears to have been determined that, on a motion for a new trial, a party cannot be granted a judgment *non obstante veredicto. Netzer v. City of Crookston,* 66 Minn. 355.

Our section 20-1315 is identical with a similar provision of the Ohio Civil Code, from which it was adopted. Construing this identical language the courts of Ohio at an early day held that, where the motion for a new trial is granted, the motion for judgment *non obstante veredicto* will be denied. *Harker v. Smith,* 5 Ohio Dec. 560. And it is said in a learned work on the Code practice of that state: "Where a party moves both for a new trial and for judgment *non obstante veredicto,* the former motion is to be heard first, and if granted the other motion is surrendered, for as soon as a new trial is granted the other party has the right to ask leave to amend his pleadings." 1 Bates, New Pleading, Practice, Parties and Forms, 428. If these authorities are to be accepted, the judgment here appealed from may not be sustained, and further discussion of this case is unnecessary. Without a final determination of the question suggested, but on the tentative assumption, for the purposes of this case, that the question involved in the judgment *non obstante*

veredicto was in some proper manner presented to and decided by the trial court, the members of this court are unanimously of the opinion that the district court has erred in entering final judgment for defendant and in the dismissal of the action. The controlling test appears to be: "A motion for judgment on the pleadings requires a consideration of what may be found in all the pleadings as the ultimate facts." *McMillan v. Chadron State Bank*, 115 Neb. 767.

"It will only be granted when it is clear that the cause of action or defense put upon the record does not in point of substance constitute a legal cause of action or defense; a mere technical defect in the pleadings is not sufficient ground upon which to grant a judgment *non obstante veredicto*." 14 Stand. Ency. of Proc. 960.

In view of these tests, this court is convinced that the pleadings in the instant case were ample to support the judgment entered upon the verdict of the jury in the trial court.

It follows that the district court erred in the entry of the judgment *non obstante veredicto* finding for defendant, and dismissing plaintiff's cause of action. This judgment of the trial court is, therefore, reversed, and the cause remanded, with directions to proceed with the trial thereof, as provided by law.

REVERSED.

HAROLD WESTBROOK V. STATE OF NEBRASKA.

FILED OCTOBER 7, 1932. No. 28008.

Criminal Law: INSTRUCTIONS: ALIBI. Alibi instruction in *Nightingale v. State*, 62 Neb. 371, followed and approved.

ERROR to the district court for Cherry county: EARL L. MEYER, JUDGE. *Affirmed.*

John M. Tucker, G. E. Price and *Wood & Ress*, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

DAY, J.

The plaintiff in error was convicted in the district court for Cherry county of the crime of bank robbery, and was sentenced to serve a term of 20 years in the state penitentiary. There are numerous assignments of error, all of which we have carefully examined and find without merit. The only one argued in the brief, or orally before the court, related to the instruction given on the question of alibi. Substantially this same instruction was approved in *Nightingale v. State,* 62 Neb. 371; *Johnson v. State,* 88 Neb. 565; *Carter v. State,* 98 Neb. 742; *Rownd v. State,* 93 Neb. 427. An elaborate annotation of 73 pages, "Alibi—Degree and Burden of Proof," in 29 A. L. R. 1127, demonstrates that this instruction heretofore approved in numerous Nebraska cases is in line with the great weight of authority.

Since it has not been demonstrated that there was any error committed by the trial court, its judgment is

AFFIRMED.

CRETE MILLS, APPELLEE, V. PAUL W. NEIHART, APPELLANT.

FILED OCTOBER 7, 1932. No. 28473.

Master and Servant: INJURY TO EMPLOYEE: INSUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to be insufficient to support a finding that the employee sustained an injury from which he had not recovered.

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

Bartos, Bartos & Placek, for appellant.

John E. Mekota, contra.

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

DAY, J.

This is a proceeding under the workmen's compensation act to determine the amount of recovery, if any, which Neihart, an employee, should have from the employer, the Crete Mills.

On August 18, 1931, Neihart sustained an injury to his right foot while operating a machine in the tin shop of his employer. Although injured, the employee continued on duty, in a directory capacity at least, until October 31, 1931, when he was discharged. Upon March 2, 1932, an award was made to the employee by the compensation commissioner. From this adverse decision of the compensation commissioner, the employer appealed to the district court. The district court found that the employee had fully recovered from his injury at the time of his discharge from employment and dismissed the claim. The employee then appealed to this court. This court has examined the record and considered the evidence *de novo*, and we find that the evidence in the record is insufficient to establish that the employee suffered an injury from which he has not recovered. This finding is the same as that of the trial court, and the judgment is accordingly

AFFIRMED.

THEODORE SAMLAND, APPELLEE, V. FORD MOTOR COMPANY, APPELLANT.

FILED OCTOBER 7, 1932. No. 28510.

1. **Master and Servant: INJURY TO EMPLOYEE: NOTICE.** Section 48-133, Comp. St. 1929, requires that notice be given of injury within six months in writing. Verbal notice to physician of employer, indirectly threatening suit, is not such notice as complies therewith.
2. **Bills and Notes: DUPLICATE CHECK.** A duplicate or substitute check given in the place of another check has the same

validity as the original. It is the original instrument repeated.

3. ———: ———. Such substitute check adds no more to the obligation, liabilities and rights of the parties when it is executed at a subsequent date than when its execution is contemporaneous with that of the original.

APPEAL from the district court for Douglas county: WILLIAM G. HASTINGS, JUDGE. *Reversed and dismissed.*

Gaines, McGilton, McLaughlin & Gaines, for appellant.

E. L. Murphy, contra.

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

PAINE, J.

This is an action for compensation, brought under the workmen's compensation act by Theodore Samland against the Ford Motor Company. The claim was rejected after a hearing before the compensation commissioner, but upon appeal to the district court the plaintiff was awarded compensation for 35 weeks at $15 per week, together with $75 medical expense. Motion for new trial being overruled, appeal was taken to this court.

There is little dispute about the facts, and, as they present a new question for determination in this court, they will be set out in some detail. While plaintiff, now appellee, was employed in the plant of the Ford Motor Company in Omaha, he suffered an injury to the index finger of his right hand upon September 4, 1928. The injury not yielding to the ordinary treatment of Dr. Hawes, the plant physician, but showing that an infection had resulted, he was sent to Dr. John H. Thomsen, who amputated the injured finger upon October 6, 1928. He made the usual recovery from the operation, and no swelling of the gland at the elbow or in the armpit occurred. On October 11 Dr. Thomsen gave him some staphylococcus vaccine, because he had developed a condition known as furuncles or boils, which had no connection whatever with the injury, but developed separately and cleared up quick-

ly; and when he left the hospital on October 21 Dr. Thomsen testifies he was entirely well except as to the loss of his finger. For this injury the appellee was paid by the Ford Motor Company 2 1/7 weeks' temporary total disability, at the rate of $15 a week, or a total of $32.20, by check dated October 9, 1928, and the company paid for his hospital and surgical service, $101.65, and he was then allowed and paid the amount due under the law of 35 weeks' disability at $15 per week for the loss of his right index finger, a total of $525. The appellee returned to work on November 19 and worked intermittently, and while he may have been given a little lighter work he drew his full pay during that time. He made no complaint about any trouble during that time. He stopped working voluntarily on January 21, 1929. They continued sending him checks during the remainder of the 35 weeks, and when they were ready to deliver the final payment check, which was so marked on the back, the cashier discovered that one of the previous checks given him had not been cashed, so that a duplicate or substitute for it was made out, and both checks were given to Dr. Hawes on August 6, 1929, to deliver personally to the claimant. In driving out to his father's place, where he lived, they passed each other on the road, and both stopped their cars and each got out and went back, and they stood in the middle of the road talking. Dr. Hawes asked the appellee what he had done with the check that was missing, and he said it was lost or he never received it, and so Dr. Hawes gave him two checks, one being the final compensation check and the other being for the period which the cashier reported had never been cashed, and Dr. Hawes requested him to sign a final release, but the appellee refused to sign the release. Dr. Hawes testified that he observed his appearance at that time; that he was very alert, jumped out of his automobile and came back on a trot, and they met half way between the two cars, which had been stopped about 100 yards apart, and the only thing the doctor noticed out of the way was that

when he reached his right hand out to shake hands he noticed that the index finger had been amputated.

The evidence discloses that the appellee cashed the duplicate check given to him on August 10, 1929, but that the second check, which had on the back of it the words, "full compensation," he did not cash, but afterwards claimed he had delivered it to his attorney. In May, 1931, the cashier discovered that one of the two checks given to the appellee on August 6, 1929, had never been cashed. Dr. Hawes thereupon called Mr. Larsen, the compensation commissioner, and asked his advice, and it was suggested that he make an attempt to find Samland and give him a duplicate check in the place of the one which he had probably lost. Dr. Hawes therefore had a substitute check prepared in the place of the one which the bookkeeper was reporting monthly to the home office as still outstanding, and with that check Dr. Hawes went to the residence of the appellee's father and found the appellee, who admitted that, while he had cashed one of the two last checks given to him, he had handed the other one to his attorney, and Dr. Hawes explained to him that he was giving him a substitute check, in the place of that one and would stop payment on the one which appellee had given to his attorney, but if he could get back the original they would like to have it for their files. At that time the appellee made no claim of any kind for any further compensation. This last check bore date of May 7, 1931, upon which day it was delivered, and upon June 22, 1931, appellee filed a petition before the compensation commissioner, setting out, among other things, that as a result of the injury to the finger a general infection and nervous condition affecting his entire body developed, so that he was totally disabled from working, except for a period of some few days, from the date of the accident until November 1, 1929, and that as a result of said infection it was necessary to secure dental treatment, and asking for an award for further and additional compensation, and said case came on for hearing before the com-

pensation commissioner at Omaha on August 18, 1931, and upon October 14, 1931, an order, dismissing appellee's petition, was entered. Thereafter a petition on appeal was filed in the district court for Douglas county on November 13, 1931. An answer was filed and trial had, and an order entered by the district court that the plaintiff was entitled to additional compensation of $15 per week for 47 weeks, with medical expenses of $75.

Section 48-138, Comp. St. 1929, provides among other things that claims for compensation shall be forever barred unless parties shall have filed a petition within one year after the accident, and provides in the last clause thereof as follows: "Where, however, payments for compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment"—and it is necessary for this court to determine whether the giving of the check upon May 7, 1931, as a duplicate or substitute check for one which had formerly been given August 6, 1929, was such a payment of compensation as extended the time to cover the filing of the petition with the compensation commissioner in this case. It is the contention of the appellee that this $15 check was a payment upon compensation as of that date, to wit, May 7, 1931, and gave the appellee the right to file a petition within one year of that date for additional compensation. But the appellant contends that such delivery of a substitute check in 1931 for one delivered and lost in 1929 is not a *last payment* on compensation such as to remove the statutory bar of limitation and permit the employee to maintain a compensation action, of which no notice had ever been given.

1. It is also contended by the appellant that the claim for additional compensation arising months after the delivery of the last check in payment of compensation for 35 weeks for the amputation of the finger is barred under section 48-133, Comp. St. 1929, providing: "No proceedings for compensation for an injury under this article

shall be maintained, unless a notice of the injury shall have been given to the employer as soon as practicable after the happening thereof; and unless the claim for compensation with respect to such injury shall have been made within six months after the occurrence of the same. * * * The said notice shall be in writing, shall state in ordinary language the time, place and cause of the injury; and shall be signed by the person injured."

The evidence discloses that no notice, as required by this statute, was given at any time by the appellee to the appellant; that, in the conversation May 7, 1931, with Dr. Hawes about his failure to cash the check given in final settlement, he said he had handed that check to his attorney, for he had figured perhaps on suing the Ford Motor Company, which incidental reference to a possible suit in no way complies with the plain terms of the statute. If it should be considered that this statement gave Dr. Hawes knowledge of an additional injury to be claimed by the appellee, then we are cited to the case of *Good v. City of Omaha*, 102 Neb. 654, which holds: "The mere fact that the employer has knowledge that the employee has received an injury will not dispense with the necessity of the claimant's making his claim for compensation."

In *Duhrkopf v. Bennett*, 108 Neb. 142, reference is made to the Massachusetts employer's liability act, in which there is a provision that an action thereunder must be brought within a year after the accident, and it has been held there that this is not a mere statute of limitations, but states a condition precedent to a right of action. *McRae v. New York, N. H. & H. R. Co.*, 199 Mass. 418; *Ohio Oil Co. v. Industrial Commission*, 293 Ill. 461; *Bushnell v. Industrial Board*, 276 Ill. 262; *Haiselden v. Industrial Board*, 275 Ill. 114.

2, 3. In considering the legal effect of giving the substitute check, we will cite the case of *Benton v. Martin*, 40 N. Y. 345, which presents a somewhat similar situation. A sight draft on New York, drawn in Olean, post-

dated the 10th of July, 1857, and before any valid presentment for payment, was lost. The defendant, knowing of the loss, subsequently drew another paper precisely in the same words and of the same date, wrote across it the word "Duplicate," and delivered it to the plaintiff; which latter paper was presented to the drawees on the 14th of August and payment refused, the drawees having failed the previous day. In an action by the plaintiff against the defendant as drawer, it was held that the true construction of the word "Duplicate," written across the draft in suit, in view of the extrinsic facts, imported that it was made as a substitute for, and to take the place of, the original, and that no new liability of the defendant was created thereby. The defendant having been discharged from liability upon the original by laches as to presentment, the plaintiff could not recover upon the duplicate.

And to the same effect is the case of *Lewis v. Commercial Nat. Bank,* 37 Tex. Civ. App. 241, which holds: "Where, after the loss of an original check, a duplicate was executed by the drawer and indorsed by the payee, such indorsement did not change the payee's relation to the original check, nor create any different liability on the duplicate than that assumed by his original indorsement." See *Bank of Gilby v. Farnsworth,* 7 N. Dak. 6, 38 L. R. A. 843; *First Nat. Bank v. McConnell,* 103 Minn. 340.

Hanson v. Towle, 19 Kan. 273, is cited with approval in *Nelson v. Becker,* 32 Neb. 99, and *Wallber v. Caldwell,* 79 Neb. 418. The holding in the Kansas case was: "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an 'acknowledgment' as is contemplated by the statute. This must be an unqualified and direct admission of a present subsisting debt on which the party is liable."

In *Goodrich v. Case,* 68 Ohio St. 187, a new note was

given to take the place of an old one which was much worn, the intention of the parties being merely to renew the evidence of the old note, and it was held that the purpose and intention of the parties should govern as to its legal effect, and that such substituted new note was not a written acknowledgment of the old note so as to prevent the running of the statute of limitations against the old note.

The new check of May 7, 1931, was made by the cashier as a substitute for and to take the place of the one dated August 6, 1929, which had not been cashed, and which they were compelled to set out in their monthly reports as still outstanding, and which they assumed had been lost. As an accommodation to the appellee, but without demand on his part, they sent Dr. Hawes out to deliver the substitute check, and in delivering the same he clearly explained to appellee that the only purpose of the check he was then delivering to him was as a duplicate or substitute for the one which had not been cashed. The appellee claims a new liability was created thereby.

This court holds that a duplicate or substitute check given for another has the same validity as the original. It adds no more to the obligation and rights of the parties when it is executed at a subsequent date than when its execution is contemporaneous with that of the original. It is simply the original instrument repeated.

That original instrument, given August 6, 1929, under section 48-138, Comp. St. 1929, permitted action to be brought before August 6, 1930, at which time his right to sue on the cause of action lapsed. When appellee lost that check and was given a substitute therefor on May 7, 1931, did this voluntary replacing of the lost check start the running of the statute again? Did it give appellee a right to file suit on a cause of action, without which his right would have been barred? This court holds that it did not.

There is no claim that the appellee was suffering from any disability at the time the last check was given or his

action filed. His alleged injury had long since disappeared. His action was an attempt to obtain a money judgment. Good faith on the part of the appellee required that he notify his employer of his additional injury, if any, as required by statute. To permit a recovery in this case is not in harmony with this act, nor allowed by its provisions. At the hearing conducted by Cecil E. Matthews, chief deputy compensation commissioner, this claim for additional compensation was rejected, and this court finds that such order was right. Judgment of the district court is reversed and the action dismissed at costs of appellee.

REVERSED AND DISMISSED.

CHARLES KNAPP, APPELLEE, V. SALINE COUNTY, APPELLANT.

FILED OCTOBER 7, 1932. No. 28071.

1. **Judgment:** RES JUDICATA. Facts established by a judgment cannot be relitigated by the parties in a subsequent action.
2. **Record** examined and found to be free from prejudicial error.
3. **Appeal:** REMITTITUR. Upon examination of evidence, verdict *held* to be excessive and remittitur ordered.

APPEAL from the district court for Fillmore county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed on condition.*

John E. Mekota, for appellant.

G. E. Hager, contra.

Heard before ROSE, DEAN, GOOD and DAY, JJ., and THOMSEN, District Judge.

THOMSEN, District Judge.

This is an action for damages caused by rain water which overflowed plaintiff's land due to defective construction of an adjacent highway and culvert. As a result of the overflow, plaintiff claimed loss of a stack of hay and of corn then growing on the land. The case was tried to a jury and resulted in a verdict for $757.

Defendant claims errors in instructions, in the failure to strike certain testimony and in the admission of other testimony.

This is the fourth appearance of this case in this court, the first appearance being on an appeal from a granted writ of mandamus. Under the order in that case the defendant was required to construct either a larger culvert to carry away the surface waters or to increase the number of culverts. The court found that prior to the imperfect construction flood waters were not collected upon plaintiff's land nor retarded in their free flow from the premises and found for the plaintiff generally in its decree. The issues there tried dispose of every contention, except one to be hereinafter noted, leaving for the jury's determination solely these questions: Whether the physical conditions were the same as those which existed at the time of the decree in the mandamus action? Whether the rainfall on and immediately prior to June 16, the date when the damage was caused for which recovery is here sought, was so extreme as not reasonably to be anticipated; and, if so, "what portion thereof would have remained on the plaintiff's land long enough to produce injury had the defendant made provision for carrying off ordinary rains, and the amount of the plaintiff's damages?" These propositions were submitted to the jury by proper instructions. In arriving at the damages, the jury were, in effect, instructed if the rainfall was found to have been in excess of a reasonably-to-be-anticipated quantity, no allowance should be made for damage caused by such excess. This properly became the main issue. The matters adjudicated in the former action could not be relitigated between the parties; they became established facts. *Stocker v. Nemaha Valley Drainage District*, 105 Neb. 684; *Toop v. Palmer*, 108 Neb. 850.

The offered testimony, of the failure to admit which the defendant complains, is directed mostly to showing that water would be impounded on plaintiff's land regardless of whether the culverts had been constructed or

not, and that the physical condition of the land was such that water would naturally remain upon it. This issue could not be retried. The defendant's attention was particularly directed to this fact in the commissioner's opinion, 27540. The court was right in excluding such evidence. The requested instructions, refused by the court, in effect permitted the jury to review the already determined fact of whether or not damage would have resulted if the highway were properly constructed; and the gist of that portion of these instructions proper to be given was included in those given by the court. We find no error in the admission or exclusion of testimony nor in the instructions given or refused.

The defendant claims the verdict to be excessive. Although other one-day rains of approximately equal intensity had fallen at other times, such rains had not theretofore caused any damage; so a verdict for the entire loss sustained seems justified. But to sustain the amount of the verdict it must be assumed that the jury gave the greatest weight to the testimony of the wife of the plaintiff in assessing the value of the corn and hay lost. There seems to be no foundation for her testimony. Furthermore, since the plaintiff was the person most interested, he naturally would fix the highest value which he hoped to recover. The highest value fixed by the plaintiff is: Hay lost, $80; corn lost, $192; a total value of $272. To this should be added interest at the rate of 7 per cent. from June 16, 1925, to the date of the judgment, April 21, 1931, an aggregate amount, with interest, of $383.32. The amount of the judgment should be reduced to this sum and the excess remitted.

For the reasons given, the judgment is affirmed upon condition that appellee remit $373.68 within thirty days, leaving a judgment for $383.32; otherwise the judgment is reversed and the cause remanded.

AFFIRMED ON CONDITION.

JULIA MORAVEC, APPELLANT, V. JOHN MORAVEC, APPELLEE.

FILED OCTOBER 21, 1932. No. 28242.

1. **Divorce**: ALIMONY. Though a divorce on petition of a wife is denied and a divorce on the ground of extreme cruelty granted to her husband on his cross-petition, this alone will not prevent the allowance of alimony.
2. ———: ———. When a husband procures a divorce on the ground of extreme cruelty, the court may award his wife reasonable alimony.

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

Bartos, Bartos & Placek, for appellant.

Waring & Waring, contra.

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

ROSE, J.

Julia Moravec, plaintiff, brought suit in equity against her husband, John Moravec, defendant, to procure a divorce and alimony on the ground of extreme cruelty. In an answer and cross-petition defendant denied the acts of cruelty pleaded by plaintiff, charged her with extreme cruelty to him and prayed for a divorce from her. The acts of cruelty upon which each relied were stated in the pleadings. Upon a trial of the issues the district court made findings in favor of defendant, granted him a divorce, permitted plaintiff to retain title to 80 acres of Fillmore county land previously conveyed to her by defendant and dismissed her petition. Plaintiff appealed.

Upon a trial *de novo,* the conclusion is that a preponderance of the evidence proves facts showing that in equity defendant is entitled to the divorce granted by the district court. In that particular the decree below is affirmed.

The principal controversy arises on the question of alimony. This leads to an inquiry into the pecuniary situation of the parties in connection with family affairs.

