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CHARLES S. HAMILTON, APPELLEE, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLANT.

275 N. W. 863

FILED NOVEMBER 5, 1937. No. 30069.

1. **Insurance.** A health and accident insurance company may limit its liability in any reasonable manner and it may therefore exempt from liability diseases of organs not common to both sexes.
2. ———. In construing terms used in a policy of insurance, they are to be taken in their plain and popular sense.
3. ———. A policy of health insurance, exempting diseases of organs which are not common to both sexes, does not insure the health of a man who contracted gonorrhea, which first attacked and chiefly affected his genital organs.

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

Gale E. Davis and *Cleary, Horan & Skutt*, for appellant.

Bernard R. Stone, Wear, Boland & Nye and *George C. Pardee, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

GOSS, C. J.

Plaintiff had a verdict of a jury and a judgment in the lower court. Defendant appealed.

The action was based on an insurance policy "against loss of time on account of disease contracted during the term of this policy * * * subject, however, to all the provisions and limitations hereinafter contained." One of the provisions, plainly printed in the policy, said: "This policy does not cover death * * * or disability from any disease of organs which are not common to both sexes."

Under the allegations of his petition, plaintiff proved that the disease which caused his disability was gonorrhea. His physician also testified that plaintiff had gonorrhea; that he had an interior urethritis, a cystitis or inflammation of the bladder with infection of the seminal vessels, an enlarged prostate gland and bilateral epididymitis or

infection of the epididymii, lying in the upper part of the testicles. The evidence shows that plaintiff had what he described as a swelling of the penis and testicles and that he was given some medicine which was applied through the penis. His physician testified that he had a severe case, which resulted in septicemia or infection in the blood stream. In plaintiff's formal claim for benefits, he described the nature of his illness as "Infection of the sexual glands." In the statement of the attending physician, made on the other side of the same form to be used as a basis of the claim for payment, he described the disease as "Acute gonorrhea with prostatic abscess and bilateral epididymitis." The company was not advised by the information given them by either plaintiff or his physician on the claim blank that plaintiff had any bladder trouble or any infection of the blood stream.

The urethra is common to both sexes though it is much shorter in the female. The bladder and the blood stream are also common to both sexes. But the penis, the prostate gland, the testicles and the epididymii are peculiar to the male. Are the urethra, the bladder and the blood stream such "organs," possessed by both sexes, that we must by interpretation or construction bring the disability within the liability on the policy?

There is some claim on the part of plaintiff that the provision quoted in the first paragraph of this opinion requires the words "disability" or "disease" to be modified by the phrase "not common to both sexes," but we are clearly of the opinion that the word "are" makes that phrase referable to "organs." That is the only one of the three words that is plural and the verb is plural. The very evident meaning, therefore, is "organs which are not common to both sexes."

A health and accident insurance company may limit its liability in any reasonable manner and it may therefore exempt from liability diseases of organs not common to both sexes. *Stone v. Physicians Casualty Ass'n*, 130 Neb. 769, 266 N. W. 605.

The provision was the very first under the additional provisions, and was printed in leaded type. Its impression on a male layman would be strikingly indicative that it is intended to exempt from the liabilities of the policy a male insured who contracts gonorrhea, though it did not specify that term. Such an insured would naturally consider that any disease which would afflict him through his penis and its adjuncts would be exempt from liability under the policy because the same disease would begin its course in a female through her genital organs, which he would well understand were not "common" with his, though they have some of the functions similar or complementary to his. But the general understanding of the lay mind is that the male and female genital organs are "not common to both sexes." That both sexes have an urethra, both have a bladder and both have a blood stream, all of which may be ultimately affected, does not make the organs of plaintiff, which were primarily affected by the poisonous gonococci, and the genital organs of a female "common to both sexes."

The sense in which such contracts are to be interpreted by the courts is not the sense in which the scientist understands the terms, but the sense in which the average man understands them. In *Lewis v. Ocean Accident & Guarantee Corporation,* 224 N. Y. 18, 120 N. E. 56, 7 A. L. R. 1129, Judge Cardozo said: "To the scientist who traces the origin of disease, there may seem to be no accident in all this. * * * But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. * * * This test—the one that is applied in the common speech of men—is also the test to be applied by courts."

In *Standard Life & Accident Ins. Co. v. McNulty* (8th C. C.) 157 Fed. 224, Sanborn, J., said: "Agreements of insurance are to be construed like other contracts, according to the sense and meaning of the terms which the parties use, taken in their plain and popular sense."

As average men, considering the contract of insurance

and taking the words of the provision in their plain and popular sense, we think there was no reasonable basis upon which the plaintiff might base a recovery for his disability.

Appellee cites *Mutual Benefit Health & Accident Ass'n v. Blaylock*, 163 Miss. 567, 143 So. 406, where a judgment against the same company as defendant here, on an apparently similar policy, was affirmed. In that case, however, the insurer had a "skin disease which could be contracted by any one on any part of the body." Thus it was held to be a disease of an organ common to both sexes. So the case is not in point.

Plaintiff did not prove any liability under the terms of the policy. The court erred in not sustaining defendant's request for an instructed verdict. The judgment is reversed and the trial court is directed to enter a judgment for defendant.

REVERSED.

HENRY LEIS, JR., APPELLEE, V. JOHN W. BECKMARK ET AL., APPELLANTS.
275 N. W. 679

FILED NOVEMBER 5, 1937. No. 30088.

1. **Landlord and Tenant.** Under an oral lease for the cultivation of a farm for a single season, where lessor agrees, in addition to the land, to furnish one-half of the seed and feed and all necessary equipment to plant, cultivate and harvest crops, and lessee agrees to perform all labor and to deliver to lessor one-half of all crops, the relation of the parties to each other is that of tenants in common of the crops.
2. **Equity.** "When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings." *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368.
3. ———. Where a court of equity acquires jurisdiction for an accounting between tenants in common of crops on the pleas of both parties to an oral contract, all the issues raised by the pleadings may be determined regardless of distinctions between equity and law.

APPEAL from the district court for Morrill county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

F. E. Williams, for appellants.

Fred T. Nichols, contra.

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

ROSE, J.

This is a controversy between a tenant and his landlords over their respective obligations and shares of crops under an oral contract for the cultivation of farm lands on which beets, potatoes, corn, barley, oats and other crops were produced in Morrill county during the season of 1935. Henry Leis, Jr., plaintiff, was tenant and John W. Beckmark, Vincent B. Beckmark and Amanda J. Beckmark, defendants, were landlords.

The cause was first tried before a duly appointed and qualified referee who heard the parties at great length on pleas of plaintiff and defendants for an accounting. The referee made findings to which defendants excepted. The cause was heard by the district court on the referee's report, the exceptions thereto and the evidence. The trial resulted in confirmation of the referee's report. From a judgment in favor of plaintiff, defendants appealed to the supreme court.

On appeal it is asserted by defendants that the action is one at law by a farm tenant against his landlords for conversion of his share of the crops and for compensation for services performed by him independently of the relation of landlord and tenant. In support of this view of the action, many technical rules of law are invoked to defeat the judgment below. The position thus taken is untenable in the light of the pleadings and the evidence. Plaintiff prayed for an accounting, in which defendants joined. The prayer in the answer of defendants to the petition of plaintiff is in part as follows:

"Defendants pray that an accounting be had of all mat-

ters between plaintiff and defendants growing out of and had pursuant to said contract for the purpose of a full and complete settlement of such matters."

The referee and the district court found, and the evidence shows, that defendants were to furnish, in addition to the farm lands, one-half of the seed, feed, fuel for tractor, and all necessary equipment to plant, cultivate and harvest crops grown on the leased premises, and that plaintiff was to perform all labor and to deliver to defendants one-half of all crops. Plaintiff owned and used a truck in connection with some of his work. The cause was tried and determined on the basis of an accounting and as such the judgment below is reviewable. The parties conferred on the district court jurisdiction to determine all matters growing out of their contract for "the purpose of a full and complete settlement." A conversion of any crop or damage thereto was cognizable in the accounting for which both parties asked. The following rule refutes the theory of defendants:

"When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings." *Disher v. Disher,* 45 Neb. 100, 63 N. W. 368.

Both referee and trial court followed this rule and determined the issues raised by the pleadings regardless of distinctions between equity and law. In the decision below the court properly considered the parties to the suit tenants in common of the crops under their oral contract and held them all accountable for what they did in that relation.

Considering the case in its true nature with a large volume of evidence adduced by both sides and the rules of equity and principles of law applicable to the facts, the referee examined separately the items on both sides of the accounting, listed them in detail and found that defendants should be charged with $629.79 and plaintiff with $410.62, leaving a balance of $219.17 due plaintiff from

defendants. Unpaid purchase prices for products sold and other pertinent matters were adjusted on the basis of equal division of crops. The district court heard the parties on the report of the referee, the exceptions thereto, and the evidence, and found the issues generally in favor of plaintiff, confirmed the referee's report and entered judgment conforming thereto. On appeal the exceptions to the report of the referee are found upon consideration of the entire record to be without merit. The judgment in favor of plaintiff and against defendant for $219.17 and for other equitable relief granted is supported by a preponderance of the evidence and free from prejudicial error.

Defendants contend that the costs should be taxed to plaintiff, and that in any event the fee allowed for the services of the referee is excessive. The trial court's allowance for the work of the referee was $250 and for that of the reporter $40. The record shows that these allowances were fair and reasonable for services well performed and were properly taxed with other costs against defendants.

AFFIRMED.

EDWARD C. HEMMER, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
276 N. W. 153

FILED NOVEMBER 5, 1937. No. 30245.

1. **Insurance.** Under the law of the case as determined by previous judgment of this court, where proof established that plaintiff's employment covered by policy in suit had continued four years, two months, and twenty-three days when payment for temporary disability was commenced, and thereafter continued for fifty-three weeks, in determining the five years of service stipulated by the terms of such insurance contract as a prerequisite to plaintiff's right to receive compensation for permanent total disability, such fifty-three weeks should be included as part thereof.
2. **Trial: INSTRUCTIONS.** Instructions given to a jury must be

construed together, and if, when considered as a whole, they properly state the law, it is sufficient.

3. **Attorney and Client.** A reasonable attorney fee in any proceeding is to be determined by the nature of the case, the amount involved in the controversy, the results obtained, and the services actually performed therein, including the length of time necessarily spent in the case, the care and diligence exhibited and the character and standing of the attorneys concerned.
4. **Costs.** Record examined, and the allowance of an attorney fee of $2,500 thereunder *held* excessive.

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

Harley G. Moorhead and *Emmet S. Brumbaugh*, for appellant.

Fradenburg, Webb, Beber, Klutznick & Kelley and *Alfred A. Fiedler, contra.*

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

EBERLY, J.

This is an action to recover permanent and total disability, alleged by plaintiff to be due him, in the sum of $1,848.50 under a group policy of insurance issued by defendant company to its own employees, of whom plaintiff was one, after completion of six months of service,—permanent and total disability benefits becoming payable only when at the time the employee applies for the same such employee had five years of service and had contributed to the premiums for such insurance ever since he was eligible or has been a continuous contributor for not less than four years and six months. There was a trial to a jury, resulting in a verdict for plaintiff in the sum of $1,407.70, and from the order of the trial court overruling its motion for new trial the defendant company appeals.

This is the second appearance of this case in this court. In *Hemmer v. Metropolitan Life Ins. Co.*, 131 Neb. 14, 267 N. W. 153, this identical controversy was presented to this court by an appeal of plaintiff from the order of the dis-

trict court for Douglas county sustaining defendant's demurrer to plaintiff's petition and dismissing his action. This court in that proceeding, after an examination of the pleadings and the terms of the insurance contract set forth therein, construed the same and reversed the judgment of the district court and remanded the cause for further proceedings. In that judgment this court, upon an examination of the contract of insurance, held substantially, as applied to the issues now presented on this second appeal, that plaintiff was required to prove only two principal factors, viz.: (1) That his disability in the degree defined by the policy had continued for 53 weeks; and (2) that at the end of such 53 weeks, being then totally and permanently disabled, if he sought total and permanent disability benefits, he had the five years of service essential to his recovery under the terms of the policy in suit, and that such five years of service could include the 53 weeks during which he was receiving temporary disability benefits. This adjudication constituted the law of the present case, as previously determined.

There is no conflict in the evidence as to the fact that plaintiff had been employed by defendant company, and within the scope of the insurance policy, four years, two months, and twenty-three days when the payments of "temporary disability" were commenced in June, 1933, and that such payments continued up to and including June 24, 1934.

The master policy here involved contained two relevant provisions, viz.:

"In addition to the temporary disability benefits provided hereunder, the employee's contributions will be waived for each full calendar week for which such benefits are payable."

Also, "the service of an employee who has been in receipt of disability benefits shall be deemed to terminate, as of the last day of the period for which such benefits were paid."

These provisions sustain and render necessary the con-

clusion as to completion of five years of service above announced.

The fact that plaintiff, at the commencement of the action, was permanently and totally disabled is not questioned either in the evidence or on argument at the bar of this court. And the further fact that he had performed the five years of service necessary to bring him within the terms of the policy entitling him to recover must be conceded in view of the record before us and the law of the case heretofore established.

Certain objections to instructions given by the trial court are challenged by appellant. These instructions must be construed together, in the light of the law of the case as heretofore determined by this court. We have so examined them and have found them free from error. *Stephan v. Prairie Life Ins. Co.*, 113 Neb. 469, 203 N. W. 626; *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458.

The defendant presents for review the reasonableness of an allowance of attorney fees in the sum of $2,500 as taxed against it by the trial court. Authority for the taxing of attorney fees by trial courts in the instant class of cases is conferred by section 44-346, Comp. St. 1929. In passing on this section the United States circuit court for the eighth circuit in a Nebraska case sustained the action of the trial court in fixing an attorney fee thereunder, in the absence of any oral evidence on the subject, and stated:

"The further point, in connection with the allowance of this fee, that there was no evidence as to a reasonable amount is not open to examination. If it were, we would be inclined to hold that the court is as good judge of reasonableness of attorney fees for services in that court as any one. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence, and, as such, advisory but not binding upon the court." *Globe Indemnity Co. v. Sulpho-Saline Bath Co.*, 299 Fed. 219.

Nevertheless, the question of attorney fees is subject to review, and the revisory action of this court is to be exercised in a consideration of all the facts disclosed by the

record. This court has carefully considered the record, including all competent evidence presented thereby on the subject of a reasonable attorney fee, in view of the nature of the case, the amount involved in the controversy, the results obtained, and the services performed including the length of time spent in the case, the care and diligence exhibited and the character and standing of the attorneys concerned. Without any criticism relative to elements so enumerated, we are unanimously of the opinion that the sum of $2,500 allowed and taxed by the trial court as attorney fees is excessive and constitutes an abuse of judicial discretion; that a reasonable fee for plaintiff's attorneys in the trial court does not exceed, and is hereby fixed at, the sum of $500; and that a fee for services performed by plaintiff's attorneys in this court upon this appeal is allowed in the sum of $250, which last-named amount is ordered to be taxed as costs in this case.

Therefore, it follows that the judgment in favor of plaintiff in the sum of $1,407.70 is affirmed, and that the order of the trial court in this case fixing and allowing an attorney fee of $2,500 is set aside and reversed, and the cause is remanded to the district court, with directions to tax the sum of $500 in favor of plaintiff's attorneys for services in the trial court.

AFFIRMED AS MODIFIED.

DAISY MOORE, ADMINISTRATRIX, APPELLEE, V. ERNEST NISLEY, APPELLANT.
275 N. W. 827

FILED NOVEMBER 5, 1937. No. 30086.

1. **Automobiles.** If, as required by law, a driver does not display lights on a projecting load when it is dark, it is evidence of negligence.
2. ———. Our examination of the record shows that the finding of negligence of the truck driver in an action for the death of the driver of an automobile which collided with a lumber skid projecting sidewise into the highway is sustained by the evidence.

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

L. R. Doyle and *T. R. P. Stocker*, for appellant.

James L. Brown, contra.

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

DAY, J.

Daisy Moore, as administratrix, seeks to recover for the death of her husband resulting from an accident on the highway with Ernest Nisley. She recovered in a trial to a jury in the district court, from which an appeal is prosecuted. While there are many assignments of error, the question of the sufficiency of the evidence embraces all of them.

The accident occurred on the 6th of September, 1935, at a point on the state highway No. 2, about one-half mile north of Cheney. The appellant was moving a metal granary from the state fair grounds in Lincoln to a farm near Bennett, which is just beyond Cheney on this highway. In order to load the granary on the truck, a skid was constructed of lumber and left between the granary and the truck when loaded. One piece of this lumber, a 2 by 8, 14 feet long, ran through the windshield of decedent's car, fatally injuring him. This, briefly, is the accident.

Proper pleadings were filed, in which the appellee alleged that the collision resulted from the negligence of the appellant. This negligence is averred to be: First, that Nisley drove his truck without lights on the granary or skid overhanging the truck; and, second, that he was driving a truck so loaded without a lawful permit of the state of Nebraska. An answer was filed alleging that the accident occurred as the result of the negligence of the deceased, and denying that the appellant was in any way responsible for the injuries and death of the decedent, Jesse E. Moore. The pleadings are elaborate, but this substantially states the issue.

There is no dispute that the law required Nisley to get a permit to move the granary on the highway, but the crux of the case is whether he so drove his truck that his negligence was the proximate cause of the accident. In order to determine this, it is necessary to determine the sufficiency of the evidence to sustain a verdict.

It is a legal platitude in this state that, where different minds may reasonably draw different conclusions from the same evidence as to the facts in the case as to whether they indicate negligence or contributory negligence, the issues must be submitted to the jury. It was recently so held in *Major v. Harrison,* 132 Neb. 363, 272 N. W. 201, citing some of the numerous cases supporting this rule.

The evidence of the appellee, and for the purpose of this case it will be considered in its most favorable light, is that the accident occurred on a cloudy day; that the sun set at 6:52 p. m., or later. It is also an established fact that the decedent entered a local hospital at 8:30 p. m. It was testified that the sun had set, and that it was dark. A witness testified that there was a light place in the west, just prior to the accident, which silhouetted vehicles coming from the west, but the truck had turned south afterwards. The headlights of the car were on. The highway was a dark oil mat. The decedent was killed, so that the only eyewitnesses were two boys in a junk truck which the decedent passed, and the driver of the truck and a passenger accompanying him. There are many witnesses as to surrounding circumstances. Upon many things the evidence is sharply in conflict. The place of the occurrence, and the manner thereof, as well as the time and the condition of the light, are matters concerning which there is adverse testimony. It is generally agreed that decedent passed a truck prior to the accident, and that when he met this truck a 2 by 8, 14-foot plank, projecting from the body of the truck at least 3½ feet, ran through the windshield of his car and killed him. It is not disputed that the appellee's decedent died as a result of the accident. Neither is it disputed that the board responsible for the accident

was overhanging the truck and not lighted. Even if it were not entirely dark, can a driver rely upon the lights of an approaching car to outline its extent? The law provides for lights on the overhanging load, even if it is not sundown, if there is not sufficient light to render vehicles discernible for a distance of 300 feet. The jury were properly instructed as to the law. Now, at the time of the accident the drivers of the cars had turned on their lights, and that is a circumstance which the jury may consider as to whether a failure to light the overhanging load was negligence. If, as required by law, a driver does not display lights on a projecting load when it is dark, it is evidence of negligence. An analogous case is *Cohen v. Silverman,* 153 Minn. 391, 190 N. W. 795. Is this not to some extent applicable if the accident occurred on one side or the other of the center of the road? The questions for the jury are the negligence and the contributory negligence at the time of the accident.

The appellant contends that the physical facts preclude recovery here. He relies on *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514, but the quotation from that case shows it is inapplicable. It begins: "Where undisputed physical facts demonstrate." To us the testimony establishing these physical facts is disputed. The rule is a salutary one, and there are many Nebraska cases supporting it, but it is not applicable here.

The question of the overhanging load as applicable to the sufficienty of the evidence is an interesting one. There are not many reported cases, but the rule uniformly adopted is that evidence of a failure to display lights upon a load projecting from a truck shows negligence. This seems to be ordinary care, even if the statute does not require it. Usually, statutes require such careful consideration for the safety of others, but it is possibly only a salutary declaration of what constitutes ordinary care. In 1927 the California supreme court held that it was evidence of negligence to place a truck carrying a girder across a road after dark. *Miller v. Lyons,* 200 Cal. 232, 252 Pac. 330. In

1928 Kansas held that testimony of a projecting timber on a truck was evidence of a truck owner's negligence. *Barzen v. Kepler,* 125 Kan. 648, 266 Pac. 69. See, also, *Bowley v. Smith,* 131 Me. 402, 163 Atl. 539; *Dorris v. Bridgman & Co.,* 296 Pa. St. 198, 145 Atl. 827. Our examination of the record shows that the finding of negligence of the truck driver in an action for the death of the driver of an automobile which collided with a lumber skid projecting into the highway is sustained by the evidence. The verdict of the jury, based upon conflicting evidence, of course, will not be disturbed.

AFFIRMED.

THEODORE DAVIS ET AL., APPELLANTS, V. ADAM MOHR, TRUSTEE, ET AL., APPELLEES.
275 N. W. 865

FILED NOVEMBER 5, 1937. No. 30082.

Record and evidence examined, and *held* to sustain the findings and judgment of the trial court.

APPEAL from the district court for Sarpy county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed.*

Joseph E. Strawn and *S. L. Winters,* for appellants.

William R. Patrick, contra.

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

PAINE, J.

Plaintiffs filed an action in equity to quiet title to certain tracts of land and accretions thereto along the north side of the Platte river in Sarpy county, and to enjoin the defendants from trespassing upon the same, or erecting barriers thereon.

The defendants first filed an answer in the nature of a general denial, and later filed an amended answer with

cross-petition, praying for a judgment quieting title to certain land in defendants, to which a reply was filed. A decree was entered, dismissing plaintiffs' petition, and granting defendants relief as prayed, from which plaintiffs appeal.

The plaintiffs are Theodore Davis and his son-in-law, Henry F. Schulz. The defendants consist of nine individuals and the Clarke Land & Loan Company, a corporation.

The land which is in controversy in this case is located in sections 26 and 27, township 13 north, range 12 east of the 6th principal meridian in Sarpy county, Nebraska, and is more particularly described as government lots 3 and 4, together with a large island, called by the plaintiffs the Davis & Schulz island, of approximately 34 acres, lying just to the south of these tracts across a small branch of the Platte river, and which constitutes the north side of the Platte river, together with certain accretions thereto. Lot 3 lies to the east of each of said lots lying along the north bank of said river. The defendants disclaimed any interest in government lot 3. Government lot 4 is the only shoreland which is in controversy, and the abstract shows that the record title to this government lot 4 is incomplete.

The plaintiffs claim the ownership of all of the Davis & Schulz island, alleging that it was formed by accretions added to a small portion of government lot No. 3 which was cut off from the mainland by the Platte river; that this portion so cut off is the eastern end of the island.

On the other hand, the defendants claim in their cross-petition that for more than ten years they have been in adverse possession of government lots 4 and 5, claiming to own and hold the same adversely to all other persons; that these lots are riparian in character, and that they are, therefore, the owners of such portion of said island as is situated south of their lands.

At the east end of the Davis & Schulz island there are a number of large trees, and the plaintiffs contend that the island was formed by an accretion from the east

end to the west end, starting from a little island where the large trees are growing, which island was cut off from government lot No. 3 on the mainland which they own, and plaintiffs insist that all of this island is formed from such accreted land, as there was no island there when the government survey was made in 1856. In the trial this tip at the east end of the island on which the large trees are growing was designated a towhead.

On the other hand, the defendants insist, and their evidence supported their claim, that this towhead was originally a part of an island called Zwiebel island, lying to the east, which island is covered with large trees of the identical character and general size with the trees on this towhead, which trees differ from the trees on the mainland, and from the smaller trees at the west end of the Davis & Schulz island. Defendants insist that in 1910 there was an ice gorge which resulted in the water cutting off the towhead from Zwiebel island, and it has remained cut off ever since, and that it was never a part of the mainland, or attached to lot No. 3.

The defendants ridicule the claim of the plaintiffs that this island of 34 acres, and reaching nearly three-quarters of a mile upstream, accreted from this towhead at its east end, and insist that islands are never formed upstream in a current, but that they are always formed from a towhead downstream, but the plaintiffs as strenuously insist that it was so formed in this case. The evidence of defendants rests in part upon the testimony of a surveyor, who testified that he had been acquainted with this situation for more than 40 years, and that he was there when this towhead was cut off from Zwiebel island. Defendants insist that up to 1924 there was just open water to the west of the towhead, and also claim that neither of the plaintiffs has ever paid any taxes whatever on any of this Davis & Schulz island.

A large number of photographs, maps, charts, and a photostatic copy of letters patent issued by the general land office, and an abstract appear in this large bill of excep-

tions, some of the photographs having been taken many years ago, and the plaintiffs insist that the proof shows that there has always been a channel between the towhead and Zwiebel island, and that they were never connected. Plaintiffs insist that they have been in possession of this island ever since it was formed, and that the title of the defendants is attempted to be shown through leases which have been given to a hunting club from a number of different people. The plaintiffs insist that some of the defendants' witnesses are honestly mistaken, and have confused in their evidence the situation in regard to Davis & Schulz island with an island farther west.

The defendants charge that plaintiffs have never paid any taxes on the land they are claiming, and that when John W. Davis died in 1917, in the inventory filed with his estate, which is found in the bill of exceptions, no reference is made to this so-called Davis & Schulz island as one of his possessions, and defendants claim that that is because it had no existence at that time, and that Davis had never claimed any part of the island which was in existence, but had simply pastured cattle there at times.

A number of witnesses were called to support the allegations as to open, nortorious and continuous possession by each of the parties, and the evidence is most confusing. Various leases were given from time to time to the members of the Papillion Gun Club, and these members testify that some of them occupied the shack owned by the club every two or three days during many years, and that there was no interference with their peaceable possession; that this house or shack was completely furnished for comfortable living, and provided with a good well, and that many guests were entertained there, including Boy Scouts, and that to enjoy hunting and fishing it was necessary to have control of the river to the center of the main channel to exclude undesirables; that at times the plaintiff Davis had been invited to eat with them, and that the relations seemed to be friendly, but the plain-

tiffs had claimed the right to, and testify they did, pasture the island.

With this evidence of adverse possession down through all these years, sharply in conflict, the trial judge, who saw and heard the witnesses, then, accompanied by opposing counsel and the clients, went out and examined the islands and trees and the riparian land in controversy, with the bayous and channels separating them, and by examination on the spot, reached a decision as to the facts. He then took the case under advisement, had briefs submitted on the law, and then entered a decree, finding that the petition of the plaintiffs should be dismissed, and that the defendants, as riparian owners of government lots 4 and 5, were the owners of that portion of the Davis & Schulz island lying within the east and west boundary lines when such government boundary lines were extended south across the island, and finding that, under the same rule of riparian rights, the plaintiffs owned the easterly portion of the island which would be cut off by an extension to the south of the west line of their government lot 3.

In a case involving the erratic action of channels of the Platte river during the spring floods and the ice gorges of winter, as well as the examination of the character and size of the trees growing upon adjacent islands, as well as upon the mainland, a trial judge who heard the same evidence which we had before us, and who made a careful examination of all these facts on the ground, is in a very advantageous position to determine the facts in a case of this nature. There is very little dispute in this case as to the law of Nebraska relating to adverse possession, riparian rights, and accretions, and we see no necessity for discussing the many cases cited upon these points.

The record has been carefully examined, and it is held to sustain the findings and judgment of the trial court.

AFFIRMED.

ALGERNON L. ANDERSON, APPELLEE, V. FORREST BYRD, DOING BUSINESS AS BYRD NURSERY COMPANY, ET AL., APPELLANTS.
275 N. W. 825

FILED NOVEMBER 5, 1937. No. 29961.

1. **Negligence.** Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened.
2. ———. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury.
3. ———. The cause of an injury is that which actually produces it, while the occasion is that which produces an opportunity for the causal agencies to act.
4. **Automobiles.** Where the drivers of two motor cars enter a cloud of smoke that has drifted over the highway and a collision occurs, the smoke is not an efficient intervening cause of the accident. In such case, the smoke is a condition which the jury should consider in connection with the other evidence in determining the question of negligence.
5. **Evidence** examined and *held* sufficient to sustain the judgment.

APPEAL from the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. Opinion on motion for rehearing of case reported in 132 Neb. 588. *Former opinion withdrawn and judgment affirmed.*

De Lamatre & De Lamatre and *Dora Nelson*, for appellants.

A. W. Storms and *Frank A. Anderson, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

CARTER, J.

Plaintiff commenced this action against the defendants to recover damages resulting from an automobile collision. The verdict of the jury in the district court was for plaintiff in the sum of $7,450. The trial court overruled defendants' motion for a new trial and entered a judgment on the verdict. Defendants thereupon appealed to this court.

The facts in this case are fully stated in a former opinion of this court. *Anderson v. Byrd,* 132 Neb. 588, 272 N. W. 572. The evidence amply supports the contention of plaintiff that his car was on the right side of the center line of the highway and that defendants' truck was partly on the left side of the center line when the collision occurred. The jury resolved the evidence as to the location of the cars in favor of the plaintiff, and there being sufficient evidence to support it, the jury's findings will not be disturbed.

The defendants pleaded in their amended answer that "said accident was proximately caused by a dense and impenetrable cloud of smoke and dampness which immediately preceding said accident settled over the road and over both motor vehicles involved in said accident." The evidence disclosed that on the day of the accident the plaintiff and three other persons were driving on highway No. 6 east of Holdrege to the scene of a railroad wreck a short distance east of that city. It appears from the record that there was a drizzle of rain falling and while the pavement was wet, it was not slippery. As they approached the location of the wreck, smoke from one or both of the locomotives settled down over the highway. The evidence is quite conflicting as to its density. The collision occurred while both cars were passing through this smoke. In our former opinion the case was reversed because of the failure of the trial court on its own motion to instruct the jury upon defendants' theory that the smoke was the proximate cause of the collision. After a reargument of the case, we now conclude that the former opinion is erroneous in this respect and that the trial court properly instructed the jury on this point.

Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.

An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act.

An alleged cause of an accident may sometimes be merely a condition and not the real cause. The activities of inanimate things are usually mere conditions and not causes. *Atlantic Coast Line R. Co. v. Daniels,* 8 Ga. App. 775, 70 S. E. 203. A cloud of dust raised by another passing car and alleged to have caused a collision has been held to be a condition and not a cause. *Mitsuda v. Isbell,* 71 Cal. App. 221, 234 Pac. 928. Likewise, it has been held that, where smoke from railroad engines settled over the scene of a collision prior to and at the time of the accident, the smoke was a condition and not a cause. *Illinois Central R. Co. v. Oswald,* 338 Ill. 270, 170 N. E. 247. In *Claar Transfer Co. v. Omaha & C. B. Street R. Co.,* 191 Ia. 124, 181 N. W. 755, smoke enveloping the scene of a collision was treated as a condition and not a cause. In *Powers v. Standard Oil Co.,* 98 N. J. Law, 730, 119 Atl. 273, in holding that the unlawful parking of an automobile on a public street was a condition and not a cause, the court said: "In either event its impotence for harm or damage, as an innocuous immobile instrumentality, must be manifest, since in both situations it simply presented a patent condition, and not an operating efficient or proximate cause, which can be said to contain by its activity, that potentiality for harm or damage, which furnishes the test upon which the rule of liability in this character of tort feasance is predicated."

In *Steenbock v. Omaha Country Club,* 110 Neb. 794, 195 N. W. 117, in holding that a flagpole lying across a driveway on the grounds of the club, into which a car was driven, was not a proximate cause of the accident, the court said: "It is not sufficient that the negligence charged does nothing more than furnish a condition by which the

injury is made possible, and if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent and the existence of the condition is not the proximate cause of the injury." See, also, *Kudrna v. Sarpy County*, 125 Neb. 83, 249 N. W. 87.

We necessarily conclude that the smoke in the case at bar was a condition and not a proximate cause of the accident. The proximate cause of the collision was the driving of the truck on the wrong side of the road. The position of the truck as it was driven over the highway was a direct cause which continued unbroken by any other efficient intervening cause up to and including the very instant that the accident occurred, and without which cause there would have been no collision between the two motor vehicles. The trial court therefore properly instructed the jury that the smoke was a condition to be considered by them in connection with all the other evidence in determining the question of negligence of the parties or either of them.

Appellants complain of certain instructions given by the trial court and of its refusal to give others requested by appellants. We have examined the instructions given by the trial court and have concluded that they are in all respects correct and fully and fairly inform the jury of the law applicable to the case. The requested instructions were properly refused as incorrect statements of the law or as stating propositions covered by the instructions given by the court.

Appellants contend that the judgment is excessive. There is evidence in the record to sustain a finding that plaintiff's injury caused him extreme pain and suffering, and nervous and mental shock. The testimony further shows that he has suffered a permanent partial loss of hearing of the left ear, that he suffered a concussion of the brain and a possible permanent brain injury, that he suffered injuries to his back and a possible permanent impairment of his general physical condition. Property damage to plaintiff's car in the amount of $610, and medical atten-

tion and expense in the sum of $350 are not disputed in the evidence. After a consideration of all the evidence, we conclude that it is sufficient to sustain a judgment for $7,450.

Our conclusion is that the former opinion, in so far as it conflicts with this opinion, should be withdrawn and a judgment of affirmance entered.

AFFIRMED.

MARJORIE KOVAR, APPELLEE, V. JOHN BECKIUS ET AL., APPELLANTS.
275 N. W. 670

FILED NOVEMBER 5, 1937. No. 30101.

1. **Automobiles:** GROSS NEGLIGENCE. "The term 'gross negligence,' as used in the automobile guest statute, signifies a degree of negligence greater than want of ordinary care or slight negligence, but not necessarily extending to wanton, wilful or intentional disregard for the guest's safety." *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677.
2. ———: ———. "The existence of gross negligence must be determined from the facts and circumstances in each case." *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96.
3. ———: ———: QUESTION FOR JURY. Whether the driver of an automobile is guilty of gross negligence, where he is familiar with the highway and has been previously warned, and where, in order to pass a car going in the same direction, he turns into a cloud of dust which the lights of his car failed to penetrate until he passed such car, going down the grade of a steep hill at a speed of 60 to 65 miles an hour, following a ridge of gravel, and after proceeding two car lengths beyond the car which he passed, strikes holes in the edge of the road, not in the highway proper, and loses control of his car, and the car bounces up and down and sways back and forth, and runs into a ditch, and a guest in the car is injured, presents a question for the jury.
4. **Trial:** INSTRUCTIONS. "Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458.
5. **Appeal:** INSTRUCTIONS: REVIEW. "Where a requested instruction is refused by the trial court, but the court embodies

the same idea in an instruction given upon its own motion, the party requesting such instruction having suggested it to the court will not be heard to complain that it is erroneous." *Vorce v. Independent Telephone Co.*, 86 Neb. 27, 124 N. W. 836.

6. Trial. "It is proper practice for court to refuse to submit to jury defense not supported by evidence." *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677.
7. Automobiles. Under the facts disclosed by the record, *held* that the plaintiff did not assume the risk.

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

L. R. Doyle, Frank Mizera and *Bernard S. Gradwohl*, for appellants.

Thomas & Thomas, Coufal & Shaw and *Ray E. Sabata, contra.*

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

MESSMORE, J.

This is an appeal from a jury verdict in the district court for Butler county, wherein the plaintiff recovered damages for personal injuries sustained by virtue of an automobile accident.

The amended petition of plaintiff alleges the topography of the highway, charges gross negligence on the part of defendant John Beckius in certain particulars, and prays damages sustained by plaintiff. The defendants' answer contains a general denial, the defense of contributory negligence, and alleges that plaintiff assumed the risk, failed to object to or protest against the driving of John Beckius, and was acquainted with the proficiency and ability of the driver. The evidence reflects that the DeSoto automobile was driven by the defendant John Beckius, with the consent of the owner, Nick Beckius. For convenience, defendant John Beckius will be hereinafter referred to as the defendant.

On September 24, 1935, at 10 p. m., or shortly thereafter, defendant, driver of the automobile, the plaintiff,

Marjorie Kovar, seated with him, and Howard Kovar, plaintiff's brother, sitting behind the driver, with Rose Sabata at Howard Kovar's right, in the rear seat, were proceeding north from David City on the David City-Schuyler road.

The immediate facts in this case relate to the method and manner of driving the car from the top of "Demuth Hill" down the grade of said hill. The testimony of the witnesses for plaintiff and defendants as to the grade and topography of the hill is so similar that no controversy arises therefrom. "Demuth Hill" is composed of light clay soil, which easily powders, erodes and washes. It does not hold gravel well, the gravel not working into it. The road grade is approximately 32 feet wide and is maintained to within two feet of the edge of the road grade because of the washing of gravel. The outer edge of the gravel ridge was about two and a half feet wide, which left 26 feet of clearance on the west edge of the gravel to the extreme west edge of the highway. On the night of the accident, there were cuts and holes in the outer edge of the road grade about 20 feet north of Demuth driveway, one of which was about two and one-half feet long and about six inches wide. There were also two washouts of smaller dimensions. The traveled portions of the highway were free from these washouts. "Demuth Hill" is a high hill, with steep banks, and, in order to construct a passable road grade, it was necessary to remove the dirt from the hill and construct a grade from the hill to the valley, which grade extended upward from the natural elevation, so that the grade was higher than the level of the land on either side.

Defendant testified that he was driving around 35 miles an hour on his own side of the highway and maintained such speed until he arrived at "Demuth Hill," when he saw an automobile, traveling north on its own right side of the road, which later developed to be the Rudolph Vrba car. Defendant started to increase his speed to go around the Vrba car when he was a distance of 150 feet

from the top of "Demuth Hill" south. He followed the Vrba car over the top of the hill and about half the distance down hill, and then asked his companions if he should pass the car. One of them said "O. K." He then started to pass the Vrba car, increasing his speed slightly, and, watching ahead, he could see the road. He testified that there was a space of about three feet between his car and the Vrba car when he passed, and about three feet between his car and the edge of the road; that he did not know whether he got clear past the Vrba car; that the first time he was aware of any trouble was when his car started to bounce and gave a severe jolt; that he did not remember going down the road or into the ditch. He testified further that he had driven the highway on an average of two or three times a week, knew the road and knew that the soil on "Demuth Hill" washed easily and that grades were made to fill in low places where they were washed out at the edge of the road, but that, until the night of the accident, he did not notice the holes in the highway which his car struck; that plaintiff made no complaint of his driving and gave no warning.

Rudolph Vrba testified that he was traveling the highway at about 10:15 on the night of the accident, and that his car was proceeding at about 40 miles an hour; that defendant's car overtook him on the north slope of the extreme right side of the road and passed quickly; that there was considerable room between the two cars as defendant's car passed and went on swiftly about two car lengths ahead of witness' car; that at that point defendant's car started to bounce up and down and went into the ditch, swaying back and forth as it went, but that it stayed on its wheels; that all of a sudden the radiator of the car shot up on the side, and the car rolled over twice; that when defendant's car went into the ditch it traveled 150 feet before it came to rest.

The plaintiff testified that she was familiar with "Demuth Hill;" that she had driven with the defendant on many occasions and knew the manner of his driving and his way

of passing other cars; that he would accelerate the speed of his automobile and not drive parallel with the car which he was passing, but would increase his speed to go around quickly; that at the time of the accident, as they reached the top of "Demuth Hill" they saw a car towards the east; that the defendant said: "There goes Nick Meisenberg, he isn't going to beat us very much to Schuyler;" that defendant stepped on the gas, the car gained speed, and Rose Sabata yelled: "Look out Johnnie;" that defendant had turned to the left side of the road which was heavy with dust, the lights of his car not penetrating through the dust, and that after traveling a short distance she noticed that they were passing the car of Rudolph Vrba; that there was a wide space between the two cars at the time of passing; that defendant's car was proceeding north along the edge of the shoulder of the road; that defendant did not diminish his speed after the warning given by Rose Sabata. Plaintiff remembered nothing further relative to the accident.

The wrecked car, 20 minutes after the accident, was facing southeast. The measurements taken disclosed certain tracks from the point of Demuth driveway north, right on the ridge of the west edge of the road, for about 200 feet, which track apparently "hung" to the west edge of the road bank, and for about 200 feet the track turned into the ditch. The course of the car, after the track turned into the west ditch to where the car came to rest, was about 122 feet. There the car apparently struck some brush and then proceeded about 128 feet more before it came to rest. After striking the brush, the car evidently tipped over and hit the ditch. The distance between the point where the car turned into the ditch and where it finally came to rest was appproximately 160 feet; the ditch in which the car came to rest was from two to three feet deep, and where the car went into the ditch at the driveway the ditch was about 10 to 12 feet deep. Following the course of the car from Demuth driveway to the point where it plunged into the west ditch, there was a washout, from two to two and

a half feet long and six inches wide, on the west edge of the road, running east and west, about 20 feet north of the driveway. There were washouts of smaller dimensions on the same edge of the roadbed.

Appellants contend that the court erred in submitting the cause to the jury, for the reason that the evidence failed to disclose gross negligence on the part of defendant, and cite several cases in support of such contention, the principal ones being *Thurston v. Carrigan*, 127 Neb. 625, 256 N. W. 39, and *Heesacker v. Bosted*, 131 Neb. 42, 267 N. W. 177. These cases are clearly distinguishable from the case at bar. In the instant case the defendant was going down the grade of a steep hill, with which he was familiar, knowing the condition of the soil, its tendency to erode and wash out, and raise dust easily when being traveled. He elected to turn to the left to pass a car, accelerated his speed, and the facts clearly indicate that the speed of his car was from 60 to 65 miles an hour at the time defendant passed the Vrba car in a cloud of dust which his lights failed to penetrate until after he had passed; that he proceeded past the car approximately two car lengths when he must have struck the holes on the west edge of the highway, causing his car to bounce to such an extent that he lost control of it and was unable to tell any part of the story thereafter. Defendant testified that it was dangerous to drive a car at 50 to 60 miles an hour over such highway in the night-time and undertake to pass a car going down a hill.

Gross negligence means negligence in a very high degree, or the absence of even slight care in the performance of a duty. The existence of gross negligence must be determined from the facts and circumstances in the case. *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96; *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677; *Lemon v. Hoffmark*, 132 Neb. 421, 272 N. W. 214.

In the body of the opinion in *Thurston v. Carrigan, supra*, quoting from the case of *Gilbert v. Bryant*, 125 Neb. 731, 251 N. W. 823, it was said that the term "gross negligence"

"indicates a degree of negligence greater than want of ordinary care or slight negligence but not necessarily extending to wanton or wilful or intentional disregard of the guest's safety." And in *Morris v. Erskine, supra,* it was said that the question of gross negligence is for the jury, where the evidence relating thereto is conflicting and from which reasonable minds might draw different conclusions. Of course, it is not necessary in all cases that the operator of a car be aware of impending danger in order to hold him guilty of gross negligence, but that is a circumstance which should be considered. Where the known risks are enhanced, the degree of care should correspondingly increase.

Sterns v. Hellerich, supra, cited by appellee, is a case somewhat analogous to the case at bar. In that case the driver had been warned by one of the passengers in the rear seat of the car, as he was proceeding down a hill on a curved road, and, in disobedience to that warning, he continued to drive at 50 miles an hour; the car was weaving from side to side before it reached a bridge and plunged through the left-hand side thereof. The evidence on behalf of defendant tended to show that no warning was given the driver of the dangerous place in the road. He was familiar with the road, while plaintiff had never before been over the road. This court held that the rate of speed and whether a warning was given were questions of fact for the jury.

In the case at bar, the defendant was familiar with the road, more so than the plaintiff. He proceeded down a steep hill, in the night-time, in a cloud of dust which his lights failed to penetrate until after he had passed the Vrba car, and in the space of two car lengths ahead of the car he struck some holes in the road, not on the highway proper; his car followed down a ridge of gravel on the edge of the road for 200 feet; he lost control of it at the time he struck the bumps in the road, and, although previously warned, as occurred in the *Sterns* case, he failed to heed the warning, even though not given by plaintiff; nor did the plaintiff in the *Sterns* case give the warning. In

our opinion, the facts in the instant case constitute a question of gross negligence for the jury to determine.

Appellants' second assignment of error is to the effect that the court erred in instructing the jury that they could return a verdict based upon any one of the acts of negligence pleaded in the amended petition.

"Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458.

Appellee cites the case of *Vorce v. Independent Telephone Co.*, 86 Neb. 27, 124 N. W. 836, in which it was held: "Where a requested instruction is refused by the trial court, but the court embodies the same idea in an instruction given upon its own motion, the party requesting such instruction having suggested it to the court will not be heard to complain that it is erroneous."

The appellants tendered an instruction embodying the idea that if the defendant had been guilty of gross negligence in one or more of the particulars alleged in plaintiff's petition, such gross negligence, if any, was the proximate cause of plaintiff's injuries, if any. We think the trial court committed no error in this respect.

Appellants' last assignment of error is that the court failed to submit to the jury the issue of contributory negligence and the assumption of risk by the plaintiff.

"Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of as a proximate cause." 45 C. J. 942.

The evidence has been extensively covered in this opinion and will not be reviewed in considering this assignment of error. The record does not disclose that the statement "O. K." was made by this plaintiff. The evidence is not clear as to whether the plaintiff knew of the holes in the

road, as contended by defendant. At least, she did not see the holes where the defendant turned his car to go around the Vrba car. The accident happened within a very short period of time, possibly not over five seconds. Plaintiff, by her silence, did not acquiesce in and approve the grossly negligent conduct of the defendant. She was not bound to anticipate such reckless driving and grossly negligent conduct on his part, as the facts in this case indicate.

"The standard of the duty of an invited guest riding in an automobile is the same as the driver's, but the conduct to fulfil that duty is ordinarily different because their circumstances are different. Whether reasonable care has been exercised in either case is a question of fact for the jury, unless the facts were such as to which reasonable minds would not differ in declaring such facts to constitute negligence." *Glick v. Poska,* 122 Neb. 102, 239 N. W. 626.

The court in the instant case told the jury that, ordinarily, a guest is not required to watch the road or advise the driver in relation to the management of his automobile, and may assume that the driver is reasonably safe and careful, but that, when a situation arises which is out of the ordinary, the guest is under a duty to warn of dangers which would be apparent to the passenger; that if the plaintiff neglected her duty in this regard and failed to warn, if able to warn, when a warning from her would have been of avail in avoiding the accident, the jury would have a right to take such circumstances into consideration. This instruction seems to cover the duty of the plaintiff in this regard.

We find from the record no evidence of contributory negligence on the part of the plaintiff, and that the trial court was correct in not submitting the issue of contributory negligence to the jury. Under the facts in this case as explained herein, the plaintiff did not assume the risk, as contended by appellants.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. LINCOLN HAIL INSURANCE COMPANY (CHARLES SMRHA, RECEIVER) ET AL., APPELLEES: F. A. WOOD ET AL., APPELLANTS.

276 N. W. 169

FILED NOVEMBER 12, 1937. No. 30043.

1. **Abatement**: PARTIES. "An action does not abate * * * by the transfer of any interest therein during its pendency, if the cause of action survive or continue. * * * In the case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." Comp. St. 1929, sec. 20-322.
2. **Receivers**: APPEAL. The order for the sale or disposition of the assets of a trust being one within the discretion of the district court to make and enter, a receiver, appointive or statutory, has no right to appeal therefrom, for he is neither the censor of the court nor interested in the event.
3. **Insurance**. The statutory provision applicable to the Lincoln Hail Insurance Company, and constituting a controlling element in all its contracts of insurance, recites: "All such associations shall deposit in some bank or banks fifty per cent. of all the assessments or premiums received from its members or policyholders which deposit shall be drawn from said bank for the payment of losses only, and by check or order issued by the treasurer of such association. Each check or order shall designate the name of the policyholder for whose benefit the money is drawn," etc. Comp. St. 1929, sec. 44-912.
4. ———: RECEIVERS. It appearing that appellants as special agents were at all times in possession of their trust under an order of a court of competent jurisdiction directing them to continue to administer it "as a going concern," such order amounted to an express direction to conduct its affairs in the usual, ordinary way for which it was organized, with a full compliance with the public policy of the state as expressed in the applicable statutes, and the performance of the company's contracts with its membership as an existing solvent institution.
5. ———: TRUSTS. The "loss fund" created by statutory mandate, usable exclusively for payment of losses arising from the insurance risks lawfully undertaken, to which fund 50 per cent. of all premiums received were incorporated, and a like per cent. of all premiums to be received were to be added, in view of the purpose of its creation, constituted a trust fund. The use of this fund by the special agents, now appellants herein,

and its application by them to purposes other than those contemplated by the law of its creation, particularly while such special agents were judicially limited in their authority to conduct the business as a going concern, constituted, to the extent of the amounts so used and diverted, a misapplication thereof and rendered them personally liable therefor.

6. ———. Record examined, and *held* that the denial of the claims of the special agents for further compensation amounted to the exercise of a sound discretion by the trial court, and the same is approved.

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

Albert S. Johnston, for appellants.

Richard F. Stout, Jay O. Rodgers, Clinton J. Campbell, Loren H. Laughlin, E. B. Perry and *John Logan, contra.*

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

PER CURIAM.

This is an appeal from the decree and judgment of the district court for Lancaster county entered on August 10, 1936, denying claims for compensation in favor of F. A. Wood and M. Witzenburg, as special agents of the department of insurance of the state of Nebraska, and a judgment entered against such special agents in favor of Charles Smrha, receiver, in the sum of $12,633.56. Included herein is an appeal of F. A. Wood and M. Witzenburg from an order of the district court for Lancaster county, entered on August 12, 1936, approving and confirming the sale and disposition of the assets of the Lincoln Hail Insurance Company to Charles Carr.

These proceedings are the culmination of a course of events which had their inception in the fact that the Lincoln Hail Insurance Company, a corporation organized and existing under the laws of the state of Nebraska relating to assessment hail insurance companies, was, on May 7, 1932, pursuant to the provisions of section 44-204, Comp. St. 1929, by order of the district court for Lancaster county, given into the possession of the department of trade and

commerce, and that department was directed and authorized to take possession of all of its property, records, and effects, and for and in the name of the defendant insurance company to conduct the business of said company as a going concern, and as expeditiously as possible to make a complete examination of the affairs of that company.

This order further directed: "It is further ordered and decreed that, upon the completion of the examination aforesaid and as soon as said department may be advised in the premises, the department make its report herein to this court setting out its acts and doings under the provisions of this decree, and its advice, recommendation and application to this court as to the resumption by the defendant company of the possession of its assets, affairs and business, or the liquidation of the business, as provided in said section 44-204, Compiled Statutes of Nebraska, 1929."

In obedience to the decree last referred to, the examination of this company was completed, a report thereof was duly filed and, by order of the district court for Lancaster county entered on July 27, 1932, was approved, and it was further therein ordered:

"That the department of trade and commerce continue to administer the property and affairs of the defendant company as a going concern pending the next annual meeting of the members of the defendant company, or until further order of this court.

"That the appointment by said department of M. Witzenburg and F. A. Wood as special agents of said department in and for said administration of the property and affairs of the defendant company be and hereby is confirmed."

Necessitated by a legislative amendment to the governing statute, on May 24, 1933, upon an application in behalf of the department of insurance of the state of Nebraska, as the statutory successor to the department of trade and commerce, the former was substituted for and in place of the latter, and M. Witzenburg and F. A. Wood as special agents, now of the department of insurance,

were in effect continued in charge of the Lincoln Hail Insurance Company.

It appears that M. Witzenburg and F. A. Wood from the time of their original appointment in July, 1932, continued in charge of the assets of the Lincoln Hail Insurance Company, carrying on its business and affairs as a going concern without any further authorization or direction from the court which approved their original appointment.

It also appears that these special agents failed to pay hail losses occurring in 1932, and on June 29, 1934, certain policyholders in the Lincoln Hail Insurance Company, who had sustained losses covered thereby in the year, filed in the district court for Lancaster county a petition in intervention, the object and prayer of which was in part to require Lee Herdman (who was the head of the department of insurance) and the defendants M. Witzenburg and F. A. Wood to replace moneys belonging to the company and contained in its loss fund, which it was alleged had been misapplied by them and wrongfully removed from said "loss fund." Thereafter Conn W. Moose, in his official capacity as director of the department of insurance, filed an application in this cause in the district court for Lancaster county, praying for the appointment of himself as receiver of the Lincoln Hail Insurance Company, for the liquidation of that organization as an insolvent company, and that as such receiver he be authorized to collect its assets and make distribution thereof according to law. On September 19, 1935, an order was entered in this cause sustaining this application of Conn W. Moose, and as he had at that time been succeeded in office by Charles Smrha, this order was entered, adjudging that the Lincoln Hail Insurance Company "be, and it is declared to be insolvent and that Charles Smrha be, and he is hereby appointed receiver of the Lincoln Hail Insurance Company," and he was therein as such receiver expressly authorized to take possession of its property of every kind, collect its assets, and liquidate the same. Charles Smrha thereupon gave the prescribed bond, qualified, and entered upon the duties

of his trust. Upon his petition, F. A. Wood and M. Witzenburg were, by the district court, directed to file a report of their acts and doings as special agents in charge of the assets and business of the Lincoln Hail Insurance Company, and an account of all receipts and disbursements by them made as such agents. With this order they complied. To this report by them filed, Charles Smrha, as receiver, filed objections, and certain other parties in interest also filed objections. At this time, Wood and Witzenburg, by proper pleadings, put in issue the allegations of the petition of the intervening policyholders. By a virtual consolidation, the issues thus made by pleadings, including the several objections referred to, were tried to the district court, and evidence was adduced by the parties, and on July 14, 1936, that court entered of record its "Findings on final report of special agents Wood and Witzenburg and objections thereto by the receiver and by the interveners filed June 29, 1934." So far as related to the present appeal, such findings recite, viz.:

"The principal assets of the company were uncollected premium notes. After the defendants Wood and Witzenburg became active as special agents, on July 21, 1932, collections on premium notes were made from that date up to and including October, 1934, in the total sum of $15,267.12, all of which went to the expense account and none of which was deposited in the loss fund.

"Under the provisions of the statute of Nebraska governing this subject one-half of the $15,267.12 or a total of $7,633.56 should have been deposited by the special agents in the loss fund (Compiled Statutes 1929, sec. 44-912). In addition to the foregoing, collections of interest on deposits and other small items were made in the amount of approximately $458.21. * * *

"Funds were transferred from the loss fund in various banks to the expense account, as follows: August 1, 1932, $2,000, January 1, 1933, $1,000, June 1, 1933, $1,000, or a total of $4,000 which was transferred from the loss fund to the expense fund after defendants Wood and Witzenburg

became special agents and apparently said transfers were on their order. On September 3, 1932, $1,000 on deposit in the invested fund in the Farmers State Bank of Saronville was transferred to the expense account."

Thereafter, based upon the above findings, which are fully sustained by the evidence, judgment was entered in favor of the receiver, Charles Smrha, and against F. A. Wood and M. Witzenburg in the sum of $12,633.56.

Later, on August 12, 1936, the district court entered an order directing the sale of the assets of the Lincoln Hail Insurance Company by its duly appointed and qualified receiver, Charles Smrha, to one Charles Carr. To this transaction the appellants also present objections on this appeal.

Preliminary to the consideration of the appeal on its merits, appellants present a "Motion Relating to Parties," which, by its terms, asks dismissal as to certain parties, which would necessarily require the substitution of others, based on the fact that certain appellees who filed their petition of intervention in the district court have, since the institution of this action, assigned and transferred their causes of action.

The Code provision here applicable is: "An action does not abate * * * by the transfer of any interest therein during its pendency, if the cause of action survive or continue. * * * In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." Comp. St. 1929, sec. 20-322.

Serving no real purpose at the present time, and in no manner affecting the merits of the appeal, this motion relating to parties is denied.

Appellants seek to attack the validity and regularity of the sale of the entire assets of the Lincoln Hail Insurance Company as directed by the district court for Lancaster county by its order of August 12, 1936. However, appellants are not parties in interest. They possess no capacity

to sustain the objections so made. Originally they were appointed and placed in possession of the business, property, and assets of the Lincoln Hail Insurance Company as "special agents" of the department of trade and commerce. By legislative amendment their designation was changed to special agents of the department of insurance. While the appellants formally conformed to the change, it in no manner affected their powers or functions. They were vested with powers analogous to receivers, and as "special agents" they functioned in a similar manner and were in large degree subject to similar limitations.

Whether the assets of a corporation in the hands of a receiver, or in the hands of a special agent exercising the powers of one, should be sold pending final decree to prevent depreciation, depletion or loss is within the discretion of the receivership court. *Hagerstown Furniture Co. v. Baker,* 158 Md. 574, 149 Atl. 556; *Boston Investment Co. v. Pacific S. L. B. Co.,* 104 Ia. 311, 73 N. W. 839; *Cox v. Snow,* 47 Idaho, 229, 273 Pac. 933; High, Receivers (4th ed.) p. 223.

The order, being an order within the discretion of the court to make and enter, suggests the applicability of the further rule that a receiver, or one exercising the powers and performing the functions of a receiver, has no right to appeal from an order within the discretion of the court, for he is neither the censor of the court nor interested in the event. *Bosworth v. St. Louis Terminal R. Ass'n,* 174 U. S. 182; *McKinnon v. Wolfenden,* 78 Wis. 237, 47 N. W. 436. See, also, 23 R. C. L. 133, secs. 141, 142; High, Receivers (4th ed.) p. 313.

It is obvious that statutory special agents of the department of insurance, exercising their statutory powers in their official capacity, may not challenge the validity of an administrative order made by a court of competent jurisdiction, the making of which is clearly within the discretion of such court.

The next contention of the appellants relates to the validity of the judgment entered against them in the sum of $12,633.56.

In this connection it will be remembered that the Lincoln Hail Insurance Company was organized and incorporated under the assessment hail insurance law of Nebraska, and the manner of transacting its business was governed by the provisions of that enactment. Not only are these statutes to be considered as a solemn declaration of the public policy of this state, binding alike upon courts, officials, and litigants, but, in addition thereto, the provisions of such statutes authorizing organization and governing the transaction of its affairs, the articles of incorporation for membership, and the policy issued thereon constitute the contract of membership between the company and those insured by it. *Jensen v. Lincoln Hail Ins. Co.*, 125 Neb. 87, 249 N. W. 94.

One of the statutory provisions thus evidencing the public policy of this state, and constituting a controlling element in all the contracts of insurance entered into by the Lincoln Hail Insurance Company, is the following: "All such associations shall deposit in some bank or banks fifty per cent. of all the assessments or premiums received from its members or policyholders which deposit shall be drawn from said bank for the payment of losses only, and by check or order issued by the treasurer of such association. Each check or order shall designate the name of the policyholder for whose benefit the money is drawn," etc. Comp. St. 1929, sec. 44-912, and as amended by section 44-912, Comp. St. Supp. 1933.

It is also to be noted that possession of the property of this corporation and the rights of the appellants as special agents in charge thereof were derived from and confirmed by the terms of the decree of the district court for Lancaster county entered on July 27, 1932, which, in express terms, provides that the property and affairs of the defendant company (Lincoln Hail Insurance Company) shall continue to be administered "as a going concern pending the next annual meeting of the members of the defendant company, or until further order of this court."

It further appears that this order has never been re-

voked or rescinded, and that said Lincoln Hail Insurance Company was first adjudged insolvent, Charles Smrha appointed receiver thereof, and direction given to liquidate it as such, by order entered in said cause by the district court for Lancaster county on September 19, 1935.

Thus it appears that during the time the appellants were in charge of the affairs of this insurance company they were operating under an express order of the district court for Lancaster county to administer its affairs as a "going concern," with the evident purpose of returning it to the control of its policyholders after the next annual election.