Plaintiff and defendant were married June 29, 1920, when he was 55 or 56 and she 28 years of age. He had three children by a former wife. The oldest had become incompetent as a result of shell-shock in World War service and requires the care of a guardian. Plaintiff had five children by a former husband, the oldest child being 11 years of age when his mother and defendant were married. The second marriage was without issue. Defendant provided plaintiff and her children with a home. With what they could do for themselves he furnished means for the education of plaintiff's children. For a number of years previous to this litigation plaintiff and defendant resided in Fillmore county on an incumbered farm to which he held title, and in the meantime he conveyed to her 80 acres thereof. In 1928 he left the farm and went to Bee, a village in Seward county. Plaintiff declined to join him there and with her children remained on the incumbered farm. Defendant moved from Bee to Lincoln, where he supports himself by taking care of his incompetent son who draws monthly compensation from the government. There is testimony to the effect that defendant owns two unimproved town lots, acquired in 1917 in exchange for a span of horses, and that he has meager equities in other real estate, but he is without earning capacity or means to pay substantial alimony. Though plaintiff is denied a divorce, that does not prevent the court from allowing her alimony. Both contributed to embarrassing pecuniary conditions in which they find themselves. Details of their interests in property or of their unhappy domestic relations would not benefit them, their children or the state, and are purposely omitted. Under the circumstances disclosed by the record, equity does not call for the allowance of substantial alimony. The record, however, contains testimony tending to prove that defendant has some personal property on the farm occupied by plaintiff and this she will be permitted to retain. As thus modified, the decree below is affirmed,

defendant to pay the costs of the appeal to the supreme court.

AFFIRMED AS MODIFIED.

WAUBONSIE BRIDGE COMPANY, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED OCTOBER 21, 1932. No. 28465.

1. *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Neb. 453, reexamined, approved and followed.
2. **Municipal Corporations: TAXATION.** Where no part of the west half of a vehicular toll bridge is within the corporate limits of a city, the taxes levied and assessed by the city authorities against the owner thereof are void.

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

Tyler & Peterson and *George H. Heinke*, for appellants.

Jessen & Dierks and *Woods, Woods & Aitken, contra.*

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

DEAN, J.

The Waubonsie Bridge Company began this action in the district court for Otoe county against Nebraska City, a municipal corporation, and Charles L. Kelly, the county treasurer, and Arthur H. Barstler, the county clerk, defendants herein, to enjoin them from collecting, or attempting to collect, city taxes for the year 1931, and all succeeding years, on the west half of the plaintiff's vehicular toll bridge which is constructed over the Missouri river at a point near Nebraska City, and which connects the state of Nebraska with the state of Iowa.

The court found and decreed that the taxes levied and assessed against the plaintiff bridge company for the year 1931 are void from the fact that no part of the west half of its bridge is within the corporate limits of Nebraska City. The defendants have appealed.

It is not contended that the taxes are excessive, nor is

it argued that there has been any irregularity in the proceedings, but the main question for determination here is whether the bridge, or any part of it, is within the corporate limits of Nebraska City and therefore subject to taxation. To this end we find it necessary to review briefly the history of Nebraska City.

The city of Nebraska City was incorporated under an act of the territorial legislature of 1855, wherein this provision appears, namely: "All the territory within the geographical limits of Nebraska City, as designated upon the plat of said city, together with all the additions that may be hereafter made thereto, according to law is hereby declared to be a city by the name of Nebraska City." Laws 1855, p. 391.

At the same legislative session Kearney City, now a part of Nebraska City, was incorporated as a city and declared to include all territory within the boundaries designated on a plat thereof. Laws 1855, p. 417.

It is the defendants' contention that the property, upon which the west half of the plaintiff's bridge is constructed, was conveyed to the mayor of Kearney City by the United States government and that it afterward was platted as required by law and included the land in question here. By an act of the legislature for 1867, Nebraska City and Kearney City were consolidated and declared to be a corporation under the name of Nebraska City. Laws 1867, p. 64.

Certain plats in the record disclose that the city is subdivided into lots up to within 160 feet of what is designated as the "levee line" along the river bank. The abutment and approach to the plaintiff's bridge are erected within this 160-foot strip of levee and do not touch the platted land belonging to the city. The levee line is parallel to the easterly side of block one of that which is known as Kearney addition to Nebraska City. And, running parallel to the plaintiff's vehicular bridge, 75 feet away, is a railroad bridge owned by the Chicago, Burlington & Quincy Railroad.

It is contended that the city has exercised continuous and adverse possession of the land in suit for more than 50 years and that the plaintiff bridge company recognized its ownership by requesting a deed thereto from the city. And it appears that, for a consideration of one dollar, a quitclaim deed was executed and delivered July 5, 1930, by the city to the company. Counsel for the city contend that the plaintiff is now estopped from denying the rights of the city to the premises.

The bridge company admits that it accepted the quitclaim deed from the city, but contends that the deed was requested for the reason that a dispute existed between the city and the Burlington railroad company as to which party was the owner of the land in suit, and that, to avoid litigation, the plaintiff applied for and was granted a deed from both the city and the railroad. But it is alleged that the deed was requested from the city, not in recognition of the city's title to the land, but solely for the purpose of assuring the plaintiff's title as against both the city and the railroad after the erection of the bridge thereon.

Substantially the same question was before this court in *Chicago, B. & Q. R. Co. v. City of Nebraska City*, 53 Neb. 453, wherein the opinion was written by Norval, J. In that case suit was instituted by the Burlington railroad to enjoin the collection of a city tax assessed in 1893 by the then city authorities upon the west half of the Burlington bridge which, as noted above, is parallel to the plaintiff's bridge. There, as in the present case, it was contended that the bridge was not within the corporate limits of the city and, therefore, the municipal authorities had no power to levy a tax thereon. It was held in the cited case that the 10 years' adverse usage by the city of the levee strip was not of itself sufficient to establish the city's title thereto and that the record did not show that the city limits had been changed by ordinance to include this adjacent territory known as the "levee 160 feet wide."

Under section 16-106, Comp. St. 1929, it is provided generally that the corporate limits of a city may be extended by ordinance to include therein all territory contiguous or adjacent thereto, and that such territory shall be subdivided into lots.

In the above cited Burlington bridge case, it appears that the city council passed an ordinance with the object in view of including within the boundaries the land in question here. But we held that the ordinance was of no effect where the land had not been subdivided into lots as provided by statute, and it was pointed out that the ordinance in all probability would not have been passed had the city council believed that the city owned the land in question by reason of 10 years' adverse usage thereof.

The plats do not show that the 160-foot strip of land has ever at any time since the decision in the Burlington bridge case been divided into lots, according to the manner provided by statute for annexing contiguous or adjacent territory to a city. The facts in that case and the present one are practically identical. That the city has certain rights to the water front will not, of course, be denied, but in the absence of an ordinance specifically including within its boundaries the levee in question, we decline to overrule our decision in *Chicago, B. & Q. R. Co. v. City of Nebraska City, supra.* We have examined other assignments advanced by the defendants but reversible error does not appear therein. We conclude that the taxes levied and assessed against the plaintiff bridge company for the year 1931 are void from the fact that no part of the west half of its bridge is within the corporate limits of Nebraska City, and, in view of the present state of the record, it is ordered that the city be permanently enjoined from levying or assessing taxes thereon.

AFFIRMED.

JOSEPH L. PARKIN, APPELLANT, V. JOHN W. PARKIN ET AL., APPELLEES.

FILED OCTOBER 21, 1932. No. 28261.

Pleading: DEMURRER: LIMITATIONS. A petition is vulnerable to demurrer if the facts pleaded show that the cause of action is barred by the statute of limitations, unless facts are also pleaded which arrest the running of the statute.

APPEAL from the district court for Loup county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Sullivan & Wilson, for appellant.

E. M. White, A. F. Black and *Schaper & Runyan, contra.*

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

GOOD, J.

This is an action to enforce specific performance of an oral contract to convey certain described real estate, and to determine plaintiff's interest in other realty. To the plaintiff's amended petition, defendant demurred on several grounds; among them, that the facts pleaded disclosed that the action was barred by the statute of limitations. The demurrer was sustained. Plaintiff refused to further plead. The action was dismissed. Plaintiff has appealed. In his brief plaintiff complains of the ruling only in so far as it relates to the cause of action for specific performance.

From the allegations of the petition it appears that the oral contract was entered into in 1900, when plaintiff was 21 years of age. By the terms of the alleged agreement, plaintiff was to work on the farm of his stepfather, John Cail, for a period of five years, and at the end of the five-year period was to receive as his compensation a deed to the particular land. In January, 1905, the five-year period expired. Plaintiff then requested Cail to execute a deed, conveying title to the land. Cail did not comply with the request, but made an excuse for delay until plaintiff should be married. A few years later and after

plaintiff's marriage, he again requested Cail to execute a deed, but again Cail made excuse and did not comply. Several other requests were made at various times for conveyance of the land, but they were not complied with. In 1930 Cail died, leaving a will which was admitted to probate. In the will he devised the land to others. This action was begun in February, 1931. Plaintiff's cause of action accrued in January, 1905. More than 26 years had elapsed after plaintiff's cause of action accrued before he instituted this action. No fact is pleaded which would toll the running of the statute. There was no written acknowledgment of the oral contract or promise to convey the land.

Pursuant to the provisions of section 20-202, Comp. St. 1929, an action for the recovery of title to or possession of lands can only be brought within ten years after the cause of action shall have accrued. The petition on its face discloses that the cause of action had accrued more than 26 years before this action was begun.

It is a well-established rule that a petition is vulnerable to demurrer if the facts pleaded show that the cause of action is barred by the statute of limitations, unless facts are pleaded which would arrest the running of the statute. This rule is recognized in *Pohle v. Nelson,* 108 Neb. 220, wherein it was held: "Where it appears from the statement of facts in the petition that the cause of action is on its face barred by the statute of limitations, and there are no allegations tolling the statute, a demurrer can be properly interposed to such cause of action." See, also, *Hawley v. Von Lanken,* 75 Neb. 597; *Reed v. Barnes,* 113 Neb. 414.

The ruling of the trial court on the demurrer was in accordance with the established rule. Plaintiff having refused to further plead, the action was properly dismissed. The conclusion reached on this point renders it unnecessary to consider other questions presented in the briefs.

JUDGMENT AFFIRMED.

ERSKINE LILLARD V. STATE OF NEBRASKA.

FILED OCTOBER 21, 1932. No. 28274.

1. **Appeal:** FUNCTION OF JURY. The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested.
2. **Homicide:** INTENT. Intent is an essential element in the crime of shooting with intent to kill, and proof of such intent is indispensable to sustain a conviction.
3. ———: ———. Where such specific intent is an essential element of the crime, such intent is inferable from the facts and circumstances, inclusive of the act of shooting.
4. **Evidence** examined, and *held* to sustain the verdict.
5. **Criminal Law:** INDICTMENT: ELECTION. It is within the sound discretion of the trial court to overrule a request to compel a county attorney to elect upon which of two counts in an indictment (or information) he will seek a conviction, where one count is for feloniously shooting at the prosecuting witness with intent to kill and the other charges a like shooting with intent to wound.
6. Sentence reduced under authority of section 29-2308, Comp. St. 1929.

ERROR to the district court for Douglas county: FRED A. WRIGHT, JUDGE. *Affirmed; sentence reduced.*

C. E. Walsh, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

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

EBERLY, J.

Erskine Lillard was convicted in the district court for Douglas county on the charge of "shooting with intent to kill," and sentenced to imprisonment in the state penitentiary for a term of ten years. From this sentence he prosecutes error.

A careful examination of the transcript and bill of exceptions has convinced the writer that the following as-

signments of error only are such as require consideration of this court: (1) Insufficiency of the evidence, (2) refusal of the trial court to require an election by the state as between a charge of shooting with intent to kill and a charge of shooting with intent to wound, (3) misconduct of the county attorney's representative, and (4) the sentence is excessive.

It must be conceded that the evidence was conflicting. Nevertheless, the testimony in the record, if believed, establishes that on the day set forth in the information the defendant and the complaining witness met some 20 feet north of the intersection of Eighteenth and Nicholas streets in Omaha. The defendant then had in his possession a .38 caliber loaded revolver. A fight occurred at the point above referred to. After the first fight the defendant, with his weapon in his possession, "followed" or was "preceded by" the complaining witness, who passed in a southerly direction across Eighteenth street and then west on Nicholas street. It seems fairly established that the altercation was not ended at the first encounter but continued in the meanwhile some distance west of the intersection of Nicholas street and Eighteenth street, the exact number of feet being in dispute, where the last of the series of quarrels was renewed. During the progress of this altercation the defendant shot the complaining witness in the abdomen "a little to the right of the midline." The defendant then returned east to Eighteenth street, which he crossed, got in his car, and left the vicinity. The complaining witness was unarmed during the entire controversy. The evidence suggests no explanation of the defendant's following or accompanying the complaining witness across Eighteenth street and along Nicholas street unless we infer a desire on defendant's part to continue the "trouble." It may also be said that the circumstances surrounding the shooting, the nature of the wound inflicted, the language employed by the defendant during the altercation, at as well as previous thereto, as detailed by certain witnesses at the trial,

amply sustain the jury's verdict. True, the defendant claims to have shot the complaining witness in self-defense, and was to a certain extent supported by certain corroborating evidence. It must be conceded, however, that defendant's evidence relating to this subject was in conflict with the evidence given on the part of the state. Taking the record as an entirety, the case here presented is not dissimilar to many which appear at the bar of this court, and calls for the application of the well-established principle that "The jury are the judges of the credibility of the witnesses who testify before them and of the weight of their testimony, when properly admitted, and, unless the decision of the jury thereon is clearly wrong, their verdict will not be molested." *Norton v. State,* 119 Neb. 588.

We concede counsel's contention that "Intent is an essential element in the crime of shooting with intent to kill and proof of such intent is indispensable to sustain a conviction." *Swartz v. State,* 121 Neb. 696. And we have carefully examined the record upon the subject of proof of the specific intent of the crime charged of which the defendant was convicted. The evidence is ample in this connection, the controlling principle being: "Where such specific intent is an essential element of the crime, such intent may be inferred from the facts and circumstances, inclusive of the assault." *Garofola v. State,* 121 Neb. 850. See, also, *Swartz v. State,* 121 Neb. 696. In concluding this branch of the case, it may be said that the record appears to contain ample competent evidence from which the jury could reasonably find the defendant guilty of the crime charged in the information. Therefore, this court, as a reviewing court, would not be justified in setting aside such verdict. *Graham v. State,* 90 Neb. 658.

As to the defendant's complaint of the failure of the district court to compel an election between the counts of the information on which he was tried, it may be said: "It is within the sound discretion of the trial court to

overrule a request to compel a county attorney to elect upon which of two counts in an indictment (or information) he will ask for a conviction, where one count is for feloniously shooting at the prosecuting witness with intent to kill and the other count charges a like shooting with intent to wound." *Krause v. State,* 88 Neb. 473. See *Brown v. State,* 111 Neb. 486.

We have carefully read the record and are unable to find that it establishes as a fact that there has been any prejudicial infringement of defendant's legal rights, either by the rulings of the trial court on the admission and rejection of evidence, or by any misconduct on the part of the prosecuting attorney.

We feel, however, that the evidence contained in the bill of exceptions discloses that there are extenuating circumstances which, while in no manner excusing the crime of which the defendant has been convicted, are such as should be given consideration in the fixing of penalties which are to be assessed against him. Therefore, considering all the circumstances in the case, we are of the opinion that the sentence of ten years is excessive. It is our judgment that the ends of the law and the good of society will be served by reducing the sentence to five years, which is hereby done under the authority of section 29-2308, Comp. St. 1929. As thus modified, the judgment of the district court is affirmed.

AFFIRMED; SENTENCE REDUCED.

NICK PAPER, APPELLANT, V. J. L. GALBRETH, APPELLEE.

FILED OCTOBER 21, 1932. No. 28263.

Appeal: BOND FOR COSTS. Where the bond is not filed within three months, as provided in section 20-1914, Comp. St. 1929, no appeal will be allowed in this court.

APPEAL from the district court for Nuckolls county: ROBERT M. PROUDFIT, JUDGE. *Dismissed.*

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

Bernard McNeny, J. S. Gilham and *L. A. Sprague, contra.*

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

PAINE, J.

An action was instituted by Nick Paper in the district court for Nuckolls county to recover on certain promissory notes given in payment of a biophone reproducer, sold to J. L. Galbreth, who conducts a picture show business at Superior, Nebraska.

The suit was for the balance due and unpaid on the purchase price of $2,500. Deceit and misrepresentations were set out in the answer, which the jury must have believed were fully proved by the evidence, as the jury denied the plaintiff relief and returned a verdict for $1,420.59 against him. An appeal therefrom was taken to this court by the plaintiff.

The case has been before this court a number of times. In the first trial in the district court, the trial judge instructed the jury to return a verdict against the defendant. Upon appeal to this court, an opinion by Chief Justice Goss was released June 29, 1931, which set out all of the material facts involved in the case and reversed the judgment of the district court and remanded the cause for a new trial, which opinion is found in 121 Neb. 454. A new trial was had in the district court, beginning October 29, 1931, at the conclusion of which the jury returned a verdict for the defendant in the sum of $1,420.59, and upon January 19, 1932, transcript thereof was filed in this court. Upon March 9, 1932, argument was made to this court, asking this court to dismiss the appeal on the ground that no cost bond had been filed within 90 days, as provided by section 20-1914, Comp. St. 1929, and this motion was by this court sustained. There-

after, upon April 16, 1932, the above order, sustaining said motion, was vacated, and appellant was allowed to file a bond, and briefs were filed and said case was argued at length to this court upon October 5, 1932, at which time there was also argued a new motion of the appellee, properly served, asking for a rehearing upon the original motion, filed March 5, 1932, asking for the dismissal of this cause on the ground that no bond for costs had been filed by the appellant within three months after judgment was rendered in the cause in the district court.

Much stress was laid in the reargument to the question whether a cost bond, provided in section 20-1914, Comp. St. 1929, is jurisdictional. This question was argued at the same time as the main case, and is here for disposition.

It is provided in section 24, art. I of the Bill of Rights: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." And this provision must be considered by the court in passing upon all questions relating to appeals.

Section 20-1914, Comp. St. 1929, provides generally that no appeal shall be allowed unless the appellant shall within three months file in the district court a bond or undertaking, as therein provided. This court has recently held, where the bond was not filed as required by this statute: "Where such bond is not filed as provided, the appeal may be, meaning must be, dismissed." *Greb v. Hansen, ante,* p. 426, in which case a complete discussion of this question is set out, and the same need not be here repeated.

Motion for dismissal is hereby sustained for failure to give security within the time required.

DISMISSED.

DOROTHY WINGATE, APPELLEE, V. EVANS MODEL LAUNDRY ET AL., APPELLANTS.

FILED OCTOBER 21, 1932. No. 28553.

1. Master and Servant: INJURY TO SERVANT: COMPENSATION. Where an employee is subjected to a painful and unnecessary operation, by reason of which the period of disability is prolonged and tenderness and weakness of the parts increased, the employee should be allowed compensation therefor.
2. ———: ———: ———. In case of a major surgical operation, section 48-120, Comp. St. 1929, provides that the employee may designate the surgeon, and when the family physician so chosen is allowed to assist the one selected by the employer or insurance carrier, and is then allowed by the operating surgeon to care for post-operative difficulties, and continues to treat such employee, such charges, if proved reasonable, should be paid by the employer.
3. ———: WORKMEN'S COMPENSATION ACT: TOTAL DISABILITY. A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.
4. ———: ———: ADMINISTRATION. It is the duty of the district court in compensation cases to make a final determination of the character of the disability and of the full amount to be paid, the times of payment, and to make such other provisions as are necessary to make a full and final disposition of the case.

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

Story & Thomas, for appellants.

Anson H. Bigelow, contra.

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

PAINE, J.

This is a claim for compensation by Dorothy Wingate, a laundry employee, for an accident in a laundry. It is admitted that she suffered injury to her back, the exact nature of which is in dispute. She was operated on, and

was paid compensation for nine weeks. Upon a hearing before the compensation commissioner, her cause of action was dismissed. Upon an appeal to the district court, a decree awarded her, first, $185 for the services of her physician, second, compensation at the rate of $13.33 a week from October 26, 1931, for temporary total disability, to be paid until further order of the court, and, third, the defendants were directed to furnish her proper medical treatment by physicians selected or approved by her for the purpose of removing all or part of her disability, to each of which the appellants object.

Dorothy Wingate, an unmarried woman, was employed, at $20 a week, as floor lady, or assistant to the superintendent, by the Evans Model Laundry, of Omaha, and met with an accident on Friday, August 14, 1931. She had about 45 girls under her supervision, but was required, in addition to making out payrolls, to do a commercial checker's work on hotel and commercial linen. On the above day she had to sack, weigh and check five large bags of wiping rags for the Ford Motor Company. She had packed and checked five large sacks, and in attempting to take the last one, weighing 102 pounds, to the scales, across a slippery floor, she twisted and strained herself in lifting the bag to get it on the scales. She felt a sudden pain in her abdomen and back, became faint, sat down with her head on the sack for several minutes. She told her superintendent right then that she had hurt herself and ought to have help to lift such bags, but the superintendent started an argument about it, and said: "If you don't want to do it you can go home; that is your job." Saturday she worked until about 2 o'clock, lying down during the noon hour. She was in bed all day Sunday, but Monday morning was not able to work.

Dr. Schleier, the company's surgeon, not being available at the time, the manager sent her to Dr. Max Flothow, a specialist in diseases of women, who told her she had torn the muscles and support of her abdominal organs loose, and directed her to go home and go to bed

and stay off her feet, and taped up her abdomen. She told him the laundry company had no one to take her place and she would have to work until she could break somebody else in to take her job. She stayed there the remainder of that week and the next, breaking in a second girl, who did the heavy work.

Dr. Flothow, who had been giving her treatments, ordered her to St. Catherine's Hospital. She complained only of a severe pain in her back, but he diagnosed her case as a "prolapsed uterus, second degree, traumatic in origin." Dr. Schleier, a specialist in surgery, could find no evidence of prolapse, and advised against the operation, which advice Miss Wingate did not learn of until long after the operation. Her pain has never been relieved. The defendants paid Dr. Flothow for the major operation which he insisted upon performing upon August 31, paid the hospital, and paid Miss Wingate nine weeks' compensation, but refused to pay for the services of the doctor of her choice, who was Dr. Egan, who had assisted in the operation and subsequently treated her, at Dr. Flothow's request, for anæmia secondary to operation, and tried to build up her strength, and fitted her with a belt, which did not relieve her, but which the insurance carrier paid for.

She endeavored to get work at various places, but could not get or hold a job, as the severe pain in her back was continuous, and she could not even do housework to help pay for her board and room. She would be up one day and go back to bed the next day.

The company doctors failing to benefit her or relieve her injured back in any degree, upon December 1, 1931, she went to see Dr. Sucha, an orthopedic surgeon, who told her she had torn muscles in the back and that she could never lift anything again, and that at least part of her injury was permanent.

On February 14, 1932, Miss Wingate, becoming greatly worried and getting no relief, came to Lincoln and consulted the firm of Drs. Orr & Thomson, orthopedic ex-

perts. Many X-ray photographs were taken by Dr. Rowe, the Roentgenologist of Bryan Memorial Hospital.

Dr. J. E. M. Thomson, after a complete examination, aided by many X-rays, testified that the operative wound in her abdomen had closed with a keloid formation, raised, thickened, hard scar, which is tender to touch or move, the tenderness extending out on both sides, more on the right side, and somewhat spastic. Her whole back is tender; the X-rays showed she had a fracture of the transverse process of the fifth lumbar vertebra on the left side; calcification of the line of fracture had not taken place. Testified that the fact of the existence of these conditions six months after her injury strengthened the idea of the permanence of her disability.

Dr. Edward W. Rowe took X-ray photographs in February, 1932, and others on May 7, 1932, and testified to the same facts as Dr. Thomson. He found she had great pain when she bent forward or backward or to the right or left, and there was marked tenderness over this fractured transverse process of the fifth lumbar vertebra.

Among the errors relied upon for reversal are the following: First, that the district court erred in finding that her disabilities are the result of an injury which occurred in lifting heavy sacks upon August 14, 1931; second, that the disability from such injury has continued up to the present time, and is still continuing; third, the court erred in directing that the services of the physician selected by the employee should be paid by the company; and fourth, that the district court erred in making the finding that the employee was entitled to receive further medical treatment by physicians to be selected or approved by her for the purpose of removing all or part of the disability now existent arising from her back injuries.

In compensation cases, it is a general rule, in all states except Massachusetts, Rhode Island and Washington, that the employer selects and provides medical and hospital treatment, it being to his interest to furnish the very best medical and surgical treatment in order to mini-

mize the result of the injury and better control malingering. It has been held in grave emergencies, however, that, where a physician must be secured at once, it is not incumbent upon the employee to waste time in first notifying the employer, who will be responsible for such emergency medical treatment rendered by the physician selected by the injured employee. 2 Schneider, Workmen's Compensation Law, 1225.

Few cases can be found covering the point in issue, but it has been held, where an employee was dissatisfied with the advice given by the surgeon first selected by the insured and then directed to go to another, who was out of town, and the employee then went to his family physician for treatment, that the insurer was liable for such treatment on the ground of having neglected to provide the surgical treatment reasonably required, the circumstances justifying the employee in securing the services of a practitioner of his own selection.

If the employee can prove that the service supplied by the employer was inadequate or inefficient to an extent that justified the employee in abandoning it, the employer may be compelled to pay for such service. *Massachusetts Bonding & Ins. Co. v. Pillsbury,* 170 Cal. 767; 28 R. C. L. 822.

It was held that, where the services furnished by the employer were inadequate or inefficient, the employee is justified in changing to his own physician, and he will be allowed reasonable costs of such services. *Kelley v. Pacific Electric R. Co.,* 1 Cal. I. A. C. Dec. 150.

When a physician furnished by the employer or insurance carrier makes a wrong diagnosis, the extended disability resulting therefrom is compensable. *Johnson v. Pacific Surety Co.,* 1 Cal. I. A. C. Dec. 560.

When a workman is hurt and removed to a hospital, or is put under the care of a surgeon, he is still, within every intendment of the law, in the course of his employment and a charge upon industry, and so continues as

long as his disability continues. *Ross v. Erickson Construction Co.*, 89 Wash. 634.

It has been held that, when one might have found some work which he could do sitting down, it will not render his disability partial. *Duprey's Case,* 219 Mass. 189; Ann. L. R. A. 1916A, 380.

In this case, the employee, being still totally disabled, and having received no benefit from the treatment given her by any of the doctors furnished by the employer, and becoming desperate of ever being benefited by them, she having suffered a major operation at their hands, was warranted in selecting other experts to take additional X-rays and make a new diagnosis, through which it was ascertained for the first time, six months after the date of her injury, that the exact injury she suffered when lifting the heavy bags in the laundry was a fracture of a portion of a vertebra and attendant injury to muscles.

As to whether the injuries are permanent is a closely contested question. Appellants urge that the question of total disability is not disposed of by the fact that it is impossible for her to perform the duties that she was performing when she was injured, but insist there may be some other occupation in which she might earn something. Several laundries have refused to hire her because of the disabilities under which she is suffering.

A workman, who, solely because of his injury, is unable to perform or to obtain any substantial amount of labor, either in his particular line of work, or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the workmen's compensation law.

There can be no award for medical attendance where the injured employee did not first seek aid from the employer but secured a physician of his own choosing. *Swift & Co. v. Industrial Commission,* 288 Ill. 132.

It has been held by this court in *Radil v. Morris & Co.*, 103 Neb. 84, 7 A. L. R. 539, that an employer could not be held liable for medical services secured by an employee

who had refused such services and medicines furnished by the employer, but the facts are entirely different from the case at bar.

It has been held that, where doctors disagree as to the probable success of an operation, the trend of the decisions is that a refusal by employee to submit to the operation under such circumstance is not unreasonable.

If Miss Wingate had known that Dr. Schleier had disapproved of an operation for a prolapsed uterus in her case, she would never have consented to have it done. When an employee is subjected to a painful and unnecessary operation, by reason of which her disability is increased and physical tenderness, pain and weakness still continue, she should be allowed compensation. In this case she requested her own physician, Dr. Egan, to perform the operation, in case it had to be done, but he hesitated because she was already in the hands of the doctor of the insurance carrier. However, he was asked to be present and act as assistant, and treated her for the anæmia and other post-operative troubles. Doubtless the burden is upon the employee to establish that such charges made by her own physician are reasonable, but, when so established, the full amount due for such services rendered under the facts in this case should be ordered paid.

We have examined this record of 338 pages, and the four packages of large X-ray photographs, and are convinced that the appellants are correct in contending that they are entitled to a final determination of this case in the district court. That court should enter an order making a final determination of the character of the disability and of the full amount to be paid, the times of payment, and all other provisions necessary to make a complete disposition of the case. *Schlesselman v. Travelers Ins. Co.*, 111 Neb. 65.

This court has profound respect for the opinions of the learned and experienced trial judge, as we have stated before, and believe that his intention was to obtain results for the best interests of the parties; however, we

have very recently held in *Steinheimer Co. v. Podkovich*, 122 Neb. 710, that failure of the district court to make a final disposition of compensation cases constitutes error, for which the judgment must be reversed and the cause remanded.

REVERSED.

MARYLAND CASUALTY COMPANY, APPELLANT, V. GEORGE GEARY, APPELLEE.

FILED OCTOBER 25, 1932. No. 28522.

1. **Appeal:** TRIAL DE NOVO. Where cases in equity are triable *de novo* in this court and the evidence in the trial court was conflicting, this court will consider the fact that the trial judge saw the witnesses and observed their demeanor while testifying and gave greater credence to the testimony of some of the witnesses than to the testimony of some of the others.
2. **Master and Servant:** WORKMEN'S COMPENSATION: AWARD. Cost of meals and lodging, furnished by an employer to his employee while traveling from place to place in the performance of his duties, under an agreement made at the time of hiring to pay for such items, is a part of the employee's wages, within the meaning of the workmen's compensation law.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed as modified.*

Story & Thomas, for appellant.

George M. Harrington and *Gerald F. Harrington, contra.*

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

GOOD, J.

This action arises under the workmen's compensation law. Plaintiff was the insurance carrier for the employer; John Robinson, doing business as the Norfolk Hide & Metal Company, was the employer; defendant Geary was the employee.

From a decree finding that defendant had sustained a compensable injury, causing permanent total disability, and awarding him compensation at the rate of $15 a week for 300 weeks and thereafter $12 a week for the remainder of his life, less amount paid, plaintiff has appealed.

Plaintiff complains that the evidence does not sustain the finding that defendant has suffered a permanent total disability.

The evidence discloses that defendant, while in the course of his employment, was operating a motor truck which overturned, and he was injured. The principal injury was to the vertebræ of his neck. The preponderance of the evidence shows that the second cervical vertebra was fractured laterally; that the front segment of this vertebra was thrust forward to the extent of three-eighths of an inch, or possibly more, and that the back segment of the vertebra was slightly forced to the rear. Defendant testified that he is totally unable to perform any labor; that he cannot move his head from side to side without excruciating pain; that he suffers pain in his head and other parts of the body and has suffered ever since the injury, a period of more than one year. There is a conflict in the testimony of the medical witnesses. All of them agree that defendant has suffered a permanent injury. They differ as to the degree of the injury and as to whether the resulting disability is total or only partial. Some of plaintiff's witnesses estimate defendant's disability at 25 to 30 per cent. One of these witnesses testified that it is at least 50 per cent., while medical testimony on behalf of defendant is that he has suffered total disability which will be permanent.

Under the statute, workmen's compensation cases are heard in the district court as in equity, and on appeal to this court are to be tried *de novo*. In this class of cases it has been frequently held that, in reaching findings of fact, we will take into consideration that the trial court saw and observed the demeanor of the witnesses while

testifying and was better able to judge of their fairness and credibility than is this court from the record. *Shafer v. Beatrice State Bank,* 99 Neb. 317; *Enterprise Planing Mill Co. v. Methodist Episcopal Church,* 100 Neb. 29; *State v. Leflang,* 108 Neb. 138; *Southern Surety Co. v. Parmely,* 121 Neb. 146. This rule has peculiar force and applicability in the instant case. The trial court saw and observed the physical condition of defendant, the character and extent of his injuries, as he appeared in court. During the course of the trial, several X-ray photographs of defendant's cervical vertebræ were used and exhibited to the trial court, and witnesses pointed out thereon the various matters that were supposed to be disclosed thereby. Colloquies were had between the witnesses and the trial judge with reference to these photographs and the condition therein disclosed. None of these, save one, is in the record presented to this court. These photographs undoubtedly were of great help to the trial court in determining the weight to be given to the testimony of the medical witnesses. The opportunity to see and observe the defendant, the extent and character of his injuries and what these X-ray photographs disclosed is denied to this court. It clearly appears that the trial court was in a vastly better position, than is this court, to determine the weight to be given to the testimony of the medical witnesses, and to ascertain the true condition of defendant's injuries and resulting disability.

From an examination of the record presented in this court, and having in mind the findings of the trial court and its superior opportunity to truly ascertain the facts, we also find that defendant's disability is total and permanent.

Plaintiff contends that the amount of the award is not sustained either by the evidence or by the applicable law. The evidence shows that defendant was hired by Robinson to operate a motor truck and to buy hides and metal, operating out of Norfolk and covering a considerable portion of northwestern Nebraska; that his weekly wage

was $10 a week, plus the cost of his meals and lodging while he was employed. From the record it fairly appears that the cost of his meals and lodging equaled or exceeded $12.50 a week. If the cost of these items is to be considered a part of his wages, then his weekly wage amounted to at least $22.50 a week. For permanent total disability the statute provides for weekly payments of compensation to the injured employee for 300 weeks at the rate of 66 2/3 *per centum* of his weekly wage, but not to exceed $15 a week, and thereafter, for the remainder of his life, 45 *per centum* of his weekly wage, but not to exceed $12 a week.

Plaintiff contends that meals and lodging cannot be considered a part of the compensation, because the money value of these items was not fixed at the time of hiring, and relies on section 48-126, Comp. St. 1929, which so far as applicable reads: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and shall not include gratuities received from the employer or others, nor shall it include board, lodging or similar advantages received from the employer, unless the money value of such advantages shall have been fixed by the parties at the time of hiring." The part of the section quoted has not been heretofore construed by this court.

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

It has long been the policy of this state to give a liberal construction of the workmen's compensation law, so that its beneficent purposes might not be thwarted by technical refinement of interpretation. *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Baade v. Omaha Flour Mills Co.*, 118 Neb. 445; *Speas v. Boone County*, 119 Neb. 58. It is plain that, under the quoted part of section 48-126, Comp. St. 1929, had defendant and his employer agreed at the time of hiring that his wages should be $10 a week and an allowance of $12.50 a week for meals and lodging, the latter item would have been a part of his wages, within the meaning of the compensation law. If, at the time of hiring, the employer had said to his employee: "I will pay you $10 a week and pay your board and lodging at Hotel A. You can ascertain from the hotel what it will charge for board and lodging." Had the employee obtained that information from the hotel and communicated it to his employer, we think no question would be raised that the cost of board and lodging would be a part of his wages, within the meaning of the compensation law. In the instant case, defendant was required to obtain his meals at various cafes, restaurants and hotels, and his lodging at various hotels and boarding houses. Neither the employer nor the employee could know what the precise amount would be until such items were furnished to the latter. Whatever the cost of these items was, they were within the contemplation and agreement of the parties.

It is a maxim in equity that that is certain which is capable of being rendered certain. In this case, the cost of the meals and lodging was capable of being, and actually was, rendered certain. The money value of the meals and lodging was fixed at the time of hiring. Defendant furnished weekly a sheet on which these items were listed, and he was reimbursed therefor. We think that a liberal interpretation of the statute requires us to hold that the cost of meals and lodging was a part of the compensation which defendant received. It follows

that his wages, therefore, amounted to at least $22.50 a week.

Save in one respect, the judgment of the district court is right. After the first 300 weeks defendant will be entitled to compensation at the rate of 45 *per centum* of his weekly wage, or $10.13 a week, instead of $12, as allowed by the trial court. The judgment will be and hereby is modified to allow defendant compensation after the first 300 weeks at the rate of $10.13 a week for the remainder of his life.

As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

RAY KISSINGER ET AL. V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1932. No. 28291.

Trespass. It is not criminal trespass for one to intentionally go upon land which he, in good faith, believes he owns and has a right to occupy, although he may be mistaken in his belief.

ERROR to the district court for Clay county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed.*

John S. Logan and *Edmund Nuss,* for plaintiffs in error.

C. A. Sorensen, Attorney General, and *Homer L. Kyle, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and PAINE, JJ.

PAINE, J.

From a conviction for trespass upon certain land in Clay county, following a jury trial, the defendants file a petition in error to the district court for Clay county, Nebraska.

The facts in the case, as set out in the bill of exceptions, disclose that for many years Frank B. Onken had been using a narrow strip of land lying to the west of the northeast quarter of section 9, township 6, range 8,

in Clay county, Nebraska, which strip of land was 18 feet wide at the north end and 3 feet wide at the south end, lying across the east side of the northwest quarter of said section. Considerable dispute had arisen between the adjoining owners as to this narrow tract of land, which was inclosed in the fence with the northeast quarter owned by Mr. Onken, who had been notified not to plant the wheat then growing thereon.

The defendants Ray and Roy Kissinger were the sons of Henry Kissinger, the owner of the northwest quarter of the same section, and Kenneth Kissinger, the third defendant, is the grandson of Henry Kissinger. The evidence discloses that several surveyors had surveyed the land in question for Mr. Kissinger, and the original government survey did not show that the northeast quarter contained the strip of land in question; in fact, L. R. Rudd, county surveyor, employed by Henry Kissinger, found the original quarter section stones buried by former county surveyors. The notes of County Surveyor Varner disclosed that, in surveying this section some years before, he had found the original government stake at the north side and replaced it with a stone on June 17, 1881, and Surveyor Rudd also found the stone at the south end set by County Surveyor Sheets some years before. Mr. Henry Kissinger employed the said L. R. Rudd, the county surveyor and highway engineer of Clay county, to run the correct line through between his northwest quarter and the northeast quarter owned by Mr. Onken, and, according to the evidence of the county surveyor, who was present and using his transit, the three defendants were engaged in driving steel posts along the correct east line of the northwest quarter. Henry Kissinger was driving a truck west of the disputed strip of ground, conveying the posts. He instructed the young men not to step over on the northeast quarter at all, but to drive these posts from the west side, and, while engaged in setting this line of posts, Frank B. Onken came to the place on September 30, 1930, and ordered the three defendants and

the county engineer to get off of his land, and then had the county attorney file a complaint before the county judge, charging that the three defendants did, on September 30, 1930, unlawfully enter and go upon the inclosed and cultivated land upon the northeast quarter of section 9, township 6, range 8, in Clay county, without the consent of Frank B. Onken, who owns and occupies said land. The county surveyor, under section 26-1606, Comp. St. 1929, when in the performance of his official duties is not liable to prosecution.

The complaining witness himself would not testify that any of the three young men had stepped over on the northeast quarter of said section, as charged in the complaint, while they were driving the posts. Henry Kissinger watched them from the truck and cautioned them not to step over the line, and the county engineer, who was watching every move as he ran his transit, said he noticed particularly that they did all of their work from the west side, so the evidence discloses conclusively that no one of the three young men stepped over on the northeast quarter of this section at the time in question.

The state insists in its brief that, if the description in the complaint advises the defendants with reasonable certainty of the place where the trespass occurred, it is all that is required, and if the trespass missed the spot charged by the length of an arm, it ought to be sufficient to show them the nature and cause of the accusation. However, no cases are cited in support thereof.

The defendants insist in their brief that the defendants cannot be convicted of a crime which is not within the terms of the offense charged in the complaint. They also contend that a charge of violating the law with reference to a certain piece of property is not sustained by proof of a violation as to other property. And further argue that this is true even though the statute itself did not require a specific description of the property, but if a specific description is given therein the evidence must sustain the charge.

Defendants cite the court to the case of *Stowe v. State,* 117 Neb. 440, which holds that the court will not ignore error as to any matter of procedure in a criminal action whereby the constitutional rights of the accused have been violated by failure to give him proper notice of the nature and cause of the accusation against him. Const. art. I, sec. 11.

Although Henry Kissinger had a deed for the northwest quarter of this section, and Mr. Onken had been notified not to plant the wheat on this disputed strip, he did not send his men upon this disputed strip by stealth, but openly, in the daytime, with steel posts, and employed the county surveyor, who was present and carefully running a line between the two stones marking the division line, when Mr. Onken appeared upon the scene and notified them to get off at once. Mr. Onken then went to the county attorney and succeeded in having the county attorney bring this criminal action for trespass under section 76-808, Comp. St. 1929, against the three defendants, when it is clear that the courts were open for a civil action to determine the title and ownership of the disputed strip of land lying in the northwest quarter of this section.

In the case of *Steele v. State,* 191 Ind. 350, we read: "The prosecution really turns out to be a suit for possession. The statute of the criminal law upon which this prosecution is based was not intended to be used as an aid to gain possession of real estate or in ousting an occupant thereof who gained such occupancy lawfully, and who thereafter held over his rightful term without right. It is the well-settled law in this state, and of many other states, that it is an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property."

"Unless a trespass is accompanied by or tends to produce a breach of the peace, it is not a crime at common law." *Busick v. Illinois Central R. Co.,* 201 Ill. App. 63.

No conviction can be had under Miss. Code 1906, sec.

1389, punishing wilful or malicious trespass, in the absence of proof that the trespass committed was wilful or malicious. *Barnett v. State,* 124 Miss. 884.

And, again, *Myers v. State,* 190 Ind. 269: "The law of criminal trespass, and of this case, is that criminal intent is an essential element for consideration, and if the act prohibited is committed in good faith, under a claim of right, no conviction will lie; but the belief in the right to do the act complained of must have a fair and reasonable foundation, which is a question for the jury, and it must appear from the evidence that defendant not only entered under a *bona fide* belief in his right to enter, but that he had reasonable grounds for such belief."

It is the well-settled law of many states that it is an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property. *Steele v. State,* 191 Ind. 350, 18 A. L. R. 500.

The machinery of the criminal law cannot be set in motion to redress merely private grievances, or to settle questions of property rights between defendant and another. *Barlow v. State,* 120 Ind. 56; *Hughes v. State,* 103 Ind. 344, 5 Am. Cr. Rep. 373; *Lyon v. Fairbank,* 79 Wis. 455, 24 Am. St. Rep. 732.

We find that "The weight of authority is that criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent, and if the act prohibited is committed in good faith, under claim of right, color of title, accidentally, or in ignorance, no conviction will lie, the view taken being that when the statute affixes to a trespass the consequences of a criminal offense, it will not be presumed that the legislature intended to punish criminally acts committed in ignorance, by accident, or under claim of right, and in the *bona fide* belief that the land is the property of the trespasser, unless the terms of the statute forbid any other construction." 38 Cyc. 1179.

It is strenuously argued in the brief of defendants that the charge of trespassing upon the northeast quarter of

this section would not be sustained by proof of trespassing upon the northwest quarter. While the statute does not seem to require a definite description of the property, yet when the complaint charges a crime with reference to a certain definite tract of property therein set out, does it not violate section 11, art. I of our Constitution, which requires the defendants to be given the exact nature and cause of their offense to convict them for a trespass on other land?