Judicial definition of the term "going concern" is not lacking.

This court has said: "A 'going concern' * * * is * * * some enterprise which is being carried on as a whole, and with some particular object in view." *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829.

The term "going concern," when applied to a corporation, means that it continues to transact its ordinary business. The mere fact that a corporation is insolvent does not dissolve the corporation and make the directors mere trustees of its assets, if it is still a going concern. *White, Potter & Paige Mfg. Co. v. Pettes Importing Co.*, 30 Fed. 864.

In *Slaughter v. Burgeson*, 203 Ia. 913, 210 N. W. 553, the supreme court of Iowa, in reference to the proper use of the term, says in part: "The term 'going concern' refers to an existing solvent business which is being conducted in the usual and ordinary way for which it was organized."

Therefore, it is obvious that the order of the district court to the appellants as special agents to administer the affairs of the defendant insurance company as a "going concern" was tantamount to an express direction to conduct its affairs in the usual and ordinary way for which it was organized, with a full compliance with the public policy of the state expressed in the applicable statutes, and the performance of the obligations of its contracts

with its membership as an existing solvent institution. The "loss fund" to which, by statutory requirement, 50 per cent. of premiums and assessments received or to be received by the company were added necessarily constituted a trust fund for the payment of losses incurred under the policies outstanding. The use and application of this fund by these special agents, to the extent of $12,633.56, for unauthorized purposes, as hereinbefore set forth, amounted to a misappropriation, and renders them personally liable to the extent of the moneys so unlawfully diverted and misappropriated. *Sherman v. Harbin,* 124 Ia. 643, 100 N. W. 622; *Sherman v. Harbin,* 125 Ia. 174, 100 N. W. 629.

Statutory agents who, in effect, function in the capacity of receivers are subject to the same liability as judicial receivers for expenditures made by them in violation of statute, and in violation of the positive direction of a court of competent jurisdiction.

It follows, therefore, that the judgment of the district court for Lancaster county in favor of the receiver in the sum of $12,633.56 is, in all respects, correct.

The last matter for our consideration is appellants' challenge to the correctness of the order of the district court rejecting their claims for further compensation. In this connection the language employed by Sedgwick, C. (later a judge of this tribunal), is suggestive. In *Stone v. Omaha Fire Ins. Co.,* 61 Neb. 834, 86 N. W. 468, he says in part: "Assets in the hands of receivers are too often unnecessarily depleted. Receiverships involving large expenses are too frequently protracted for the benefit of officers and attorneys, rather than for the benefit of creditors and other owners of the funds; and, as suggested by the appellee in this case, it is the duty of the court to scrutinize such proceedings closely, and prevent, as far as possible, those practices, which too often bring reproach upon the administration of the law. And therefore the law clothes the court with a large discretion in reviewing the expenses incurred by its receivers."

The claim of Mr. Wood, which the trial court rejected,

was for compensation from January 1, 1934, to September 1, 1934, at the rate of $250 a month, and from January 1, 1935, to date of release (whatever date that may be) at half time, or $125 a month. The claim of Mr. Witzenburg, likewise denied by the trial court, was for compensation at $250 a month from January 1, 1934, to January 28, 1935. The record further discloses that each claimant has already been paid from the assets of the trust the sum of $250 a month from the date of his appointment (July 21, 1932) to January 1, 1934.

The circumstances which surround the performance of the services for which the appellants claim compensation, in addition to the unlawful and improper use of the "loss fund" already herein discussed, disclose that when the insurance company was taken over by the state the "loss fund," derived from 50 per cent. of premiums and assessments theretofore received and which had been set apart and deposited in the special loss fund as the statute directs, aggregated $39,251.22, and the expense fund then amounted to $686.62. This insurance company possessed unpaid premium notes which the evidence indicates aggregated $214,829.43. It then owed one promissory note then outstanding which was well secured by collateral. On or about July 21, 1932, $34,662.41 then constituting the "loss fund" and $566.91 as the balance of the expense fund then on hand were transferred to and received by Wood and Witzenburg. Unpaid premium notes were also delivered to them. On these $15,267.12 was collected. One-half of this amount, under the terms of the statute as well as by order of the trial court, they were required to segregate and deposit in the "loss fund" and use the same only for the payment of policyholders' claims. This duty, however, these "special agents" wholly failed to perform. The hail losses occurring during the year 1932, after this corporation was taken over by the state's representatives, amounted to $34,506.73. The policyholders sustaining these losses were indebted on premium notes to the company in the sum of $15,251.47. It follows that the company's net liability for

hail losses in 1932 was therefore $19,255.26. Notwithstanding the fact that there was received by the representatives of the state a total of $46,633.56 in cash as loss funds, which in a hail insurance business conducted as a going concern was required to be used exclusively in the satisfaction of claims of policyholders for hail losses, no payment whatever was made by the appellants on this $19,255.26 indebtedness. Furthermore, in their last report submitted by appellants as special agents to the district court for Lancaster county, it is disclosed that the total admitted assets (available cash resources of the Lincoln Hail Insurance Company) were $3,460.83, and that the total salary claims and bills accrued against the company amounted to $3,770.88. Thus approximately more than $40,000 of loss funds were unlawfully paid out and dissipated by the special agents, and the plain duties of their trust remain entirely unperformed.

We have already noted that the Lincoln Hail Insurance Company was adjudged insolvent and a receiver appointed therefor on September 19, 1935. Practically from the date of the appointment of these special agents they continuously conducted this business as a going concern, with knowledge of the fact that it was unprofitable and losing money. This these special agents continued until in the natural course of events insolvency intervened. But they in no manner advised the court of competent jurisdiction of the situation as it developed or continued, or sought its instructions in the premises. The rule appears to be, viz.: "If a receiver, without authority so to do, carries on or conducts a business committed to his charge, he is personally liable for any losses sustained therein; and if, being authorized to conduct a business, he is guilty of negligence or mismanagement, or continues to operate the business with knowledge that it is unprofitable or losing money, he is likewise liable in his personal capacity for the resulting loss." 53 C. J. 175. See, also, 53 C. J. 167.

In view of the situation outlined, it is quite obvious that the district court wisely exercised its discretion in the

denial of the claims for compensation here presented on appeal.

The judgments and decrees of the trial court, so far as presented to us on this appeal, are correct, and are

AFFIRMED.

SCOTTS BLUFF COUNTY, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

276 N. W. 185

FILED NOVEMBER 12, 1937. No. 30046.

1. **Statutes:** CONSTRUCTION. In view of the situation outlined in the present record, chapters 190 and 297, Laws 1919, as applicable thereto, invoke the principle of construction that "All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." *Chicago, R. I. & P. R. Co. v. Zernecke*, 59 Neb. 689, 82 N. W. 26.
2. **Contracts.** Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into it and becomes a part thereof. This is true between individuals dealing between themselves by contract, express or implied, and likewise true between individuals and the government.
3. **States.** Where an agent or agency is appointed or created by law to contract for the state, the law under which such agent or agency acts is as much a part of the contract made as if it were formally embodied therein. Statutes which qualify or limit the grant of authority to contract are mandatory, and contracts not conforming thereto do not bind the state.
4. **Bridges.** The provision contained in section 2, art. III, title VII, ch. 190, Laws 1919, that "The state shall not be liable for any money in excess of the appropriation made for that purpose," by implication, becomes a part of the contracts out of which the instant litigation arose, and the department of public works in relation to "state aid bridges" could not impose upon the state a contractual obligation, either express or implied, except subject to the limitation above quoted.
5. ———. Under the facts in this case, no right of contribution can exist based upon nonperformance by the state of Nebraska of contracts it was prohibited from making, and as to which, after October, 1920, by necessary implication, further performance by the state was prohibited.

6. States: ACTION: FORUM. "Where the statutes provide an exclusive remedy against the state and a particular forum for a judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum." *McNeel v. State*, 120 Neb. 674, 234 N. W. 786.
7. ———: CLAIMS. In view of the constitutional and statutory provisions relating to claims against the state and the judicial interpretations thereof, the legislation conferring upon district courts jurisdiction to hear and determine "all claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed" (Comp. St. 1929, sec. 27-319) includes "any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature," and such claims must be presented to the auditor of public accounts, with right of appeal from his decision to the courts, and may not in violation of this requirement be presented to the courts in the first instance.
8. Petition of plaintiff examined, and *held* insufficient to state a cause of action against the state.

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

Rush C. Clarke, Robert W. Patterson and *Allen, Requartte & Wood*, for appellant.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

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

EBERLY, J.

Appellant, hereinafter called plaintiff, after having obtained legislative permission to sue the state by resolution of the senate of the 1933 regular session, and also by resolution adopted by the senate again in its 1935 legislative session, but without any prior presentation of its claims to the state auditor, filed its suit thereon against appellee, the state of Nebraska, hereinafter called defendant, in the district court for Lancaster county. To the county's amended and supplemental petition, the state demurred "for the reason this court has no jurisdiction over the subject-matter of this action, and for the further rea-

son that the petition does not state facts sufficient to constitute a cause of action." This demurrer the district court sustained. Plaintiff appeals.

This action is in the nature of a claim for contribution in favor of plaintiff and against defendant, plaintiff alleging it paid more than its proportionate share due to certain bridge contractors as provided in three written contracts, under the state aid bridge law, for the construction of three bridges, alleged to have been entered into jointly by defendant and plaintiff as coobligors on September 16, 1919. So far as the controlling terms are concerned, save only as to amounts and description of the structures, the bridges covered by the contracts in suit are identical and invoke identical principles of law for the determination of the rights of the parties thereto.

The surrounding facts and circumstances which together form the background of the present controversy include the following: Prior to 1911 the duty and responsibility for the erection and maintenance of all bridges within their boundaries, excepting certain structures situated within municipalities and over streams forming state boundaries, were by law imposed upon the respective counties. In 1911 chapter 112 of the session laws of that year was enacted, which provided limited "state aid" for counties in the construction of any bridge across any stream of the width of 175 feet or more under the jurisdiction of such county boards, and prescribed the methods for obtaining the same from the designated state authorities.

Chapter 112, Laws 1911, was subsequently amended by chapter 190, Laws 1919, approved April 19, 1919, and incorporated into the "Civil Administrative Code" as article III, title VII, thereof. Section 2, art. III, provides the method to be followed by counties to secure state aid for the construction of state aid bridges, and also contains the provision, viz.: "The state shall not be liable for any money in excess of the appropriation made for that purpose." For the biennium ending March 31, 1921, the appropriation for state aid bridge funds was made and

limited by chapter 297, Laws 1919, entitled, "An act to appropriate 95 per cent. of the one-fifth of one mill per annum tax levy on the grand assessment roll of the state for the years 1919 and 1920 for the state aid bridge fund for the biennium ending March 31, 1921. * * * Approved March 19, 1919."

The situation outlined, so far as concerns chapter 190 and chapter 297, Laws 1919, invokes the application of the principle of construction, viz.: "All statutes *in pari materia* must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision." *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689, 82 N. W. 26. See, also, *Logan County v. Carnahan,* 66 Neb. 693, 95 N. W. 812; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979.

The contracts out of which plaintiff's claims arise were made pursuant to the terms of the statutes referred to. These statutes afforded the sole authority for the action taken, and, whether referred to or not in the written instruments actually executed by the representatives of the county and the state, the terms of the statutes necessarily, in legal effect, were a part thereof and controlling both as an authorization and as limitations.

In *McWilliams v. Griffin,* 132 Neb. 753, 273 N. W. 209, we stated:

"A contract is not merely what the parties expressly stipulate. It is that also which the existing laws of the county where the contract is made annex to it at the time when it was formed. *Ogden v. Saunders,* 12 Wheat. (U. S.) 213; *Bronson v. Kinzie,* 1 How. (U. S.) *311. See, also, *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S. 649, 43 Sup. Ct. Rep. 651; *Fidelity State Bank v. North Fork Highway District,* 35 Idaho, 797, 209 Pac. 449; *State v. Klein,* 63 N. Dak. 514, 249 N. W. 118; *Gregg School Township v. Hinshaw,* 76 Ind. App. 503, 132 N. E. 586; *Maxwell v. Eddy Paper Co.,* 232 Mich. 356, 205 N. W. 111; *Anderson v. Miller Scrap Iron Co.,* 169 Wis. 106, 170 N. W. 275.

"Every contract is made with reference to, and subject to, existing law, and every law affecting the contract is read into and becomes a part of the contract. This is true between individuals dealing between themselves by contract, and it is also true between individuals and the government. *Cobbs v. Home Ins. Co. of New York,* 18 Ala. App. 206, 91 So. 627; *People v. Levitt,* 145 Misc. 621, 260 N. Y. Supp. 458; *Walker v. Whitehead,* 16 Wall. (U. S.) 314; *City of Henderson v. Henderson Traction Co.,* 200 Ky. 183, 254 S. W. 332; 13 C. J. 560.

"The foregoing rules were early adopted, and have been consistently applied and followed, in this jurisdiction. *Watkins & Co. v. Kobiela,* 84 Neb. 422, 121 N. W. 448; *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583."

So, also, "The authority to bind the state by contract need not be express, but may be implied; but it must be an actual, as distinguished from an apparent, authority, and cannot be varied or enlarged by mere usage. The Constitution of the state is a part of state contracts, and, where an agent is appointed by law to contract for the state, the law under which he acts is as much a part of the contract made by him as if it were formally embodied in the contract. Statutes qualifying or limiting the grant of authority to contract are mandatory, and contracts not conforming thereto are not binding on the state. The governor and other executive officers of a state have no general authority to contract in its behalf and can bind the state only within the power specially conferred on them by law." 59 C. J. 170. As supporting the foregoing text, we cite the following: *Hill v. American Book Co.,* 171 Ark. 427, 285 S. W. 20; *State v. Allis,* 18 Ark. 269; *Nellis v. State,* 204 App. Div. 176, 197 N. Y. Supp. 762 (affirming 118 Misc. Rep. 612, 194 N. Y. Supp. 169); *State v. Ward & Briggs,* 9 Heisk. (Tenn.) 100.

In *Nellis v. State, supra,* it appears that the controlling statute and facts involved presented a case in principle almost identical with that here under consideration. The

opinion in the *Nellis* case recites, viz.: "The power of the trustees of public buildings, under section 3, subdivision 7, of the public buildings law, is a limited power and the statute provides that 'no liability shall be incurred by the state beyond the money available for the purpose.'" The lease in litigation in the *Nellis* case actually subscribed by these trustees was an ordinary short form lease and did not contain the clause above referred to, or any reference thereto, or any provision in effect stating the limitation therein prescribed. But it was held, on this state of facts, that the provision above quoted, "by implication," became a part of the lease, and "the trustees of public buildings could not impose upon the state a contractual obligation of this character except subject to this limitation."

As applied to the controversy now before us, the conclusion is that the words of the statute, "the state shall not be liable for any money in excess of the appropriation made for that purpose," by implication, became a part of these contracts entered into by and with the bridge contractors, out of which the present action proceeds; and the representatives of the state could not impose upon the state a contractual obligation under the state aid bridge act except subject to this controlling limitation. The state necessarily must be conceded the right to limit its obligations to the money expressly appropriated for these donations.

Plaintiff's allegations in the pleading demurred to, viz., "that thereafter the Allied Contractors, Inc., commenced construction of said bridges and proceeded therewith; that shortly prior to the 1st day of October, 1920, the state aid bridge fund of the state of Nebraska became depleted and the state was without funds with which to pay its proportion of the cost of the remainder of the construction of said bridges," by necessary effect, plead and admit that any further expenditures by the state would be in excess of the "appropriation made for that purpose," and would transgress the statutory limitation expressly prescribed.

It is obvious that no right to contribution can exist based upon the nonperformance by the state of Nebraska

of a contract which it was prohibited from making, and as to which, after October, 1920, by necessary implication, further performance by the state was prohibited.

While the record does not disclose the reasons which actuated the trial court in sustaining the demurrer to the petition, the case was largely submitted by the parties to this court as a question of practice, viz.: In the present case was it essential to the jurisdiction of the trial court that plaintiff's claims be first presented to the state auditor and, in the event of an adverse determination by that official, that an appeal therefrom be lodged in the district court for Lancaster county? This practice was not followed in the instant case.

Waiving arguendo the question of statutory limitation just discussed, it appears that the position of plaintiff, summarized, may be said to be as follows: Under the state aid bridge act the plaintiff and defendant as coobligors entered into a contract for the construction of three state aid bridges. Shortly prior to October 1, 1920, the state aid bridge fund became depleted, and thereafter, at the request of certain representatives of the state, plaintiff paid out the amounts in suit which should have been paid by the state under the terms of its contracts, and thus the county is entitled to reimbursement for the advances thus made.

It must be conceded that this amounts to an action for contribution, and grows out of the three written contracts for the construction of the bridges, entered into in 1919. In the ordinary course of proceeding, it is, in effect, an action at law upon an implied contract. *Estate of Koch*, 148 Wis. 548, 134 N. W. 663; *Chipman v. Morrill*, 20 Cal. 130.

The controlling rule announced by this court is: "Where the statutes provide an exclusive remedy against the state and a particular forum for a judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum." *McNeel v. State*, 120 Neb. 674, 234 N. W. 786.

In such *McNeel* case this court had occasion to discuss the principles which are applicable to and controlling in

the instant controversy. We can add nothing to the force of this language, in the light of the facts disclosed by the present record. In delivering the opinion of this court, Rose, J., in the discussion of the constitutional and statutory provisions, says in part:

" 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought.' Const. art. V, sec. 22.

" 'The legislature shall provide by law that all claims upon the treasury shall be examined and adjusted by the auditor and approved by the secretary of state, before any warrant for the amount allowed shall be drawn. Provided, that a party aggrieved by the decision of the auditor and secretary of state may appeal to the district court.' Const. art. VIII, sec. 9.

" 'The state may be sued in the district court of the county wherein the capital is situate, in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state.' Comp. St. 1929, sec. 27-324.

" 'The auditor of public accounts shall keep a record of all claims presented to him for examination and adjustment and shall therein note the amount of such claims as shall be allowed or disallowed, and in case of the disallowance of all such claims, or any part thereof, the party aggrieved by the decision of the auditor and secretary of state may appeal therefrom to the district court of the county where the capital is located within twenty days after receiving official notice.' Comp. St. 1929, sec. 77-2607.

"In view of the constitutional and statutory provisions relating to claims against the state and the judicial interpretations thereof, the legislation conferring upon the district courts jurisdiction to hear and determine 'all claims against the state filed therein which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed' (Comp. St. 1929,

sec. 27-319), includes 'any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state,' while 'all claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication' (Comp. St. 1929, sec. 27-319), apply to claims based on wrongs or torts. In other words, claims in the first of the statutory classes are based on, or arise out of, contracts with the state, and claims in the second of the statutory classes are not included in the first but are based on wrongs or torts committed by departments, officers or agencies of the state. A claim in the first class must be presented to the auditor with the right of appeal from his decision and the second must be presented to a district court with legislative authority to sue the state. Comp. St. 1929, sec. 27-319; *State v. Stout*, 7 Neb. 89; *Peterson v. State*, 113 Neb. 546; *Pickus v. State*, 115 Neb. 869.

"Where the statutes provide an exclusive remedy against the state and a particular forum for judicial trial, one branch of the legislature alone cannot extend jurisdiction to another forum. The constitutional provision that 'The state may sue and be sued, and the legislature shall provide by law in what manner and in what court suits shall be brought,' does not confer on a single branch of the legislature power to extend jurisdiction beyond that limited by statute. Since the Constitution and statutes provide that 'matter founded upon or growing out of a contract, expressed or implied,' require such a claim against the state to be presented to the auditor of public accounts with the right of claimant to appeal from an adverse decision to the district court where the capital is located, a single branch of the legislature cannot confer on another district court jurisdiction to entertain and determine an action 'founded upon or growing out of a contract, expressed or implied.' "

In the light of this discussion, which we again approve, it is clear that the petition of plaintiff wholly failed to state a cause of action against the state, and the trial court properly sustained the demurrer of defendant thereto.

Therefore, the judgment of the district court is correct, and it is

AFFIRMED.

EVA IRENE GRIMES, APPELLEE, V. J. L. BAKER, APPELLANT.
275 N. W. 860

FILED NOVEMBER 12, 1937. No. 30000.

1. Corporations. If stock is sold with a promise by seller to repurchase the same at the option of the buyer, such contract, if supported by a good consideration, will be enforced as in the nature of one in indemnity.
2. Contracts. *Nudum pactum* is a voluntary promise, without any other consideration than mere good-will, or natural affection. Such a promise is unenforceable.
3. ———. Reciprocal promises as the basis of a valid agreement must ordinarily be equally obligatory upon the parties, so that each may have an action thereon; otherwise, such agreement is *nudum pactum*.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. Opinion on rehearing of case reported in 132 Neb. 898. *Reversed and dismissed.*

Gaines, McLaughlin & Gaines, for appellant.

Clarence T. Spier and *Arthur C. Bailey, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

PAINE, J.

This is an action by a stockholder to compel another stockholder, who had recommended the investment, to carry out a promise to save her from loss in the event the stock went down.

The first opinion of this court appears in 132 Neb. 898,

273 N. W. 789, in which a statement of the principal allegations of the pleadings and a discussion of some of the Nebraska cases in relation thereto are briefly set out.

The brief in support of a rehearing by plaintiff and appellee charged that the former decision was not supported by any evidence, but was based upon a misconception of the facts, and that it was contrary to former decisions of this court. A reargument was therefore allowed upon the motion for a rehearing, and in this decision an attempt will be made to clarify the former opinion as to some of the points discussed by plaintiff in such reargument.

If the former opinion implied in any way that the defendant took the witness-stand and testified, it would be an error, for Robert S. Morse, his private secretary, testified that he saw the defendant daily and looked after his affairs, and that defendant was 81 years old, and his mental condition was very bad, and that in his opinion he would not be a competent witness to testify to business matters.

Plaintiff charges that the former opinion stated that the defendant represented to the plaintiff's mother, while he was lunching with her at the Omaha Athletic Club, that he had received not only regular dividends, but stock dividends, in the company in which she was urged to buy stock. An examination of the evidence shows that he made the statement referred to upon the earnings of his stock in the United States Gypsum Company, and that he said he thought there was just as big an opportunity for making money in the new Universal Gypsum & Lime Company, in which he was buying stock, as there had been in the United States Gypsum Company, and told why.

Plaintiff also attacks the statement made in our former opinion as to the ownership of the stock sold to her, and insists that it is quite obvious that the defendant was selling his own stock to the plaintiff. We have been absolutely unable to find any statement in the record which in any way supports this claim. In exhibit No. 4, a letter from defendant, J. L. Baker, written on the Baker Ice

Machine Company's stationery, of which company he was president, to the mother of the plaintiff, with whom all negotiations were had, he said that he noted that the plaintiff was willing to pay $17 a share for the stock, but he had been holding off, hoping to get it for her at a lower price, and that he had finally succeeded in doing so, and that he had sent the same to Chicago to have it transferred to her, and was glad to save her $2 a share on the buy.

In a letter from the defendant, dated November 12, 1926, being exhibit No. 5, and written to the mother of the plaintiff, he refers to the purchase of some of the 7 per cent. preferred stock, and says he has been buying this stock himself all the way down from $70 a share to $64 a share, and put her stock in at $64 a share, and "think she has a profit in it today of $11 a share," and that the 12 shares amount to $768, the amount of her check, which was dated August 20, 1926, and which he says he has not cashed until that day. He also says in this letter: "I had an order in for myself for 100 shares of this stock, but could only get a part of it at this figure, and could not buy it for less than $75 today." This letter, exhibit No. 5, was forwarded to the plaintiff, with a postscript at the bottom, signed, "Affectionately yours, Mamma," and one paragraph of the postscript reads: "Mighty fine of Mr. Baker to put yours in at the lowest price of the stock he secured."

In the plan of reorganization, being exhibit No. 17, it shows in the balance sheet of April 30, 1935, that the amount of preferred stock outstanding, of a par value of $60 a share, was $1,057,680, together with common stock outstanding of $455,549.

Exhibit No. 26 was a registered letter, mailed by defendant September 7, 1926, to the company at its office in the Conway building, Chicago, inclosing 25 shares of stock in the name of George E. Sipple, and 25 shares of stock in the name of Henry Sipple, which certificates he desired them to transfer to the plaintiff, and mail to her mother at Fremont.

In exhibit No. 25, dated September 9, 1926, the company

by its secretary acknowledges receipt of the registered letter of September 7, and writes that they are forwarding the 50 shares to plaintiff, as directed, and are inclosing to him certificate No. 4332 for 350 shares issued to him.

Exhibit No. 9, offered by the defendant and received without objection and read to the jury, was an informal letter written by plaintiff's mother with a pen to Mr. Baker, and began, "Dear Link," and contains this paragraph: "I am sorry if I did not make myself clear about the Gypsum stock. I told Eva Irene about it and she wanted 100 shares and gave the money for it. I understood you that you had 50 shares and I sent the money for that amount. I should have sent the full amount that Eva Irene gave me in the first place but only sent enough for what I understood you to say you had and wanted you to get 50 more for her. If it is too late to get it at the price paid for mine I will pay the difference and promise not to bother you any more with business affairs for me." This letter is signed, "Eva."

We have endeavored, by going into detail, to clear up some of the criticisms made in the brief and argument for rehearing as to the statements of fact in our former opinion, and the court fails to see anything in the evidence which even remotely tends to support the statement made repeatedly by the plaintiff that the stock sold to her was stock which belonged to the defendant himself.

On the other hand, a more careful examination of the bill of exceptions convinces the court that the stock purchased by her mother's request was purchased on the open market, at the same time the defendant was purchasing a very large amount of the same stock in several different lots, and that he purchased for her the few shares of stock she wanted at the lowest price obtainable at the time at which he was purchasing a much greater amount of stock for himself at much higher prices.

It is insisted finally by the plaintiff that the former decision in the case at bar is contrary to the law of Nebraska, as previously announced by this court in *Trenholm*

v. Kloepper, 88 Neb. 236, 129 N. W. 436, in which it was said: "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds."

Before setting aside such former holding, we decided to make a careful reexamination of the record in that case, and find the following state of facts:

Belle S. Trenholm, the plaintiff in that case, was a widow who secured certain money from life insurance upon the death of her husband. The defendant, who had been well acquainted with her for many years, and whose place of business adjoined her husband's place of business, called at her home twice within a period of ten days, urging her to buy stock in the Lincoln Transfer Company, of which he was the president and active operating manager, there being a bookkeeper also in the office. He represented to her that the stock never paid less than 15 per cent., and had paid as high as 21 per cent., and was a good investment for her funds.

The evidence disclosed that the authorized capital stock of this transfer company was at that time $25,000, and it is not disclosed how much of it was unsold and in the treasury of the company, but the defendant owned at least $5,500 of the capital stock.

He went with her to her box in the safety deposit vault, and she handed him $1,100 in currency for the stock. Plaintiff claims that he promised her that, at any time she notified him and gave him three or four months' notice, he would take the stock off her hands. When later on she asked him to repay her money, he said it would be hard for him to write a check just then, for he had promised to pay Albert Urban for his stock, and therefore he did not have the money to pay her just then. Her stock was issued to her on December 28, 1904, by the defendant, who signed the same as president, and the certificate was signed by G. W. Berge as secretary.

T. J. Doyle, attorney, testified that he presented the plaintiff's certificate of stock to the defendant and demanded repayment of him of $1,100, and the defendant said that he had had a contract with G. W. Berge, attorney and secretary for the company, to take up his stock of either $2,000 or $2,500, and he had taken that up. Mr. Doyle testified that the defendant also had added that such agreement with Mr. Berge had been in writing, and he refused to take up plaintiff's stock.

The defendant testified that he had been president of the company for about 15 years; that the stock sold to Mrs. Trenholm was treasury stock, issued by the company, and not owned by the defendant. The defendant admitted he told her that it was a good investment, and that it was selling at a premium of 10 per cent., or $1,100 for ten shares, but did not recall that he told her that he would take it back upon demand.

The syllabus in the case just discussed should, to meet the record therein, have read:

If the managing officer of a corporation, who is the principal stockholder therein, orally promises a prospective purchaser of its treasury stock that he will, upon notice, take it off her hands if she is dissatisfied with her purchase, the agreement is an original contract, and is not within the statute of frauds.

In the case at bar, the defendant had no personal interest in whether the plaintiff purchased the stock or not. It did not mean a penny to him. Plaintiff had a small amount of money to invest. Her mother testified she considered Mr. Baker an exceptional financier, and she had had other deals with him, as shown by her letter of October 6, 1932, written after she had become Mrs. Ross L. Hammond, being exhibit No. 24, the last paragraph of which letter reads: "When you very kindly loaned me $1,500 to margin my General Motors I expected to pay you back in full very soon. Conditions have developed in an unprecedented condition since and people have not paid their obligations to me; so I have been able so far to pay

only a small part of the principal. But Link as I lost through your recommendation to purchase Uni. Jypsum I think you should be very lenient in regard to the payment of the note or send it to me canceled."

In our opinion, in all the decisions which have allowed a recovery on a rescission of a sale of stock, it will be found that in the sale to the plaintiff there was a good consideration for the option to repurchase given by the seller; that such a contract is regarded in the nature of one of indemnity, and not within the statute of frauds.

In our former opinion in the case at bar, we wrote but one syllabus, which reads: "An agreement without consideration is *nudum pactum* and unenforceable."

The law has held from the earliest times that "a contract naked of any obligation or duty on one side—a *nudum pactum*—is not enforceable." *Virtue v. Stanley,* 87 Wash. 167, 151 Pac. 270.

Nudum pactum is "a voluntary promise, without any other consideration than mere good-will, or natural affection." *Justice v. Lang,* 42 N. Y. 493, 1 Am. Rep. 576.

It was said by the Kentucky bench in 1819: "This would be against conscience, and in violation of a favorite maxim in both courts, that there must be, in every contract, to render it valid, a good, or a valuable consideration. The '*quid pro quo*' is the delight of the law; so much so, that out of the various considerations which influence human action, it has selected and considered the two foregoing only—the good and the valuable." *Shackelford v. Handley's Executors,* 1 A. K. Marsh. (Ky.) *496, 10 Am. Dec. 753.