It is not possible to reconcile all of the authorities upon this point. But we think it would be found that, where the place is stated, not as a venue but as a matter of local description, a variance between the description of it in the indictment and the evidence on the trial will be fatal. *State v. Kelley*, 66 N. H. 577.

Under these authorities, the defendants being tried on such a complaint would have the right to introduce evidence attempting to show that the place described in the complaint was not where the offense, if any was committed, occurred, and this question under this complaint was a question for the jury.

There is evidence that the defendants thought they had a legal right to go upon this land and did not intend to commit any criminal act, and this question, as well as the others discussed in this opinion, can be submitted to a jury in another trial under proper instructions.

REVERSED.

JAMES F. MCLAUGHLIN V. STATE OF NEBRASKA.

FILED OCTOBER 25, 1932. No. 28348.

1. **Municipal Corporations: ORDINANCES: VIOLATION: ACTION.** A prosecution for a violation of a city ordinance, which does not embrace an offense made criminal by the common law or by the laws of this state, is, while in form a criminal prosecution, in fact a civil proceeding to recover a penalty.
2. ———: ———: ———: **JURY TRIAL.** In such a proceeding, the defendant is not entitled to a jury trial.

3. **Evidence: TELEPHONE CONVERSATION.** In a telephone conversation with a nonidentified voice, it is usually the weight, and not the admissibility, of the evidence that is affected.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Davey & Hayes, for plaintiff in error.

C. A. Sorensen, Attorney General, and *Clifford L. Rein, contra.*

Heard before ROSE, DEAN, GOOD, EBERLY and PAINE, JJ.

PAINE, J.

This is a writ of error to the district court for Douglas county. The plaintiff in error, James F. McLaughlin, hereafter referred to as defendant, was convicted of violating an Omaha ordinance against keeping a disorderly house, and was fined $50.

In the Omaha municipal court, defendant was charged with the offense of keeping a disorderly house, in that he permitted race gambling to be conducted in his place of business.

Section 48, ch. LIV, Revised Ordinances of the city of Omaha 1905, provides, among other things: "Any person * * * who shall permit in his * * * house * * * or other premises under his * * * control, any gambling with cards, dice or other implements or devices used in gambling * * * shall be deemed guilty of keeping a disorderly house, and on conviction thereof, shall be fined in any sum not less than five dollars or exceeding two hundred dollars."

The appellant assigns two errors for reversal, which it will be necessary to consider: (1) The court erred in denying appellant's motion for a trial by jury; (2) the court erred in admitting, over the objection of appellant, certain testimony offered by the state, alleged to have been heard over a telephone.

It is contended by the defendant that he was entitled to a trial by a jury, and we are cited that the right of trial by jury in all criminal prosecutions should be carefully guarded by the courts. It is not competent for the legislature to limit or modify this right. *Lucas v. State,* 75 Neb. 11. Upon examining this case, it is found to be a first degree murder case.

But in *Peterson v. State,* 79 Neb. 132, it was held: "A prosecution for the violation of a city ordinance, which does not embrace any offense made criminal by the laws of the state, while in form a criminal prosecution, is, in fact, a civil proceeding to recover a penalty, and clear and satisfactory proof that the offense has been committed is sufficient to sustain a conviction. Proof beyond a reasonable doubt is not required." See *Liberman v. State,* 26 Neb. 464.

This court held in a prosecution in the police court of Omaha that such offenses, although frequently prosecuted in the name of the state, are criminal in form merely, while in substance and effect they are civil proceedings, and, therefore, not within the provisions of the Constitution, which declares that the right of trial by jury shall remain inviolate. *Foley v. State,* 42 Neb. 233.

In *State v. Fulton,* 118 Neb. 400, Judge Good held that mandamus will not lie to compel a county judge to vacate an order denying a defendant a jury trial in a misdemeanor case, since there is an adequate remedy by appeal, or proceedings in error to review the same.

A defendant charged with a misdemeanor in a police court for a violation of a city ordinance is not entitled to a jury trial unless the offense charged was a criminal offense under the common law, or is a criminal offense under our statutes, in either of which cases the defendant would be entitled to a trial by jury.

It is not argued, nor are we able to find, that keeping race track gambling devices, as in this case, is other than a violation of city ordinances, and, therefore, defendant was not entitled to a trial by a jury.

To discuss the second error assigned, it is necessary to set out the facts. The defendant for many years operated a news and cigar stand in Omaha. He was arrested with his clerks by two police officers. A moment later, Walter O. Lickert, a police officer for 13 years, and attached to the morals squad, went in to assist. He testified that when he had been there a short time the telephone rang, and he answered it, and made notations on two sheets of paper, exhibits 1 and 2, at the time. He answered the telephone by saying, "McLaughlin's cigar store." And then he testified as follows: "A lady's voice on the other end of the wire said, 'This is No. 30,' I said, 'Yes.' She said, 'I want to place some bets.' She said, 'First race, Jefferson Park, My Ingra, No. 18, stud, one and one and out. Raffler Con No. 14, second race. And also Escoblin one and one out. Fellow Marsh one and one out. Beautiful Doll, one to show.' I asked her who it was and she said it was No. 30."

From printed race forms for that day, introduced in evidence, the officer then identified each race and horse in the telephone conversation.

The other officers testified that two men in a corner of the store were studying these race sheets for that day, and one witness testified to placing a horse-race bet in this store.

Under the ordinance quoted, it was not necessary to connect the betting with the defendant personally, but simply that he conducted a place for gambling.

In a telephone conversation with a nonidentified voice, it is usually the weight, and not the admissibility, of the evidence that is affected. The telephone wire served as an illicit use of the gambling devices in the store. It was clearly one of the circumstances provable at the trial. It was held in *Tacoma & Eastern Lumber Co. v. Field & Co.*, 100 Wash. 79, that conversations over a telephone with a person not identified are admissible in evidence to the same extent as a personal interview by a customer with an unknown clerk in charge of an or-

dinary shop would be in relation to the business there carried on.

In *Oskamp v. Gadsden*, 35 Neb. 7, 17 L. R. A. 440, we find a statement quoted in the text with approval: "In *Wolfe v. M. P. R. Co.*, 97 Mo. 473, it was ruled that if a voice was not identified or recognized, but the conversation is held through a telephone kept in a business house or office, it is admissible, the effect or weight of such evidence, when admitted, to be determined by the jury."

The evidence in this case sustains the conviction.

AFFIRMED.

FLOSSIE BASH, APPELLANT, V. JAMES O. BASH ET AL., APPELLEES.

FILED OCTOBER 25, 1932. No. 28249.

Guaranty: LIMITATIONS. Where the payment of a debt evidenced, or to be evidenced, by a promissory note is guaranteed by a separate written instrument which, in itself, fixes no time in which or for which the guaranty shall be in force, such guaranty will ordinarily expire upon the running of the period of limitation as to the original note contemplated by the contract of guaranty, and executed pursuant thereto; and subsequent renewals of such a note between the maker and the payee, without the authority, knowledge or consent of the maker of the contract of guaranty, will not serve to toll the statute of limitations as to the contract of guaranty; this notwithstanding the bar of the statute may not, because of different renewals, have attached to either note.

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

L. L. Hines, Victor Westermark and *Perry, Van Pelt & Marti*, for appellant.

Butler & James and *R. D. Druliner, contra.*

Heard before GOSS, C. J., DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BLACKLEDGE, District Judge.

In this case the question is whether the allegations of the petition are sufficient to state a cause of action in favor of the plaintiff. Certain of the defendants demurred to the second amended petition in the district court, the demurrer was sustained and, the plaintiff electing to stand on the petition, the case was dismissed, and this appeal presents for review the matter of the sufficiency of the petition as against the demurrer.

The following facts appear in the allegations of the petition: The Parks Equity Exchange was in financial difficulties and, desiring to raise money and establish credit for the continuance of its business, at a stockholders' meeting held April 5, 1919, a resolution was adopted which was entered in the minutes of the meeting and individually signed therein by the defendants in the following words:

"Motion made and carried this 5th day of April, 1919, that we the stockholders of the Parks Equity Exchange do hereby empower the board of directors to borrow money, to renew notes and get money to do business to the extent of sixty thousand dollars ($60,000) if necessary and we severally and individually guarantee the security of the same."

That the board of directors acting under the authority of said guaranty did borrow money, renew notes and secure credit to enable the exchange to continue doing business, and such action was necessary to enable the exchange to continue as a going concern.

That at that time James O. Bash, one of the stockholders and a signer of said resolution, was a creditor of the exchange to the amount of $6,000, represented by a promissory note as to which he refused to extend the time of payment thereof unless additional security was furnished, and thereupon, upon the signing of the resolution and furnishing to him of a copy thereof, he did renew the note and loaned an additional sum of $5,694, which was also represented by a note, both notes maturing in 18 months from their date or on November 12, 1920.

That thereafter on May 12, 1921, said two notes were renewed into a note for $12,000, due in one year from its date, and thereafter on May 12, 1924, another renewal was made for the whole sum by a note maturing in two years from its date. This last named note is set forth by copy in the petition as evidencing the existing indebtedness, certain indorsements of interest payments are shown thereon, and an indorsement by the payee, James O. Bash, transferring the note to the plaintiff, Flossie Bash.

It further appears from the petition that the Parks Equity Exchange was adjudged bankrupt in November, 1927, and that certain dividends were received from the bankrupt estate in 1928 of $872, in 1929 of $938, and in 1930 a final dividend of $255, all of which were applied on the note and that nothing further may be derived from that source.

The plaintiff prays judgment for the sum of $14,432 with interest from October 1, 1930, as the amount due on the note.

The action was commenced October 4, 1930.

It is also alleged that the intent and purpose of the defendant signers of the guaranty in giving the same was to empower the board of directors to borrow money and to guarantee the payment of all notes given by the board under the authority of the guaranty, and in addition there is an allegation in respect to the particular wording of the guaranty whereby it is claimed that inadvertently the word "individually" was used therein in lieu of the word "jointly," and that the word "security" was also used in lieu of the word "payment," and a reformation of the instrument is asked in those particulars.

The proposition raised and principally relied upon by the defendants under the demurrer is that it appears on the face of the petition that the action at the time of its commencement was barred by the statute of limitations. There is the further proposition that it is necessary there should be pleaded a notice to them of the

acceptance of the guaranty; but, in view of the conclusion reached upon the question of the statute of limitations, we do not find it necessary to discuss this latter proposition.

It is to be noted that the first notes made pursuant to and at approximately the time of the execution of the contract of guaranty matured and remained unpaid and unrenewed for a period of six months. There can be no doubt of the accrual of a cause of action upon the guaranty at that time, or that the statute of limitations commenced to run thereon; and the question to be determined would, therefore, be whether by any later act of the parties the running of the statute was suspended.

It does not appear from the petition that the defendants who signed the guaranty had any part in, or notice or knowledge of, the later transactions involving the renewals and extensions of the note, and no act of the defendants or any of them after the execution of the contract of guaranty in recognition of the obligation thereof such as would toll the running of the statute of limitations is pleaded. The question must therefore be determined upon construction of the contract itself. The exchange continued in business until it was adjudged bankrupt in November, 1927, two and a half years after the maturity of the last renewal note and seven years after the accrual of the cause of action on the guaranty by the maturity of the notes first given thereunder. This action was commenced approximately three years after the adjudication of bankruptcy.

The appellant contends that the instrument under consideration is a "continuing guaranty," and would apply this term to the time and manner of its enforcement, leaving the right of action thereon to be governed, so far as the matter of limitations is concerned, by the right of action upon the original note or any renewal thereof.

In this construction respecting a continuing guaranty, we think there is error in that such term ordinarily contemplates a series of transactions which give rise to the

liability; as, successive purchases of goods which may be made within its time, either stated or contemplated. The statement of the law is made in 12 R. C. L. 1061, sec. 11, as follows:

"Where there is no limit in time or amount the courts hesitate to classify the guaranty as a continuing one. Some courts even take the view that a contract will not be construed as a continuing guaranty unless its language reasonably so requires. On the other hand, it is held that a liberal construction is to be given in favor of one claiming rights under a guaranty and that it is the duty of the guarantor to limit his liability to a single transaction if he wishes to avoid further responsibility. Between these extreme views is a middle ground, that the proper construction of the instrument is such as best accords with the intention of the parties, as manifested by the terms of the guaranty, in connection with its subject-matter and surrounding circumstances, neither enlarging the words beyond their natural import in favor of the creditor nor restricting them in aid of the surety."

This court has adopted the rule of strict construction as to such contracts and in the case of *Hunter v. Huffman,* 108 Neb. 729, it is held:

"The rule of *strictissimi juris* applies in determining the effect of a contract of guaranty. When the meaning of the contract is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms."

It is further held in the case last cited and in the case of *Rushton v. Dierks Lumber Co.,* 2 Neb. (Unof.) 563, that any material change in the terms of the principal contract which is covered by the guaranty agreement, made without the consent of the guarantors, will release them from the obligation of the guaranty. In the *Hunter* case the change construed was a shortening of the time which the loan was to run from the period of six months to four months; and in the *Rushton* case the change construed was an extension of the time of stay of sale in a

foreclosure proceeding from the period of nine months designated by statute to the period of twelve months.

In the case of *Hall v. Rogers,* 113 Neb. 290, it is held: "The payment of interest or a part of the principal on a note by a principal debtor, without the authority or consent of the surety, will not stop the running of the statute of limitations as to the surety."

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

It is held in the case of *Cummins v. Tibbetts,* 58 Neb. 318, that "the statute of limitations begins to run against a contract of guaranty the same moment an action accrues thereon," and that the action upon the separate contract of guaranty for the payment of a promissory note considered in that case was barred in five years from the maturity of the note.

Upon a continuing guaranty a right of action arises with each freshly incurred liability. In the present case the right of action could be single only. Appellant's argument that the guaranty was one of payment, and that the successive renewals were not payments of the preexisting debt, may be sound, but it does not help appellant's situation in the case.

"The promise to guarantee a renewal of the same obligation is meant to define the liability with respect to that obligation rather than to create an added or new liability in the future. The guarantor agrees to be held liable for the particular debt whether evidenced by the original note or by a renewal. Regardless of the number of times the debt is renewed, the cause of action is essentially single and is upon the original guaranty, and it must be brought within the period of limitation prescribed for such a cause." *Baird v. Foss Investment Co.,* 58 N. Dak. 345.

In view of these adjudications and their application to the petition presented, further discussion seems unnecessary, and it clearly appears that the bar of the statute

of limitations had intervened at the commencement of the action.

The judgment of the district court was right and it is
AFFIRMED.

PERINO B. COLE, APPELLEE, V. THOMAS J. MINNICK ET AL., APPELLANTS.

FILED OCTOBER 25, 1932. No. 28362.

1. **Master and Servant: EMPLOYEE: INDEPENDENT CONTRACTOR.** "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor but that relation must be determined from all the facts in each particular case." *Showers v. Lund, ante*, p. 56.
2. ———: ———. Record examined and the plaintiff *held* to be an employee within the meaning of the workmen's compensation act.

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

Cordeal, Colfer & Russell and *Smith, Schall & Sheehan*, for appellants.

G. E. Simon and *Perry, Van Pelt & Marti, contra.*

Heard before ROSE, DEAN, EBERLY, DAY and PAINE, JJ., and BEGLEY and BLACKLEDGE, District Judges.

BLACKLEDGE, District Judge.

This is a compensation case and the question to be determined is whether the plaintiff was an employee or an independent contractor.

The Minnick Hardware Company dealt in hardware and farm machinery and had been in business about five years. It had frequent need of the services of a repairman to do repairing and welding, but did not have enough work of that kind to justify the employment of a machinist and welder at full time. Plaintiff Cole was a competent workman in that line, having tools and equip-

ment of his own. He had applied for employment, and an arrangement was orally made whereby Cole was to do all such work as the hardware company had in that line, furnishing his own tools and receiving payment at the rate of $1 an hour for the time devoted to the services. This arrangement had continued during all the time the hardware company had been in business. There was work just as it happened in the course of the business, sometimes one to three or four times a day, then maybe a week or longer, possibly sometimes a month, intervened. Cole maintained a shop of his own and did similar work for others. It was part of the arrangement that Cole did the work personally and gave the hardware company preferential service, in that its work should be attended to at once upon call. The arrangement was to continue as long as the company wanted him, or until Cole wanted to quit. The company furnished parts and materials and had the right of supervision and direction of the work, and usually exercised it in telling him how, where and what was wanted, but did not tell Cole what tools to use or how to use them. The particular instance from which the injury resulted involved the making of an opening into a tank and the insertion of a nipple, in reference to which Minnick furnished the tank and nipple and told Cole just where it should be placed and that it should be welded in and not tapped or screwed in. The welding outfit was portable and work was done with it indiscriminately at Cole's shop, or elsewhere, as seemed most advantageous. Cole was paid irregularly from time to time as he presented bills. No separate account of his work was kept, and what was paid to him was shown on the books in the same manner as that paid any other employee. There is no question raised as to the extent of plaintiff's injury or that the injury arose out of or in the course of his employment, if it was employment within the meaning of the compensation law. That is the question in the case.

Another matter was touched upon in the proof, to the

effect that the hardware company carried insurance, that the agent, Mr. Druse, who sold the policy was at once notified of the injury and the insurer had investigated it. Proof was further offered, that in the negotiations for the policy the hardware company had expressly desired a policy covering part time employees, mentioning Mr. Cole, and it paid a higher rate accordingly. This offer was excluded by the trial court, probably because the insurance company was not a party to the case nor Cole a party to that transaction or conversation, but it might well have been admitted as tending to show the construction placed by the actual defendant upon its relation to the plaintiff Cole.

It has been many times stated and decided by our court that there is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that the relation must be determined from all the facts in each particular case.

There is, of course, no one fact upon which the decision turns, but we may get some aid in reaching the right conclusion by reference to some of the things which, according to the decisions, do not make one an independent contractor or prevent him from being an employee. Thus, it seems to be well settled in the various jurisdictions that a piece workman is an employee rather than an independent contractor and so is entitled to the protection of the workmen's compensation act. Ann. 38 A. L. R. 839. Merely because an employee furnishes his own tools and equipment does not convert him from an employee into an independent contractor. *Claus v. DeVere,* 120 Neb. 812. It is not necessary that the services under the employment be continuous, and the fact that the contract of employment permitted and contemplated that the employee would engage in other tasks or occupations does not remove the particular contract of hire from the operation of the statute. *Davis v. Lincoln County,* 117 Neb. 148.

Upon the other hand, the adjudications upon some of the features which the record shows existed between the

parties in this case have been that the right to supervise and direct the work, if found to exist in the employer, indicates that the workman is an employee. *(Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850); also that perhaps the most important feature is the right of either party to terminate the relation without liability. Where such right exists the workman is usually a servant *(Industrial Commission v. Hammond,* 77 Colo. 414).

The contract in this case was for the personal services of the plaintiff Cole, and there is indicated in the case of *Potter v. Scotts Bluff County,* 112 Neb. 318, some of the features which usually attach to the character of an independent contractor as distinct from an employee.

It is said in appellants' brief that the trial court based its decision largely upon the case of *Davis v. Lincoln County,* 117 Neb. 148, and, in an endeavor to distinguish that case from this one, the defendants argue that in the *Davis* case it was assumed at the outset that the relation of employer and employee existed. We cannot agree with this view of the *Davis* case, for the reason that in the opinion by Eberly, J., is set out the contentions presented on the appeal and the one that heads the list is "that the relation then existing between the county and the plaintiff at the time of the accident did not create a compensable status in the latter." We find many of the features of the employment of the plaintiff in that case, as the same are stated in the opinion, quite similar to those of the plaintiff in the present case, and it might well be that the decision in the *Davis* case influenced the trial court toward the determination that plaintiff was an employee. However that may be, this court has in the later case of *Showers v. Lund, ante,* p. 56, in an opinion by Goss, C. J., assembled and succinctly stated many of the features which control the determination of the status of the workman, and we find the same applicable to the present case.

We believe that under the evidence disclosed by the record and referred to herein, and upon the decisions of

this court in *Davis v. Lincoln County*, 117 Neb. 148, *Claus v. DeVere*, 120 Neb. 812, and *Showers v. Lund*, *ante*, p. 56, the plaintiff Cole must be held to have been an employee, and not an independent contractor.

It may be said that this case upon its facts is a border line case. Even so, it is held that our compensation act is one of general interest, not only to the workman and his employer, but as well to the state, and it should be so construed that technical refinements and interpretations will not be permitted to defeat it. The act being remedial in its nature, this court, in accord with others, should be inclined to solve such questions in favor of the employee. *Parson v. Murphy*, 101 Neb. 542; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609; *Herron v. Coolsaet Bros.*, 158 Minn. 522.

The conclusion, therefore, is that the judgment of the trial court was right, it should be and is affirmed, and the appellee is allowed an attorney's fee in this court of $200.

AFFIRMED.

BEGLEY, District Judge, dissenting.

I am unable to concur in the majority opinion in this case. It is an action to recover for workman's compensation under the following circumstances:

The claimant Cole has been operating a machine shop at Cambridge since 1917. His shop is equipped with lathes, raddle drills, dies, hack and power saws, and small tools of various sorts. For the past ten years he has operated a portable acetylene welding outfit. He does repair work in his line as a machinist as well as an acetylene welder for any one who wants work of that character.