In 1 Restatement, Contracts, 80, sec. 75, appears this very pertinent comment: "No duty is generally imposed on one who makes an informal promise unless the promise is supported by sufficient consideration."

"Reciprocal promises as the basis of a valid agreement must be equally obligatory upon the parties, so that each may have an action thereon; otherwise such agreement is *nudum pactum.*" *State v. Holcomb,* 46 Neb. 612, 65 N. W. 873.

We are still of the opinion that there was no consideration binding the defendant.

JUDGMENT REVERSED AND CAUSE DISMISSED.

CARTER, J., concurs in the result.

DAY, J., dissents.

SYLVIA SWEETEN MYERS, APPELLANT, V. RAY MCMAKEN: WATSON BROTHERS TRANSFER COMPANY, INC., APPELLEE.
276 N. W. 167

FILED NOVEMBER 12, 1937. No. 30077.

1. **Automobiles:** EVIDENCE. In an action for damages growing out of a collision between an automobile and a truck, evidence that the name of defendant was on the sides of the truck raises a presumption that the truck belonged to defendant.
2. ———: ———. Such presumption vanishes, however, when rebutted by uncontradicted proof that the defendant is not the owner of the truck.
3. ———: AGENCY: PROOF. Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent even though it may properly be designated as a part of the *res gestæ*.
4. **Evidence.** Evidence of an offer or desire to compromise, consisting of a direct offer to buy peace, or settle a controversy without respect to legal liability, is not admissible against the person making it.

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

Gaines, McLaughlin & Gaines and *L. Q. Hills*, for appellant.

Fradenburg, Webb, Beber, Klutznick & Kelley, contra.

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

CARTER, J.

Plaintiff commenced this action against the defendants to recover damages for injuries sustained in an automobile

collision. The trial court directed a verdict against plaintiff as to the defendant Watson Brothers Transfer Company. From the overruling of her motion for a new trial, plaintiff appeals.

The evidence discloses that on July 28, 1935, at about 3 a. m., a truck bearing the name of Watson Brothers Transfer Company collided with the automobile in which plaintiff was riding, causing the injuries of which she complains. Defendant in its answer pleaded that Ray McMaken, the truck driver, was the owner of the truck, which allegation was not denied in the pleadings or evidence. It further appears that McMaken was a foreman for defendant at its warehouse, working regularly from 1 p. m. to 10 p. m. of each day. The record further shows that, after colliding with the car in which the plaintiff was riding, McMaken attempted to escape from the scene of the accident but was caught by a policeman a block or two away. Plaintiff attempted to prove by the officer that at the time McMaken was apprehended he informed the officer "that he was in a hurry and he was going to make a pick-up for Watson Brothers Company by whom he was employed." This evidence of the officer was excluded by the trial court and plaintiff contends that this ruling was prejudicially erroneous. Plaintiff also offered evidence to the effect that the owner of the car in which plaintiff was riding negotiated a settlement with the Watson Brothers Transfer Company at which time Ray Watson, an officer of the company, stated that he desired to negotiate a settlement of damages with the plaintiff. This evidence was also excluded by the trial court and is alleged by plaintiff to constitute prejudicial error.

It cannot be successfully disputed that plaintiff had the burden of proving that Watson Brothers Transfer Company was the owner of the truck, that McMaken was an employee of the owner, and that McMaken was, at the time of the accident, engaged in the business of his employer. Plaintiff contends that evidence showing that the name of the defendant Watson Brothers Transfer Com-

pany was painted on the outside of the truck is sufficient to take the issue of ownership to the jury. The better rule is that such evidence raises a presumption of ownership. *Tieman v. Red Top Cab Co.*, 117 Cal. App. 40, 3 Pac. (2d) 381; *Robeson v. Greyhound Lines, Inc.*, 257 Ill. App. 278; *Rockwell v. Standard Stamping Co.*, 210 Mo. App. 168, 241 S. W. 979; *Weber v. Thompson-Belden & Co.*, 105 Neb. 606, 181 N. W. 649. This presumption vanishes, however, when rebutted by uncontradicted proof. *Silent Automatic Sales Corporation v. Stayton*, 45 Fed. (2d) 471. In the case at bar it is not disputed that McMaken was the owner of the car. Any presumption that Watson Brothers Transfer Company was the owner because of the fact that its name was written on the truck must necessarily fall where the record establishes that the driver of the truck was in fact the owner. There being insufficient proof in the record that Watson Brothers Transfer Company was the owner of the truck, there can be no presumption that the driver of the truck was its employee engaged within the scope of his employer's business at the time of the accident. The record further shows that McMaken was a warehouse foreman for Watson Brothers Transfer Company, working from 1 p. m. to 10 p. m. each day. The evidence shows that the accident occurred at about 3 a. m. The record is therefore devoid of any proof that McMaken was an employee engaged in his master's business when the accident occurred.

Appellant argues that the statement of McMaken made to the police officer provides the necessary proof and that the court erroneously excluded it.

Assuming for the sake of argument that the statement made to the police officer was a part of the *res gestæ*, yet it can avail the plaintiff nothing because of another well-established rule of law, to wit: "Evidence of acts or declarations of an agent concerning the existence or extent of his authority is not admissible against the principal to prove its existence or extent." *Le Bron Electrical Works, Inc., v. Livingston*, 130 Neb. 733, 266 N. W. 589, and au-

thorities therein cited. There being no other competent evidence in the record establishing the agency, and the alleged *res gestæ* statement being incompetent for that purpose, there is a failure of proof on the part of plaintiff on this fundamental issue.

Plaintiff contends, however, that if the statement was a part of the *res gestæ* it is within an exception to the general rule and can be used as proof of the agency of the employee. Plaintiff cites cases sustaining this contention. We think that these decisions constitute a minority view and that the better rule is that statements of an alleged agent concerning the existence or extent of his authority are not admissible against the principal to prove its existence or extent even though they might properly be designated as a part of the *res gestæ*. In the case at bar, the thing that produced a spontaneous utterance of the alleged employee, if it can be said that one was made, was the collision. The utterance throws no light upon the accident, nor does it tend to show who was to blame. It refers only to matters entirely disconnected with the accident and therefore cannot be admissible as *res gestæ*. The correct rule is stated by an authoritative text as follows: "Evidence of statements by agents or servants made under the impulse of emotion and relating to an event then occurring is admissible to the same extent as if made by a person not an agent. The fact that a person while doing an act is an agent and makes comments with respect to such act does not of itself cause the evidence to be admissible. It may be admissible as an operative fact or it may be admissible to show the motive or purpose with which the act was done. Unless it is so admissible, however, it is not admissible against the principal except to the extent that the statements of any person at the time and place and operating under the same emotion would be admissible." 2 Restatement, Agency, sec. 289, comment d. We necessarily conclude that the trial court properly rejected the statement made by the truck driver to the police officer.

Plaintiff further complains of the ruling of the trial court in excluding the alleged admission of liability by Ray Watson, an officer of the Watson Brothers Transfer Company. The substance of the alleged admission was that defendant desired to negotiate a settlement with plaintiff. It is not alleged that there was an admission of any act or facts that would make the defendant liable. The most that can be said for the purported admission is that it expresses a desire to settle the controversy. Settlements are favored in the law. It is common knowledge that a person disclaiming all liability may endeavor to buy his peace by ridding himself of the annoyance of litigation. Certainly the expression of a desire to do the thing which the law favors, without admitting the truth of any fact in issue in the controversy, does not constitute an admission against interest upon which liability can be predicated. The reason is just as applicable where the purported admission was made to a third person as when made to the person pressing a claim. *Creighton v. Chicago, R. I. & P. R. Co.*, 68 Neb. 456, 94 N. W. 527. The statement offered in evidence as an admission in the case at bar merely implies a desire for peace, not a concession of a wrong. The trial court properly rejected the offer.

For the reasons herein set out, we conclude that the rulings of the trial court were in all respects correct and that a verdict was properly directed against the plaintiff on her claim against the Watson Brothers Transfer Company.

AFFIRMED.

NELLIE E. SAFFER, APPELLANT, V. JOHN SAFFER ET AL., APPELLEES.
274 N. W. 479

FILED NOVEMBER 12, 1937. No. 29996.

1. **Life Estates: TAXES.** It is ordinarily the duty of the owner of a life estate to pay the taxes assessed against the property,

but where the facts and circumstances disclosed by the evidence show that one of the remaindermen is the agent of the life tenant and looking after the property, and has collected sufficient rents therefrom to pay the taxes, it then becomes the duty of such remainderman to pay the taxes.

2. ———: ———. Where the evidence discloses that a remainderman is the agent of a life tenant and borrows money, without the knowledge or acquiescence of the life tenant, to pay taxes against real estate, and receives the assignment of the tax certificate in his name, the effect of such assignment is to constitute a redemption of the property from tax sale for the use and benefit of the life tenant, himself, as remainderman, and the heirs of the deceased, and operates to pay the taxes against the property and not to create a lien thereon.
3. Agency may be implied from the words and conduct of the parties and the circumstances of the particular case, evidencing an intention to create the relationship.
4. Fraud is never presumed but must be proved by a preponderance of the evidence by the person alleging it.
5. Taxation. When the statute under which land is sold for taxes directs an act to be done, such as recording a tax deed, such statute must be strictly, if not literally, complied with.

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

L. W. Setz, for appellant.

John E. von Dorn and *Fradenburg, Webb, Beber, Klutznick & Kelley, contra.*

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

MESSMORE, J.

This cause now comes before this court on reargument.

Plaintiff seeks to quiet title to certain real estate in Omaha, Nebraska, which she claims under a tax deed. The defendants are the life tenants and remaindermen, and among the remaindermen is John Saffer, the husband of the plaintiff.

Sebastian Saffer died in 1923, leaving property which he devised to his wife, Emma Saffer, for life, and the remainder to his three sons, John, Frank and Harry. Harry

Saffer has died since the commencement of this action, and it was revived against his heirs. Emma Saffer, the widow, elected to take under the will and occupied the premises in question for about a year after her husband's death. She then moved to Chicago where she took up her abode with her son John. Frank Saffer thereafter occupied the premises, sublet part thereof, and, after making certain deductions, forwarded the balance of the rents to his mother. It is claimed by Emma Saffer and Frank Saffer that John Saffer received a portion of the rents. The 1928 taxes were not paid, and D. Z. Mummert, of Blair, Nebraska, purchased the taxes, and a certificate of tax sale was issued to him. In addition thereto he paid the subsequent taxes up to November 5, 1931, when the certificate was assigned to John Saffer.

The plaintiff, who had been acquainted with John Saffer for many years, and which acquaintanceship was renewed in January, 1931, was Miss Nellie E. Bott. John Saffer stated to plaintiff, to whom he was married shortly afterwards, that he and his mother owned a piece of property in Omaha which had been sold for taxes; that a tax buyer had purchased the same, and that he, John Saffer, wished to redeem; that if the plaintiff cared to put up the money and pay for the tax certificate the property would be hers and would in part compensate her for money previously advanced by her to John Saffer, in the sum of $10,000. The amount of the certificate in question was nearly $600. Miss Bott, now the plaintiff, complied with the request of John Saffer, loaned the money and eventually obtained the tax certificate indorsed from John Saffer to her, but which originally was indorsed to John Saffer. She kept possession up to the time that John Saffer finally sent the tax certificate to an attorney, R. E. Svoboda, for the purpose of obtaining a tax deed. Mr. Svoboda, in turn, obtained a tax deed, as directed by John Saffer, for the plaintiff, and until this time apparently has retained possession of the tax deed, not having recorded it. John Saffer and the plaintiff were married January 31, 1932. The tax cer-

tificate was assigned by John Saffer to plaintiff, his wife, July 20, 1932, using her maiden name, Nellie E. Bott. The tax deed was issued to the plaintiff on November 13, 1933, and is the basis of this action.

The substance of the finding and decree of the district court, pertinent to this case, is as follows: "That the defendant John Saffer was not acting as the agent or representative of the plaintiff at the time he obtained the assignment of the tax certificate * * * from the purchaser of the said property at tax sale, but said defendant was acting for himself as heir of Sebastian Saffer, deceased, and in a representative capacity and for and on behalf of his mother, the defendant Emma Saffer, also an heir of Sebastian Saffer, deceased; and the assignment of said tax certificate obtained by him by assignment to him constituted a redemption of the property from tax sale for the use and benefit of the defendant Emma Saffer and all heirs of Sebastian Saffer, deceased, and operated to pay the tax against the property and not to create a lien thereon, and that the funds used by the defendant John Saffer to redeem said property were advanced to him by the plaintiff in his individual capacity and not as agent or representative of the defendant Emma Saffer. That the defendant John Saffer, during the period when said property was sold for taxes * * * and when he took an assignment of said tax certificate and when he reassigned the same to the plaintiff, as representative of the defendant Emma Saffer, received sufficient funds derived from said property to pay all taxes then becoming due or delinquent against it."

It is fundamental that, ordinarily, it is the duty of the life tenant, and not of the remainderman, to pay the taxes. 21 C. J. 955. It is also true that a "tenant in common cannot add to or strengthen his own title by purchasing at a tax sale or by purchasing from a stranger who purchased at a sale. The purchase of the outstanding tax title for the entire property by one cotenant operates as a payment of the tax and an extinguishment of the tax title,

amounting to no more than a redemption until ouster or notice to his cotenants that his possession is exclusive, and a deed to him as purchaser simply acts as a discharge of the taxes assessed on the land. Such purchase or extinguishment inures to the benefit of all of the tenants in common and the purchasing tenant holds the title or interest acquired in trust for the benefit of his cotenants." 62 C. J. 467.

It might be well at this juncture to set out the relationship between the remainderman John Saffer, defendant, and the life tenant, Emma Saffer, his mother, so far as this property is concerned. The record is replete with statements of this relationship. Mr. Svoboda testified that, as attorney, he represented some of the Saffers in other litigation; that he handled negotiations for John Saffer in procuring the tax deed and handled correspondence with John Saffer; that he had personal contact with John Saffer and Emma Saffer, and that John Saffer represented that he was taking care of his mother's affairs, and that Mrs. Emma Saffer lived with her son John a great deal of the time; that he conveyed the information to John Saffer that the taxes were not paid on the premises in question and wrote to him about this matter; that, in fact, he tried to arrive at a compromise with Mr. Mummert for John Saffer; that he did not communicate with the plaintiff in this case relative to this real estate. Emma Saffer testified: "I told Jack, I said you owe me so much money; I have got to pay these taxes, and about two or three weeks after that he came and said, 'Mother, your taxes are paid.' I said, 'Fine.'" She further testified that John collected the rents for the property in Omaha for the time that she lived with him, and did not turn the rents over to her; that she talked with John about taking care of and supervising the property and collecting the rents, and that she trusted him. Mrs. Lenore Passoth lived in the Omaha property, collected rents and sent the amount thereof to defendant John Saffer, which, less the expense, amounted to $1,483.61. She testified that John Saffer instructed her

to remit the rent only to him and finally paid her a commission for collecting rent; then terminated her service.

It will readily be seen from the foregoing evidence that John Saffer was acting for and in behalf of the life tenant. The transactions, conversations and correspondence had by him with the various witnesses are fully indicative of this fact and create, we believe from the evidence, the relationship of principal and agent, in so far as the life tenant is concerned. This being true, and defendant John Saffer having collected more than a sufficient amount to have paid the taxes on the real estate in question, he could and should have paid the taxes for the life tenant without borrowing from the plaintiff. He borrowed from her without any apparent knowledge, on the part of his principal, the life tenant, until, as reflected in the record, plaintiff told Emma Saffer, the life tenant, nine months before this action was commenced when John and the plaintiff were living on a farm in Minnesota, that plaintiff had advanced the money for payment of the taxes. At most, the loan from the plaintiff to her husband was a personal obligation and, under the circumstances as indicated by the evidence, was an obligation in which the life tenant and the other remaindermen and heirs at law had not acquiesced, and of which they apparently had no knowledge. Therefore, the court's decree, as hereinbefore set out, is correct.

"Agency may be implied from the words and conduct of the parties and the circumstances of the particular case evidencing an intention to create the relationship." 2 C. J. S. 1045.

In *Goldfein v. Continental Ins. Co.*, 125 Neb. 112, 249 N. W. 78, it was held: "In establishing agency, it is necessary to take into consideration the facts and circumstances in the case, the relations of the parties, what they did, their usual course of dealing, what instructions were given, if any, the conduct of the parties generally, and the nature of the transaction."

The defendants plead fraud. A careful reading of the evidence in this case shows the record to be free from

fraud, so far as this plaintiff is concerned; nor does it show that there is any connivance on the part of John Saffer, defendant, and this plaintiff. Fraud is never presumed, but must be proved by the person alleging fraud by a preponderance of the evidence.

Section 77-2026, Comp. St. 1929, reads as follows: "The deed so made by the county treasurer shall be under his official seal of office and acknowledged by him before some officer authorized to take the acknowledgment of deeds, and when so executed and acknowledged shall be recorded in the same manner as other conveyances of real estate, and when so recorded shall vest in the grantee, his heirs and assigns, the title of the property therein described."

The nature of the transaction suggests that a requirement that the tax deed be recorded before, in effect, vesting title serves a well-considered public policy. It is plain that the title to the lands in suit must be vested in plaintiff before she can maintain an action to quiet the same. The above statute was cited for the first time in the motion for rehearing, and the writer of the former opinion did not have the benefit of a brief on this point when he wrote his opinion; nor was his attention challenged to this point on oral argument. Nevertheless, the point was presented to the trial court and expressly decided by it, and it appears that, unless a present title vests in plaintiff, she is entitled to no relief, in view of the form of the action which she has instituted.

The law applicable to this provision of the statute is stated in an early Vermont case, *Chandler v. Spear*, 22 Vt. 388, cited in the Nebraska case of *Brokaw v. Cottrell*, 114 Neb. 858, 211 N. W. 184. The Vermont case holds: "When the statute, under which land is sold for taxes, directs an act to be done, or prescribes the form, time and manner of doing any act, such act must be done, and in the form, time and manner prescribed, or the title is invalid; and in this respect the statute must be strictly, if not literally, complied with." This court in the body of the opinion in *Brokaw v. Cottrell, supra,* makes this statement relative

to the Vermont case: "While this Vermont case has not been referred to by us in our previous opinions, we have adopted the rule therein announced, and consistently followed the same when such question has been presented to this court."

There are other questions presented by the appeal which are not necessary for us to determine herein, and for the reasons stated in this opinion our former opinion is withdrawn and the judgment of the trial court is

AFFIRMED.

ALICE A. BROWN, APPELLEE, V. EVERETT L. STORY ET AL., APPELLANTS.
276 N. W. 155

FILED NOVEMBER 19, 1937. No. 30094.

Easements. Where owners of adjoining city lots with a house on each enter into an oral agreement for a party driveway with its center on the lot line, construct it, each paying half the initial expense, and use it in common for seven years, the easement thus created is not revocable at the will of one, over the protest of the other, where the latter built and for the same period used garages which are inaccessible by motor vehicles except for the driveway, and equity may prevent obstruction thereof.

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

Sterling F. Mutz and *Robert S. Stauffer*, for appellants.

Burkett, Wilson & Van Kirk, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

ROSE, J.

This is a suit in equity for an injunction preventing the obstruction of a driveway for motor vehicles between an apartment-house lot owned by plaintiff and an adjoining residence lot owned by defendants in the city of Lincoln.

The district court granted the injunction and defendants appealed to the supreme court.

These lots extend north and south with the front ends on paved G street which runs east and west. Plaintiff, Alice A. Brown, owns at 1432 G street the south 125 feet of lot 11, block 151, Lincoln, on which her apartment-house is situated. Everett L. Story and Sadie Story, defendants, own, adjoining on the west, at 1428 G street, 33 feet of lot 10, block 151, Lincoln, on which their dwelling-house is situated. There is no access to or egress from the rear of these lots by motor vehicle, if there is no driveway between the two houses, there being no alley at the north end of the lots or other outlet.

These facts are conclusively established by the record. In addition, plaintiff pleaded in her petition and proved that she and Samuel P. Story, a former owner of defendants' lot, entered into an oral contract prior to August 26, 1927, for an 8-foot easement on the lot line for a party driveway occupying 4 feet on each side; that, pursuant thereto, the contracting parties procured a city permit to cut the concrete curb on the north side of G street; that they did so and jointly constructed a cement approach on the lot line from the paved street to the public sidewalk running east and west in front of the lots; that each party paid approximately half the cost of the approach; that a cinder driveway on both sides of the lot line extended to the rear of the houses and was kept in repair by the lot owners; that plaintiff constructed on the north end of her lot three garages in 1927; that the driveway and garages were continuously used by plaintiff and her tenants until defendants, over her protest, constructed a wire fence on the lot line May 23, 1935. These alleged facts were proved at the trial by uncontradicted evidence. The trial judge heard the witnesses, viewed the premises and found the issues in favor of plaintiff. All owners of both lots from 1927 until 1935 knew of, recognized and used the easement created by the oral, mutual agreement of 1927. By mesne transfers from Samuel P. Story, Everett L. Story, defend-

ant, acquired title to his lot. Each lot owner used for a driveway approximately 4 feet of the other's lot and had the benefit of the easement. Everett L. Story, at the time of the trial, was still using the joint approach to his premises and a portion of the lot owned by plaintiff, while excluding her from the 4-foot strip on his own side of the lot line, and so admitted on the witness-stand.

The substance of the defenses interposed are: The contract was not in writing and therefore would be void under the statute of frauds. An easement by adverse user was not created, because the statutory period of 10 years had not elapsed at the time the driveway was obstructed. Plaintiff's use of the 4-foot strip on the east side of defendants' lot was permissive and was revocable at the will of defendants. The permit for a driveway did not ripen into an easement.

The rules of equity and the principles of law applicable to the established facts show that the defenses urged are all without merit, as indicated by the following former rulings:

"A court of equity will give effect to a parol grant of an easement where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds." *Gilmore v. Armstrong,* 48 Neb. 92, 66 N. W. 998.

"Adjoining lot owners in a city may, by grant, impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the covenant in such case being a sufficient consideration for the respective grants.

"Mutual covenants imposing such rights or restrictions will be construed as the grant of reciprocal easements which may, when the remedy at law is insufficient, be enforced and protected by a court of equity." *Barr v. Lamaster,* 48 Neb. 114, 66 N. W. 1110.

"Where owners of adjoining properties use a strip of

land along their boundary line between their properties as a common driveway, and improvements are constructed with relation thereto, each is estopped from disputing the other's right of such way, and such estoppel extends to their grantees, who take with notice of the driveway, although it was not expressly reserved." *Christensen v. Luehrs, ante,* p. 50, 273 N. W. 839.

Conceding that the driveway was obstructed when used seven years only, equity nevertheless has power to protect plaintiff's right to such use, under the circumstances disclosed. The oral agreement was so performed by both parties to it as to take it out of the statute of frauds. *Gilmore v. Armstrong,* 48 Neb. 92, 66 N. W. 998.

The findings on appeal are the same as the findings of the district court.

AFFIRMED.

ROSE FILLEY, APPELLEE, V. SAMUEL MANCUSO ET AL., APPELLANTS.

276 N. W. 157

FILED NOVEMBER 19, 1937. No. 30105.

Mortgages. In a suit in equity in which foreclosure of a mortgage is ordered to satisfy the unpaid debt, a confirmed sale of the mortgaged realty may be reversed on appeal, where the uncontradicted evidence shows that the sale price was so low and so disproportionate to value as to be unconscionable.

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

Charles W. Haller, for appellants.

Edith Beckman, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

ROSE, J.

This is a suit to foreclose a mortgage on a residence lot

facing on Hanscom Park in the city of Omaha. The property was sold under an order of sale issued pursuant to a decree of foreclosure in the district court for Douglas county. From a judgment confirming the sale, defendants appealed.

The appeal presents a single question which was distinctly stated in the brief and orally at the bar—the price for which the mortgaged property was sold at the sheriff's sale was so grossly disproportionate to value as to be unconscionable in a court of equity.

The mortgage was given to secure a debt of $6,000 and the unpaid interest was $732, total—$6,732, April 8, 1935. Under an order of sale the sheriff sold the mortgaged property to Molly Bruno for $3,450, October 27, 1936. Upon motion to confirm the sale, the district court heard the issue of value on affidavits, one of which fixed the value at the time of the sale as follows: Lot, $3,000, improvements, $5,000, total—$8,000. There is nothing in the record to contradict or vary this evidence of value in any respect. The undisputed evidence therefore is that the mortgaged property was sold at the judicial sale for less than half its value. Confirmation on that basis followed. In a court of equity the sale price was so low as to be clearly unconscionable on the face of the record. The sale and confirmation are therefore reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES P. MEGAN, TRUSTEE, APPELLANT, V. BOYD COUNTY, APPELLEE.

276 N. W. 160

FILED NOVEMBER 19, 1937. No. 30085.

1. **Statutes:** CONSTRUCTION. The basic rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute.
2. ———: ———. In construing statutes the court will endeavor

to ascertain, and will give effect, if possible, to the legislative intent.

3. ———: ———. "Ordinarily an exception in a statute will be held to apply to the clause or sentence immediately preceding it, but this rule is not unbending, and if a consideration of all statutes bearing upon the subject indicates a different legislative intent, this will prevail over a construction based upon the rules of syntax." *State v. Searle*, 86 Neb. 259, 125 N. W. 590.
4. Counties with a population of 9,000 or less are limited by statute to authority to levy a maximum of four mills for ordinary county purposes.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

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

W. L. Brennan, contra.

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

DAY, J.

Charles P. Megan, the trustee of the Chicago & Northwestern Railway Company, seeks to recover taxes which he claims were unlawfully imposed upon him by Boyd county in excess of statutory authority. The taxes were paid, the excess under protest, and a refund was demanded and refused. A demurrer was filed to the answer of the county, which was overruled by the trial court, and, on the plaintiff's refusal to plead further, the action was dismissed. This in effect denied recovery. This case requires a construction of the statute authorizing the levy of taxes by counties.

Prior to the legislative session of 1935 counties levied and collected taxes by virtue of the authority given them by section 77-1801, Comp. St. 1929. In that session section 77-1801 was amended by section 1, ch. 138, Laws 1935. Section 77-1801, Comp. St. 1929, as amended, was later amended at the same session by section 1, ch. 52, Laws 1935. The latest amendatory section contained a proper

repealing clause. This amended law now appears as section 77-1801, Comp. St. Supp. 1935. This section formerly, and as amended, contained a provision that, "in counties having a population of over thirty-five hundred, the rate of tax for county purposes shall not exceed thirty-five cents per hundred dollars actual valuation, as determined by the assessment rolls; and in counties having a population of thirty-five hundred or less, the rate of tax for county purposes shall not exceed fifty cents per hundred dollars actual valuation, as determined by the assessment rolls." This was contained in the ultimate amendment which also included the proviso as follows: "Provided, in counties having a population of nine thousand or less, such tax shall not exceed four mills on the dollar valuation."

Boyd county, according to the allegations of the answer, has a total population of 7,100. The county authorities levied for 1935 tax purposes, excluding all special funds, 3.95 mills for all other county purposes exclusive of special levies. The appellant insists that the foregoing statute quoted limits this amount to 3.5 mills, and that the levy was excessive by .45 mills. The county, of course, contends that the foregoing statute as set out authorizes the county to levy not to exceed 4 mills for county purposes other than those specifically mentioned, because they come within the provision as to counties under 9,000 population.

Thus the issue is presented to this court. The proviso added to the law in the last days of the session of 1935 is in conflict with the proviso already in the act. If the original proviso obtains, there is a conflict of the provisions in counties over 3,500 and under 9,000 population. Both provisos as to such counties cannot be given full force and effect. It is impossible to say that the legislature fixed two limited rates of taxation applicable to such counties, each of which is different, and each of which is the maximum which such a county can levy. There are cited several cases, and a text relating to provisos of statutes and the part such proviso modifies. This court is familiar with the rule that a proviso ordinarily modifies

the operation of that part of a statute immediately preceding the proviso, "but it is not always so used." *State v. Summers,* 118 Neb. 189, 223 N. W. 957; *Ford v. Boyd County,* 111 Neb. 834, 197 N. W. 953.

But the purpose of a proviso in a statute is to take special cases out of a general class. In this case our proviso had for its purpose to place a special classification (according to population) of counties beyond the effect of the enacted law. It retained the effect of the statute, and limited the language thereof. The basic rule of statutory construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20; *Peterson v. School District,* 124 Neb. 352, 246 N. W. 723. In *McQuiston v. Griffith,* 128 Neb. 260, 258 N. W. 553, this court substantially said that in construing statutes the court will endeavor to ascertain, and will give effect, if possible, to the legislative intent.

This court has spoken definitely to the effect that: "Ordinarily an exception in a statute will be held to apply to the clause or sentence immediately preceding it, but this rule is not unbending, and if a consideration of all statutes bearing upon the subject indicates a different legislative intent, this will prevail over a construction based upon the rules of syntax." *State v. Searle,* 86 Neb. 259, 125 N. W. 590.

The legislative history of the amendment to section 77-1801, at the last of the session of 1935, is an aid to ascertaining the legislative intent prompting the enactment of the proviso. The legislature intended, and they demonstrated that intention by adding the proviso, counties having a population of 9,000 or less to be limited to levy four mills for ordinary county purposes. Comp. St. Supp. 1935, sec. 77-1801.

A well-known text, 2 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 369, states: "The presumption is that the lawmaker has a definite purpose in every enactment, and has adapted and formulated the subsidiary pro-

visions in harmony with that purpose; that these are needful to accomplish it; and that, if they have the intended effect, they will, at least, conduce to effectuate it."

When the legislature, as an afterthought in the closing days of the 1935 session, added as their latest expression this proviso, it was clearly with the intention of permitting certain counties with a population of 9,000 or less to levy four mills per dollar of valuation. Boyd county comes within the purview of the act, and the judgment of the district court is right.

AFFIRMED.

JULIA ECHTERNACH, ADMINISTRATRIX, APPELLEE, V. WILLIAM WIDICK ET AL., APPELLANTS.
276 N. W. 162

FILED NOVEMBER 19, 1937. No. 30096.

Affirmance. An examination of the evidence reveals that it is sufficient to support a verdict.

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

Edmund P. Nuss and *John E. Ray,* for appellants.

McNeny & Sprague, contra.

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and KROGER, District Judge.

DAY, J.

The widow of Elmer Echternach seeks to recover because his death resulted from an automobile collision between his car and a truck of the Debus Baking Company. The Debus Baking Company appeals from a verdict of $5,000, and assigns three errors it relies upon for reversal. These assignments of error can be reduced and simply stated that the evidence is not sufficient to support the verdict.

This requires an examination of the entire record. The deceased, Elmer Echternach, was riding with his son in a Ford roadster, when his car collided with a truck of the Debus Baking Company on Highway No. 4. The truck was driven by William Widick. The accident occurred on the morning of September 25, 1935. The only question presented by this appeal is the sufficiency of the evidence to sustain the allegations of Widick's negligence in the operation of the Debus truck.

The appellee alleged that the proximate cause of the accident was the negligence of the driver, Widick. This negligence is specified to be the unlawful speed, and the failure to regard the safety of other users of the road. The appellee's allegation states that the appellant's employee drove on the wrong side of the road, did not control the truck, and neglected to reduce the rate of speed when the necessities of the occasion required.

Before the case was submitted to the jury under proper instructions, much testimony was adduced, and many witnesses were examined. These witnesses do not agree, and the testimony is in conflict as to the vital issue. But there is a certain agreement among them so that an undisputed statement of certain facts can be made. There was a serious accident upon this highway at a point near a driveway into a farm. The two automobiles collided, with the result that both cars were damaged, and plaintiff's intestate died from the injuries he received. His son had, just prior to the accident, driven north from the driveway, and turned west into the highway. The Debus truck was traveling on the highway from west to east over a hill some distance less than one quarter of a mile away. The truck was thus going down a mild grade, but the hill does not appear factually very important, except as it relates to the distance of possible vision for the drivers. The appellant's truck crossed the road and upset in the ditch on its left side of the road.

The appellants contend that the decedent and his son were driving north from the driveway onto the highway

without warning, and that they tried to avoid the collision. The employee himself asserts that the collision occurred in the highway, at a point opposite the driveway. He places the cars immediately after the accident east of the driveway. The superintendent, and other employees of the Debus Baking Company who went to the scene of the accident afterwards, testified as to the tracks and the position of the two cars then. Their testimony, in a measure, supports the contention of the appellants.

On the other hand, the witnesses for the appellee, including the son of the decedent who was the driver of the car in which the decedent was riding, placed the accident 75 feet west of the driveway. Other apparently disinterested witnesses corroborate his statement. Their version of the affair is that Widick, driver of the Debus truck, came over the brow of the hill at a speed of 55 or 60 miles an hour, crossed the center of the highway, and hit the Echternach car because he did not have his own car under control. They testify as to the tracks in the gravel after the collision.

Thus there is a disputed question of fact for determination. It was submitted to the jury under proper instructions. Indeed, there are no objections to the instructions. The evidence is sufficient to support a finding of fact by the jury in favor of either party. The evidence preponderates in favor of the plaintiff, and so the court is unable to state that the verdict is clearly wrong. It is an old rule of law in this state that, where the evidence is conflicting, a verdict based upon sufficient evidence will not be disturbed by this court. Authorities are not cited because unnecessary. Many authorities are cited in appellants' brief, which we believe correctly state the law but are not applicable to this case when the jury have resolved the questions of fact surrounding the accident against them. An examination of the evidence reveals that it is sufficient to support the verdict.

AFFIRMED.

WILLIAM C. REDFIELD, ADMINISTRATOR, APPELLEE, V. JAMES J. COLLOPY ET AL., APPELLANTS.
276 N. W. 158

FILED NOVEMBER 19, 1937. No. 30097.

Mortgages. Where the undisputed record shows that real estate was sold on foreclosure sale for a price so disproportionate to its value as to be unconscionable, a confirmation thereof will be reversed on appeal.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

Morrow & Morrow, for appellants.

Olsen & Olsen, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

CARTER, J.

This is a suit to foreclose a mortgage on 120 acres of land in Scotts Bluff county. The property was sold under an order of sale pursuant to a decree of foreclosure for $1,650. From an order confirming this sale, defendants appeal.

The only question raised that requires consideration is whether the price for which the mortgaged property was sold was so grossly disproportionate to its value as to be unconscionable in a court of equity.

Defendants offered in evidence the affidavits of four witnesses who stated that the mortgaged real estate was of the value of $8,000. There is no evidence in the record disputing the value placed upon it by defendants' witnesses. Under the undisputed evidence, the mortgaged real estate was sold for less than one-fourth its value. The rule applicable requires us to hold that the property sold for a price so low as to be clearly unconscionable. *Filley v. Mancuso, ante*, p. 538, 276 N. W. 157. The order confirming the sale is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ALBERT W. MILLER, APPELLEE, V. CITY OF SCOTTSBLUFF, APPELLANT.
276 N. W. 158

FILED NOVEMBER 19, 1937. No. 30160.

1. **Municipal Corporations: SPECIAL IMPROVEMENTS: WARRANTS: PAYMENT.** The obligation of a city to create a fund for the payment of warrants issued in payment of special improvements is not met by levying a special assessment on the property benefited and a provision that the special assessment when paid is to be placed in a special fund for the payment of such warrants.
2. ———: ———: ———: ———. It is the further duty of the city to collect the special assessments so levied, and when the city fails to collect and permits general and other special taxes to accumulate until it becomes evident that the special taxes will never supply a fund from which to pay them, the warrants become general obligations of the city.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Straight Townsend, for appellant.

Mothersead & York, contra.

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

KROGER, District Judge.

This is an appeal by the city from a judgment in favor of the holder of unpaid warrants issued for the construction of sewers.

Plaintiff in his petition alleged the creation of the sewer districts, the issuance of the warrants in payment of the construction costs, the levying of special assessments on the property benefited to cover the costs of construction, the presentation of the warrants for payment and their indorsement by the treasurer as presented for payment and not paid for want of funds. Plaintiff further alleged that the city had failed, neglected and refused to enforce payment of said special assessments, and that the assessments were not paid, and that the special assessments and

general taxes levied against the property specially benefited are in excess of the value of the real estate, and that the defendant city had wholly failed, neglected and refused to create a fund for the payment of the warrants.

To this petition the defendant city filed a general demurrer, which was overruled; and thereupon filed its answer admitting most of the allegations of plaintiff's petition, but denied that no fund had been created out of which said warrants could be paid and denied that the city had failed, neglected and refused to create a fund for the payment of said warrants.

The evidence was mostly stipulated and there is no conflict as to the facts. It discloses that the sewer districts in question were created in the years 1928 and 1929, and further discloses that, after the creation of the sewer districts, paving district No. 15 was created affecting a large portion of the property assessed for sewer benefits, as also some minor sidewalk and drainage assessments. It also discloses that practically no taxes of any kind, either general or special, have been paid since the creation of the sewer districts, and at the time of the trial the total due for taxes, both general and special, was in many instances more than twice the value of the real estate against which the assessment was levied.

The defendant city contends that when it levied the special assessments in an amount sufficient to retire the warrants, if and when the assessments were paid, the city had performed its full duty and that the warrants in question could not become a general obligation of the city because of the provisions of section 16-649, Comp. St. 1929, under authority of which the sewers were constructed.

The position of the plaintiff is that the obligation of the city did not stop with the levy of the special assessments and the requirement that the special assessments be paid into a special fund, but that, in addition, it was the duty of the city to collect the special assessments, and that, having failed to collect the assessments, they, in effect, failed to create the fund and the warrants then became a

general obligation of the city under the former holdings of this court.

A similar question was presented to this court in the case of *Daniels v. City of Gering*, 130 Neb. 443, 265 N. W. 416, and while in that case the question arose under a statute applicable to cities of the second class, the conclusion there reached is controlling in this case and the reasoning of that opinion is herein adopted.

Counsel for the city attempts to distinguish between the statute construed in *Daniels v. City of Gering, supra*, where the applicable provision read: "The entire cost of such sewers * * * shall be chargeable to the private property therein," etc., and the applicable provision of section 16-649, Comp. St. 1929, which reads: "Without cost to the city." There is no merit in the claim that this difference in wording is material. If the entire cost of the improvement is to be chargeable to the private property within the district, it would seem to follow that it would be without cost to the city.

As we view the matter, the sole question in this case is whether the defendant city did create a fund out of which the warrants in question would be paid.

This leads us to a consideration of what is meant by the term "create a fund." We find the answer in *Daniels v. City of Gering, supra*, where this court, after reciting that the property specially benefited and on which the special assessment had been levied had been sold for delinquent taxes under the scavenger act and that thereafter it became evident that the special taxes could never supply a fund from which to pay the warrants, used the following language: "As to the unpaid warrants involved here, the city had in fact created no fund." So, in the instant case, it is apparent from the evidence that the special taxes levied will never supply a fund from which to pay the warrants held by the plaintiff.

We hold that the obligation to create a fund imposed upon the city the duty, not only to levy the special assessments, but to make collection of the same, and it being ap-

parent that the special assessments will never supply a fund from which plaintiff's warrants can be paid, the city has failed in its duty to create a fund, and the judgment of the trial court is right and is

AFFIRMED.

EPPLEY HOTELS COMPANY, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

276 N. W. 196

FILED NOVEMBER 26, 1937. No. 30148.

1. **Municipal Corporations**: TAXATION. It is not necessary or proper for the city of Lincoln, a home rule city using the commission form of government in respect of its appointive officers, to elect a tax commissioner by vote of the people.
2. ———: CHARTERS. A city may enact and put into its home rule charter any provisions for its government that it deems proper so long as they do not run contrary to the Constitution or to any general statute.
3. ———: ———. "The purpose of the constitutional provision (as to home rule charters) is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter." *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N. W. 643.
4. ———: ———. "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation." *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N. W. 87.
5. ———: TAXATION. The limitation of $365,000 taxes, to be levied in cities of the population of Lincoln, provided for by the legislature in the general charter, did not bind the city after it adopted a home rule charter as to taxes for purely municipal purposes.
6. **Constitutional Law**. The taxes complained of by appellant do not violate the due process clauses of either the state or federal Constitutions.

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

J. R. McManus, Hotz & Hotz, C. J. Campbell and *John J. Wilson,* for appellant.

Loren H. Laughlin and *George A. Piper, contra.*

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

GOSS, C. J.

Plaintiff appealed because unsuccessful in an effort to enjoin the city of Lincoln from collecting real estate taxes for 1931 to 1936, inclusive, upon lands occupied by the Lincoln Hotel and the Capital Hotel. It claimed (1) that the assessments were void because not made by a person legally authorized, in that the statutes specifically provide for the election of an assessing officer by the people in a city of the population of Lincoln and none was so elected; and (2) that the statutes specifically prohibit a city of the population of Lincoln from levying more than $365,000 a year on all taxable property, real and personal, and the city levied and assessed during all those years amounts far in excess of the statutory limitation.

Plaintiff alleges that these taxes are void and their collection would amount to a taking of its property without due process of law under both the state and federal Constitutions.

Until it adopted a home rule charter in 1917, the city of Lincoln had operated under a legislative charter set up in 1901 for cities of its population by a complete act known as chapter 16, Laws 1901, approved March 27, 1901; with few amendments this has been carried down and is now found in chapter 15, Comp. St. 1929. In 1911 the legislature passed an act authorizing cities having 5,000 or more population to adopt the provisions of the act called the "Commission Plan of City Government," chapter 24, Laws 1911, approved April 7, 1911. Lincoln adopted that plan in 1912. It became effective in 1913 and has continued in use. It is codified as chapter 19, art. 4, Comp. St. 1929. It was amended in 1923 to enable cities of 2,000 to 5,000 inhabitants to come into the plan. Laws 1923, ch. 141.

The distinguishing features of the commission form of government as applied to Lincoln were that the people were to elect, "not by or from wards or districts, but at large, the following officers and none others, to wit, * * * five councilmen." The council "shall have and may exercise all executive or legislative or judicial powers * * * hitherto provided by law for or within any such city, except officers named in the state Constitution." The executive and administrative powers, authorities and duties were distributed into and among departments as follows: (1) Public affairs, (2) accounts and finances, (3) public safety, (4) streets and public improvements, and (5) parks and public property. "The council shall provide, as nearly as may be, the powers and duties to be exercised and performed by, and assign them to the appropriate departments and may prescribe the powers and duties of all officers and employees of the city * * * and may make such other rules and regulations as may be necessary or proper for the efficient and economical management of the business affairs of the city." By majority vote the council elects one of its number as president of the council, to be known as mayor, designates one member to head each department and shall "elect as many of the city officers provided for by the then existing laws or ordinances governing any such city as may, in the judgment of the council, be essential and necessary to the economical but efficient and proper conducting of the government of the city."

By an election held November 14, 1917, the people of Lincoln adopted a home rule charter. It has continued to be governed by or under such a charter. The amendment to the Constitution providing for such a charter was adopted by the people of the state in 1912. That amendment said, in part: "Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state." Const. art. XI, sec. 2.

The Lincoln home rule charter as originally adopted

provided for power in the council to levy a tax of not to exceed $365,000 on real and personal property in any one year plus any judgments against the city and plus principal maturing on any bonded debt. This charter provision was amended August 12, 1930, by vote of the people of Lincoln so as to raise the amount of the maximum levy to $800,000, with power to levy an additional amount to pay judgments and interest on the bonded debt as well as the principal of any maturing bonded debt. There was added, also, the power to increase the levy at the rate of $15,000 annually. The change also provided that the council should at no time make a levy of taxes for general operating expenses in an amount to exceed 7¾ mills upon the assessed valuation. The amendment of the home rule charter August 12, 1930, as further amended May 5, 1931, gave the council additional power to levy, in excess of amounts theretofore provided, $25,000 each year commencing on the beginning of the fiscal year, September, 1930, for ten years, for the purpose of erecting a municipal building at Tenth and Q streets and for fire stations and for housing street department machinery and equipment. In addition, beginning in September, 1930, the council was by the charter authorized to levy for ten years a tax of $50,000 annually for the purpose of providing storm sewers.

Under the home rule charter the general plan of the commission form of government has been followed. It is vigorously asserted by appellant that the taxes attacked are void because the city failed to elect a tax commissioner. The council received, in the first instance, its values of property through P. H. Mathews, a tax commissioner appointed by the city council, and then the council duly equalized, levied and assessed the taxes. Mathews has served in the capacity of the appointed tax commissioner through all the years involved in the taxes assailed by appellant. He served under oath and was bonded as such officer. He has viewed real estate, made appraisals and assessments thereof, and originally considered all personal property and its values until recent years when, the city

becoming too large, he has copied the county personal list of personal taxes. These he views personally and passes them on to the city council with the real estate lists and they equalize the values and perform the functions of the city equalization board. He has had a separate office, with the sign "Tax Commissioner" on the door until recently, when he moved into the city treasurer's office. He has had continuous duties with the public in relation to assessments, has always used letterheads designating him as "Tax Commissioner," and has always received a salary as such officer.

In *State v. Ure*, 91 Neb. 31, 135 N. W. 224, the relator sought, by original action here for a mandamus, to compel Ure, city treasurer of Omaha, a city under the commission form of government, to issue a receipt to the relator for his filing fee tendered but refused, so that he might run for the office of city clerk. In an opinion by Judge Letton, the relief was denied on the theory that the office was made appointive under the commission form of government. The same principle applies in the instant case. It was not necessary or proper to elect a tax commissioner in Lincoln under the form of local government under which that city was operated.

The second and last point of attack by appellant is that the city had no power by its charter to increase the amount of taxes levied by it for general purposes over the $365,000 allowed in the legislative charters for cities of the size of Lincoln. The provision is found in section 15-803, Comp. St. 1929. That is a part of chapter 15 of the 1929 Statutes, which is understood to comprise the general charter for all cities of 40,000 to 100,000 people unless and until they have complied with the Constitution by a vote of their people and have thus adopted a home rule charter to supersede this general charter. The people of Lincoln did that and thus became empowered to operate under that home rule charter and amendments thereto validly made. This particular section of the statute had no particular sanctity beyond any other section of the statutory charter,

It was no part of any general revenue statute. It provided for the levying of no taxes for any purposes other than for the uses and purposes of the city and upon no other property except that within the physical limits and jurisdiction of the city. If a home rule charter means what the words imply, why were not the people of Lincoln authorized by the Constitution to hold a charter convention or to have a local constitutional convention of their own and to vote upon amendments to any charter by which they were formerly governed and make the charter thereby formed supersede the charter formerly existing, so long as they did not thereby violate the Constitution or general laws of the state?

In *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237, Judge Good, then a district judge sitting in this court, said: "The city of Lincoln has adopted a home rule charter pursuant to the provisions of article XI of the state Constitution. Section 2 of that article provides, among other things: 'Any city having a population of more than five thousand (5,000) inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this state, * * * and if a majority of such qualified voters, voting thereon, shall ratify the same, it shall at the end of sixty days thereafter become the charter of said city, and supersede any existing charter and all amendments thereof.' Plaintiff insists that under this constitutional provision the city is still governed by the provisions of the legislative charters under which it was previously governed. We are not inclined to this view. If a city, after having adopted a home rule charter, was still to be subject to all the provisions of the former legislative charters, there could be no object or purpose in adopting a home rule charter. While a home rule charter adopted pursuant to the constitutional provision may not contravene any provisions of the Constitution or of any general statute enacted by the legislature, it is, in all other respects, binding and controlling. A city may enact and put into its charter any provisions for its government that

it deems proper, so long as they do not run contrary to the Constitution or to any general statute."

The principle announced in *Schroeder v. Zehrung, supra,* defining the meaning of the home rule section of the Constitution, has not been changed in the more than fifteen years that have passed since the opinion was published on May 6, 1922. When the people of the state said, by adopting the home rule charter amendment, that such a charter should "supersede any existing charter and all amendments thereof," they had in mind that cities of Lincoln's class had a legislative charter applicable in all its terms to cities of that class. They delegated to such cities the power to form and adopt a home rule charter and thereafter to be governed by it without being compelled to go to the legislature for power every time anything in that line was desired by the city. The Lincoln home rule charter did thereby, in the language of the charter, "supersede" the existing legislative charter. It and its amendments from time to time have continued to be and still are the charter of cities of the same population whose people have not taken advantage of the home rule charter of the Constitution.

In *Consumers Coal Co. v. City of Lincoln,* 109 Neb. 51, 189 N. W. 643, opinion by Redick, district judge, referring to home rule charters, the second point of the syllabus says: "The purpose of the constitutional provision (as to home rule charters) is to render cities independent of state legislation as to all subjects which are of strictly municipal concern; therefore, as to such matters general laws applicable to cities yield to the charter."

In *Carlberg v. Metcalfe,* 120 Neb. 481, 234 N. W. 87, Judge Day reviews briefly some of the home rule charter cases from our state and cites cases from other states. The opinion holds, in effect, that, notwithstanding the city had a home rule charter, it had power to take advantage of a general act of the legislature authorizing such a city to establish and maintain a municipal university. This was sustained on the ground that education is a matter of

state concern in Nebraska, as distinguished from a matter of strictly municipal concern. The second point of the syllabus says: "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation."

As we have intimated before, city taxes, to be used strictly for city purposes, are a matter of municipal concern and in no way concern the state in their subject-matter nor in the way they were assessed and levied in the case at bar.

On several occasions, the evidence shows, plaintiff, by its agents, appeared before the city council, sitting as a board of equalization, in an effort to reduce valuations on its properties. This probably does not estop it from seeking an injunction against the taxes, but it is very inconsistent with its views now expressed that the taxes are void because there was no city tax commissioner and because the city council had no power to sit as a board to equalize the taxes on the values before them.

In bankruptcy proceeding instituted by appellant at Omaha in 1934, under section 77-B of the bankruptcy act, the appellant listed the taxes then admitted to be due the city of Lincoln as a part of its debts. These facts were in evidence and, while they may not be taken advantage of legally by the city, they are of some value in appraising the good faith and equity of appellant's attitude here.

We do not think there was or is any violation of the due process clauses of either the state or federal Constitutions found herein. On the other hand, we are of the opinion that the taxes levied and assessed against the properties of appellant are valid and that the judgment of the district court was right. The judgment is

AFFIRMED.

AMERICAN NATIONAL RED CROSS, APPELLANT, V. GLEN B. YOUNG ET AL.: SCHOOL DISTRICT NO. 82 OF NEMAHA COUNTY, APPELLEE.
276 N. W. 194

FILED NOVEMBER 26, 1937. No. 30119.

1. **Trusts.** The evidence examined and *held* to establish that the fund involved was local community funds.
2. **New Trial.** A motion for a new trial on the ground of newly discovered evidence is within the judicial discretion of the court, and the court's ruling thereon will not be disturbed unless there was a clear abuse of discretion.

APPEAL from the district court for Nemaha county: JOHN B. RAPER, JUDGE. *Affirmed.*

Courtright, Sidner, Lee & Gunderson and *Edgar Ferneau*, for appellant.

Armstrong & McKnight, contra.

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

DAY, J.

This is a suit for an accounting brought by the American National Red Cross against the officers of the Julian Branch and School District No. 82. The dispute is over a certain fund, $1,000 of which the district spent for improvements of its property. The district court entered a judgment for the defendants, and the plaintiff appeals.

The school district admits receiving $1,000 during 1926 from a fund raised during wartime, but contends that the fund was raised by a group of local citizens, and did not belong to the American National Red Cross. The school district also claims that more than four years have elapsed since it received the money, and that recovery is barred by the statute of limitations. The Red Cross replied that it demanded the return of the $1,000, and on the 26th of October, 1927, the school district issued its warrant, which was registered but never paid, to repay the money to the

fund, and that this is an acknowledgment of the indebtedness in writing.

The case, therefore, involves the ownership of the fund from which the $1,000 originated. It appears from the record that the $1,000 was a part of a fund of $3,600 in the Julian Bank in an account designated "Red Cross Flag." It was put in the bank and controlled by prominent citizens of the town who were also officers of the local Red Cross. This fund represented the proceeds of a sale at Julian on June 1, 1918. At that time a flag was sold for $2,650 of the $3,600, and the fund derived its name from this sale. No part of the fund included membership dues, but the articles which were sold were donated, and the prices paid at auction were much more than their intrinsic value.

Since this suit involves the ownership of this particular fund, it will be necessary to examine its genesis. The people in the vicinity of Julian, a village of about 150 inhabitants, had an unusually patriotic spirit, and wished to do more than their share in the war emergency. They had oversubscribed every quota to the Red Cross at the time this sale was held in June, 1918. The community was asked to contribute funds for other worthy causes during the war. They were asked for funds by the Y. M. C. A., the Knights of Columbus, and the Salvation Army. There were some in this community who thought the money should be a community fund to be paid as needed to the various agencies doing the work. It is admitted by all that the sum is a large one for this community. The charter and by-laws and the manual for chapters are made a part of the record by stipulation. This would be, under the circumstances of this case, controlling as to the use of the money, if this is in fact the property of the American National Red Cross. It is not contended here that this is a proper use of Red Cross funds. It is not contended here that the school district should not repay the money loaned back into the fund; but it is contended that the American National Red Cross is not entitled to the fund,

and therefore cannot maintain this suit. It was stipulated that an advertisement appeared in the Nemaha County Herald. The advertisement was:

"Red Cross Sale

"A Red Cross Sale will be held at Julian next Saturday, June 1. Bring anything that is suitable. Let us be liberal. This is a time when the miser is detested.

"Col. C. L. Mesnet, Chairman
"Col. John Aufenkamp, Auctioneer,
assisted by Col. Herman Ernst
and O. O. Barney."

This is contended to advertise the sale as a Red Cross sale. This stipulation was made during and as a part of the examination of Mrs. J. C. Voline, business manager of the Nemaha County Herald. This is mentioned because it relates to a subject hereafter discussed. Mr. Mesnet was chairman of the local branch of the Red Cross. He was a prominent citizen, and had other activities. He was also cashier of the local bank in which the funds of the Red Cross and this fund were kept. Immediately prior to the sale it was announced by one of the auctioneers, and according to one witness by Mr. Mesnet also, that the Red Cross quota had been oversubscribed, and that the proceeds of this sale were being raised for a community fund, and not for the Red Cross alone. There was much conversation to the effect that this money was to be used to meet future demands for war work, including the Red Cross. Under these conditions the sale was held, and the proceeds were put in the bank by Mr. Mesnet, not in the regular account of the local branch of the Red Cross, but in this separate account. It was never reported by the officers as the property of the American National Red Cross. During the following years auditors of the American National Red Cross examined the books and the account in the bank. They asked about this account, the "Red Cross Flag," and were told it was a community fund, and was not Red Cross money. Some controversy arose

about this, and in 1927 the school board issued a warrant to repay this loan to Mr. Paul Bize. He was president of the local Red Cross branch, but there is no evidence that the warrant was payable to him as such. He claims otherwise. The warrant reads:

"No..... Julian, Nebraska $1,000.00
"School Order on District Treasurer
"Oct. 26th, 1927.
"Treasurer of School District No. 82 of Nemaha County, Nebr.
Pay to the Order of Paul Bize, President
————One Thousand and No/100————Dollars
out of any moneys in your hands belonging to the General Fund Paid for Loan.
"Countersigned
"E. C. Ferguson G. B. Young
"President or Moderator Secretary or Director"

While we are not passing upon its sufficiency to toll the statute of limitations, it falls far short of amounting to an acknowledgment of the debt to the Red Cross. It was registered by the treasurer of the school district, but never delivered or paid, and was finally canceled. Mrs. Voline alone testified that this was a Red Cross sale in opposition to numerous other witnesses. She was and is an officer of the county organization. If the others can be said to be personally interested in keeping the money in the community, she manifests an equal interest in taking it out of the community.

Considering all this evidence, the district court found for the defendant school district, and against the American National Red Cross. While this is an equity case, triable *de novo* before this court, we will consider, when the evidence is in conflict, that the trial court saw and heard the witnesses and reached this conclusion. The evidence does not justify any other conclusion. The trial judge was the Honorable John B. Raper, a veteran judge of large experience upon the bench of this state. This court reaches

the same conclusion after an examination of the evidence. It is contended that in another case the court held at an *ex parte* hearing that the fund was Red Cross money. The Red Cross did file a claim against the receiver of the failed bank, and was paid a 50 per cent. dividend on a balance of $1,500. This was not contested. It is not controlling here.

A motion for a new trial on the ground of newly discovered evidence was filed, supported by the affidavits of one of the attorneys for the plaintiff and the witness, Mrs. Voline. The motion was overruled by the Honorable Virgil Falloon, successor in office to the trial judge. The newly discovered evidence set out in the affidavit of Mrs. J. C. Voline is that Mr. C. L. Mesnet, chairman of the Julian Branch of the Red Cross, by long distance telephone requested her to insert the advertisement heretofore noted in the Nemaha County Herald. Mr. Aufenkamp testified he asked that the advertisement be inserted in the paper, and he was not authorized to do so by any official of the Red Cross. Even if important, in view of the fact that a public announcement was made at the sale that the money was for a community fund, and not for the Red Cross exclusively, it would not entitle the plaintiff to a new trial on the ground of newly discovered evidence. A motion for a new trial on the ground of newly discovered evidence is within the sound judicial discretion of the court, and the court's ruling thereon will not be disturbed unless there was a clear abuse of discretion. *Blaha v. Chicago & N. W. R. Co.*, 119 Neb. 611, 230 N. W. 453; *Christensen v. Omaha & C. B. Street R. Co.*, 85 Neb. 694, 124 N. W. 96. There is no evidence of an abuse of discretion here. Mrs. J. C. Voline was a witness at the trial. During her testimony the advertisement was admitted by stipulation. She was, according to her testimony, business manager of the Nemaha County Herald. She did not testify as to the advertisement, and she was not asked. The record does not show she was not available for rebuttal after Mr. Aufenkamp testified. Newly discovered evidence must not only

be material, but of such a substantial nature as to render it probable that it would produce a different result. *Killion v. Dinklage,* 121 Neb. 322, 236 N. W. 757; *Smith v. Goodman,* 100 Neb. 284, 159 N. W. 418. There is no showing of diligence which failed to produce the testimony at the trial, the affiant was a witness, and the testimony was not such as would probably change the result. There was no abuse of judicial discretion in overruling the motion for rehearing.

The finding of this court is the same as the trial court, and the judgment will not be disturbed.

AFFIRMED.

ELIZA STANTON, APPELLEE, V. EDWARD C. STANTON ET AL., APPELLEES: KENESAW STATE BANK, APPELLANT.
276 N. W. 180

FILED NOVEMBER 26, 1937. No. 30103.

1. **Descent and Distribution.** A legal debt due an estate from an heir is not forgiven because it is not set out in a will as an advancement.
2. **Executors and Administrators.** Retainer is the right to have the debt of a legatee or distributee charged to him in the adjustment of his distributive share of an estate.
3. **Descent and Distribution.** *Held,* that a lawful debt due from a son to his father's estate should be deducted from the son's distributive share of the estate and the balance above that be held to apply on the lien of a judgment against such son.

APPEAL from the district court for Kearney county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Tibbets, Canaday & Hewitt, for appellant.

King & Bracken, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

PAINE, J.

The Kenesaw State Bank, appellant, insists that the lower court erred in finding that an indebtedness owing

by an heir to an estate was a first lien upon such heir's distributive share of the real estate in such estate, and was superior to the lien of a judgment secured by said bank against such heir.

There is no fact in dispute in this case. All of the evidence is found in a stipulation of the facts, together with certain court files attached thereto. Before discussing the law, we will briefly set out the facts necessary to an understanding of issues in the case.

Patrick W. Stanton, of Heartwell, Kearney county, Nebraska, made a will on March 6, 1925, giving $300 to the local Catholic church, and then dividing his property equally, with slight exceptions, between his children and grandchildren.