The defendants, Thomas J. Minnick and Harvey E. Minnick, are partners in Cambridge under the name of Minnick Hardware Company. They are retail dealers in hardware, farm machinery and other lines of merchandise. They have no facilities for repairing broken parts of machinery nor are they equipped to do acetylene welding. Their place of business is situated at a distance of more than two blocks from Cole's shop. When the Min-

nicks opened their store about five years ago, Cole, knowing that they would occasionally want repair work and welding, solicited their business, and they orally agreed to give him all the work they had in his line and were to pay him $1 an hour for the time spent in working for them, the same as he received from other customers of his shop. All of the work excepting occasionally the welding was to be done at the Cole shop. Cole had a portable acetylene welding outfit, and he agreed, when it was necessary, to take this any place where work of that sort was to be done and to give immediate and prompt service. Cole did all the work that defendants had to do and he also traded with them in their store at intervals, balancing accounts. When Minnicks sent customers over to Cole to have their repair work done, sometimes it was paid direct by the customer and sometimes it was handled by Minnicks through their accounts between the parties. The quantity of work varied greatly. Cole might do two or three jobs in one day and then again he might do nothing for them for a week or sometimes a month. He worked for other people and did the same kind of work and received pay at the same rate.

The terms of the contract were oral and very informal. Cole employed no help and did all his own work. He testified that the only conversation with Minnick was as follows: "We were talking about his going into business, and I says: 'You will have work along my line, and I would like to have your work along my line as machinist and welder.' And he says: 'Sure, I will give it to you; we have not got so awfully much work, but I will give you what we have.'"

On October 6, 1930, Minnick took a tank to Cole's place of business on a truck belonging to the defendants and left it on the truck in the street just north of the entrance to his shop. Cole had theretofore done a similar job for the defendants and Minnick told him to put the nipple in the same distance from the bottom of the tank and in the same manner as he had done in the other job.

Minnick drove into the country and was not present when Cole started to work. In the course of the work an explosion occurred injuring Cole very seriously.

The question to be determined in this case is whether the relation between Cole and the Minnicks is that of employer and employee or whether the claimant was an independent contractor.

Subdivision 4, sec. 48-115, Comp. St. 1929, in defining what is not an employee or workman under our compensation act, provides: "It shall not be construed to include any person to whom articles and materials are given to be made up, cleaned, washed, finished, repaired or adapted for sale in the worker's own home or on other premises not under the control or management of the employer, unless the employee is required to perform the work at a place designated by the employer."

It seems to me this section of the statute covers the present situation exactly. Cole was the owner and operator of a machine shop; the articles and materials were given to be made up and repaired in his own shop, not under the control or management of the Minnicks, and he was not required to perform the work at any other place; and under such circumstance he should be held to be an independent contractor, engaged in such work with the public generally, and the defendant's work was received and handled the same as the work of any other customer.

Cole contends that the Minnicks superintended and directed the work which Cole was to do, but the evidence shows that they were not skilled in this line of work, had no equipment, and left the matter entirely to Cole. Cole also claimed that he was an employee because he agreed to give them a preference, but the evidence shows his shop was open to the general public for services in this line of business but such preference as a claim was only incidental to his work and merely is rendered to increase his business. An independent artisan could not under such an agreement be considered as an employee within

the intendment of the compensation statute. He could claim an artisan's lien under section 52-201, Comp. St. 1929.

The facts involved in the case of *Cobb v. Long Bell Lumber Co.*, 16 La. App. 297, are very similar to the facts in the instant case. There the plaintiff, who was running a blacksmith shop fully equipped to shoe horses and mules, entered into a contract with the defendant company to have its mules shod at the barn of the defendant for the same price he was charging at his shop for his customers for similar services, in consideration of the offer that plaintiff would get a regular job to shoe all of its mules. It was held, after a broad discussion of all of the issues raised, that the plaintiff was an independent contractor.

The cases cited in the majority opinion are not strictly in point, as it is not shown in any of them that the work was performed at the home or on the premises of the claimants. In the case of *Davis v. Lincoln County*, 117 Neb. 148, Davis was employed by the authorities of Lincoln county, Nebraska, to care for, supervise and perform necessary services in connection with the maintenance and protection of three bridges across the Platte river, situate in said county, for such repairs and protection as might from time to time arise. The only question involved in that case was the question of the county being liable for continuous employment or part employment, or whether or not the plaintiff was an employee at the time he was injured.

I respectfully submit that under the statute the claimant Cole was an independent contractor in this case, and that the case should be reversed and dismissed.

DAY, J., joins in dissent.

MOSES M. LIPPINCOTT, APPELLANT, V. CLARE C. POPE ET AL., APPELLEES: BYERS LUMBER COMPANY, APPELLANT.

FILED OCTOBER 25, 1932. No. 28127.

1. Liens: PRIORITIES. The priority of liens on realty is not affected by the senior mortgagee, after loss has occurred, releasing to the mortgagor the proceeds of an insurance policy, covering the premises, which contained a clause making loss first payable to such mortgagee, when the senior mortgagee had no notice of the claims of junior liens.
2. Evidence examined and *held* to support the decree of the trial court.

APPEAL from the district court for Adams county: J. W. JAMES, JUDGE. *Affirmed.*

James E. Addie, for appellants.

Stiner & Boslaugh and *Edmund Nuss, contra.*

Heard before GOSS, C. J., DEAN and PAINE, JJ., and BROADY and RHOADES, District Judges.

RHOADES, District Judge.

This was an action to foreclose mechanics' liens by appellants herein and Stevens Plumbing Company against Clare C. Pope. Lucy J. Pope, the mother of Clare C. Pope, also asked for a foreclosure of her mortgage against the same property. Appellants asked that the mortgage of Lucy J. Pope be canceled of record, as fully paid, or that her lien be subordinated to their liens. The court found for each of the mechanics' lienholders for the full amount asked by them; found that the mortgage of Lucy J. Pope was a first lien, and directed that the property be sold to pay the liens. From that part of the judgment decreeing the mortgage of Lucy J. Pope to be a first lien, and not subordinating it to the liens of appellants, this appeal was taken.

The question presented is one of priorities between a senior mortgagee and subsequent lienors, where, after the commencement of repairs on premises damaged by wind,

the mortgagee released to the mortgagor the proceeds of insurance paid for such damage, no notice of their claim of lien or demand for protection having been made by the junior lienors.

On September 10, 1928, Clare C. Pope, hereinafter referred to as mortgagor, together with his wife, residents of Hastings, Adams county, Nebraska, for consideration, executed and delivered to his mother, Lucy J. Pope, a resident of Red Cloud, Webster county, Nebraska, hereinafter referred to as mortgagee, a note and mortgage on the premises in question in the principal sum of $1,500, payable $16 a month, with interest at 8 per cent. per annum. The mortgage provided that the mortgagor should keep the buildings on the premises insured against fire and tornado in the sum of $1,500, loss, if any, payable to the mortgagee. The mortgage was duly recorded in the office of the register of deeds of Adams county, Nebraska, on the 22d day of September, 1928. Twenty-two months' payments were made thereon.

On May 8, 1930, the premises were damaged by a tornado. On May 12, 1930, an adjustment was made by the insurance company with the mortgagor in the sum of $1,574.25, and on the same day Moses M. Lippincott, hereinafter referred to as plaintiff, entered into an agreement with the mortgagor to repair the premises and on May 14 commenced work thereon.

On May 22, 1930, the insurance company issued a sight draft on the First National Bank of Chicago, Illinois, payable jointly to the mortgagor and the mortgagee, which was indorsed by both and deposited on June 10, 1930, in the mortgagor's bank at Hastings, and paid on presentation. The mortgagor's testimony that the entire proceeds were received and retained by him is not disputed.

Moses M. Lippincott, plaintiff, as general contractor, and Byers Lumber Company and Stevens Plumbing Company, defendants herein, as materialmen, duly filed liens within the statutory period.

It is conceded plaintiff had knowledge of the mortgage before he commenced repairing the premises and that at no time did he or the other lienors notify the mortgagee of the improvements being made or of their claim of lien against the premises. Neither is any proof offered to indicate the mortgagee had actual knowledge of the repairs being made on the premises at the time she indorsed the insurance draft.

The marshaling of assets is a familiar practice in equity. It is admirably stated by Mr. Pomeroy in section 1414 of the fourth edition of his Equity Jurisprudence:

"The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only,—as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another,—the former must seek satisfaction out of that fund which the latter cannot touch. If, therefore, the prior creditor resorts to the doubly charged fund, the subsequent creditor will be substituted, as far as possible, to his rights."

This interference with the strict legal rights of the prior lienor is based on the principle that justice requires that he should not arbitrarily or capriciously ignore the rights of another creditor of the same debtor, having a less favored security.

But notice of the senior lienor is essential; and mere constructive notice or even actual knowledge has been held not sufficient.

In *Ocobock v. Baker,* 52 Neb. 447, the court held mere notice or knowledge was not sufficient, but that diligence was required of the junior lienor, and if he neglected to notify the senior lienor that he desired him to first exhaust the security, upon which he had no lien, he was

not entitled to equitable relief. This principle has been sustained by later decisions of this court.

Plaintiff alleged he relied on the statement of the mortgagor, made before he commenced work, that the mortgage would be paid from the insurance proceeds and released. Fraud and collusion are charged for failure so to do. Since the mortgagee was not a party to this arrangement and not shown to have knowledge thereof, no fraud or collusion can be imputed to her. In the absence of notice and claim, she owed junior lienors no duty of protection, and failure to give proper notice was negligence on their part.

In a more recent case, *First State Bank v. Niklasson,* 116 Neb. 713, in an opinion written by District Judge Redick, the court holds strictly to the view that the junior lienor must notify the senior lienor he will require him to first exhaust the security not covered by the junior lien. We quote from the opinion as follows:

"It is contended by the Newman Grove Bank that the plaintiff should be required to exhaust its chattel mortgage security before being allowed to foreclose its mortgage upon the real estate, or that its lien should be reduced to the extent of the value of such chattel security. It appears that upon execution of the quitclaim deed the plaintiff released its chattel security, and the question is whether, under the doctrine of marshaling of assets, it should be required to credit the value thereof as against the claims of the Newman Grove Bank. We have held, contrary to defendant's contention, in *Ocobock v. Baker,* 52 Neb. 447, that, in the absence of notice by the junior lienholder that he would require the senior to first exhaust the property not covered by the junior lien, a release of the latter property from the senior lien would not subrogate the junior lien to a first lien upon the property covered by both liens. See, also, 26 Cyc. 935b, where it is said: 'In any case the prior incumbrancer is entitled to notice of the existence of the junior claim, and of the intention of the junior creditor to com-

pel the former to make his election in compliance with this principle.' No such notice was here given prior to the release of the chattel mortgage."

In *Andersen Yard Co. v. Citizens State Bank,* 187 Wis. 60, the lien of a senior mortgage was subordinated to that of a junior mechanic's lien, where the mortgagee released a part of the proceeds of insurance money received after the mechanic's lien had attached, based upon notice. In the course of opinion the court said.

"The findings of the court that the defendant (mortgagee) had notice of this claim for a lien before making the payment to the mortgagor and that such payment was made without the plaintiff's (mechanic lienor) consent are well sustained by the evidence. The testimony also shows that, in communications between the agent of the plaintiff and the officers of the defendant bank, the bank was made acquainted with the fact that the plaintiff was looking to the insurance money as a fund which would help to make its claim secure."

A mechanic's lien attaches from the time of commencement of work or delivery of materials, and in the instant case the draft for payment of insurance was issued after appellants' liens had attached. Had the mortgagee been timely notified of the intention of the junior lienors to require her to first exhaust the insurance proceeds in satisfaction of her lien the junior liens would have been entitled to priority.

It is contended the mere fact that the mechanics' liens had attached prior to the release of the insurance proceeds was sufficient to charge the mortgagee with notice. It is the general rule and the law of this state that the recording of a junior lien does not constitute constructive notice thereof to a prior lienor. The attaching of the mechanics' liens cannot be construed as of greater effect or notice than if recorded as of attaching date.

Under the facts disclosed by the record, we find the pleadings and evidence to sustain the decree, and it is therefore AFFIRMED.

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3. Error or mistake as basis for impeachment of an account stated need not be mutual. *Baldrige v. Flothow* 218

Action.

A litigant may not have an unjust recovery based on a wrong to which he assented. *Yant Construction Co. v. Village of Campbell* 360

Adverse Possession.

1. Title to land cannot be acquired by adverse possession while the title is in the state. *State v. Cheyenne County* 1
2. To obtain prescriptive title, actual, open, exclusive, continuous possession under claim of ownership for statutory period is required. *Williams v. Lantz* 67

Appeal. SEE CRIMINAL LAW. TRIAL.

1. In determining the weight of evidence on appeal in equity cases, the court will consider that the trial court observed the witnesses. *State v. Cheyenne County* 1
2. On appeal in equity, where the evidence is conflicting, the supreme court will consider the fact that the trial judge saw the witnesses and observed their demeanor. *Maryland Casualty Co. v. Geary* 851
3. Where damage by hail was established by evidence in an action on hail insurance policy and the jury were correctly instructed on the measure of damage, the judgment will not be disturbed. *Bolser v. Fidelity-Phenix Fire Ins. Co.* 92
4. Verdict on conflicting evidence will not be disturbed unless clearly wrong. *Bolser v. Fidelity-Phenix Fire Ins. Co.* 92
5. Appointment of a receiver by a court of equity is a judicial order from which an appeal may be taken. *State, ex rel. Sorensen, v. State Bank of Minatare* 109
6. In trial to the court, the court's finding has the same effect as verdict of jury. *Ayres v. Atlas Ins. Co.* 285

7. On appeal in equity, the supreme court must try the issues *de novo*, but it will consider the fact that the trial court made a personal examination of the physical facts and observed the witnesses. *City of Wilber v. Bednar* 324
8. The findings of a jury, based on conflicting evidence, will not be disturbed unless clearly wrong. *Yant Construction Co. v. Village of Campbell*..... 360
9. The rule that appellant's transcript is available to cross-appellants does not extend to persons not parties to the appeal and having no litigable right or interest. *Moffitt v. Reed*..... 420
10. Persons not parties to an appeal who desire to take cross-appeals must file their transcript within the statutory period. *Moffitt v. Reed*..... 420
11. Statute requiring the giving of a cost bond on appeal is mandatory and jurisdictional. *Greb v. Hansen*..... 426
Paper v. Galbreth..... 841
12. Where a cost bond on appeal is not filed, the appeal must be dismissed. *Greb v. Hansen*..... 426
Paper v. Galbreth..... 841
13. In testing on appeal the sufficiency of evidence to sustain a verdict that defendants uttered and published a slander, reasonable and proper testimony of plaintiff may be accepted as truthful. *Pendrock v. Woolworth Co.* 477
14. A party in default of answer, who does not have default set aside, may not appeal. *Carley v. Morgan*..... 498
15. Unless it appears from the evidence on a second appeal that former conclusions were incorrect, the former decision becomes the law of the case. *In re Estate of Wecker* 504
16. The doctrine of "law of the case" does not include examination of points of law not presented and determined, actually or impliedly, on a former appeal. *In re Estate of Wecker*..... 504
17. Alleged irregularity in receiving verdict is not reviewable, unless the irregularity was called to the attention of the trial court, and its ruling had thereon. *In re Estate of Lodge*..... 531
18. A judgment will not be reversed for an erroneous ruling which is not prejudicial. *In re Estate of Lodge*..... 531
19. Error cannot be predicted on remarks by trial judge in presence of jury, unless the remarks are prejudicial. *In re Estate of Lodge*..... 531
20. A question presented on appeal, but not necessary to a decision, need not be determined. *Goergen v. Department of Public Works*..... 648

21. Where a verdict is not warranted by the facts, a presumption arises that it resulted from mistake, passion or prejudice. *Schafer v. Missouri Valley Pipe Line Co.* 669
22. A verdict not supported by evidence will be set aside. *Schafer v. Missouri Valley Pipe Line Co.* 669
23. Where the verdict was the only one permissible under the pleadings and evidence, the judgment will be affirmed. *Patrick v. Shallcross* 742
24. Transcript filed within three months from overruling of motion for new trial is sufficient to confer jurisdiction on the supreme court on appeal. *Wiegand v. Lincoln Traction Co.* 766
25. A question not presented by the record on appeal may be disregarded. *Williams v. Lantz* 790
26. The supreme court may consider a plain error not specified in appellant's brief. *Hamaker v. Patrick* 809
27. The jury are the judges of the credibility of witnesses and the weight of their testimony, and their verdict will not be disturbed unless clearly wrong. *Lillard v. State* 838
28. Instructing on an issue upon which the evidence is not sufficient to support a verdict constitutes error, where the instruction is misleading and prejudicial. *Miller Rubber Products Co. v. Anderson* 247
29. Requested instructions which assume facts as proved on which there is material controversy, and assume facts as proved which are not proved conclusively, are properly refused. *Schrage v. Miller* 266
30. Alleged error in instructions will not be considered where the verdict returned is the only one justified by the evidence. *Patrick v. Shallcross* 742

Assignments.

1. Check on bank does not operate as assignment of funds therein to amount of check. *State, ex rel. Sorensen, v. Farmers & Merchants Bank* 358
2. Generally, an assignee of a chose in action takes subject to defenses and equities enforcible against his assignor at time of assignment, and to such as accrue thereafter before notice to debtor. *Union Nat. Bank v. Village of Beemer* 778

Attorney and Client.

1. A purported release of an attorney's lien, obtained by fraud and without consideration, will not defeat the lien. *Blatchford v. Palmer* 8
2. Department of public works *held* bound by knowledge and legal services of attorney employed to procure con-

demnation of land for highway purposes. *Goergen v. Department of Public Works* 648
3. Misappropriation by attorney of money of client is ground for disbarment. *State, ex rel. Spillman, v. Priest* 241
4. The primary purpose of a disbarment proceeding is not to punish the attorney, but to determine in the public interest whether he should be permitted to practice. *State, ex rel. Spillman, v. Priest* 241
5. Attorneys in performance of obligations and duties assumed must conform to certain standards in relation to clients, to courts, to the profession, and to the public. *State, ex rel. Spillman, v. Priest* 241
6. Generally, settlement with clients does not preclude inquiry into the moral and professional quality of an attorney's acts. *State, ex rel. Spillman, v. Priest* 241
7. The court will not permit matters affecting the character of its officers to be compromised and settled by private arrangement. *State, ex rel. Spillman, v. Priest* 241
8. Settlement with client after disbarment is not a sufficient showing to entitle a disbarred attorney to reinstatement. *State, ex rel. Spillman, v. Priest* 241
9. On application by disbarred attorney for reinstatement, the question is whether the applicant is of good moral character and a fit and proper person to be entrusted with the privileges of office of attorney. *State, ex rel. Spillman, v. Priest* 241
10. An attorney disbarred for conversion of a client's money must establish reformation before he may be reinstated. *State, ex rel. Spillman, v. Priest* 241
11. To warrant reinstatement, a disbarred attorney has burden to establish good moral character. *State, ex rel. Spillman, v. Priest* 241
12. Mere formal proof of good character required for admission to the bar is not sufficient to establish good moral character as basis for reinstatement after disbarment. *State, ex rel. Spillman, v. Priest* 241
13. In determining question of moral fitness of disbarred attorney for reinstatement, settlement with client will not be given much weight. *State, ex rel. Spillman, v. Priest* 241
14. Conviction of an attorney for felony involving moral turpitude is ground for disbarment. *State, ex rel. Sorensen, v. Scoville* 457
15. Conviction in the federal court of felony or misdemeanor involving moral turpitude is ground for disbarment. *State, ex rel. Sorensen, v. Scoville* 457
16. The term "felony" as ground for disbarment compre-

hends an offense punishable by imprisonment in the penitentiary. *State, ex rel. Sorensen, v. Scoville* 457
17. Granting of a license to practice law is on the implied understanding that the licensee shall demean himself in proper manner, and abstain from such practices as bring discredit upon himself, the profession, and the courts. *State, ex rel. Sorensen, v. Scoville* 457
18. An attorney, to retain license to practice law, must abstain from conduct which establishes a depreciation of good moral character. *State, ex rel. Sorensen, v. Scoville* 457
19. Misconduct of attorney, indicative of moral unfitness sufficient to deny an applicant admission to the bar, though not committed in professional capacity, justifies disbarment. *State, ex rel. Sorensen, v. Scoville* 457

Automobiles.

1. In an action for personal injury, service of a summons on a driver of a "trucking company," though owned by an individual, *held* sufficient. *Schwarting v. Ogram* 76
2. Evidence as to speed of truck a few seconds before collision with automobile *held* competent. *Schwarting v. Ogram* 76
3. Duty of automobile driver, on entering or crossing a state highway, stated. *Schrage v. Miller* 266
4. Reciprocal right or duty of motorist on state highway, on approaching an intersection, stated. *Schrage v. Miller* 266
5. Whether an automobile driver exercised ordinary care *held* question of fact. *Schrage v. Miller* 266
6. Driver of automobile, approaching a state highway from a private road, *held* not so negligent, under the evidence, as to defeat recovery for injuries received in a collision. *Coburn v. Loetscher* 407
7. Whether condition of lights on truck was the proximate cause of injury *held* question for jury. *Johnson v. Mallory* 706
8. Failure to have a spare tire and parking a truck on the roadway *held* not proximate cause of injury to passenger in automobile which collided with rear of truck at night. *Johnson v. Mallory* 706
9. In an action for injury, whether manner of parking a truck after dark on the roadway constituted negligence *held* a question for the jury. *Johnson v. Mallory* 706
10. Charge of negligence that a truck was parked on the roadway after dark where it could be seen only a short distance therefrom *held* not sustained by evidence that it was visible 300 yards away. *Johnson v. Mallory* 706

Bailment.

Trust receipt *held* to establish the relation of bailor and bailee. *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co*..... 142

Banks and Banking.