On January 25, 1926, the Kenesaw State Bank secured a judgment against William P. Stanton, a son, in the amount of $1,125, with interest at 10 per cent., and properly filed the same.

On June 20, 1927, a codicil was added to the will because of the death of a granddaughter, whose share was therein given to her father.

The testator died April 17, 1929, and on September 19, 1929, his will was admitted to probate.

Among the assets of the estate were two notes given by the son, William P. Stanton, to his father, both dated October 17, 1921, one for $600, the other for $204.54. Upon the first note appeared a payment of $6 under date of December 5, 1925, and upon the second note two payments were indorsed, one for $20 on November 7, 1921, and another for $6 on December 5, 1925. The final decree found the amount due the estate from this heir on these two notes was $1,109.11, and that, the maker of the notes being insolvent, the executor was unable to collect anything from him.

In said final decree the judgment debtor, William P. Stanton, was given his one-eighth distributive share in the real estate, subject to his indebtedness to the estate in the sum of $1,109.11.

On April 4, 1930, one of the devisees began an action in the district court to partition this real estate. The Kenesaw State Bank filed a cross-petition, setting up its judgment and asking that it be declared a first lien on William P. Stanton's share in said real estate.

The decree of the district court denied the prayer of the cross-petition, and found that the devisees of Patrick W. Stanton had a first lien on William P. Stanton's share of the real estate devised to him for the amount due the estate on his two notes, and that the lien of the Kenesaw State Bank was the second lien thereon. From this decree the Kenesaw State Bank has appealed.

From this statement it clearly appears that the sole question that comes to this court for decision, and a question which this court has never passed upon before so far as we are able to find, is this: Does the judgment creditor have a lien on real estate given an heir in a devise under the will which is prior to the lien of a debt due to the testator, there being no mention made of the debt due to the testator in the will?

The bank contends that its judgment was duly entered of record before the testator made a codicil to his will, and claims he could have protected his estate if he had wanted to when he made that codicil; that he could have provided that the debt to him from his son William should be a charge against the portion of the real estate which he had devised in the will to his son William. Of all the cases cited by them, the bank's counsel claim that the case of *In re Von Ruden,* 22 Fed. (2d) 860, is the nearest in point, which says: "On the death of Henry Von Ruden, title to his real estate passed to his heirs, free of any claims of his on his estate against them. He had it within his power to charge their interests with debts by will, but he did not do so. It is a fair assumption that he intended them to take the interest the law gave them in his real estate without encumbrance." Other cases are cited to the same effect.

To the contrary, there is no holding cited from our

Nebraska court which requires that a testator refer to a debt due him from an heir in his will or it will be considered as canceled.

Appellees insist that, because of the fact that he did not mention this debt owed to him by his son in this codicil, it cannot be construed to mean that he intended to cancel the debt, especially because the father had received three payments, as shown by indorsements made on the notes which kept the notes legally alive.

In discussing the law of the case, we are at the outset met by the term "retainer," which is defined as the right to have the debt of the legatee or distributee charged to him in the adjustment of the legacy or the distributive share. This right to retainer rests upon the broad principles of equity. *Oxsheer v. Nave,* 90 Tex. 568, 40 S. W. 7, 37 L. R. A. 98.

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

All of the courts uniformly apply the doctrine of retainer to personal property, but some deny it as to inherited real estate, such as Arkansas, Florida, Iowa, Massachusetts, Michigan, New Jersey, Tennessee, and Virginia. The leading case supporting the right of the creditor as against the estate is *Marvin v. Bowlby,* 142 Mich. 245, 105 N. W. 751, 113 Am. St. Rep. 574, 7 Ann. Cas. 559, which cites and analyzes the numerous decisions on this question holding that the distributee's share of the real estate of an heir who is debtor to the estate of his ancestor is not chargeable with such indebtedness, either as against the land or the proceeds of the sale thereof. This *Marvin v. Bowlby* case implies that no distinction is made between real and personal property, but both are considered as one common mass or fund, and pass alike into the possession and control of an administrator for the purpose of ad-

ministration and distribution of the surplus among the heirs.

In discussing the case of *Marvin v. Bowlby, supra,* the supreme court of Oklahoma said that the case was in accord with the common law of England, in which the real estate of a deceased person was not liable to answer even his own simple contract debts, but that this is not the law in Oklahoma. *In re Dayton's Estate,* 173 Okla. 180, 46 Pac. (2d) 933.

In *Bruce v. Farrar,* 156 Va. 542, 158 S. E. 856, 75 A. L. R. 872, it was held that the indebtedness of a son to his father, who had died intestate, may not be deducted from his share of the realty as against his judgment creditor where by statute real estate descends directly to the heir. This decision also reviews the authorities on both sides.

"In the majority of jurisdictions, however, this exception in regard to real estate as to the general rule that an executor or administrator may retain a debt due from an heir or legatee is not recognized, and hence it is that a debt due to the estate from an heir may be deducted from his distributive share of the proceeds of real estate which has been sold in process of administration. The view taken by the courts that refuse to recognize the exception seems to be that the heir takes his share in the realty of the intestate subject to all equities existing in favor of the estate. And this has been held to be the rule applicable under statutes by virtue of which the real property of an intestate is made chargeable with the payment of debts equally with the personalty, except that the personalty must first be exhausted." 11 R. C. L. 247, sec. 279.

The conflict existing between the courts cannot be reconciled. A great majority of our states now apply the doctrine of retainer to inherited real estate. Among the well-considered cases from these states might be cited the following showing how the question arose:

"An administrator has the right to subject lands of his intestate to the payment of a debt due by an heir * * * to the estate * * * in preference to the claims of a purchaser

from the heir, and likewise in preference to the lien of a judgment creditor of said heir which attached to said lands on the death of the ancestor." *Streety & Co. v. McCurdy,* 104 Ala. 493, 16 So. 686.

"Where money of an estate is advanced to one heir, the other heirs have an equitable lien on decedent's land to cover such debt and their lien is superior in equity to that of a judgment creditor of the heir." *Reed v. Ragsdale,* 230 Ala. 683, 163 So. 324.

"The heir of a decedent is entitled to his distributive share of real property belonging to the estate only after all equities in favor of the estate against him personally have been satisfied." *Blackwood v. Blackwood,* 120 Kan. 72, 242 Pac. 451. See, also, *Head v. Spier,* 66 Kan. 386, 71 Pac. 833.

"Judgment creditor who recorded abstract of judgment against heir of estate had no interest in land of estate, where heir's interest in estate had been extinguished in settlement of her indebtedness to estate." *Patranella v. Smith,* 102 S. W. (2d) (Tex. Civ. App.) 297.

"Right of an executor to appropriate the distributive share of one of the heirs * * * to the payment of debts due by the heir to the testator is superior to the lien of a judgment against the heir." *Johnson v. Jones,* 54 Ga. App. 456, 188 S. E. 279.

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

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

Two of the exhaustive cases holding with the majority are *Stenson v. Halvorson Co.*, 28 N. Dak. 151, 147 N. W. 800, L. R. A. 1915A, 1179, Ann. Cas. 1916D, 1289, wherein numerous cases are analyzed, and *Loverett v. Veatch,* 268 Ky. 797, 105 S. W. (2d) 1052, decided in May, 1937, which is the latest case we have been able to find. The father died intestate, and one son had given the father a note for more than $6,000, and it was held in the last case that "an heir's indebtedness to the estate is deductible from the heir's interest in both personalty and realty inherited from estate."

In the text it is said: "We have said enough to direct the attention of the reader to sources which demonstrate that no such distinction should be drawn, and which conclusion is supported by irrefutable logic, and wherein the alleged distinction is dissipated as being shadowy and unsupported by either reason or justice. * * * We conclude that the doctrine of retainer or set-off should apply equally to both inherited personal property and inherited real estate."

Iowa is one of several states which has changed its stand on this matter, as it first took the stand against applying the right of retainer to inherited real estate, as set out in *Russell v. Smith,* 115 Ia. 261, 88 N. W. 361, but in a more recent case of *Woods v. Knotts,* 196 Ia. 544, 194 N. W. 953, seriously criticized its former opinion, and expressed doubt as to the soundness of the reasoning of the courts in drawing a distinction between the application of the right of retainer in cases of inherited personal property and rejecting it in the case of real estate. The Iowa court now holds: "Where the deceased had, as surety, paid certain claims against an heir, and the heir was insolvent, his share of the real property will be offset against the claim of the deceased; the personal property being entirely insufficient to offset the indebtedness." (194 N. W. 953.)

In *Wilson v. Channell,* 102 Kan. 793, 175 Pac. 95, 1 A. L. R. 987, it is said: "An indebtedness owing by an heir to his ancestor, remaining unpaid on the final settlement of

the estate, constitutes an equitable lien upon such heir's distributive share of the real property belonging to the estate, superior to the lien of a judgment existing and docketed against him at the time of the death of his ancestor; and, after such final settlement, the interests of the other heirs in the real property are paramount to the lien of the judgment creditor."

In 18 C. J. 965, it is said: "The right of a creditor is not only subject to the priority of the debts of the intestate, but also the share which he can reach is that which remains after the deduction of the indebtedness, if any, of the heir * * * to the estate." And at page 966 it is stated: "The indebtedness of heirs * * * is to be deducted from their shares in preference to the claims of their other creditors,"—citing cases from Kentucky, Maine, Massachusetts, Missouri, New York, North Dakota, and Pennsylvania.

Other cases may be cited: *Wheeler & Motter Mercantile Co. v. Knox*, 136 Ark. 95, 206 S. W. 46; *Harvey v. White*, 46 R. I. 470, 129 Atl. 263; *Chase Nat. Bank v. Sayles*, 30 Fed. (2d) 178.

In Nebraska we have the case of *McClave v. McClave*, 60 Neb. 464, 83 N. W. 668: "Advancements made by a father to a son may properly be deducted from the distributive share of the latter in the estate of the deceased father." In this case it is said: "If the lien of the estate proves to be superior to that of the attaching creditor in Ohio, that is the misfortune of such creditor, but certainly it constitutes no error on the part of the trial court in this action." See, also, *Brown v. Webster*, 87 Neb. 788, 128 N. W. 635.

And, again: "Where the legal title to real estate is in the name of the judgment debtor, nevertheless the lien of a judgment against him attaches only to the actual interest which he has in the real estate." *Roberts v. Robinson*, 49 Neb. 717, 68 N. W. 1035.

The nearest Nebraska case appears to be *First Trust Co. v. Cornell*, 114 Neb. 126, 206 N. W. 749, which is right in point, except that it involves only personal property, while

the case at bar involves real estate. When Dr. B. L. Paine died, March 13, 1921, his will gave to Herman L. Cornell a legacy of $2,000. The will was admitted to probate on April 11, 1921, and on April 30, 1921, Cornell assigned his legacy of $2,000, while he was indebted to the testator on notes in the sum of $15,000, which had not matured on the date of his assignment of his legacy, and the assignment was immediately filed in the probate proceedings in Dr. Paine's estate. The district court held that the assignment of this legacy was good, but the decision on appeal to this court was reversed, and this court held: "Where the distributee is indebted to the estate, it is the duty of the executor to retain from his share the amount of such indebtedness. * * * And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands as a debtor to the estate."

In an action in the circuit court of appeals for the eighth circuit, involving an attempt to secure the return of a portion of the $212,843.70 federal estate tax paid in the George A. Hoagland estate, it was held: "Decedent's real property in Nebraska *held* properly included in gross estate for determining tax, as property subject to payment of administration expenses." *First Trust Co. v. Allen,* 60 Fed. (2d) 812, affirming 51 Fed. (2d) 1069. Judge Booth cites section 30-1109, Comp. St. 1929, providing as to the proceeds of land sold to pay debts, and refers to *Reckewey v. Waltemath,* 28 Neb. 492, 44 N. W. 659, which holds that only the residue of an estate after payment of debts passes to the heirs.

"Section 30-406, Comp. St. 1929, vests the executor or administrator with 'a right to the possession of all the real as well as the personal estate of the deceased * * * until the estate shall have been settled, or until delivered over * * * to the heirs or devisees.' We have sustained the right of the executor and administrator, under this statutory provision, as a general rule, to maintain ejectment for real estate, pending payment of debts and settlement of

the estate." *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644.

In so far as this section applies to the facts in this case, section 30-233, Comp. St. 1929, reads as follows: "The estate, real or personal, given by will to any devisees or legatees, shall be held liable to the payment of the debts, expenses of administration, and family expenses, in proportion to the amount of the several devises or legacies."

This subject, which has never required an opinion by this court before, is of the greatest interest. The courts of various states decide differently on the same state of facts.

To this court it appears that, if an heir owes an estate, and if his share of the personal property is not equal to the amount he has received, his share of the real estate ought to be held for the payment of the remainder of his debt, and he should receive that much less.

There is no substantial justification for a less equitable rule in favor of the estate, so far as real property is concerned, than concerning personal property.

The Kenesaw State Bank, appellant, secured a judgment against the son, William P. Stanton, and is entitled to its money, if the debtor has it. This son also owed his father and gave his father notes for such indebtedness. While the father did not reduce his notes to a judgment against his son, they are still a prior indebtedness against the son's share in the real estate. The bank may consider this ruling a hardship, yet its judgment is a lien against what? It is a lien against all of this insolvent son's net share in his father's estate, and against that share the bank's judgment is in law a first lien.

To illustrate, we consider it would be a travesty on justice to say that, if a son borrowed a thousand dollars of his father, and another thousand dollars of a bank, and inherited a legacy of a thousand dollars from his father's estate, he need not pay the estate a dollar on what he owed his father, and the bank would get the son's full legacy, and the other heirs would lose the thousand dollars due from the son to the father.

We conclude that the trial court was right in finding that the indebtedness of William P. Stanton to his father's estate was a first lien upon his distributive share of the real estate in said estate, and was superior to the lien of the bank's judgment against him.

AFFIRMED.

CARTER, J., dissenting.

This is a case of first impression in Nebraska and on which there is a division of authority in other jurisdictions. I quite agree that an heir's distributive share of the personal estate may be applied by the administrator or executor in payment of a debt due the estate by such heir. The reason is that the personal estate passes to the administrator or executor, and, while it is in the possession of such administrator or executor, he may retain a sufficient amount of a devisee's share in the personal property to satisfy his claim against him. It is this situation that gives rise to the use of the term "retainer." But the title to the real estate passes directly to the heir immediately upon the death of the decedent. Such real estate or the proceeds thereof is never in the hands of the administrator or executor and consequently there is nothing for him to "retain." In my judgment the better rule is that, where an heir is indebted to the estate of his ancestor, neither the heir's distributive share of the real estate of such ancestor nor the proceeds of a sale thereof in the hands of an administrator or executor is chargeable with such indebtedness, which should be collected in the same manner as other debts due the estate.

The necessary effect of the majority opinion is to add to the plain provisions of our statute governing the descent of real estate, by judicial fiat, conditions and exceptions never enacted by the legislature or contemplated by it.

I am authorized to say that Mr. Justice Eberly, though not participating in the decision of this case, concurs in the propositions of law stated in this dissent.

DAY, J., concurs in the foregoing dissent.

ANTON F. MAIXNER ET AL., APPELLANTS, V. TRAVELERS INSURANCE COMPANY ET AL., APPELLEES.
276 N. W. 163

FILED NOVEMBER 26, 1937. No. 30120.

1. **Principal and Agent: CONTRACTS.** One professing to contract as agent is personally liable if, unknown to the other party, his purported principal is fictitious, for the agent impliedly represents that his principal has existence, and if no principal is bound, then he himself will be liable.
2. ———: ———. One seeking to recover from a principal, for an unauthorized act of an agent, must establish that the principal obtained knowledge of such act before it had changed its position.
3. ———: ———: RATIFICATION. If a principal received that to which it was entitled, regardless of an unauthorized act, and if it cannot make restitution without loss of that which it is entitled to keep, then ratification of such unauthorized act does not result from a failure to return the benefits received.

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

Littrell & Patz, for appellants.

Hall, Cline & Williams and *Walker & McArthur, contra.*

Heard before GOSS, C. J., DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

PAINE, J.

This is an action for fraud and deceit, and for the return of $500 to plaintiffs, who have elected to rescind a contract for the purchase of real estate, upon which $500 was paid down. The plaintiffs, having lost in the lower court, appeal to this court.

The evidence discloses that the plaintiffs have resided at Brainard, Nebraska, for over five years, moving there from Loveland, Colorado, but had lived in Nebraska for many years prior to moving to Colorado; that the plaintiffs are husband and wife, and are farmers, and each of them speaks the Bohemian language much more fluently than they do English; that the defendant E. A. Marshall

had resided at Stanton, Nebraska, since 1912, and was connected in this deal with W. H. Hyland, a real estate agent, also residing at Stanton since 1906.

The plaintiffs owned land in Colorado which they had advertised for sale in an Omaha paper, and Marshall and Hyland, seeing the advertisement, got in touch with them to trade them something for their land in Colorado. They first tried to trade them a piece of land belonging to a man named Wagner, but were unable to get the title to this land. Later they found that a half-section of land in Antelope county, which had been foreclosed by the Travelers Insurance Company, could be purchased for $4,000; at least W. F. Powers, who was in charge of over 100 of the insurance company's farms in the vicinity of Plainview, said that he would recommend to the Travelers Insurance Company that they should accept an offer of that amount.

Marshall took the plaintiffs to see this land, and on December 12, 1934, the plaintiffs signed a contract to buy the half-section in Antelope county for a consideration of $10,500, of which amount they paid $500 in cash and agreed to pay $1,500 March 1, 1935, and were to pay the balance by deeding their 80 acres of land in Larimer county, Colorado, together with two lots in Loveland, Colorado, and, in addition, to give back a mortgage of $2,500 on the half-section they were buying. This contract, being exhibit No. 16, left the name of the owner of the Antelope county half-section in blank. E. A. Marshall represented to the plaintiffs that the Antelope county half-section was first-class land and very productive, and well worth $12,000, but he could let them have it for $10,500. Plaintiffs testify that he told them they did not need to spade the soil because it was dark and productive, and they could take his word for it. On the day they visited the land in Marshall's car, the snow was deep, but they waded out through the snow for a ways, although they were not at the farm more than 15 or 20 minutes. Marshall said if they would buy the farm he could resell it for them in six months for around $12,000. Marshall took them to the

office of Hyland in Stanton, at which place the contract was dictated by Marshall and typed by Hyland, and signed by plaintiffs alone. It was falsely stated to the plaintiffs that the land was owned by a "Mr. Johnson," residing in Sioux City, and Marshall said he would leave immediately and go to Sioux City and deliver the money to him. That instead of going to Sioux City he at once drove to Plainview, Nebraska, arriving at the office of W. F. Powers at about 7:30 in the evening, and represented to Mr. Powers that he had secured a buyer for the half-section, and after some conversation a contract was drawn, dated December 12, 1934, between W. F. Powers, agent of the Travelers Insurance Company, and W. H. Hyland, for the half-section of Antelope county land for $4,000, upon which contract Marshall paid Powers $500 in currency that night, and the contract agreed that $1,500 would be paid March 1, 1935, and a $2,000 mortgage to be taken back on the land for five years at 5 per cent., and this contract was sent to Omaha to be forwarded to the Travelers Insurance Company at Hartford for approval. Marshall was to receive 2½ per cent. commission on this sale.

It developed in the evidence that "Mr. Johnson," the purported owner of the land, was an entirely fictitious person, and that Marshall, at the time he made the contract with the plaintiffs in Hyland's office, had no authority whatever to contract to sell the half-section of land in Antelope county belonging to the Travelers Insurance Company. Plaintiffs had no idea at the time they signed the contract that the land did not belong to "Mr. Johnson" of Sioux City. The plaintiffs lived at Brainard, which was around 200 miles away from the land in Antelope county. They placed entire confidence in the representations made to them by Marshall and Hyland, and were deceived thereby. The land was not as represented, and W. F. Powers testified that it was a sandy top soil, and that it was not a first-class farm, and that $4,000 was its value under normal conditions. The plaintiffs upon their return home began to investigate the land they had contracted to buy,

got a soil map from the university at Lincoln, and learned that it was sandy land instead of black dirt, and then employed attorneys to rescind the contract and secure the return of their $500.

The petition was filed in the municipal court in the city of Lincoln, and summons was served upon the Travelers Insurance Company by delivering the same to M. A. Fairchild, chief clerk of the insurance department of the state of Nebraska, being their statutory agent for the service of process, and summons was also delivered to the sheriff of Stanton county for service upon W. H. Hyland and E. A. Marshall.

At the trial in the municipal court, the motion of the Travelers Insurance Company to dismiss the action, for the reason that there was insufficient evidence to sustain a judgment against said company, was sustained. Marshall and Hyland then moved for a dismissal on the ground that they were nonresidents, and, the action against the Travelers Insurance Company having been dismissed, that the court was without jurisdiction over their person, and this motion was also sustained. Plaintiffs thereupon appealed to the district court. A new petition was filed, and answers were filed by the Travelers Insurance Company, also by Hyland and Marshall, together with replies, after special appearances had been overruled. A jury was duly impaneled, and the evidence of the plaintiffs taken, whereupon the Travelers Insurance Company moved for a directed verdict in its favor, which motion was sustained by the court, and the motion to dismiss by defendants Hyland and Marshall, on the ground that they were each nonresidents of Lancaster county, was also sustained for lack of jurisdiction over them, and an appeal was taken to this court.

Among the eight errors relied upon for reversal, we find these: That the court erred in holding there was no evidence of agency between E. A. Marshall and the Travelers Insurance Company, or any facts from which an inference of agency could be drawn, and upon which reason-

able and impartial minds could differ; that the court erred in denying the plaintiffs the right of trial by jury upon the disputed questions of fact; that the court erred in holding that the Travelers Insurance Company could lawfully be the beneficiary of the fraud perpetrated upon the plaintiffs; that the court erred in holding that the Travelers Insurance Company was not estopped from denying the agency of E. A. Marshall, and from denying liability for the return of the benefits derived from the fraud practiced upon the plaintiffs.

The plaintiffs insist that the Travelers Insurance Company was an undisclosed principal and received the $500 which had been obtained by fraud from the plaintiffs by Marshall and Hyland, and after learning how the $500 was obtained from the plaintiffs, by still retaining such $500 it thereby ratified all that Marshall and Hyland did in obtaining the false and fraudulent contract from the plaintiffs.

It is contended by the Travelers Insurance Company that parties dealing with an agent assuming to have authority to sell land are put upon inquiry to ascertain the extent of his authority.

"Ordinarily, authority to sell will not authorize a sale for anything but money, and does not authorize an exchange." 2 Am. Jur., Agency, sec. 147.

It has been held by this court that an agency might arise by implication from acts done by an agent with the consent or acquiescence of the principal. *Goldfein v. Continental Ins. Co.*, 125 Neb. 112, 249 N. W. 78. But in this case such consent and acquiescence are entirely lacking, for Marshall never in any way brought to Powers' attention that there was any deal for the sale of the Travelers Insurance Company's half-section of land to any one but Hyland, and never in any way acquainted Powers with the contemplated deal with the plaintiffs, and we are of the opinion that there is no evidence in any way connecting the Travelers Insurance Company with the obligations and liabilities of the contract made with the plaintiffs by Mar-

shall and Hyland to sell them this half-section of land in Antelope county.

The plaintiffs insist that, after the Travelers Insurance Company had been given all of the facts of the swindle perpetrated upon the plaintiffs, by retaining the $500 paid to Powers on the contract with Hyland it has elected to ratify a part of such transaction and reject the residue, and that, even though it is true that no agency existed prior to the acceptance of the $500, it is now bound, upon receiving notice of the fraud perpetrated upon the plaintiffs, to repudiate the contract with Hyland and return the $500 received in that contract to the plaintiffs, and plaintiffs cite 1 Restatement, Agency, 582, sec. 261, comment *a*, but, as stated above, the evidence shows clearly that Powers in making the contract with Hyland through Marshall knew nothing about the deal of the plaintiffs, and it is just as clear from the evidence that the plaintiffs did not learn until some time afterwards that the Travelers Insurance Company owned the land they were buying, but believed that the land belonged to a "Mr. Johnson" of Sioux City, Iowa.

The law is that one professing to contract as agent is personally liable if, unknown to the other party, his purported principal is actually nonexistent, for the agent impliedly represents or warrants that his principal has existence or legal competency, and he must see that his principal is bound or he himself will be liable. 3 C. J. S. 118; *Durant & Co. v. Roberts and Keighley, Maxsted & Co.*, 1 Q. B. (Eng.) 629; *Keighley, Maxsted & Co. v. Durant*, A. C. (Eng.) 240; *Minder & Jorgenson Land Co. v. Brustuen*, 24 S. Dak. 537, 124 N. W. 723; *Winkleblack v. National Exchange Bank*, 155 Mo. App. 1, 136 S. W. 712; *Houghton & Co. v. Todd*, 58 Neb. 360, 78 N. W. 634.

The burden was on the plaintiffs seeking to recover their $500, on the theory that the principal ratified the agent's unauthorized act by retaining the money paid on the other contract, to establish that the principal obtained knowledge of Marshall's unauthorized act before it had changed

its position, which plaintiffs failed to do. *Clark v. Opp*, 66 Pac. (2d) (Or.) 1179; *Johnson v. City Co.*, 78 Fed. (2d) 782.

The Travelers Insurance Company has a contract with Hyland upon which $500 has been paid and the abstract furnished, and because of the rights and obligations growing out of that contract it cannot well give the $500 it has received to bind that contract over to the plaintiffs, to whom it is in nowise legally liable, for it is in exactly the same position as if its contract to sell to Hyland had been made the day before Marshall and Hyland made their contract between the plaintiffs and the fictitious "Mr. Johnson." The transaction with the plaintiffs was not made with an agent purporting to represent the Travelers Insurance Company.

There were two separate and distinct contracts made. In the first deal, upon which the plaintiffs paid their $500 in Hyland's office in Stanton, there was nothing which connected the Travelers Insurance Company, directly or indirectly, with the transaction; in the second deal, made in the evening of the same day in the office of Powers at Plainview, Marshall paid $500 to Powers to secure a contract from the Travelers Insurance Company to sell the land to Hyland for $4,000, and in this second deal there was no mention made, directly or indirectly, of the plaintiffs.

The Travelers Insurance Company, principal in the second contract, received that to which it was entitled, regardless of the unauthorized act, and if it cannot make restitution without loss of that which it is entitled to keep, ratification does not result from a failure to return the benefits received. 6 Neb. Law Bulletin, 141; *German American State Bank v. Mutual Benefit, Health & Accident Ass'n*, 107 Neb. 124, 185 N. W. 313; *Atlas Land Co. v. Hendriks*, 298 Fed. 589.

The interests, rights, liabilities, and obligations of the parties in the two contracts are in law entirely distinct, and the Travelers Insurance Company was in nowise a

party to the first transaction, and, secondly, there is no legal obligation on the Travelers Insurance Company to pay the $500 which it received on the second transaction to the plaintiffs, and the judgment of the trial court is therefore

AFFIRMED.

TEWELL, District Judge, concurs in the result.

EDWARD COHEN, APPELLEE, V. SWANSON PETROLEUM COMPANY, APPELLANT.
276 N. W. 190

FILED NOVEMBER 26, 1937. No. 30106.

1. Evidence. Where a party affirmatively pleads the existence of a fact material to the issue, he thereby assumes the burden of proving such fact by a preponderance of the evidence.
2. ———. The admission of secondary evidence, relating to a lost or stolen instrument, is dependent upon proving, by a preponderance of the evidence, the existence of such instrument and a diligent search therefor, if lost or stolen, when such instrument is the basis for the plaintiff's action.
3. ———. Evidence examined and set out in the opinion, *held* insufficient to prove, by a preponderance thereof, the alleged lost or stolen contract constituting the basis of plaintiff's cause of action.

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

George C. Pardee and *Bernard R. Stone*, for appellant.

Leon & White and *Louis E. Lipp, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

MESSMORE, J.

This is an appeal from the district court for Douglas county, wherein the court found for the plaintiff and assessed the amount of his recovery in the sum of $1,155.74, from which decree and judgment the defendant appealed.

For convenience, the appellant will be designated herein as the defendant, and the appellee as the plaintiff.

The plaintiff's petition predicates a cause of action based on an alleged written contract under date of January 30, 1933, under the terms of which plaintiff agreed to use certain products of the defendant, and the defendant agreed to pay one-half cent for each gallon of gasoline delivered by the defendant to the plaintiff as a so-called rental, and agreed further to allow the plaintiff a margin of 4½ cents under the standard retail gasoline prices in the city of Omaha, such contract being for a period of one year and subject to renewal for three years. Plaintiff's petition further alleges that on February 1, 1933, one Chris C. Bentzen brought an action in replevin to recover certain equipment in the plaintiff's place of business, and plaintiff asks an accounting.

The defendant's answer contains a general denial, alleges an assignment of the equipment in the gasoline station to it and a foreclosure of such chattel mortgage, and further alleges the execution of two contracts by the plaintiff, one a regular service station lease contract; the other a contract providing for the sale of gasoline and the margin of profit to the plaintiff thereunder; sets forth the account of the plaintiff and defendant, and prays judgment for the oil, gas, grease and tire account of the plaintiff with defendant, in the sum of $1,244.26.

The evidence reflects that the plaintiff was desirous of entering into the oil and gasoline business at Twenty-fourth street and St. Mary's avenue in the city of Omaha, and taking over a station, previously occupied by F. D. Winslow and W. R. McCoy, who apparently had abandoned the operation of the station, owing a mortgage on the equipment therein to Chris C. Bentzen, dated July 26, 1932, which mortgage was properly filed of record. The plaintiff had negotiated with several oil companies selling standard products, and finally contacted the defendant company with a view to contracting with it to handle its products. The defendant company took an as-

signment of the chattel mortgage in order to keep the equipment in the station, and as a matter of convenience for the new operator, the plaintiff. Two contracts were entered into on or about the 18th day of January, 1933, which the evidence discloses were executed by the plaintiff, and which appear in the evidence in this case as exhibits 3 and 4, and by the terms of which, according to the defendant, plaintiff was to receive a discount of 3½ cents a gallon on "Nevr-nox" Ethyl gasoline, 3½ cents on "Diamond Regular," and 1 cent on power gasoline. The other agreement was a lease agreement of one-half cent a gallon, to be paid by defendant to plaintiff for a lease of the premises. The defendant denies that any other agreement existed between the parties. Plaintiff contends that the contract for sale of gasoline was at a greater margin to him, viz.: 4½ cents on the "Nerv-nox," 4½ cents on "Diamond Regular," 2½ cents on the competitive gasoline, and one-half cent as rental, making a total of 5 cents on all gasoline except the competitive power gasoline.

The evidence on behalf of plaintiff is to the effect that the gasoline and oil contract executed by him was not filled in relative to the margin amount and was to contain noncancelation clauses; that the cancelation clause was stricken from the lease agreement, and the contract carrying the gasoline margin conception contained a cancelation clause; that such contracts were for his convenience in order to start operation of the stations on the 19th of January, 1933, and that later another contract was to be entered into between the parties, conveying his conception of the margin of profit to which he would be entitled, in the event he handled defendant's products, viz., 5 cents a gallon.

The plaintiff predicates his cause of action on the contract which he alleges was entered into January 30, 1933, and in which he claims he conveyed his idea of the margin of profit to which he was entitled, and which was on the printed form exactly as the contract executed on January 18, with the exception of the figures for his margin of

profit. Plaintiff's testimony on this contract of January 30 follows: "Q. Did you have the contract? A. Yes, sir. Q. What happened to it? A. I had some argument with them after I was in business there about a year. They sent me a statement saying I owed them a certain amount of money. I called them up and told them they were wrong and I could not figure up—that they owed. Mr. Herring (city salesman for the defendant) came up and said they mislaid their contract and wanted to see mine. * * * Q. Did Mr. Herring come to your station? A. Yes, sir. Q. Did you show him your contract? A. Yes; I did. Q. What happened? A. We were there sitting in the office talking, and another car came on the job; and I wanted to wait on the car, and when I came back Herring and the contract were both gone. Q. Have you ever been able to get that contract back? A. No, sir." Then the plaintiff proceeded to detail the contents of the contract. The evidence as to the existence of this contract was given by a brother of the plaintiff who testified that he had advanced money for the business operations of the plaintiff and had seen the contract containing the profit margin contended for by the plaintiff. The witness A. P. Burke, an oil salesman for the defendant, testified that he was present on the 18th day of January, 1933, when negotiations were had between Mr. Swanson, representing the defendant, and Mr. Munson, secretary of the company, and the plaintiff in the office of the defendant company, and remembered that the plaintiff and defendant had entered into a contract for a half-cent lease on the station and 4½ cents on the margin of profit; that the deal was based on 5 cents for the "Nevr-nox," 5 cents for the regular, and 3 cents for the competitive gasoline. His reason for remembering the prices in the contract was that he desired to sell gasoline to the plaintiff, having terminated his relations with defendant.

The testimony on behalf of defendant is to the effect that two contracts had been entered into on January 18, 1933; that the company had agreed to give the plaintiff the benefit of any spread of margin on account of the fluctua-

tion in price of the products, and had, for a period of five months after the plaintiff started in business, given him what amounted to a 5-cent margin, and on separate occasions had credited him with two certain amounts as allowances, in accordance with the terms of the contract, one in the sum of $343.94 in January, 1934, and a final amount of $544.27 in October, 1935; that during the time of the dealings between plaintiff and defendant the defendant cut the margin of gasoline below the contract price, on account of business conditions in its field; that is, below the price in the contract contended for by the company; that finally the plaintiff was placed on a C. O. D. basis with the defendant, and the company declined to extend further credit to him, as a result of which he terminated his business relations with it and bought gasoline and oil elsewhere. Defendant denied the existence of any other contracts than the contracts of January 18, 1933. Mr. Herring denied the transaction relative to the contract as testified to by the plaintiff. The defendant denied that Mr. Burke was present at the time of the negotiations with the plaintiff on January 18, 1933, and Mr. Munson, secretary of the company, testified that he did fill in the contract blanks in typewritten form, to meet the ideas of the contracting parties. The chattel mortgage was foreclosed, bid in by the defendant; plaintiff was present at the time of the foreclosure sale, and knew the facts relative thereto.

This case is tried *de novo,* as provided in section 20-1925, Comp. St. 1929. All of the evidence is not set out in this opinion. The foregoing statement of facts is sufficient for an analysis of this case.

The defendant contends in this court that the evidence is insufficient to warrant the decree and judgment of the district court, and that plaintiff has failed to prove his case by a preponderance of the evidence, as provided by law. The plaintiff was seeking to prove a contract dated January 30, 1933, which he claimed was either lost or taken by an agent of the defendant company. The evidence as to the existence of the contract was given by

plaintiff's brother, who claimed he saw a contract with the defendant on regular printed form, like exhibits 3 and 4, which plaintiff signed; that he examined the contract and that it provided for 4½ cents on the Ethyl, 4½ cents on the regular, and 2½ cents on the power gasoline. And Burke, who claimed to have been present at the dealings had between plaintiff and defendant on January 18, 1933, stated what he understood the margin of profit to be. The evidence relative to the search made for the lost contract is to the effect that plaintiff had asked Mr. Herring for it on several occasions, and that Mr. Herring said that he did not have it.

The plaintiff has not proved the existence of the contract of January 30, 1933, by a preponderance of the evidence. There is nothing to show by this evidence that the plaintiff made a diligent search for the contract for which he contends. While an honest and diligent search is sufficient, there is no reasonably certain proof in this evidence of the loss of the contract of January 30, 1933. To determine whether an alleged contract, which is the basis of a suit, exists in fact might be, and often would be, to determine the only fundamental issue of fact in the suit. No definite and well-established rule can be laid down as to just the amount of diligence required in searching for a lost instrument, but rules of evidence must be adopted for practical purposes in the administration of justice. The extent of the rule is governed in some measure by the circumstances and a consideration of all the evidence in the case.

In 2 Jones, Commentaries on Evidence (2d ed.) p. 1492, it is said: "When it is sought to introduce a copy of a writing, the basic element of proof must necessarily be that the original document, deed, or other instrument, was at one time in existence, and this necessarily involves proof of its genuineness or execution. In the absence of such proof the rest must fall to the ground. It is not sufficient to prove the loss of the document of which the copy or other evidence is about to be given; it is absolutely essential to prove that a deed or document executed or signed

by some person was in existence, and that can only be done by proving the document as though it were in court. If the document were in existence, it would be proved by testimony as to its signature by either the party himself or an attesting witness, or one who knew of the execution or was familiar with the signature; in its absence there must be, first of all, proof of the execution or signature of the document, so that the superstructure of contents and loss may be safely raised upon it."

In *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb. 321, 68 N. W. 477, this court held: "Parol testimony is not admissible to prove the contents of a written document until its absence is accounted for." And in *Miksch v. Tassler*, 108 Neb. 208, 187 N. W. 796, we held: "To entitle plaintiff to findings and decree in his favor in a trial *de novo* in this court, it must appear under the pleadings and from the evidence preserved in the bill of exceptions that the material facts charged in the petition are supported by a fair preponderance of the evidence." In *Pierce v. Miller*, 107 Neb. 851, 187 N. W. 105, it was held: "Where a party affirmatively pleads the existence of a fact material to the issue, he thereby assumes the burden of proving such fact."

In each of the cases cited by the plaintiff, relative to the introduction of secondary evidence to prove the contents of a lost instrument, it is shown conclusively that a reasonably diligent search had been made for such instrument, and, further, that the existence of such lost instrument was shown as if the instrument had been in court.

The decree of the court found that the plaintiff and defendant entered into two written contracts on or about the 18th of January, 1933, one providing for a private service station lease, and the other for a private station license agreement, and fixed the intention of the parties as contended for by the plaintiff, relative to the margin of profit in said contract; found that the plaintiff had paid the amount of $200 due on the chattel mortgage on the equipment in the station, and found further that the defendant

owed the plaintiff $1,155.74 in the accounting. It will be noted that this decree and judgment of the court are not based on the contract as contended for by plaintiff; nor is there any pertinent statement in the decree as to the proof of such contract. Suffice it to say in this regard, that this action is based on a distinct contract, claimed by plaintiff, which he has failed to prove by a preponderance of the evidence. The record is clear on the foreclosure of the chattel mortgage. The contention of the plaintiff in this regard, under the pleadings and the evidence, cannot prevail. In the absence of any contrary statement as to the attack on the accounting, other than as disclosed by the evidence, and in the absence of an attack on the contract by virtue of which the defendant voluntarily reduced the margin price of the gasoline from a certain date, as disclosed by the evidence, we believe that the account and credits, as existing between plaintiff and defendant, are proved by a preponderance of the evidence, and that defendant should have and recover of and from the plaintiff the sum of $1,244.26.

The contention that the objection that no sufficient and proper foundation had been laid was not ample, for the reason that it did not specifically point out the objection to the testimony, is not well taken. The general objection to the admission of evidence as incompetent, irrelevant and immaterial, and no sufficient and proper foundation laid, relative to a lost instrument, as disclosed by the evidence, is sufficient to notify the court and counsel of the reasons for objecting.

The judgment of the district court is reversed, and such court is directed to enter judgment for the defendant and against the plaintiff in the sum of $1,244.26.

REVERSED.

MARY B. MCDONALD, APPELLEE, V. MASONIC TEMPLE CRAFT OF NORTH PLATTE, TRUSTEE, ET AL., APPELLANTS: COUNTY OF LINCOLN ET AL., APPELLEES.
276 N. W. 176

FILED NOVEMBER 26, 1937. No. 29987.

1. **Parties.** Where impleaded defendants are not necessary parties to a determination of the controversy, demurrer of such impleaded defendants properly sustained.
2. **Taxation:** EXEMPTIONS. "The ownership and exclusive use of property determine whether or not it is entitled to exemption from taxation." *Masonic Temple Craft v. Board of Equalization*, 129 Neb. 293, 261 N. W. 569.
3. ———. Temporary interruption in use, due to rebuilding or remodeling, does not change character of property for taxation purposes.
4. ———: EXEMPTIONS. Where a part of building is exempt from taxation and balance is taxable, and assessment is based on value of the whole, owner's remedy is to go before the board of equalization and have the overvaluation abated.
5. ———: ———. Where part of a property is exempt and assessment is of the whole, tax levied on such assessment is not void or invalid.
6. ———: INTEREST. To avoid interest charge on taxes due, where assessment is excessive, owner must tender amount of taxes actually due and owing and keep his tender good.
7. ———: ———. Owner of tax sale certificate issued prior to 1933 is entitled to interest at 12 per cent. per annum on amount due at time of decree, and decree draws interest at same rate.
8. ———: ASSESSMENT: LIEN. Where part of a building is exempt and the balance is taxable, the amount of the assessment is to be arrived at by valuing that portion of the building which is taxable in its relation to the entire property, and the entire property is then assessed in the amount so determined and the tax is a lien on the entire property.
9. ———: SUBROGATION. Purchaser of real estate for delinquent taxes is subrogated to the rights of the public against the real estate for taxes, but cannot acquire any greater rights than the public had.

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

Hoagland, Carr & Hoagland, for appellants.

Beeler, Crosby & Baskins, for appellee McDonald.

R. H. Beatty and *S. S. Diedrichs,* for appellees Lincoln county *et al.*

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

KROGER, District Judge.

The Masonic Temple Craft, on and before January 1, 1929, was the owner of the north 88 feet of lots 3 and 4, in block 133, of the original town, now city, of North Platte, Nebraska. At that time a two-story building was on a part of said premises, the upper floor of which was used exclusively for lodge purposes; the lower floor had been used for commercial purposes, but had been vacated in the fall of 1928, except for a small portion used for a shoe shining parlor. The lower floor at no time was used for lodge purposes. Commencing about March 1, 1929, the building was torn down preparatory to the construction of a new four-story building now on said lots, which new building was completed early in December, 1929. In the new building the two upper floors are used exclusively for lodge purposes and the two lower floors are leased for commercial use. Taxes for the year 1929 were regularly levied upon this property and, not being paid, the property was advertised and, on November 3, 1930, sold for delinquent taxes to Mary B. McDonald, appellee. Subsequent taxes were paid by appellee for the years 1930, 1931, 1932, 1933, and the first half of 1934.

The evidence discloses that the first time the Masonic Temple Craft took any action regarding the assessment of the property in question was on August 30, 1930, when it filed an application before the board of equalization of Lincoln county, Nebraska, to have the property exempted from taxes for the year 1930. The county board had adjourned *sine die* as a board of equalization before any action was taken on the application, but on September 20,

1930, sitting as a county board, denied the application for exemption. From this action of the county board an appeal was taken to the district court, which appeal was later dismissed by the district court for want of jurisdiction.

In 1931 and subsequent years appellant appeared before the board of equalization of Lincoln county and objected to the assessment, and from the refusal of the board to reduce the assessment prosecuted separate appeals for each year. The question thus raised was disposed of by this court in the case of *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, 261 N. W. 569, as modified on rehearing in *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 827, 263 N. W. 150.

On June 19, 1935, Mary B. McDonald filed her petition in the district court for Lincoln county, Nebraska, for the foreclosure of her tax lien arising from the tax sale certificate and subsequent taxes paid by her. Defendants in that action made application to the district court to have Lincoln county, the members of the board of equalization, in their official capacity and as individuals, the members of the county board, in their official capacity and as individuals, the county clerk and county assessor and the county treasurer, each in his official capacity and as an individual, impleaded as parties defendant, which application was granted. Thereupon defndants filed a voluminous answer and cross-petition setting out in detail all of the various proceedings theretofore had. We do not deem it necessary to extend this opinion by setting out all of the matters attempted to be raised in the answer and cross-petition. Suffice it to say, the contention of defendants was that the assessment for the year 1929 was void, their theory being that the property at that time was entirely exempt from taxation, and that the taxes assessed for the subsequent years were void for the reason that a part of the property was exempt from taxation and the assessment was made on the property as a whole. The impleaded defendants filed a demurrer, which demurrer was sustained

by the trial court, and from this ruling the defendant Masonic Temple Craft prosecutes a separate appeal.

Trial on plaintiff's petition and the amended answer resulted in a decree of the court granting foreclosure of the tax sale certificate for the taxes for the year 1929 and subsequent taxes for the year 1930 in full, and 35 per cent. of the subsequent taxes for the years 1931 to the first half of 1934, inclusive, together with interest and attorney's fees, as by law provided. From the overruling of a motion for new trial, defendants prosecute this appeal and plaintiff filed cross-appeal.

Appellants first contend that the trial court erred in sustaining the demurrer of the impleaded defendants. It seems to be the theory of appellants that the impleaded defendants were proper, if not necessary, parties to a complete determination of the controversy respecting the taxes in question, and they argue that a court of equity having acquired jurisdiction of the matter could and should dispose of the entire controversy.

Appellants cite section 20-323, Comp. St. 1929, which provides: "When a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in." They contend it is applicable to the facts in this case. Unless the defendants sought to be impleaded were necessary parties to the case, the demurrer was properly sustained. The action was one to foreclose a tax sale certificate. The defense was that the tax sale certificate was void. If the plaintiff prevailed and the tax sale was held valid, defendants, not having paid any of the taxes, would have no claim against Lincoln county or its officials; if the defendants prevailed, plaintiff had an adequate remedy at law. See Comp. St. 1929, secs. 77-2030, 77-2054; *Farm Investment Co. v. Scotts Bluff County*, 125 Neb. 582, 251 N. W. 115. We conclude that the trial court did not err in sustaining the demurrer.

This brings us to a consideration of the main controversy. It is admitted that so much of the appellants' property as was being used exclusively for lodge purposes

was exempt from taxation, but appellee contends that during the year 1929 none of the property was owned and used for lodge purposes and that as a consequence it was taxable.

The evidence discloses that until after the 22d day of February, 1929, the second floor of the building then on the premises was used exclusively for lodge purposes, and that soon thereafter the building was torn down and a new building constructed on the site, which new building was not completed until in December, 1929. Obviously, between the 1st day of March, 1929, and the time when the new building was completed, the premises were not actually used for either lodge or business purposes.

Whether or not property is exempt from taxation on the ground that it is owned and used for educational, charitable or religious purposes depends upon the use that is made of the property. Ownership by an educational, charitable or religious organization, alone, is not sufficient ground for exemption, but the property must also be used for educational, charitable or religious purposes. See *Masonic Temple Craft v. Board of Equalization*, 129 Neb. 293, 261 N. W. 569; *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105, 182 N. W. 593.

In this case, during the year 1929 there was a temporary interruption in the use of the property due to the rebuilding of the premises, but such temporary cessation of use while the property was being remodeled and rebuilt did not change the character of the property for taxation purposes; and the second floor of the old building and the two upper floors of the new building during the year 1929 were exempt from taxation; the lower floor of the old building and the two lower floors of the new building, never having been used for lodge purposes, were not exempt and were subject to assessment.

It is the contention of the appellants that, if a part of the building was exempt and the assessment was on the entire building, in such a case the tax levy was void. With this contention we cannot agree.

In the case of *Janike v. Butler County,* 103 Neb. 865, 174 N. W. 847, this court used the following language: "So long as the property assessed is liable to taxation, or is liable to taxation in part, plaintiff's remedy is to go before the board of equalization, where that portion constituting the overvaluation, however it may occur, may be abated."

Appellants did not go before the board of equalization and complain about the assessment for the year 1929, and, having failed to avail themselves of the remedy provided by statute, cannot now question the validity of the taxes for that year; likewise, in the year 1930, not having properly protected their rights, cannot now question the validity of the taxes for that year.

In the year 1931 and subsequent years, appellants did go before the board of equalization and properly perfected their appeals from the action of the board of equalization and by the judgment of this court in the case of *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, 261 N. W. 569, as modified on rehearing in *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 827, 263 N. W. 150, secured a reduction of 65 per cent. of the assessed valuation. The effect of this decision is not to declare the assessment void or invalid, but that it is excessive, and directs that the assessment for the year 1931 be entered in the reduced amount thus determined.

The decree of the trial court found that plaintiff was entitled to recover the taxes for the years 1929 and 1930 in full, and for the years 1931 and subsequent thereto 35 per cent. of the tax levied. In this there was no error.

In June, 1936, the county board ordered the county assessor and county clerk to correct the assessments on the property in compliance with the decision of this court; and appellants contend this was the first opportunity they had to pay the lawful taxes on this property, and that they are not chargeable with interest during any of the time prior to June 24, 1936.

The difficulty with that contention is that the holding of this court was that the property at all times from 1931

to 1936, inclusive, was liable for taxes to the extent of 35 per cent. of the assessed valuation fixed by the county assessor, and while the appellants claim that they made a tender of the taxes for those years, the fact is that they merely appeared before the board of equalization, and at one time at least before the county treasurer, and offered to pay the tax on the lower two floors of the building if and when the lower two floors were separately assessed and the amount of the tax thus determined. At no time did they offer to pay the 1929 and 1930 taxes in full. This falls far short of a proper tender such as would relieve the taxpayer from the interest charge on the taxes actually due and owing. There was no tender of any given amount. Neither was the tender kept good, but, as stated before, only a request made that the tax be ascertained in a stated manner and an expression of readiness to pay the tax when so determined.

It follows from what has been said that the trial court did not err in allowing interest.

This brings us to a consideration of the questions raised by the cross-appeal. Cross-appellant contends first that she was entitled to 12 per cent. interest on each payment of taxes made by her, and that the trial court erred in allowing her only 9 per cent. interest on the taxes paid for the years 1932, 1933, and the first half of 1934.

On November 3, 1930, the date of the tax sale certificate, the statutes of this state provided that the owner or any person having a lien or interest in land sold for taxes might redeem the same by paying to the county treasurer the sum mentioned in the tax sale certificate with interest at the rate of 12 per cent. per annum from the date of purchase to the date of redemption, together with all other taxes subsequently paid with interest thereon at the same rate from date of payment to date of redemption. Comp. St. 1929, sec. 77-2020.

This section was amended by the legislature in 1933 by changing the rate of interest from 12 to 9 per cent. and the fee for receipt of treasurer from 25 to 15 cents, and

in all other respects it remains the same. Laws 1933, ch. 136, sec. 8.

Section 77-2041, Comp. St. 1929, provides that, in the event of foreclosure by a private holder of a tax sale certificate, such person shall be entitled to a decree for the amount appearing to be due thereon with interest at the rate per cent. per annum required to be paid for redemption from such tax sale, and that the decree shall draw interest at the same rate.

The tax sale certificate issued to cross-appellant bore interest at the rate of 12 per cent. per annum and at the time of the decree there was due thereon not only the amount paid at the time the tax sale certificate was acquired, with interest, but in addition thereto all sums paid for subsequent taxes.

It seems clear from a careful reading of these two sections of the statute that cross-appellant was entitled to interest at the rate of 12 per cent. per annum to date of decree, and that the decree should draw interest at the rate of 12 per cent. per annum until satisfied.

Cross-appellant's next contention is that she was entitled to a lien upon the whole of the Masonic Temple Craft building and lots on which it is situated for the amount found due her on her tax lien. The trial court decreed a lien on the real estate and the lower two stories of the building thereon subject to the right of support for the two upper stories and an easement of entrance to and from said upper stories. This precise question was before this court in *Young Men's Christian Association v. Lancaster County,* 106 Neb. 105, 182 N. W. 593, and the conclusion there reached was that the taxing authorities should arrive at a just valuation of that portion of the building which is taxable, in its relation to the entire property, and assess the property in that amount. Clearly this indicates that the amount of the assessment is to be arrived at by valuing that portion of the building which is taxable in its relation to the entire property, and that the entire property is then to be assessed in the amount determined.

In this case, it has been determined that the portion of the premises which is taxable represented 35 per cent. of the value of the entire property. The assessment so determined should be against the entire property, and the tax levied would be a lien on the entire property.

The final contention by cross-appellant is that she was entitled to the full amount paid by her for subsequent taxes, and that the trial court erred in allowing her only 35 per cent. of the amount paid for subsequent taxes for the year 1931 to the first half of 1934, inclusive. A purchaser of real estate at a sale made for delinquent taxes is subrogated to the rights of the public and invested with all liens and rights which the public had against the real estate by reason of taxes assessed and delinquent thereon. *Adams v. Osgood,* 42 Neb. 450, 60 N. W. 869. In the instant case the rights of the public, as finally determined, for the year 1931 and subsequent years were taxes based on an assessment of 35 per cent. of the value placed on the premises by the county assessor for those years. The tax certificate holder by paying the subsequent taxes could acquire no greater interest than the public had. The trial court did not err in denying cross-appellant recovery for the entire amount of subsequent taxes paid for the years 1931 to the first half of 1934, inclusive.

In so far as the decree of the trial court denied plaintiff interest at the rate of 12 per cent. for subsequent taxes paid for the years 1932, 1933, and the first half of 1934, and in so far as it denied plaintiff a lien on the entire premises for the amount found due, the judgment is reversed and the cause remanded, with directions to enter decree in conformity herewith. In all other respects it is affirmed.

AFFIRMED IN PART AND REVERSED IN PART.

ARTHUR B. CUNNINGHAM, APPELLANT, V. ARMOUR & COMPANY, APPELLEE.
276 N. W. 393

FILED DECEMBER 10, 1937. No. 30200.

1. **Workmen's Compensation.** In a workmen's compensation case, it is incumbent on the plaintiff to prove his case by a preponderance of the evidence.
2. ———. Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

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

John C. Barrett and *Fred J. Schwertley,* for appellant.

Kennedy, Holland, DeLacy & Svoboda, contra.

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

GOSS, C. J.

Arthur B. Cunningham appeals because dissatisfied with a compensation award made in the district court. On August 6, 1934, plaintiff was working as a plumber or steam-fitter in the basement below the engine room at the packing plant of Armour & Company at South Omaha. There is no question that he was an employee and, if injured, was injured in the course of his employment.

About 10:30 on the morning named, a pipe (containing ammonia under pressure) on the outside of the building in which plaintiff was working, and about 35 feet above the ground level, broke and caused ammonia fumes to enter the building. When plaintiff realized this, he started to escape and make his way to the outside. This necessitated traveling a considerable distance through the plant. Just before he reached a door to the loading dock, where he would be outside in fresh air, he fell and attracted the

attention of two other employees. They supported him, one on either side, and he walked to the first-aid room, where they left him. The nurse received him and he sat in a chair until she finished the work on which she was then engaged. She testified that he had a slight redness on his neck, chin and lips and his face and forehead were slightly red. He was coughing some and nervous. She applied ointment, bandaged him with gauze, called the ambulance and sent him to the Lutheran Hospital for observation by Dr. Kirk, the company physician.

Plaintiff was discharged from the hospital August 18, 1934, and went home. Dr. Kirk is on the staff of the Lutheran Hospital. He testified that he was at the hospital when plaintiff was brought there by the ambulance in the forenoon of August 6, 1934; that his temperature on admission was normal and at 1:30 p. m. that day his temperature was 99, his pulse was 80; an examination showed no evidence of injury to the mucous membrane of the nose and throat, no injury to his eyes, the lungs were clear and the physical examination was essentially negative; again he saw him at 3 p. m. and he was sleeping; after awakening, his temperature was taken, at which time it was 98, his pulse was 80 and respiration was 18, all practically normal; that the next morning he found plaintiff had rested well the night before and the head bandages were removed and his face was examined for the first time; that he found only a slight redness, no blister, and it was not necessary to reapply the bandages,—merely to apply an ointment over those reddened areas.

It would take unmerited space to state all the evidence, which we have carefully read. When Cunningham was first confined in the hospital he had chills and muscular twitchings. Later, from time to time, he offered to show these twitchings, which he sometimes could produce voluntarily and sometimes failed to produce. He was offered the services of any doctor he might name and was examined by quite a number of local specialists from time to time. He was tendered the services of the Mayo Clinic

at Rochester, Minnesota, but chose to go to Chicago, to be examined by Dr. Solomon, a neurologist and psychiatrist of that city. He went to Chicago, at the expense of the company, and chose to go to a hospital rather than to a hotel, both of which were tendered. He was given a preliminary examination by Dr. Alfred P. Solomon at the doctor's office and then went to the hospital, where the doctor arranged to examine him further. There, after he took his room, an interne arrived to take the necessary history and had commenced to do so when Cunningham abruptly left the hospital and took a train home. The chief reason assigned by him for that action is that he thought his case was to be considered by a Dr. Meyer Solomon, whose name he had found in a list of Chicago specialists in a blue book in the Omaha Library.

As before stated, plaintiff was examined by quite a number of local doctors, eminent in their lines, and was tendered the other services named. Many X-rays were taken by both parties and are in evidence. We cannot take space here to detail all the evidence.

The effect of the evidence of Mr. Cunningham's medical witnesses is that he is still suffering from the results of gas poisoning; that of the company witnesses is that he has long been able to return to work, but that he is simulating symptoms of a disease that he does not have, is feigning, or is a malingerer for the purpose of continuing to receive compensation.

The district court allowed plaintiff compensation at the rate of $15 a week (which is conceded to be the correct rate) from February 15, 1935, to February 15, 1936 (compensation having previously been paid at that date from August 6, 1934, to February 15, 1935, as well as medical expenses for that period), and allowed other medical and hospital bills amounting to a total of $658.83; and further found and decreed that, from and after February 15, 1936, plaintiff was not disabled and is not entitled to compensation after that date.

From the evidence, without being able to see the wit-

nesses, we think the judgment of the district court was justified. The trial court had an opportunity to see the witnesses, observe their demeanor and to compare and weigh the oral testimony of those witnesses expressing conflicting views. This is a case where we think such opportunity affords some advantage to the trial court.

In a workmen's compensation case, it is incumbent on plaintiff to prove his case by a preponderance of the evidence. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655; *Hudson v. City of Lincoln*, 128 Neb. 202, 258 N. W. 398; *Callahan v. Allied Mills*, 128 Neb. 352, 258 N. W. 804.

Where the evidence is conflicting, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others. *Southern Surety Co. v. Parmely*, 121 Neb. 146, 236 N. W. 178; *Sherman v. Great Western Sugar Co.*, 127 Neb. 505, 255 N. W. 772.

The earlier cases of *Shafer v. Beatrice State Bank*, 99 Neb. 317, 156 N. W. 632, *Greusel v. Payne*, 107 Neb. 84, 185 N. W. 336, *State v. Delaware-Hickman Ditch Co.*, 114 Neb. 806, 210 N. W. 279, and *City of Wilber v. Bednar*, 123 Neb. 324, 242 N. W. 644, announce the additional thought that, where in reviews *de novo*, the evidence is conflicting and "cannot be reconciled," this court will consider that the district court gave credence to the testimony of some rather than to the contradictory testimony of other witnesses. While in the cases first cited on this point it might well be said that it was implied that the conflicting testimony could not have been reconciled or it would have been, we prefer the statement of the rule with the qualification as stated in the cases in this paragraph. For the purposes of this case we state the rule as follows: Where the evidence is conflicting and cannot be reconciled, this court, upon a trial *de novo* in a workmen's compensation case, will consider the fact that the district court observed

the demeanor of witnesses and gave credence to the testimony of some rather than to the contradictory testimony of others.

Plaintiff has failed to show by a preponderance of the evidence that he is entitled to compensation beyond the date fixed by the trial court.

The judgment of the district court is

AFFIRMED.

E. H. LUIKART, RECEIVER, APPELLANT, V. NELLIE L. LEHMKUHL ET AL., APPELLEES.
276 N. W. 373

FILED DECEMBER 10, 1937. No. 30075.

Fraudulent Conveyances. In a suit to cancel a deed by an insolvent debtor to a relative and subject the land described therein to payment of a judgment against grantor in favor of plaintiff, but not then a lien on the land, such relief may be denied, where grantor and grantee prove by a preponderance of evidence which is clear and satisfactory that the deed was executed and accepted in good faith for an adequate consideration without any intent on the part of either to hinder, delay or defraud any creditor.