1. Payee of draft drawn by a state bank which became insolvent before payment is a holder of exchange, entitled to payment only as a depositor. *State, ex rel. Sorensen, v. First State Bank of Alliance*..... 23
2. Taking securities from state bank securing deposits of village and school district funds, *held* not "payment," precluding accounting to receiver on bank's insolvency. *Bliss v. Laipply*..... 105
3. A statute providing that the secretary of the department of trade and commerce shall be sole receiver of insolvent state banks *held* nothing more, in a judicial proceeding to liquidate a bank, than a legislative recommendation. *State, ex rel. Sorensen, v. State Bank of Minatare* 109
4. Evidence *held* not to establish preferred claim against insolvent state bank based on conversion. *State, ex rel. Sorensen, v. Beemer State Bank*..... 231
5. Trust fund of banking corporation, under the terms of resolution creating the fund, *held* to belong to the corporation and not to the stockholders as a severance of accumulated earnings. *State, ex rel. Sorensen, v. Nebraska State Bank*..... 289
6. Purchaser of cashier's check, bank draft, or certified check generally becomes a creditor of the bank and holder of exchange, and not the beneficiary of a trust. *State, ex rel. Sorensen, v. Farmers & Merchants Bank*.... 358
7. Holder of cashier's check on insolvent bank *held* not entitled to preference in payment as against depositors. *State, ex rel Sorensen, v. Farmers & Merchants Bank*.... 358
8. An order allowing a depositor of an insolvent bank a preferred claim against the guaranty fund is a judgment, and a lien against the assets. *Bliss v. Bryan*..... 461
9. The department of trade and commerce and the guaranty fund commission are governmental agencies and trustees of funds coming into their custody. *Bliss v. Bryan* 461
10. The bank guaranty fund and the bankers' conservation fund are trust funds of the distributees. *Bliss v. Bryan* 461
11. A judgment allowing a depositor of an insolvent state bank a claim against the guaranty fund constitutes a statutory and an equitable lien upon the fund. *Bliss v. Bryan* 461

12. The statute providing for transfer of assets from the depositors' guaranty fund to the depositors' final settlement fund *held* to transfer only assets not subject to existing judgment liens. *Bliss v. Bryan* 461
13. An insolvent state bank closed by the department of trade and commerce may be reorganized, recapitalized, restored to solvency, and reopened. *Barber v. Bryan* 566
14. Where an insolvent state bank is reorganized and reopened, change in capitalization, officers, and management does not create a new or dissolve the old corporation. *Barber v. Bryan* 566
15. A reorganized insolvent state bank operates under the original charter with the identity of the corporation unchanged. *Barber v. Bryan* 566
16. An insolvent state banking corporation survives for the purpose of liquidation or reorganization. *Barber v. Bryan* 566
17. Reorganization and reopening of an insolvent state bank does not result in dissolution of the old bank by liquidation, or in the creation of a new bank. *Barber v. Bryan* 566
18. Reorganization contract *held* to obligate the reorganized bank to pay assessments levied for bank guaranty and final settlement funds before reorganization, and to require a reserve fund created from old assets to meet the obligation. *Barber v. Bryan* 566
19. An insolvent state bank which openly received deposits and transacted a general banking business *held* liable for assessments levied during such period for the bank guaranty and final settlement funds. *Barber v. Bryan* 566
20. Allowance of reasonable fees to attorneys for receiver of an insolvent state bank will be upheld on appeal in absence of abuse of court's discretion. *State, ex rel. Sorensen, v. First State Bank* 620
21. Where clerk of district court deposits trust funds in a bank and the representative of beneficiaries requests and accepts a draft, the representative becomes a creditor of the bank and loses his right to preference on bank becoming insolvent. *State, ex rel. Sorensen, v. First State Bank* 643
22. Purchaser of draft is entitled to share only *pro rata* with depositors in assets of insolvent state bank and in depositors' final settlement fund, in absence of special circumstances entitling him to a preference. *State, ex rel. Sorensen, v. First State Bank* 643
23. Issuing of deposit slip for sight draft merely indicates receipt of a collection item. *Diehl v. Johnson* 699

24. A bank receiving a sight draft for collection does not owe the amount thereof to the sender until collected. *Diehl v. Johnson* 699
25. The fact that a bank had knowledge of the general purpose for which funds from sight draft were to be used is insufficient to establish a special deposit. *Diehl v. Johnson* 699
26. A bank, whose officers are officers of a village, *held* trustee of village deposits. *Union Nat. Bank v. Village of Beemer* 778
27. A duplicate check given in place of original check has the same validity as the original. *Samland v. Ford Motor Co.* 819

Bills and Notes.

1. Change of a general indorsement to special indorsement by writing above indorser's signature words of assignment *held* not to qualify indorser's liability. *Baldwin-Heckes Co. v. Kammerlohr* 317
2. The consideration for a promissory note need not move to the maker; it being sufficient if it moves to a third party at maker's request. *Vybiral v. Maly* 436
3. Whether plaintiffs are innocent holders of a note is immaterial, where no defense thereto has been established. *Vybiral v. Maly* 436

Boundaries.

In absence of corners fixed by government survey, or of satisfactory proof of their location, field notes of the government survey, including plats, furnish *prima facie* evidence from which the true corners and lines may be located. *State v. Cheyenne County* 1

Commerce.

Gasoline unloaded from tank cars into shipper's storage tank loses its interstate character, and becomes subject to excise tax upon its use and distribution. *Burke v. Bass* 297

Constitutional Law. SEE ELECTIONS, 1. STATUTES, 1.

1. Statute declaring sale of liquor a misdemeanor, and providing for trial without a jury, *held* constitutional. *State v. Kacin* 64
2. Where a cause is properly before a court of equity, appointment of a necessary receiver is a judicial function which cannot be exercised or controlled by the governor or the legislature. *State, ex rel. Sorensen, v. State Bank of Minatare* 109

3. The judicial department of government has an imperative duty to protect its jurisdiction at the boundaries of power fixed by the Constitution. *State, ex rel. Sorensen, v. State Bank of Minatare* 109
4. Proceeding for liquidation of an insolvent state bank, in a court of equity, is judicial and not executive. *State, ex rel. Sorensen, v. State Bank of Minatare* 109
5. An excise tax imposed upon the use and distribution of gasoline *held* constitutional. *Burke v. Bass* 297
6. Constitutional provision for appointment of state tax commissioner and defining his jurisdiction *held* self-executing. *State v. Odd Fellows Hall Ass'n* 440
7. Vested property rights cannot be taken away by the legislature. *City of Fairbury v. Fairbury Mill & Elevator Co.* 588

Contracts.

1. Beneficiaries, though not parties to a contract, may recover thereon where it appears their rights were provided for therein. *Fowler v. Doran* 37
2. Where the terms of a contract are ambiguous, the jury should determine its meaning. *First Nat. Bank v. Davis* 304
3. Where an issue of ambiguity in a contract is to be solved by a jury, the instructions should clearly state the alternative claims of the parties and the alternative findings necessary to determine the issue. *First Nat. Bank v. Davis* 304
4. The motive for rescinding a contract is immaterial, where equitable grounds exist. *Wineberg v. Baker* 411
5. In construing a contract, the court must endeavor to place itself in the position of the parties and ascertain their intention. *Lyman-Richey Sand & Gravel Co. v. State* 674
6. Ambiguous language in a contract prepared by one party should receive such construction as the party preparing it supposed the other party would give it. *Lyman-Richey Sand & Gravel Co. v. State* 674
7. An ambiguous provision in a contract prepared by one party should be construed strictly against such party. *Lyman-Richey Sand & Gravel Co. v. State* 674

Corporations.

1. Profits of a corporation are not due a stockholder as a debt, until a dividend is declared. *State, ex rel. Sorensen, v. Nebraska State Bank* 289
2. "Dividend" is that portion of corporate profits and surplus actually set apart for distribution among stockholders. *State, ex rel. Sorensen, v. Nebraska State Bank* 289

Counties and County Officers.

1. County commissioners act quasi judicially when action on claims involves determination of questions of fact or exercise of discretion. *Red Willow County v. McClain* 209
2. Action of county commissioners fixing allowance to sheriff for conveying prisoners, *held* quasi judicial, and therefore their decision is not subject to collateral attack. *Red Willow County v. McClain* 209
3. A county board is clothed with implied powers requisite to enable it to discharge official duties imposed by law. *Cheney v. County Board of Supervisors* 624

Courts.

1. The doctrine of the "law of the case" is a rule adopted by courts, and rests upon the principle of *res judicata*, distinct from that of *stare decisis*. *In re Estate of Wecker* 504
2. Generally, where property of an insolvent debtor is in possession of a receiver, another court of concurrent jurisdiction will not interfere with such possession. *Prudential Ins. Co. v. Bliss* 578
3. A mortgagee is entitled to appointment of a receiver in a foreclosure suit, notwithstanding a prior general receivership of mortgagor debtor's property. *Prudential Ins. Co. v. Bliss* 578

Creditors' Suit.

Property conveyed by a debtor in consideration of future support may be subjected to payment of a judgment to the extent that the value of the property exceeds the amount of support furnished. *Christensen v. Smith* 388

Criminal Law.

1. Accused and his attorney should be allowed reasonable time to prepare for trial. *Smith v. State* 17
2. What constitutes reasonable time for accused to prepare for trial must be determined from facts and circumstances presented. *Smith v. State* 17
3. Overruling of motion for continuance does not constitute reversible error, unless the trial court abused its discretion. *Smith v. State* 17
4. Denying a continuance is not abuse of discretion, unless accused was prejudiced thereby. *Smith v. State* 17
5. Where separate offenses of the same class, for connected acts, are charged in different informations, consolidation thereof for trial is within the court's discretion. *Luke v. State* 101
6. Where separate verdicts of guilty are returned on two

informations tried together, sentence should be imposed for each offense, and the sentences will run concurrently unless otherwise ordered. *Luke v. State* 101
7. If two sentences are to run consecutively, the judgment should provide that the second sentence begin at termination of the first, and not at any specific date. *Luke v. State* 101
8. Objections to jurisdiction *held* waived by failing to object to the complaint and by pleading not guilty. *Shaffer v. State* 121
9. The statute authorizing discharge of any person held in jail charged with an indictable offense, if not indicted at term to which he is held to answer, *held* to apply to prosecution by information. *Shaffer v. State* 121
10. Defendant, though accused by information at the term to which he is held to answer, is not entitled to trial at that term as a matter of right. *Shaffer v. State* 121
11. Error at trial, to be available, should be called to trial court's attention and be affirmatively shown on the record for review. *Shaffer v. State* 121
12. Length of time a jury should be kept together before being discharged because of disagreement rests largely in the trial court's discretion. *Shaffer v. State* 121
13. Affidavits used at trial are not available on review unless embodied in bill of exceptions. *Shaffer v. State* 121
14. A proper court order discharging the jury when unable to agree and requiring a retrial *held* not to violate the constitutional provision prohibiting putting a person twice in jeopardy. *Shaffer v. State* 121
15. Where a plea of not guilty was not withdrawn, a subsequent plea in bar of former jeopardy may be disregarded or overruled. *Shaffer v. State* 121
16. Permitting names of additional witnesses to be indorsed on the information during the trial is within the trial court's discretion. *Shaffer v. State* 121
17. Harmless rulings in giving and refusing instructions are not grounds for reversal. *Shaffer v. State* 121
18. Where the evidence does not warrant a finding of a lesser degree than that charged in the information, refusal to give an instruction defining the lesser offense is not error. *Torske v. State* 161
19. Giving an instruction incorrect as an abstract statement of law relating to a lessor, unsupported offense than that charged, and on which accused is acquitted, does not constitute reversible error. *Torske v. State* 161
20. Generally, error cannot be predicated on an instruction given at the request of the complaining party. *Torske v. State* 161

21. Insanity does not constitute a defense to a criminal act unless it renders accused incapable of distinguishing between right and wrong with reference to the act. *Torske v. State* 161
22. The giving of an erroneous instruction does not warrant reversal, if not prejudicial to the rights of accused. *Torske v. State* 161
23. Nonexpert witnesses may testify as to a person's sanity after stating the primary facts supporting their conclusion. *Torske v. State* 161
24. Value of nonexpert opinion on question of insanity depends on facts and circumstances detailed. *Torske v. State* 161
25. Where accused has offered competent evidence to support defense of insanity, the state has the burden to establish sanity. *Torske v. State* 161
26. The opinion of a medical expert may be based on acquaintance with the party, on medical examination, or on a hypothetical case. *Torske v. State* 161
27. Generally, an expert witness testifying from observation or personal knowledge must testify to facts on which his opinion is based. *Torske v. State* 161
28. A physician may give an opinion as to a person's sanity, basing his opinion solely on an opportunity for observation and examination. *Torske v. State* 161
29. Where instructions, considered together, correctly state the law, the judgment will not be reversed. *Torske v. State* 161
30. Where personalty is mortgaged in Nebraska and feloniously sold in Iowa, the wrong-doer cannot be convicted in Nebraska on the sole charge of selling mortgaged personalty. *Forney v. State* 179
31. The supreme court will not interfere with a verdict of guilty based on conflicting evidence, unless, as a matter of law, it is insufficient. *O'Connor v. State* 471
32. Argument of prosecutor, if improper, *held* not to affect defendant's substantial rights. *O'Connor v. State* 471
33. Overruling of motion for new trial based on bias of juror, not made until after verdict, *held* not error. *Zorn v. State* 596
34. Error cannot be predicated in giving of instructions, where defendant, by requested instructions, recognizes correctness of rule stated in instructions given. *Cooper v. State* 605
35. In a prosecution for forgery, accused, having admitted that he signed indorsers' names on backs of checks, is estopped to complain of the state's failure to offer the

indorsements in evidence. *Cooper v. State* 605
36. Instructions must be considered as a whole. *Cooper v. State* 605
37. In a prosecution for forgery, instruction informing the jury of the criminal statute charged to have been violated and pointing out the material allegations of the several counts of the information *held* not erroneous. *Cooper v. State* 605
38. Refusal of instruction correctly stating the law, where its substance has been given, *held* not error. *Witt v. State* 799
39. In a prosecution for rape, a cautionary instruction directing the jury's attention to evidence of a particular witness *held* properly refused. *Witt v. State* 799
40. In a prosecution for rape, evidence *held* to sufficiently corroborate prosecutrix, and to sustain conviction. *Witt v. State* 799
41. In a criminal case, the credibility of witnesses and the weight to be given to evidence are questions solely for the jury. *Witt v. State* 799
42. Instruction on reasonable doubt *held* a statement of the law. *Witt v. State* 799
43. In a criminal action, where the punishment is left to the court, an instruction that the jury have nothing to do with the punishment *held* proper. *Witt v. State* 799
44. In a criminal action, the trial court is vested with sound discretion in determining the number of character witnesses a defendant may call. *Witt v. State* 799
45. An instruction on alibi which substantially followed an instruction approved in a prior case *held* proper. *Westbrook v. State* 817
46. It is within the discretion of the court to overrule a request to compel a county attorney to elect between a count in an indictment for shooting with intent to kill and one for shooting with intent to wound. *Lillard v. State* 838
47. Sentence for shooting with intent to kill reduced. *Lillard v. State* 838
48. Admitting a telephone conversation with an unidentified voice, relating to gaming, *held* not error. *McLaughlin v. State* 861

Damages.

1. Damages for permanent injury cannot be based on mere speculation, probability, or uncertainty, but must be based on competent evidence that permanent injury is reasonably certain as proximate result of the injury. *Schwarting v. Ogram* 76

2. Verdict of $15,000 for permanent injuries to 16 year old girl *held* not excessive. *Schwarting v. Ogram* 76
3. Verdict for damages should be limited to damages proved. *Glandt v. Ricceri* 126
4. Verdict of $7,500 for laceration of tissues *held* excessive. *Blackwell v. Omaha Athletic Club* 332
5. Where damages from breach of a contract are difficult of ascertainment, and the stipulated amount is not disproportionate to damages reasonably anticipated, the stipulated amount is generally regarded as liquidated damages. *Yant Construction Co. v. Village of Campbell* 360
6. Where damages may be readily ascertained, and the amount stipulated in contract exceeds compensation for breach, the amount will be regarded as a penalty. *Yant Construction Co. v. Village of Campbell* 360

Depositaries.

A bond given by a state bank to secure a school district deposit is a valid obligation of the sureties. *School District v. Vanatta* 216

Divorce.

1. Where a husband procures a divorce on the ground of extreme cruelty, the court may award his wife reasonable alimony. *Moravec v. Moravec* 830
2. Denial of divorce to wife and granting divorce to husband *held* not to prevent allowance of alimony to wife. *Moravec v. Moravec* 830

Easements.

1. Where the terms of a grant create an easement of a certain width, structures encroaching on the width stated cannot be lawfully erected. *Williams v. Lantz* 67
2. A party who wrongfully erects a structure encroaching on an easement for an alleyway may be compelled to remove the part encroaching on the easement. *Williams v. Lantz* 67
3. A party who erects a structure encroaching on an easement for an alleyway cannot complain of a decree directing removal of the encroachment unless the wrongdoer quitclaims to the co-owner of the easement an equal width from the other side of the easement. *Williams v. Lantz* 67
4. Cessation of use of an easement for a term less than the prescriptive period, accompanied by acts clearly indicating an intention to abandon the right, will extinquish the easement. *Williams v. Lantz* 67
5. A purchaser of land burdened with an easement, of

which he has actual or constructive notice, acquires an estate servient to the easement. *Polyzois v. Resnick* 663
6. Where the owner of an easement renders use of the easement impossible, or obstructs it in a manner inconsistent with further enjoyment, the easement will be considered as abandoned by him. *Polyzois v. Resnick*.... 663

Elections.

1. Statutes regulating nomination and election of candidates *held* constitutional. *State, ex rel. Nelson, v. Marsh* 423
2. Requisites to having name placed on primary ballots stated. *State, ex rel. Nelson, v. Marsh*..... 423

Eminent Domain.

1. The constitutional provision requiring just compensation for private property taken or damaged for public use applies to special damages from vacating of a public highway. *Lowell v. Buffalo County*..... 194
2. The word "damaged," in the constitutional provision requiring just compensation for private property taken for public use includes all damages causing diminution to its value. *Lowell v. Buffalo County*..... 194
3. The law provides for ascertainment and payment of special damages to private property from vacating a public highway, and for appeal to the district court from the award. *Lowell v. Buffalo County*..... 194
4. Upon appeal from an award of damages caused by vacating a public highway, compensation must be ascertained as in ordinary actions. *Lowell v. Buffalo County* 194
5. Any loss or injury to realty from vacating a public highway, special benefits considered, is recoverable. *Lowell v. Buffalo County*..... 194
6. A landowner cannot recover, on account of a lawful public improvement, damages suffered in common with the public generally. *Lowell v. Buffalo County*..... 194
7. The measure of damages to property from vacating a public highway is the difference between its value immediately before and immediately after its vacation. *Lowell v. Buffalo County* 194
8. Where a public highway is vacated, leaving the landowner with only one outlet from a *cul-de-sac*, he may thus suffer special damages. *Lowell v. Buffalo County* 194
9. Reduction of market value of realty may be considered in determining just compensation under exercise of eminent domain. *Lowell v. Buffalo County*..... 194
10. The jury, in determining just compensation to landowner from vacating a public highway, may consider

diversion of travel and removal of a mail box and schoolhouse. *Lowell v. Buffalo County* 194
11. In proceedings to recover damages from vacating a highway, petitions signed by landowner and referring to other highways in the immediate vicinity *held* admissible for consideration in assessing special damages. *Lowell v. Buffalo County* 194
12. The owner of land condemned for sewer purposes is entitled to the present market value of the land taken, and special damages to the remainder of the tract resulting from the improvement. *Stuhr v. City of Grand Island* 369
13. In condemnation proceeding, contingent, speculative, and remote damages, not affecting the present market value of land not taken, are not allowable. *Stuhr v. City of Grand Island* 369
14. In condemnation proceeding, evidence showing that property might be subdivided some day and contains gravel deposits, without showing the quantity, quality, or present commercial value, *held* too remote and speculative as elements of special damages. *Stuhr v. City of Grand Island* 369
15. Private property used in a business prohibited by a valid police regulation may be depreciated in value without any provision for compensation. *Hawkins v. City of Red Cloud* 487
16. Authority to select and summon freeholders to ascertain damages for land condemned for highway is granted to the sheriff, and the appointing power of the county judge is limited to freeholders so selected. *Goergen v. Department of Public Works* 648
17. Proceedings by department of public works to condemn land for highway purposes must be conducted according to statute. *Goergen v. Department of Public Works* 648
18. Award of damages for land condemned for highway, where appraisers were appointed by the county judge who had not been selected and summoned by the sheriff, *held* void. *Goergen v. Department of Public Works* 648
19. State employees entering upon land against the owner's will, under a void appraisement of damages, may be enjoined. *Goergen v. Department of Public Works* 648
20. Private property cannot be taken or damaged for a public highway without just compensation. *Gledhill v. State* 726
21. The owner of land damaged temporarily for public use by the state is entitled to compensation. *Gledhill v. State* 726
22. Temporary damage to property owners resulting from

construction of a temporary bridge, which obstructs the flow of water, must be compensated. *Gledhill v. State* 726
23. In an action to recover compensation for damage to property in making a public improvement, it is immaterial whether the petition states a cause of action *ex delicto* or *ex contractu*. *Gledhill v. State* 726
24. Where land, not taken, is temporarily damaged by a temporary public improvement, the measure of compensation is value of use for period damaged. *Gledhill v. State* 726
25. Damages to unmatured crops, resulting from a public improvement, cannot be recovered where uncertain or remote. *Gledhill v. State* 726
26. The test of whether damages to unmatured crop are speculative is whether there is sufficient data to determine with reasonable certainty the probable value if it had matured. *Gledhill v. State* 726
27. Sufficient data to determine with reasonable certainty the probable value of an unmatured crop exist when there is evidence of actual value of like crops matured during the same period in the same locality, under similar conditions. *Gledhill v. State* 726
28. A tenant for a term has a property right in land, entitling him to compensation where land is damaged for public use. *Gledhill v. State* 726
29. A landowner who petitions for organization of an irrigation district waives right to compensation under the Constitution for damage to property, and accepts in lieu thereof the statutory remedy. *Omaha Life Ins. Co. v. Gering & Ft. Laramie Irrigation District* 761

Estates.

1. Generally, when a greater and a less estate meet in one person, without any intermediate estate, the less estate is merged in the greater. *American Savings & Loan Ass'n v. Barry* 523
2. In equity, whether the legal rule of merger of a less estate in the greater will be applied depends on the facts of the particular case. *American Savings & Loan Ass'n v. Barry* 523

Estoppel.

1. A party who pleads estoppel has the burden of proving it. *State v. Cheyenne County* 1
2. Where an assignee waives all rights to funds garnished, he is estopped from thereafter asserting any claim as against the garnishee. *Van Kirk v. Beckley* 148
3. Facts must be known by defendant, to result in waiver

or estoppel to claim a defense pleaded. *First Nat. Bank v. Davis* 304
4. Estoppel, to be available, must be pleaded. *Diehl v. Johnson* 699

Evidence. SEE CRIMINAL LAW, 48.
1. In proceedings to recover damages resulting from vacating of a public highway, witnesses may on cross-examination be interrogated as to their knowledge of values of lands in the immediate vicinity, where the value of claimant's lands was fixed on direct examination, for the purpose of testing their credibility. *Lowell v. Buffalo County* 194
2. Testimony of physician in compensation case, based on observation and examination of claimant and on assumption of truth of evidentiary facts, *held* admissible. *Watkins v. Brunswick Restaurant Co* 212
3. Regularity of official acts is presumed in absence of evidence showing misconduct or disregard of law. *Campbell Co. v. City of Harvard* 539
4. In compensation proceeding, statements by employee within a few minutes after injury resulting in death *held* admissible as part of *res gestæ*. *Perry v. Johnson Fruit Co.* 558
5. Facts reasonably inferable from facts and circumstances proved may be regarded as established. *Perry v. Johnson Fruit Co* 558

Executors and Administrators.
1. Petition in intervention to enforce an attorney's lien *held* to show that the claim was being prosecuted in his capacity as personal representative of decedent. *Blatchford v. Palmer* 8
2. Generally, where a personal representative of a decedent files a petition stating a cause of action, and his representative capacity is not specifically denied, his representative capacity will be presumed. *Blatchford v. Palmer* 8
3. A "contingent claim" against an estate is one wherein liability depends on a future event, which may or may not happen. *In re Estate of Ayres* 453
4. A claim for possible deficiency judgment does not constitute a "contingent claim" against an estate. *In re Estate of Ayres* 453

Exemptions.
1. Whether property is exempt from garnishment must be determined as of date of service of garnishee summons. *Van Kirk v. Beckley* 148

2. Where property is not exempt at time of service of garnishee summons, the debtor cannot thereafter by transferring the property render it exempt. *Van Kirk v. Beckley* 148

Fines.

Statute making judgments for fines and costs in criminal cases a lien on property *held* not repealed by implication by homestead law subsequently enacted. *Mancuso v. State* 204

Forgery.

1. Information charging forgery *held* sufficient, though omitting the name of the person defrauded. *Bullington v. State* 432
2. Act of knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. *Bullington v. State* 432
3. Evidence *held* to sustain conviction. *Zorn v. State*..... 596
4. "Forgery" defined. *Cooper v. State*..... 605
5. It is no defense to prosecution for forgery that the victim could have detected the forgery. *Cooper v. State*.... 605
6. In proof of forgery, it is not necessary that the writing should bear any resemblance to that of the person whose writing it purports to be. *Cooper v. State*..... 605
7. An information charging forgery of names of indorsers on checks, though not using the statutory word "signature," *held* not subject to demurrer. *Cooper v. State*..... 605
8. An information charging forgery of name of indorser of check need not set forth copy of indorsement, the purport thereof being sufficient. *Cooper v. State*..... 605

Fraudulent Conveyances.

1. In a suit to cancel a deed as fraudulent, evidence that grantor owed plaintiff a debt partially secured by an unsatisfied mortgage *held* sufficient to show plaintiff was an existing creditor. *Christensen v. Smith*..... 388
2. A deed from parent to children is presumptively fraudulent as to existing creditors. *Christensen v. Smith*..... 388
3. In a creditor's suit to cancel a deed from parent to children as fraudulent, the children have the burden to establish good faith by a preponderance of the evidence. *Christensen v. Smith*..... 388
4. A parent's conveyance of property to a child is presumptively fraudulent as to the parent's creditors. *Buckner v. McHugh*..... 396
5. In a suit by a judgment creditor to enforce application of property to payment of a judgment, it is immaterial

when the creditor became owner of the judgment. *Buckner v. McHugh* 396
6. Creditor's suit *held* not barred by laches. *Buckner v. McHugh* 396

Garnishment.
1. An attorney assigned by court to defend an indigent defendant *held* not an employee or officer of the county, and therefore amount due from county for services was not subject to garnishment. *Home Savings & Loan Ass'n v. Carrico* 25
2. Where garnishee admits he has funds which, but for a purported assignment, would belong to the judgment debtor, and the assignee waives his rights, the court may order payment of the amount on the judgment. *Van Kirk v. Beckley* 148
3. Where an assignee disclaims all rights to funds garnished, the garnishee cannot thereafter assert the assignee's rights as a defense. *Van Kirk v. Beckley* 148

Guaranty.
1. Guarantor of account for merchandise purchased *held* not liable on guaranty, where the merchandise was delivered under a trust receipt creating the relation of bailor and bailee. *Holcomb & Hoke Mfg. Co. v. N. P. Dodge Co.* 142
2. Where a debt evidenced by a note is guaranteed by a separate instrument not fixing the term of guaranty, generally the guaranty will expire on the running of limitation on the note. *Bash v. Bash* 865
3. Renewals of note guaranteed by a separate instrument *held* not to toll the statute of limitations as to the contract of guaranty. *Bash v. Bash* 865

Guardian and Ward.
A guardian may be charged with his ward's funds which he negligently kept on deposit in a bank knowing that it was insolvent. *Stryker v. Wilson* 62

Highways.
1. Ordinary gravel "resurfacing" of highway *held* to be "repair," and not "improvement," requiring competitive bids. *Cheney v. County Board of Supervisors* 624
2. County board of supervisors *held* not required to advertise for bids and let contracts for resurfacing of highways to the lowest and best bidder, though cost exceeds $500. *Cheney v. County Board of Supervisors* 624
3. The term "freight rates" in a highway construction contract may apply to cost of transportation by truck. *Lyman-Richey Sand & Gravel Co. v. State* 674

Homestead.

1. Judgment for fine and costs imposed upon conviction for a criminal offense, unless the sentence is for more than two years in the penitentiary or death, creates a lien on the homestead. *Mancuso v. State* 204
2. Abandonment of homestead may be established by evidence that the occupants left it, and, while absent, formed the intention not to return. *Christensen v. Smith* 388

Homicide.

1. Intent is an essential element of the crime of shooting with intent to kill, and proof of such intent is requisite to conviction. *Lillard v. State* 838
2. Specific intent, which is an essential element of the crime of shooting with intent to kill, is inferable from facts and circumstances, inclusive of the act of shooting. *Lillard v. State* 838

Indictment and Information.

1. A joinder in information in separate counts of different felonies does not require the court, on motion of accused, to compel the prosecutor to elect. *Forney v. State* 179
2. Ruling on motion by accused at close of state's evidence to require prosecutor to elect between counts of information is within the court's discretion. *Forney v. State* 179
3. Information charging gambling *held* not duplicitous. *Sudyka v. State* 431
4. Where an information in separate counts charged forgery, possession, false uttering, and publishing of a check, overruling of motion to require the state to elect *held* not error. *Bullington v. State* 432
5. The court will give words in information their ordinary and commonly accepted meaning. *Cooper v. State* 605
6. Where words in information have same meaning as words found in language of statute denouncing the offense, the information will be upheld. *Cooper v. State* 605

Injunction. SEE EMINENT DOMAIN, 19.

1. Equity will not enjoin actions against nonresident defendants, where no defense is shown, though resident defendant is not a *bona fide* defendant. *Epp v. Federal Trust Co* 375
2. In a suit to enjoin encroachment on plaintiff's property, evidence *held* insufficient to sustain decree for plaintiff. *Resnick v. Kazakes* 654

Insane Persons.

Alleged incompetent *held* entitled to have appointment of attorney as guardian of his estate set aside for constructive fraud. *Hall v. Hall* 280

Insurance.

1. The phrase "accidental means" within an accident insurance certificate should be interpreted according to ordinary usage. *Bennett v. Travelers Protective Ass'n* 31
2. An injury tragically disproportionate to trivial cause, if unforeseen, would be caused by "accidental means" within an accident insurance certificate. *Bennett v. Travelers Protective Ass'n* 31
3. The mere fact that an injury occurred is insufficient to support a finding that injuries were caused by "accidental means" within accident insurance policy. *Bennett v. Travelers Protective Ass'n* 31
4. Loss of eye caused by strain *held* result of "accidental means" within accident insurance policy. *Bennett v. Travelers Protective Ass'n* 31
5. Provision for forfeiture of policy for failure to pay premiums is enforceable. *Morgan v. United Benefit Life Ins. Co* 47
6. Evidence *held* insufficient to support a claim of waiver or estoppel against insurer to declare a forfeiture for insured's failure to pay a premium when due. *Morgan v. United Benefit Life Ins. Co* 47
7. A mere clerical error in description of land *held* not to bar recovery on hail insurance policy for loss of crop. *Bolser v. Fidelity-Phenix Fire Ins. Co* 92
8. Reformation is not necessary to recover on a hail insurance policy incorrectly describing land insured. *Bolser v. Fidelity-Phenix Fire Ins. Co* 92
9. Where insurer, with knowledge that insured wanted merchandise located in a certain building insured, represented in effect that the policy covered such merchandise, insured is entitled to reformation of policy. *Fremont Beverage Co. v. Maryland Ins. Co* 192
10. Evidence *held* to warrant reformation of fire policy so as to cover merchandise at a different location. *Fremont Beverage Co. v. Maryland Ins. Co* 192
11. An agent, in making out an application for insurance, acts as agent of the insurer. *Roth v. Employers Fire Ins. Co.* 300
12. Where insured makes full and honest answers to all questions asked him by agent in making out an application, the insurer cannot take advantage of a false

answer inserted by its agent. *Roth v. Employers Fire Ins. Co.* 300
13. Insurer *held* not entitled to a judgment by way of subrogation against assignor of leasehold interest in school lands for amount paid insured. *Kirk v. Fletcher* 634
14. Cashier of bank which took a void assignment of an interest in a lease *held* to have no insurable interest in the premises. *Kirk v. Fletcher* 634
15. The term "recall," in agency contract between a life insurance company and its agent, *held* not the equivalent of "rescind." *Kortright v. Mutual Life Ins. Co* 746
16. Where insurer cancels a policy without legal cause, it cannot recover from the agent any part of the commission. *Kortright v. Mutual Life Ins. Co* 746

Intoxicating Liquors.

One having in his private dwelling-house intoxicating liquor for personal use only, in amount no more than reasonably sufficient for such purpose, may not be convicted of illegal possession, regardless of when the liquor was manufactured. *State v. Bishop* 481

Joint Adventures.

Provisions of declaration of interest of parties to joint adventure *held* ineffectual to operate as waiver of rights of contribution to which parties thereto were otherwise entitled, or to preclude enforcement thereof. *Baldrige v. Flothow* 218

Judgment.

1. A judgment *non obstante veredicto* can only be entered where the pleadings of the party who recovered the verdict confess facts entitling the other party to judgment. *Bielfeldt v. Grand Island Transit Co* 368
2. Order denying compensation based on theory that claimant suffered hernia *held* not to bar subsequent action based on latent disability. *Marler v. Grainger Bros.* 517
3. Where proceedings by the state result in an unsatisfactory decision, it should appeal or abide by the consequences. *Goergen v. Department of Public Works* 648
4. The district court may vacate a judgment during the term. *Citizens State Bank v. Young* 786
5. Vacation of judgment against mental incompetent, during term, *held* proper. *Citizens State Bank v. Young* 786
6. The purpose of the statute authorizing judgment notwithstanding the verdict is to adopt the common-law practice as to rendering judgment *non obstante veredicto*. *Hamaker v. Patrick* 809

7. Judgment *non obstante veredicto* can be granted only upon the pleadings. *Hamaker v. Patrick* 809
8. Where a party is entitled to a jury trial, and the pleadings do not confess the right to judgment, and a verdict is returned and judgment entered thereon, the district court, at a subsequent term, cannot set same aside and without a new trial enter such judgment as the evidence warrants. *Hamaker v. Patrick* 809
9. Matters adjudicated in a former action between the same parties cannot be relitigated. *Knapp v. Saline County* 827

Judicial Sales.

A judicial sale of land will not be set aside for inadequacy of price, unless it is so gross as to show that it was the result of fraud or mistake. *Royal Highlanders v. Louthan* 469

Jury. SEE CONSTITUTIONAL LAW, 1. MUNICIPAL CORPORATIONS, 17.

Larceny.

1. In an information for hog stealing, it is not necessary to allege the value of the stolen hog. *Graham v. State* 63
2. Statute defining cattle stealing *held* a valid enactment defining an independent substantive crime and providing penalties. *Shaffer v. State* 121
3. Evidence *held* sufficient to sustain conviction for cattle stealing. *Shaffer v. State* 121
4. Evidence *held* sufficient to sustain conviction. *Sypherd v. State* 403

Libel and Slander.

1. The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances. *Sorensen v. Wood* 348
2. Owner of radio broadcasting station and one speaking defamatory words over microphone may be joined in an action for damages for libel. *Sorensen v. Wood* 348
3. An action for damages for broadcasting a defamatory writing is based on libel and not on negligence. *Sorensen v. Wood* 348
4. Defense of radio broadcasting station that it was a common carrier within the interstate commerce act *held* not available in an action against it for libel because of defamatory broadcast. *Sorensen v. Wood* 348
5. Evidence *held* to sustain verdict that defendants spoke slanderous words to plaintiff and communicated them. *Pendrock v. Woolworth Co* 477
6. In an action for slander, plaintiff may prove by direct

or circumstantial evidence that the defamatory utterances were heard and understood by third persons. *Pendrock v. Woolworth Co*..... 477
7. Statement by defendant that plaintiff was trying "to steal" part of defendant's land *held* not actionable *per se*. *Patrick v. Shallcross*..... 742
8. An oral charge of an attempt to commit a crime is not actionable *per se* where such attempt does not of itself constitute a distinct substantive offense. *Patrick v. Shallcross*..... 742
9. The words "thief" and "criminal," if relating to taking of property not a subject of larceny, are not actionable. *Patrick v. Shallcross*..... 742

Licenses.
1. The gasoline tax is an excise tax upon the use and distribution of gasoline within the state. *Burke v. Bass*.... 297
2. Cities of the second class have authority to enact ordinances to license and regulate bowling alleys. *State, ex rel. City of Friend, v. Friend Recreation Club*..... 740
3. A bowling alley, open to the public on payment of a fee, *held* not exempt from provisions of ordinance requiring a license, though incorporated as a recreation club. *State, ex rel. City of Friend, v. Friend Recreation Club* 740

Liens.
Recording of a junior lien does not constitute constructive notice thereof to a prior lienor. *Lippincott v. Pope*..... 879

Limitation of Actions. SEE GUARANTY, 2, 3. PLEADING, 4.
Giving duplicate check by employer to claimant *held* not to extend limitation on claim for compensation. *Samland v. Ford Motor Co*..... 819

Marshaling Assets and Securities.
Where a senior mortgagee, after a windstorm loss, released the proceeds of insurance to the mortgagor, and where the mortgagee was without notice of junior mechanics' liens, the priority of liens *held* not affected by the release. *Lippincott v. Pope*..... 879

Master and Servant.
1. Evidence *held* to establish that applicant for workman's compensation was injured while working under a contract of employment entered into in Nebraska. *Radford v. Smith Bros*..... 13
2. Compensation allowable for total loss of use of one leg and permanent partial loss of use of the other leg and of both hands. *Radford v. Smith Bros*..... 13

3. "Employee" defined. *Home Savings & Loan Ass'n v. Carrico* 25
4. Generally, the term "employee" does not apply to officers of an employer. *Home Savings & Loan Ass'n v. Carrico* 25
5. Whether one is an "employee" or "independent contractor" must be determined from the facts of the particular case. *Showers v. Lund* 56
Cole v. Minnick 871
6. A truckman engaged in hauling gravel *held* an "employee" within the workmen's compensation law. *Showers v. Lund* 56
7. Workmen's compensation act *held* not applicable, where contract of employment was made in another state for services to be performed there. *Freeman v. Higgins* 73
8. Notice of claim and action commenced within the statutory period after discovery that a latent injury has caused compensable disability is a compliance with the statute. *Astuto v. V. Ray Gould Co* 138
9. Injury *held* to cause removal of appendix, and compensable. *Watkins v. Brunswick Restaurant Co* 212
10. A compensation award need not necessarily be reversed on the ground that the compensation allowed was not within the issues, where the case was tried without objection to the pleadings. *Collins v. Casualty Reciprocal Exchange* 227
11. Where a claimant was awarded compensation for temporary disability, but his injury was latent and culminated in permanent disability, he may recover for permanent disability, where he filed application therefor within a year from culmination of the injury. *Collins v. Casualty Reciprocal Exchange* 227
12. Evidence *held* insufficient to show that accident arose out of and in course of employment. *Babcock v. School District* 491
13. Claim of latent disability may be filed within a year after culmination thereof. *Marler v. Grainger Bros.* 517
14. Evidence *held* to sustain finding that traumatic neurosis was caused by an injury received in course of employment. *Marler v. Grainger Bros.* 517
15. The fact that work being performed by a township officer at time of injury was not part of his official duty will not, in itself, entitle him to workman's compensation. *Vandenburg v. Center Township* 544
16. A township officer cannot recover workman's compensation from township unless he was an employee thereof. *Vandenburg v. Center Township* 544

17. A township officer cannot recover workman's compensation for injury sustained while in performance of duty. *Vandenburg v. Center Township* 544
18. Injury to employee *held* to have arisen out of and in the course of his employment. *Perry v. Johnson Fruit Co.* 558
19. Evidence *held* to sustain finding that plaintiff sustained injuries during course of employment, within compensation act. *Conzuello v. Teague* 574
20. Applicant for compensation has the burden to establish injury was caused by an accident arising out of and in course of employment. *Bartlett v. Eaton* 599
Townsend v. Loeffelbein 791
21. Compensation award must be based on sufficient evidence showing that claimant incurred disability arising out of and in course of employment. *Bartlett v. Eaton* 599
Townsend v. Loeffelbein 791
22. One soliciting advertising for another on a percentage basis *held* not, under the facts, an "employee" within the workmen's compensation act. *Johnston v. Smith* 716
23. Where an injury to a finger is the usual and natural one, compensation cannot be fixed on the basis of loss of use of a hand. *Greseck v. Farmers Union Elevator Co.* 755
24. Injury to finger *held* not to entitle claimant to compensation for loss of use of hand. *Greseck v. Farmers Union Elevator Co.* 755
25. Injury causing a dormant disease to flare up *held* compensable. *Miller v. Central Coal & Coke Co.* 793
26. Evidence *held* insufficient to sustain finding that employee had not recovered from injury. *Crete Mills v. Neihart* 818
27. Verbal notice to physician of employer *held* insufficient as notice of claim for compensation. *Samland v. Ford Motor Co.* 819
28. An employee subjected to an unnecessary operation, prolonging disability, will be allowed compensation therefor. *Wingate v. Evans Model Laundry* 844
29. Charges of surgeon selected by employee to assist in major operation should be paid by the employer. *Wingate v. Evans Model Laundry* 844
30. A workman who because of injury is unable to perform a substantial amount of labor is "totally disabled," within the workmen's compensation act. *Wingate v. Evans Model Laundry* 844
31. The district court on appeal in a compensation case should make final disposition of the case. *Wingate v. Evans Model Laundry* 844

32. Cost of meals and lodging furnished an employee while traveling *held* "wages" and basis for fixing compensation for total disability. *Maryland Casualty Co. v. Geary* 851
33. Mechanic *held* to be an "employee," and not an "independent contractor," within the workmen's compensation act. *Cole v. Minnick* 871

Mechanics' Liens.

1. Materialman *held* entitled to sue directly on the bond of a building contractor in view of conditions of the bond and contract. *Fowler v. Doran* 37
2. Surety on building contractor's bond, in view of conditions of bond and contract, *held* liable for full price of millwork, though contract had been rescinded. *Fowler v. Doran* 37
3. In a suit to foreclose a mechanic's lien, evidence *held* insufficient to sustain decree for plaintiff. *York Brick & Tile Co. v. Ude Motor Co* 154

Mortgages.

1. In foreclosure suit, evidence *held* to sustain decree for defendants. *Zitting v. Facka* 159
2. Release of former mortgage filed on same day as subsequent mortgage *held* not to give intervening second mortgage priority under the stated facts. *Peoples Bank v. Trowbridge* 312
3. Evidence *held* insufficient to warrant vacation of decree of foreclosure after term. *Citizens Bank of Ogallala v. Lister* 386
4. A mortgage conveying a contingent or fee simple interest in realty owned by mortgagor's mother who was not divested of title at time mortgage was executed, *held* void. *Nebraska Nat. Bank v. Bayer* 391
5. Evidence *held* insufficient to establish that notes and mortgages were obtained by duress. *Vybiral v. Maly* 436
6. One objecting to confirmation of a foreclosure sale has the burden of showing that the judgment of confirmation is erroneous. *Royal Highlanders v. Louthan* 469
7. The means by which the trial court may satisfy itself that a fair price was obtained at a foreclosure sale, or that a subsequent sale would not realize a greater amount, are not restricted. *Royal Highlanders v. Louthan* 469
8. Mortgagee in foreclosure suit, having obtained stay of sale, cannot thereafter appeal. *Carley v. Morgan* 498
9. Where, at time of foreclosure of prior mechanics' liens and a mortgage, judgment liens were not discovered

owing to negligent search, the mortgagee purchaser at foreclosure sale *held* entitled to be restored to liens of mortgage and prior lienors as against the judgment creditors. *American Savings & Loan Ass'n v. Barry*..... 523
10. Jurisdiction to foreclose a mortgage on realty vests in the district court for the county in which the realty, or some part thereof, is situated. *Prudential Ins. Co. v. Bliss* 578
11. In a foreclosure suit the mortgagee, upon a showing that the realty is probably insufficient to discharge the debt, is entitled to appointment of a receiver. *Prudential Ins. Co. v. Bliss*..... 578
12. A mortgagee can have a receiver appointed only in the foreclosure suit and by the court in which suit is pending. *Prudential Ins. Co. v. Bliss*..... 578
13. A mortgagee can reach rents and profits of mortgaged premises only by appointment of a receiver in foreclosure suit. *Prudential Ins. Co. v. Bliss*..... 578

Municipal Corporations.

1. Decree annexing territory to city upheld. *City of Wilber v. Bednar*..... 324
2. If an ordinance is valid as an exercise of police power, courts will not inquire into motives for enacting it. *Hawkins v. City of Red Cloud*..... 487
3. Courts, in determining validity of ordinance enacted under police power, will presume that the city council acted with full knowledge of conditions relating to the subject. *Hawkins v. City of Red Cloud*..... 487
4. The municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted under delegated police power. *Hawkins v. City of Red Cloud* 487
5. Ownership and use of private property in a city is subject to proper police regulations. *Hawkins v. City of Red Cloud* 487
6. Police regulations promoting public safety and welfare may be valid, though restricting the liberty of citizens in regard to occupations and ownership and use of property. *Hawkins v. City of Red Cloud*..... 487
7. An ordinance prohibiting installation and operation of automatic gasoline pumps without an attendant *held* valid as a proper exercise of police power.
Hawkins v. City of Red Cloud..... 487
Hawkins v. City of Red Cloud..... 490
8. A contract with a city in violation of a charter provision making an appropriation or the sanction of electors

a prerequisite to incurring of indebtedness is void. *Campbell Co. v. City of Harvard* 539
9. A city, under provision of charter, *held* to have implied power to contract for audit of treasury's books, and for the auditor's compensation. *Campbell Co. v. City of Harvard* 539
10. Compensation due auditor of books of city officers *held* payable out of general fund at time contract for audit was made. *Campbell Co. v. City of Harvard* 539
11. Depletion of city general fund available for audit at time contract was made *held* not to render contract void. *Campbell Co. v. City of Harvard* 539
12. November general election *held* a "regular election" within the statute ordering submission to municipal electors of question of levy of tax to provide for a community nurse. *State, ex rel. Long, v. City of Nebraska City* 614
13. A municipal election will not be held invalid for lack of notice, where notice is actually brought home to the voters and it does not appear that enough voters to change the result failed to vote because of lack of notice. *State, ex rel. Long, v. City of Nebraska City* 614
14. A bank, whose officers are officers of a village, purchasing village warrants irregular on their face, holds the warrants subject to right of village to offset claim against bank. *Union Nat. Bank v. Village of Beemer* 778
15. Knowledge of officers of a bank who are also officers of a village that the bank had assigned village warrants purchased by it, *held* not imputed to the village. *Union Nat. Bank v. Village of Beemer* 778
16. Where no part of toll bridge is within the corporate limits of a city, taxes levied by the city against the owner of the bridge are void. *Waubonsie Bridge Co. v. City of Nebraska City* 832
17. A prosecution for violation of an ordinance, which does not embrace a criminal offense under common law or statute, is a civil proceeding to recover a penalty, and therefore defendant is not entitled to a jury trial. *McLaughlin v. State* 861

Negligence.

1. Contributory negligence is an affirmative defense, the burden of proof being on the party pleading it. *Schrage v. Miller* 266
2. The legal effect of contributory negligence and defendant's burden of proving contributory negligence were not changed by the comparative negligence statute. *Schrage v. Miller* 266

3. "Ordinary care" defined. *Schrage v. Miller* 266
4. A life guard at a bathing resort who goes to the rescue of a patron must exercise ordinary care. *Blackwell v. Omaha Athletic Club* 332
5. In an action for injuries in a swimming pool, instructions given and refusal of requested instructions *held* not prejudicial. *Blackwell v. Omaha Athletic Club* 332
6. Unless prohibited by statute or ordinance, a pedestrian may cross a street at any point. *Kauffman v. Fundaburg* 340
7. A motorist owes ordinary care toward one crossing a street at a point other than a regular crossing, and must exercise more care toward a child of tender years than toward adults in same circumstances. *Kauffman v. Fundaburg* 340
8. A child's crossing a street near a regular crossing *held* not of itself negligence. *Kauffman v. Fundaburg* 340
9. A child crossing a street between blocks need exercise only such care as persons of his age, experience, and intelligence ordinarily exercise. *Kauffman v. Fundaburg* 340
10. Negligence of driver in failing to keep proper lookout, give timely warning, or keep truck under proper control when school children were on both sides of the street, *held* question for jury in action for death of child. *Kauffman v. Fundaburg* 340
11. The duty of a bathing resort keeper to make reasonable provision against accidents to bathers may require furnishing attendants. *Nolan v. Young Men's Christian Ass'n* 549
12. Ordinary care to provide a reasonably sufficient number of attendants at a bathing resort is a standard of the owner's duty. *Nolan v. Young Men's Christian Ass'n* 549
13. Issues of negligence are questions for the jury only when the evidence is sufficient to sustain a finding of negligence. *Nolan v. Young Men's Christian Ass'n* 549
14. In an action for death from drowning in a swimming pool, direction of verdict for defendant *held* proper. *Nolan v. Young Men's Christian Ass'n* 549
15. Prior to ch. 105, Laws 1931, personal negligence of automobile driver was not imputed to a passenger. *Garrotto v. Butera* 682
16. The driver of an automobile owes passengers the duty of exercising ordinary care in its operation, whether they are invited guests or engaged in a common purpose. *Garrotto v. Butera* 682
17. Whether an act constitutes negligence is a question for the jury, where reasonable minds may honestly find neg-

ligence from the evidence. *Johnson v. Mallory* 706
18. Question of negligence should not be submitted to the jury where the evidence is insufficient to support an affirmative finding. *Johnson v. Mallory* 706
19. What constitutes "proximate cause" of injury from negligence, stated. *Johnson v. Mallory* 706
20. Separate acts of negligence acting contemporaneously may constitute proximate cause of injury, if injury would not have happened in absence of either, and one is not relieved of liability merely because he was responsible for only one of such acts. *Johnson v. Mallory* 706
21. Acts from independent sources are not concurrent in causing injury, if one merely furnishes a condition rendering injury possible, and later such injury occurs through the efficient and independent operation of the other. *Johnson v. Mallory* 706
22. One doing a wrongful act which might reasonably be anticipated to cause an injury is not relieved from liability for injury immediately brought about by an intervening cause set in operation by such original wrongful act, and which alone would not have caused the injury. *Johnson v. Mallory* 706

New Trial.

1. Where a new trial is asked on the ground of misconduct of juror, the trial court's finding in support of the verdict will not be set aside where the evidence of misconduct is not clear and convincing. *Blackwell v. Omaha Athletic Club* 332
2. Where the verdict is not sustained by evidence, the remedy is by motion for new trial on that ground. *Bielfeldt v. Grand Island Transit Co* 368
3. On motion for new trial, the presumption is that the verdict is right. *Wiegand v. Lincoln Traction Co* 766
4. Showing requisite to new trial on ground of newly discovered evidence, stated. *Wiegand v. Lincoln Traction Co.* 766

Officers.

"Public officer" defined. *Home Savings & Loan Ass'n v. Carrico* 25

Payment.

Generally, a creditor's failure to return a check does not constitute payment, where the creditor does nothing indicating intention to receive the check in payment. *Babson v. Crete Mills* 175

Pleading.

1. Permitting amendment to pleading does not constitute reversible error, unless error appears from the record. *Miller Rubber Products Co. v. Anderson* 247
2. Amendment to pleading may be made at any stage of a proceeding if it does not change the issues nor affect the quantum of proof. *Miller Rubber Products Co. v. Anderson* 247
3. Where upon statements in pleadings one party is entitled as matter of law to judgment, judgment should be so rendered. *State, ex rel. Sorensen, v. Scoville* 457
4. A petition pleading facts disclosing that the cause of action is barred is demurrable, unless facts tolling the statute are also pleaded. *Parkin v. Parkin* 836

Public Lands.

Assignee of assignment of a lessee's interest in school lands *held* not entitled to a lien to secure repayment of money advanced under void assignment. *Kirk v. Fletcher* 634

Quieting Title.

In a suit to quiet title as against judgment liens, threatened enforcement of the judgment liens pending suit may be enjoined. *American Savings & Loan Ass'n v. Barry* 523

Quo Warranto.

Evidence *held* to sustain findings of referee that respondent at time of election was a defaulter, and therefore ineligible to hold office. *State, ex rel. Sorensen, v. Farley* 687

Receivers. SEE COURTS, 2, 3.

Reasonable fees are allowable for services of attorneys for receiver of an insolvent state bank. *State, ex rel. Sorensen, v. First State Bank* 620

Receiving Stolen Goods.

1. Mere suspicion is insufficient to establish knowledge that property was stolen, so as to warrant conviction of receiving and concealing stolen property. *Smith v. State* 17
2. Evidence *held* to sustain conviction of receiving and concealing stolen property. *Smith v. State* 17

Specific Performance.

1. Specific performance of oral contract to convey realty in consideration of personal care to be given the owner during life will be decreed where a fair contract is es-

tablished by clear, satisfactory, and convincing evidence. *Weber v. Crabill* 88
2. Owner of life estate *held* not entitled to specific performance of contract in which she agreed to convey a fee simple title. *DeWitt v. Searles* 129
3. Specific performance is within the court's discretion. *Wineberg v. Baker* 411
4. Specific performance of contract for sale of land may be refused where the vendor misled the vendee as to the quantity of land, even though the vendor acted innocently. *Wineberg v. Baker* 411

States.

On appeal from allowance of claim against the state, the court will determine the matter according to justice and right. *Lyman-Richey Sand & Gravel Co. v. State* 674

Statute of Frauds.

An easement may be created by parol, where the grant has been accepted and acted upon. *Polyzois v. Resnick* 663

Statutes.

1. Statute permitting certain actions against a trucking company to be brought in any county through which the line passes *held* constitutional. *Schwarting v. Ogram* 76
2. Presumption is against implied repeal of provisions of a local or special statute by a later general act. *Mancuso v. State* 204
3. Statutes should be construed so as to sustain, rather than defeat, them. *Mancuso v. State* 204
4. Special statutory provisions control general provisions. *Mancuso v. State* 204
5. Generally, where there is a conflict between a general and a special statute, the latter must prevail. *Mancuso v. State* 204
6. Where language of a statute is clear and unambiguous, courts will not by construction give it a meaning not intended or expressed. *State v. Bishop* 481

Stipulations.

A stipulation on interpretation of a will made at the first trial is admissible at a subsequent trial of the same suit, with certain exceptions. *In re Estate of Wecker* 504

Taxation.

1. No one only a party whose interest in real estate will be affected by foreclosure of a tax lien has a right to redeem. *Williams v. Lantz* 67

2. The attorney general may invoke the jurisdiction of the supreme court by writ of error to review an order of the state board of equalization. *State v. State Board of Equalization and Assessment* 259
3. Where the state board of equalization failed to follow statutory requirements, its action in reducing pipe line valuations must be set aside. *State v. State Board of Equalization and Assessment* 259
4. County boards of equalization, during a session not exceeding 20 days, are vested with power to determine the tax exempt character of realty. *State v. Odd Fellows Hall Ass'n* 440
5. County boards of equalization may sit for 20 days, not necessarily continuous, and not later than July 10th of any year. *State v. Odd Fellows Hall Ass'n* 440
6. Statutes providing for appeals from orders of county boards of equalization do not preclude appeal by any person, representative, or entity whose interest may be adversely affected. *State v. Odd Fellows Hall Ass'n* 440
7. The state may appeal from a decision of the county board of equalization exempting property from taxation. *State v. Odd Fellows Hall Ass'n* 440
8. The state may appeal from county board of equalization by serving written notice on the county clerk within 20 days after rendition of the decision complained of. *State v. Odd Fellows Hall Ass'n* 440
9. Bond for costs, appeal, or supersedeas is not required of the state as a prerequisite to appeal from the state board of equalization. *State v. Odd Fellows Hall Ass'n* 440
10. Notice of appeal by the state and the state board of equalization, and service thereof, approved. *State v. Odd Fellows Hall Ass'n* 440
11. The state tax commissioner may, in the name of the state, appeal from orders of county boards of equalization exempting property from taxation. *State v. Odd Fellows Hall Ass'n* 440
12. A tax levied on an increase in assessed value over the last previous assessment, when statutory notice thereof was not given to the landowner, *held* void. *Rosenbery v. Douglas County* 803

Towns.

In absence of evidence to contrary, the official character of a township officer is not changed because he did some act not required by his office. *Vandenburg v. Center Township* 544

Trespass.

Intentional going upon land which a person, in good faith, believes he owns, although he may be mistaken, is not criminal trespass. *Kissinger v. State* 856

Trial. SEE APPEAL. CRIMINAL LAW.

1. It is proper to direct a verdict where only one conclusion can be reasonably reached from the evidence. *Morgan v. United Benefit Life Ins. Co* 47
2. Misstatement of pleadings in instruction *held* not prejudicially erroneous. *Lowell v. Buffalo County* 194
3. A judgment will not be reversed for alleged error in an instruction, when the instructions, considered in their entirety, are not prejudicial. *Lowell v. Buffalo County* 194
4. In an action against principal and surety, it is error to submit to jury issue of principal's liability as a basis of surety's liability, where motion to direct verdict against principal was properly sustained. *Miller Rubber Products Co. v. Anderson* 247
5. An instruction as to the burden of proving contributory negligence *held* not prejudicially erroneous when considered in connection with all the instructions. *Schrage v. Miller* 266
6. Instructions when considered as a whole *held* not erroneous as omitting defense of contributory negligence. *Schrage v. Miller* 266
7. Instruction as to part of statute *held* not error, where there was no issue as to omitted part. *Schrage v. Miller* 266
8. Reciprocal rights and duties of automobile drivers may be covered by separate instructions. *Schrage v. Miller* 266
9. Statement by counsel to jury does not justify reversal, where exception to statement was sustained and the jury duly admonished. *Schrage v. Miller* 266
10. Pleadings should not be copied in instructions in stating issues. *First Nat. Bank v. Davis* 304
11. Where there is evidence which would support a verdict if not contradicted, the trial court must submit the case to the jury. *Blackwell v. Omaha Athletic Club* 332
12. Refusal of requested instruction is not prejudicial, where directions therein were properly included in instructions given. *Pendrock v. Woolworth Co* 477
13. A verdict should be received only when the judge is present and the court open for transaction of business. *In re Estate of Lodge* 531

Trusts.

Parol evidence necessary to establish a resulting trust

must be clear, unequivocal and convincing. *Buckner v. McHugh* 396

Usury.

Provision in mortgage *held* not to constitute usury. *Carley v. Morgan* 498

Vendor and Purchaser.

1. Where the contract gives vendor unlimited time to perfect title, that vendee takes possession on the date provided does not constitute waiver of defects apparent in the title. *Bliss v. Schlund* 253
2. "Merchantable title" defined. *Bliss v. Schlund* 253
3. Vendor's positive representations as to total and cultivated acreage of land offered for sale are statements of fact, and if false and there is a material deficiency, the vendee, relying thereon, may rescind. *Wineberg v. Baker* 411
4. Whether deficiency in quantity of land sold justifies rescission depends on the particular circumstances. *Wineberg v. Baker* 411
5. Deficiency of 8.59 acres from 120 acres in land sold *held* to justify rescission. *Wineberg v. Baker* 411
6. In a suit to rescind, doctrine of *caveat emptor held* not to apply. *Wineberg v. Baker* 411
7. Vendee may rely on vendor's positive statement of fact, where investigation would be required to discover the truth. *Wineberg v. Baker* 411
8. Right to rescind contract *held* barred by laches. *Platner v. Ellingwood* 719

Venue.

1. Where a resident defendant has no interest in an action *in personam*, jurisdiction cannot be acquired over a nonresident codefendant by service of summons upon him in a foreign county. *Epp v. Federal Trust Co* 375
2. The test for determining whether an action is properly brought in one county against a resident defendant, so as to support service of summons on nonresident defendants in a foreign county, is whether the resident defendant is a *bona fide* defendant. *Epp v. Federal Trust Co.* 375

Waters.

1. Statutory dedication of water of natural streams to use of the people does not divest water rights previously acquired. *City of Fairbury v. Fairbury Mill & Elevator Co.* 588

2. One may appropriate unappropriated water of a stream. *City of Fairbury v. Fairbury Mill & Elevator Co*..... 588
3. A riparian owner's right to use of flow of a stream is a property right. *City of Fairbury v. Fairbury Mill & Elevator Co*..... 588
4. City *held* entitled to use of water of stream appropriated for mill purposes, where such use does not interfere with rights of the mill owner. *City of Fairbury v. Fairbury Mill & Elevator Co*..... 588
5. Department of public works may grant appropriation for use of water of stream, not impairing prior appropriations. *City of Fairbury v. Fairbury Mill & Elevator Co.*..... 588
6. Department of public works may issue permits for improvements of streams for beneficial use of water, but cannot determine damages or property rights. *City of Fairbury v. Fairbury Mill & Elevator Co*..... 588
7. Evidence *held* to establish that permit to construct certain retards and deflectors in a stream by a city does not impair prior rights of mill company. *City of Fairbury v. Fairbury Mill & Elevator Co*..... 588
8. A bridge must be constructed and maintained to provide for flow of all water carried in the channel, including flood waters. *Gledhill v. State*..... 726
9. Failure to properly provide for flow of water under a bridge imposes liability, notwithstanding the bridge was constructed according to approved principles of engineering. *Gledhill v. State*..... 726
10. The fact that a bridge obstructs the flow of water is evidence of improper construction. *Gledhill v. State*..... 726
11. Irrigation districts are not liable for damages resulting from landowners' negligence in use of water. *Omaha Life Ins. Co. v. Gering & Ft. Laramie Irrigation District* 761
12. The statutory remedy for drainage of subirrigated lands within an irrigation district is exclusive. *Omaha Life Ins. Co. v. Gering & Ft. Laramie Irrigation District*..... 761

Wills.

1. The later of two irreconcilable provisions of a will will prevail over the earlier, unless a contrary intention is evinced. *In re Estate of Curtis*..... 97
2. Devisee *held* to take only life estate in lands devised, with vested remainder in her children. *DeWitt v. Searles* 129
3. To render a devise conditional, it must so affirmatively appear from the language of the devise or from the entire will when read in the light of surrounding cir-

cumstances. *Morys v. Morys* 188
4. Will construed and *held* to devise to son an absolute estate in remainder, subject to a life estate. *Morys v. Morys* 188
5. The court in construing a will must ascertain the true intent of the testator as disclosed by the language of the will. *Nebraska Nat. Bank v. Bayer* 391
6. A devise to a son, subject to the mother's life interest, which prohibited the son from mortgaging the land during his life *held* valid. *Nebraska Nat. Bank v. Bayer* 391
7. Personalty bequeathed for life, then to named remaindermen, *held* not to revert to estate on death of life tenant. *In re Estate of Wecker* 504
8. Personalty bequeathed, without restriction, to a life tenant becomes her own property, but she must exercise reasonable precautions to preserve its full value for remaindermen. *In re Estate of Wecker* 504
9. The estate of a life tenant is entitled to profits from personalty, in absence of contrary provision in will, and the profits pass to her heirs or devisees. *In re Estate of Wecker* 504
10. Signature of testator may be affixed to will by holding a pen in his hand while another, at his request, directs the hand in writing the signature. *In re Estate of Lodge* 531
11. Evidence *held* to sustain finding that execution of will was not procured by undue influence of proponent and beneficiary. *In re Estate of Lodge* 531
12. Contestants have the burden of proving that the will was procured by undue influence, except where the person charged with exercising undue influence sustains a confidential relation to the testator and is a beneficiary. *In re Estate of Lodge* 531
13. Evidence *held* sufficient to sustain finding of testator's testamentary capacity. *In re Estate of Lodge* 531
14. Generally, attorney's fees are not allowed in an unsuccessful attempt to probate a will. *In re Estate of Charles* 630
15. Attorney's fees will not be allowed, where proponent, named as executor, has a personal interest in securing probate of a will. *In re Estate of Charles* 630

Witnesses.

1. Considerable discretion is vested in the trial court to permit cross-examination of defendant beyond the direct examination to test his accuracy, memory or credibility. *O'Connor v. State* 471

2. Where testimony of witness at first trial is read at second trial, admission of certified record of his conviction of felony in interim, *held* not error. *Wiegand v. Lincoln Traction Co* 766
3. In a prosecution for rape, the credibility of a witness may not be impeached by proof that she has been committed to the state training school for girls. *Witt v. State* 799