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

F. C. Radke, Clarence G. Miles and *W. A. Crossland,* for appellant.

H. A. Bryant, Schiefelbein & Donato and *William W. Graham, contra.*

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

ROSE, J.

This is a suit in the nature of a creditor's bill in the district court for Saunders county to cancel a deed to a quarter-section of farm land and subject it to payment of a judgment recovered in the district court for Cheyenne

county. From a dismissal of the action upon a trial, there is an appeal to the supreme court.

When E. H. Luikart was receiver of the Liberty State Bank at Sidney, Cheyenne county, he recovered in that capacity, November 23, 1932, a judgment against Nellie L. Lehmkuhl for $6,660.15 on her liability as a stockholder of that bank. After the judgment was reduced by a credit of $1,650 and other credits of $109.60, a transcript thereof was filed in the district court for Saunders county August 12, 1935. Execution from that court was issued the same day and returned unsatisfied.

The receiver, E. H. Luikart, plaintiff in this creditor's suit, charged that the judgment debtor, Nellie L. Lehmkuhl, defendant herein, while owning the north half of the north half of section 13, township 14 north, range 6 east, Saunders county, fraudulently deeded the same without consideration to her brother-in-law, Edward Lehmkuhl, March 10, 1934, and registered the deed August 15, 1934, with intent to hinder, delay or defraud the judgment creditor in the collection of the debt. The grantee in the deed was accused of participation in the fraud. He and his wife, and his sister-in-law, Nellie L. Lehmkuhl, the Federal Land Bank of Omaha, mortgagee to the extent of $6,800, and the terre-tenants are also defendants.

The making of the deed and the execution of the mortgage were admitted by the Lehmkuhls and by the mortgagee, but they denied in their answers the allegations of fraud pleaded in the petition. The reply contained a general denial.

During the trial of the cause the plaintiff dismissed without prejudice the suit as to the Federal Land Bank of Omaha, mortgagee. The trial court found that defendant Edward Lehmkuhl, for a valuable consideration, purchased the land described in the petition in good faith without any intention on his part, or that of Nellie L. Lehmkuhl, to in any manner hinder, delay or defraud creditors of plaintiff. On these findings it was decreed that Edward Lehmkuhl is the owner in fee simple of the land in question.

It was from the judgment in favor of grantor and grantee that plaintiff appealed to the supreme court.

The question for determination on appeal is the same as in the district court—was the deed made without consideration with the intent to hinder, delay or defraud plaintiff, a creditor of grantor? The answer must be found in the evidence. The statute says that a deed made with such intent "shall be void." Comp. St. 1929, sec. 36-401.

The unpaid judgment in Cheyenne county, the transcript thereof to Saunders county, the existence of the mortgage and the execution of the deed were admitted by grantor and grantee and were proved by records and documents. Plaintiff marshaled circumstances to prove fraudulent intent—unpaid judgment and sale of real estate of debtor in Cheyenne county on execution; the deed by grantor to her brother-in-law, creating presumption of fraud in the transfer; inadequacy of consideration for the 160 acres of land of the value of 60 or 65 dollars an acre; grantee's ownership of 160 acres of other land cornering on the land of grantor, both tracts formerly managed by grantee and occupied by the same tenants; insolvency of grantor; both parties former stockholders of the insolvent bank with knowledge of the judgment for stockholder's liability. In addition, plaintiff introduced evidence that grantee applied to the Federal Land Bank for a loan on the land described in the deed and stated he received from the crops produced thereon in 1933 $1,070. He testified, however, that this statement was made for the purpose of getting a loan to pay former mortgage liens on the same land, but he did not make a satisfactory explanation of what he did with that income. There is no direct evidence of grantor's intent to hinder, delay or defraud creditors and plaintiff relies on circumstances to prove that alleged fact. The law, of course, permits fraudulent intent to be shown by circumstantial evidence, but good faith of grantor and grantee may also be shown in the same manner.

There is direct evidence by both grantor and grantee that in their negotiations for the transfer the judgment in the

district court for Cheyenne county was not mentioned. On the witness-stand each denied any intent to hinder, delay or defraud any judgment creditor and they are corroborated by circumstances. They also stated directly that the deed was executed and accepted in good faith. Adequacy of the consideration was shown by uncontradicted evidence. Grantee testified that he paid for grantor to a former mortgagor in discharge of her mortgage debts, $6,765.20; that to grantor herself, $400; to aid in construction of her buildings under an arrangement for repayment, $450, an obligation satisfied by the deed; to claimants for repairs on her buildings, $111.65. While the estimates of the farm value were 60 or 65 dollars an acre, efforts to sell the land for $60 an acre before the deed was executed were unavailing. Grantor owned the land for about five years. Before she sold it, it was encumbered by mortgages aggregating $6,765.20. That was her debt. She could then entertain in good faith an honest intent to pay it without first paying the judgment in the district court for Cheyenne county. The mortgages were liens on her Saunders county farm and the judgment was not a lien thereon. Foreclosure was threatened for nonpayment of interest and taxes. She was without money to pay those obligations. In that situation she sold her farm to her brother-in-law and thus by her deed to him paid her mortgages, discharged her obligations to her grantee and received from him $400. It is a fair inference from the evidence that she could not have made a better bargain under the circumstances. The proper view of the evidence is that it preponderates in favor of both parties to the deed and that they affirmatively proved by clear and satisfactory evidence their good faith in their transaction and also the adequacy of the consideration. The judgment of the district court conforms to the conclusion reached on appeal and is accordingly

AFFIRMED.

DAY and CARTER, JJ., dissent.

THEODORE M. OSTERMAN ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

276 N. W. 398

FILED DECEMBER 10, 1937. No. 30207.

1. **Waters: RES JUDICATÆ.** After the state department of roads and irrigation granted water rights for irrigation and power in the proper exercise of original jurisdiction and after all the litigable issues raised in the proceeding were determined by the supreme court on appeal, unnecessary new parties subsequently appearing in the state department in the same case are bound by the record as they find it, including adjudications.
2. **Appeal.** Where justiciable issues in a proceeding before the state department of roads and irrigation are all properly determined on appeal to the supreme court, the same issues are not relitigable on subsequent appeals in the same case.

APPEAL from the Department of Roads and Irrigation. *Appeal dismissed.*

B. J. Cunningham, W. P. Lauritsen, P. S. Heaton, E. J. Patterson, Paul R. Morris, Lloyd L. Pospishil, Coufal & Shaw, William H. Lamme, Ray E. Sabata, Cleary, Suhr & Davis, Hoagland, Carr & Hoagland and *Cordeal, Colfer & Russell,* for appellants.

R. O. Canaday and *P. E. Boslaugh, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

ROSE J.

The question for determination arises on a motion to dismiss an appeal from the state department of roads and irrigation to the supreme court.

The litigation was instituted by proceedings before that public tribunal, the forum of original jurisdiction. To it the Central Nebraska Public Power and Irrigation District, commonly called "Tri-County District," directed four applications for permission to divert in Nebraska and use waters of the North Platte and Platte rivers.

Application 2351 asked for an order authorizing Tri-

County district to divert waters at "Maxwell Diversion" from the Platte river in Lincoln county above Brady Island for conveyance by channel to and storage in upper and lower Plum creek reservoirs to be constructed in northern Gosper county. Application 2354 was for authority to use waters between the Maxwell Diversion and the mouth of Plum creek for generating hydro-electric power and after such use, in part, for irrigation. Application 2355 was for the right to use waters diverted at the Maxwell Diversion for the purposes of irrigation in Gosper, Phelps, Kearney and Adams counties, by means of the canal supplying Plum creek reservoirs. This latter application asked also for authority to divert waters of the Platte river near the mouth of Plum creek and also below the city of Kearney. Application 2374 was for permission to construct a channel reservoir in the basin of the North Platte river a few miles above Keystone in Keith county.

These projects included canals to carry vast quantities of water for irrigation and power from the Platte river southward beyond its watershed into the watersheds of the Republican and the Blue rivers. Before the state department of roads and irrigation, administered by the state engineer, these proposed diversions of waters from one watershed to others were resisted by many irrigating appropriators of Platte river waters and by riparians along that stream. Upon a hearing before the state engineer, after he acquired jurisdiction, the applications enumerated were granted. Parties objecting to the orders of the state department appealed to the supreme court. By printed briefs and oral statements of counsel at the bar, the litigants and the appellate court limited the issue for determination to the diverting of waters from the Platte river watershed to the others. The appeal resulted in an adjudication that the department of roads and irrigation was without power to authorize the Tri-County District to divert Platte river waters by canals to the watersheds of the other rivers for irrigation and power. The granting of applications 2351, 2354, 2355 and 2374 therefore were

all reversed and the cause remanded to the state department, with directions, if desired, to grant applicant leave to amend the applications by limiting the use of waters taken thereunder to power purposes and to irrigation of lands in the watershed of the Platte river. *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N. W. 334.

After the mandate of the supreme court appeared in the tribunal of original jurisdiction, applications 2354 and 2374 were amended as directed by the supreme court and in the amended form were granted November 27, 1936, on condition forbidding diversion of waters beyond the Platte river watershed; protecting the right of riparians to the use of water for domestic purposes; respecting the rights of prior appropriators of water for irrigation and rights acquired by continuous beneficial use of waters; complying with laws giving users of waters for domestic, agricultural and irrigating purposes preference over users for manufacturing and power purposes.

From the judgment of the department of roads and irrigation, granting applications 2354 and 2374 as amended pursuant to the opinion, judgment and mandate of the supreme court, the Cozad Ditch Company and others appealed in the same case and brought up the identical record of the former appeal in its entirety.

Upon the second appeal the entire record, pleadings, evidence and judgments of both tribunals were patiently reexamined in connection with new briefs and oral arguments. It was thereupon adjudicated that the orders from which the appeal was taken conformed to the mandate of the supreme court; that every material question argued by appellants on the second appeal had been determined on the former appeal and that no undetermined justiciable issue in the proceeding had been left open for further controversy. The second appeal was accordingly dismissed. *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District,* 132 Neb. 547, 272 N. W. 560.

After the proceeding again appeared in the state de-

partment of roads and irrigation by mandate from the supreme court, parties having no former connection with the case filed with the state engineer a petition assailing his grant of power to the Tri-County District November 27, 1936, and also assigned error in the previous adjudication permitting the amendment of applications 2354 and 2374, and alleging that petitioners had no notice of those applications; that the new petitioners had never been accorded a hearing thereon; that there were no unappropriated waters in the Platte river which could be devoted to the projects of the Tri-County District at its point of diversion; that the new petitioners have prior water rights which the proposed diversion will destroy; that the diversion will lower the underground water levels and thus injure property rights of petitioners, riparians and of irrigators; that the state engineer's grant of power to the Tri-County District was detrimental to the public welfare. The new petitioners in the same original proceeding, assuming to be parties whose rights had not been adjudicated, appealed from the state engineer's order of November 27, 1936, objected to it as erroneous and challenged the supreme court's judgment directing the department of roads and irrigation to amend the applications. On this third appeal the new petitioners brought up the entire record which, twice before, had been considered in review. Some of the original parties also now seek further relief herein.

With the record in the condition outlined, the Central Nebraska Public Power and Irrigation District presented a motion to dismiss the third appeal.

The new petitioners have no greater rights than those generally accorded interveners. They were not necessary parties when the state engineer in the proper exercise of original jurisdiction granted applications 2354 and 2374 as amended by direction of the supreme court. They appeared in the proceeding and are bound by the condition in which they found it, including former adjudications. They were not entitled to relitigate issues and matters already determined in the case in which they appeared.

These are familiar principles of law essential to orderly judicial procedure. Original parties joining in the third appeal are in no better situation than the new petitioners as to former final adjudications. Neither group has anything new to review on appeal to the supreme court. A reexamination of the entire record in connection with briefs and oral arguments on the motion to dismiss leads to the conclusion that no new material issue is raised on the third appeal. Every question involving alleged new matter was adjudicated by the supreme court on the former appeals. *Osterman v. Central Nebraska Public Power and Irrigation District*, 131 Neb. 356, 268 N. W. 334; *Cozad Ditch Co. v. Central Nebraska Public Power and Irrigation District*, 132 Neb. 547, 272 N. W. 560.

It necessarily follows that the motion to dismiss the third appeal must be sustained.

DISMISSED.

RALPH E. STEVENS, APPELLEE, V. R. E. FALL: CHARLES P. DAVIS, APPELLANT.

276 N. W. 401

FILED DECEMBER 10, 1937. No. 30090.

1. Sales: BURDEN OF PROOF. "In an action on account for goods sold and delivered, where the purchase and receipt of the goods are denied, the burden is on the plaintiff to prove such sale to the defendant." *Hirsch Distilling Co. v. Roach*, 92 Neb. 624, 138 N. W. 1131.
2. Trial: DIRECTION OF VERDICT. "In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination." *Doyle v. Franek*, 82 Neb. 606, 118 N. W. 468.

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

Dent & Deakins, for appellant.

Hoagland, Carr & Hoagland and *Kelley & Kelley, contra.*

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

EBERLY, J.

This is an action on account for intoxicating liquors sold and delivered, brought by Ralph E. Stevens, as plaintiff, a duly licensed and qualified wholesale liquor dealer, against defendants R. E. Fall and Charles P. Davis, who, it is alleged, are "a partnership organized and doing business in the city of North Platte, Nebraska, as retail liquor dealers, and are operating said liquor retail business in the city of North Platte, Nebraska, under the firm name of 'The Alamo.' " Plaintiff further alleges "that during the period from September 10, 1935, to December 30, 1935, the defendants and each of them purchased from the plaintiff certain merchandise at the fair, reasonable and agreed value of $2,601.17, and during said same period of time said defendants made total payments to this plaintiff on said merchandise of $2,226.87, leaving a balance due from the defendants and each of them to the plaintiff herein in the amount of $374.30," for which, with interest, judgment is prayed.

To this petition the defendant Charles P. Davis answered separately, (1) denying generally the averments of plaintiff's petition; (2) denies that he was ever associated in a partnership with defendant R. E. Fall; (3) admits that plaintiff was engaged in the business of a wholesale liquor dealer as alleged; (4) alleges the giving of notice to plaintiff that he would not be responsible for merchandise sold R. E. Fall at McCook, Nebraska, but that notwithstanding such notice plaintiff extended credit to R. E. Fall and sold goods, wares and merchandise to R. E. Fall; and (5) further alleges that the merchandise sold to R. E. Fall which is the subject-matter of this suit was sold to R. E. Fall and delivered by plaintiff to him at McCook, Nebraska, and was never delivered to defendant's place of business or to this defendant; that plaintiff sold the same to R. E. Fall well knowing that the said Fall was taking the same to the state of Kansas for unlawful sale.

To this answer, the plaintiff filed a reply which was, in substance, a general denial.

At the conclusion of all the evidence the plaintiff moved for a directed verdict for the items in suit, "for the reason the evidence in this case conclusively shows the defendant Charles P. Davis is responsible for the goods, wares and merchandise delivered by the plaintiff under license No. 1004 in the name of R. E. Fall." This motion was sustained and judgment entered in favor of the plaintiff and against Charles P. Davis for the sum of $381.75 and interest as by law provided. From the order of the trial court overruling his motion for a new trial, Davis appeals.

It may be said that evidence in the record, though contradicted in part, if believed, established that in September, 1935, at the instance of Charles P. Davis who furnished the money necessary for the purpose, R. E. Fall secured a state license as a retail dealer in intoxicating liquors, in his own name, at North Platte, Nebraska. A stock of intoxicating liquors was purchased by use of funds of Davis, and the Alamo liquor store, a business of selling liquors at retail, was commenced and carried on (under cover) by Davis ostensibly pursuant to such license in Fall's name. The license so granted R. E. Fall was framed and hung in plain view and in a conspicuous place on the licensed premises. Fall worked at this place, as employee of Davis, but had no interest whatever in the stock of liquors. Davis owned and controlled it and Fall received as compensation for his services 25 per cent. of the net profits of the business transacted. In November, 1935, Davis notified the plaintiff, through the latter's authorized representative, Mr. Bozarth, not to sell or deliver any more liquors to R. E. Fall. The testimony of Davis, on this subject is, in part: "Q. What was the nature of that conversation? A. I told Mr. Bozarth not to give Mr. Fall any liquor, that I wouldn't pay for it if he did. Mr. Fall was starting to running it down into Kansas prior to November and I notified all the liquor houses I had done any business with not to let Mr. Fall have any liquor on credit. Q. And did you notify

Mr. Bozarth here in November of that? A. Yes, sir."

On December 3, 1935, R. E. Fall was discharged by Davis, and his relations with the Alamo liquor store wholly severed. After that date the liquors in suit were purchased from plaintiff by R. E. Fall, and were by him personally received at the warehouse of plaintiff in McCook, Nebraska, and not at the Alamo liquor store in North Platte. There is ample evidence in the record, if believed, which establishes as a fact that the liquors in suit were neither received nor appropriated by or for the benefit of Davis.

"In an action on account for goods sold and delivered, where the purchase and receipt of the goods are denied, the burden is on the plaintiff to prove such sale to the defendant." *Hirsch Distilling Co. v. Roach*, 92 Neb 624, 138 N. W. 1131.

If certain evidence in the record is to be believed, the plaintiff had ample notice of want of authority on part of Fall to bind Davis in liquor transactions at the time the liquors in suit were delivered to Fall in December, 1935, and that all actual authority to bind Davis had ceased.

The rule is that, if a third person has notice of a limitation or termination of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation or after such termination. Nor is the doctrine of an illegal transaction a justification of the trial court's direction of a verdict in favor of plaintiff. If Davis was not a legally licensed retailer of liquors, his (plaintiff's) sales of liquor to him must be deemed in violation of law. Evidence, controverted it is true, appears in the record which fully advised plaintiff of the actual situation that then existed, at least at the time of the sale of the liquors in suit.

"Where intoxicating liquors are sold in this state for the purpose of enabling the purchaser to resell them contrary to, or in violation of, the laws of this state, and the vendor has the knowledge of the illegal purpose of the buyer and participates with him in the illegal traffic, the sale is void, and no recovery can be had for the purchase

price of the liquors thus sold." *Storz v. Finklestein,* 48 Neb. 27, 66 N. W. 1020. See, also, *Storz v. Finklestein,* 46 Neb. 577, 65 N. W. 195.

In this connection, it is to be remembered: "A license shall be purely a personal privilege, * * * nor shall it be alienable or transferable, voluntarily or involuntarily." Comp. St. Supp. 1935, sec. 53-327. While a liquor license may be issued to a copartnership (Comp. St. Supp. 1935, sec. 53-328), we have no evidence of such issuance in the instant case, and the license issued as described in the present transaction affords no protection as to sales of intoxicating liquors to Davis by those having notice of the real facts.

Therefore, there being, admittedly, a substantial conflict in the evidence essential to sustain plaintiff's cause of action, the trial court erred in directing a verdict for plaintiff.

We have long been committed to the rule: "In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination." *Doyle v. Franek,* 82 Neb. 606, 118 N. W. 468. See, also, *Dworak v. Shire,* 126 Neb. 474, 253 N. W. 655.

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

REVERSED.

E. H. LUIKART, RECEIVER, APPELLEE, V. A. B. DETWEILER ET AL.: JOHN J. FOSSLER, APPELLANT.
276 N. W. 395

FILED DECEMBER 10, 1937. No. 30108.

1. **Fraudulent Conveyances: PARTIES.** The contingent liability of a stockholder of a state bank makes depositors "existing creditors" entitled to attack a voluntary conveyance.

2. ———. In a suit to cancel a mortgage because executed to defraud creditors, the question of the intent of the parties is one of fact.
3. ———. Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inference may reasonably be drawn.

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

Fischer, Fischer, Fischer & Fischer, for appellant.

F. C. Radke, Hastings & Hastings and *W. C. Conover, contra.*

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

DAY, J.

This is an equitable suit to declare fraudulent and set aside deeds and a mortgage on a quarter-section of land in Perkins county. The trial court canceled the deeds and mortgage. The mortgagee, Fossler, alone appeals.

A. B. Detweiler, the owner of seventy-four (74) of one hundred and fifty (150) shares of the stock, was the president and managing officer of the German Bank of Millard. The bank was insolvent, and on May 22, 1931, it closed, and Luikart was appointed its receiver. As such receiver he recovered a judgment in January, 1932, in Douglas county in the sum of $7,341.51, based upon the stockholders' double liability by the ownership of stock, against Detweiler. This judgment was transcripted to Perkins county on March 17, 1936. On March 1, 1935, Detweiler and his wife conveyed this property to another, who, at the same time, conveyed this property to the wife, Corrine A. Detweiler. The court found these deeds to be executed and delivered without any consideration, and wholly null and void as against creditors, of which the receiver of the German Bank of Millard is one. There was no appeal taken from this finding, the appellant admits the facts, and the legal title is now in A. B. Detweiler. The appellant's mortgage, which is the subject of the contro-

versy here, was executed by Detweiler and his wife on April 1, 1931, and the bank closed following that date on May 22, 1931.

The law applicable to this case is well settled in this state. There is a serious dispute in the record upon the question of consideration for the mortgage. The appellant contends that there was consideration for the mortgage of $6,400, while the appellee asserts there was no consideration. This was a disputed question of fact for determination.

Fossler contends that the note secured by mortgage is a renewal of preexisting indebtedness. Both Fossler and Detweiler testify that this is the fact. This testimony is not corroborated by any disinterested witness, or by any documentary evidence. Some notes are introduced in evidence which are said to evidence a preexisting indebtedness incurred when Detweiler borrowed money from Fossler. If we accept them, Detweiler was borrowing money from Fossler at 6 per cent., while Fossler, for a long period of years, was borrowing money from the bank of which Detweiler was president at 8 per cent. The trial judge found that this was "a circumstance so anomalous and contrary to the usual method of doing business as to challenge the integrity of the transaction." Fossler owed the bank as much as $4,000 from 1920 to 1930. It was during this period, ending in 1927, that Detweiler incurred this indebtedness.

Except a series of notes introduced in evidence to justify the note merging them in one, secured by this real estate mortgage, all of the bank checks and all the accounts bearing upon the transaction were destroyed. In the ordinary business transaction so much money leaves indelible traces. This $6,400 was merged without any traces in the note secured by a mortgage on this land.

Fossler was not a man of great means. He did not own his home, nor his office building in a small town, and his financial condition was not such that he would be likely to loan money to such an extent.

These are substantially the reasons given by the trial judge who heard the witnesses and their manner of testifying in finding that the mortgage was given without any consideration, and that it was canceled of record because in fraud of creditors.

There is also evidence that Detweiler employed the attorney and arranged for the execution of this mortgage. His attorney represented the appellant, Fossler, in this suit. There is ample evidence supporting the petition of the appellee, Luikart, in this case. No good purpose will be served by a lengthy recital of the evidence. The law applicable to the facts outlined is now stated:

The contingent liability of a stockholder of a state bank makes depositors "existing creditors" entitled to attack a voluntary conveyance. *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678.

In a suit to cancel a mortgage because executed to defraud creditors, the question of the intent of the parties is one of fact. *Adler & Sons Clothing Co. v. Hellman,* 55 Neb. 266, 75 N. W. 877.

Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inferences may reasonably be drawn. *Peterson v. Wahlquist, supra.*

The facts in this case as determined by this court, in an identical opinion with that of the trial court, make these well reasoned rules applicable. The Detweilers mortgaged their property, and there was a subsequent transfer from A. B. Detweiler to his wife, Corrine A. Detweiler, without any consideration, to hinder and delay his creditors. If the plan had succeeded, the creditors of A. B. Detweiler would have been defrauded. The laudable motives asserted do not make a fraudulent transfer valid, if a debtor's voluntary transfer renders it impossible for existing creditors to satisfy their claim. Only because of the passionate appeal of the attorney for the appellant at the bar of this court do we notice the claim that, in two cases consolidated, the trial court, on the same evidence, found differently in each case. While the other matter, not having been

appealed, is not before us for determination, the record discloses that there was vastly different evidence as to the matter of consideration between the parties. The judgment of the trial court is that of this court.

AFFIRMED.

ELMER E. THENO, APPELLANT, V. NATIONAL ASSURANCE CORPORATION, APPELLEE.

276 N. W. 375

FILED DECEMBER 10, 1937. No. 30107.

1. **Evidence.** If a written agreement was executed for the purpose of settling all pending business matters between the parties, and in which each released and discharged the other of any and all claims, it is held that an alleged prior oral agreement, providing for additional renewal commissions on premiums to be paid in after plaintiff has quit such employment, cannot be shown, as it would add to, contradict, and modify the express terms of the final settlement agreement.
2. **Trial.** The admission without objection of testimony in violation of the parol evidence rule does not preclude the court from disregarding such testimony and sustaining a motion to direct a verdict.
3. **Evidence.** The parol evidence rule is not merely one of evidence, but is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids such facts to be proved at all.

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

Frederick J. Patz and *Edward C. Fisher*, for appellant.

Flansburg, Lee & Sheldahl, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

PAINE, J.

An action at law was brought by an agent to recover commissions he claimed due from defendant company for selling policies under two separate oral contracts of agency.

The claim for commissions to be collected after plaintiff left the employ of the company is flatly denied by defendant, which sets up in its answer a written settlement agreement, which definitely settles all past or future claims between the parties. At the close of all the evidence a verdict was directed for defendant.

Plaintiff sought to introduce evidence of mistake, accident, and fraud in such written settlement, and claimed that it was not intended by either party to cover renewal commissions. The court sustained objections and refused to admit some of such evidence.

The defendant's motion for a directed verdict charged that the written settlement agreement was complete on its face and covered all claims of plaintiff, and for the further reason that plaintiff's allegations of fraud with reference to the settlement agreement were not supported by any evidence, and that plaintiff had received $500 for the purchase of his stock, according to the terms of such settlement, and had received about the same amount in payments upon other items in such settlement contract, and that, as he had retained all of such payments received under the settlement agreement, he had thereby ratified it.

The errors relied upon for reversal allege fraud, accident, mistake, and concealment in the making of the final settlement contract between the parties, and that the court erred in refusing to allow testimony to vary the terms of the instrument.

It appears from the bill of exceptions that exhibit No. 9 is the final settlement agreement, made December 9, 1935, between the plaintiff and defendant. Such agreement provides, first, for the purchase of 20 shares of stock held by the plaintiff in the defendant company, for which the defendant agrees to pay the sum of $500. The third paragraph provides that the defendant is to pay to the plaintiff commissions of 66 2/3 per cent. on over 40 policies listed in exhibit A, attached thereto, when such premiums are paid. The fourth paragraph provides that, if the plaintiff reinstates any of the lapsed policies therein listed, he

will be paid 66 2/3 per cent. of the first year's premiums. The fifth and final paragraph provides as follows: "In consideration of the foregoing, the first and second parties mutually agree that the second party accepts the resignation of the first party, and that the first and second parties hereby release and discharge any and all claims that they now have or may have against each other, except the commissions that may become due the first party under paragraphs three and four of this agreement, which commissions shall be paid by the second party when and as they become due thereunder."

The evidence disclosed that the plaintiff had worked for the defendant some five years, beginning in October, 1928, at the end of which time he claimed they owed him certain renewal commissions. He reentered their employment under a second oral contract to take charge of a department for the sale of thrift contracts, but after discussion it was decided to get away from the word "thrift" and call them endowment savings contracts, and after a discussion of the matter from December, 1933, to March, 1934, the plaintiff again actively entered the employment of the defendant.

The plaintiff claims that in March, 1934, W. L. Harlan promised him if he would come back to work they would put him in full and complete charge of the endowment savings department, and would give him $8 out of the first $12 paid by the purchaser and a 5 per cent. renewal for a nine-year period thereafter, which renewals would be vested and nonforfeitable, and if agents under him sold these thrift units plaintiff was to receive $1 on the first year's payments as an overwriting commission, and he was to receive, according to his testimony, 5 per cent. renewal on all such endowment savings contracts after the first year, no matter who sold them.

During 1935 many disputes arose, and finally the plaintiff decided to leave the company, and the final settlement contract of December 9, 1935, was drawn. L. L. Waters, secretary-treasurer of defendant, testified as to a conver-

sation in which the plaintiff said: "Now that I have definitely made up my mind I am going to leave I want to have a positive understanding of just exactly what my status is and the company's status is after I leave." And, further: "He suggested that it be reduced to writing so that we would both of us understand and we would agree exactly the basis on which he terminated his employment. I asked him what he wanted included in that agreement and he said, 'I want you to buy the stock I own in the company. I want you to buy that and pay me $500 for it.' "

The plaintiff would not sign this agreement until he had taken it out to Mr. Harlan's home, where he was sick, and talked it over with his friend Mr. Harlan, and he came back and said that, if they would insert in the settlement contract that the company would release him from any claims of any kind which the company might have against him, as he was releasing it, he would sign it. After this provision demanded by the plaintiff was inserted, the contract was drawn and signed by the parties as an entire settlement of all the transactions of every kind and nature between the parties.

In rebuttal the plaintiff sought to introduce evidence in support of the allegations of mistake, accident, and fraud contained in his reply seeking to show that by mistake exhibit 9 was so drawn as to apparently include all claims of every nature, when in fact it was not intended by either party to cover renewal commissions.

The briefs and the argument by counsel in this case present to us nearly every phase of the parol evidence rule, which comes to us from the English common law, and which was clearly announced in *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 75 N. W. 1092: "Where negotiations take place between parties which result in their reaching an agreement in reference to the subject-matter of the negotiations, and the parties subsequently reduce their agreement to writing, sign and deliver the same, then, in the absence of fraud or mistake or an ambiguity in the writing, it constitutes the best and the only competent

evidence of the contract originally made." See 10 R. C. L. 1016, sec. 208; 22 C. J. 1070. It has been held that, if the written agreement is incomplete upon its face, parol evidence not in conflict therewith is admissible to supply such deficiency. *National Engraving Co. v. Queen City Laundry*, 92 Neb. 402, 138 N. W. 575. However, it is not shown to have been incomplete. Another recognized exception to the parol evidence rule is that evidence tending to establish a second oral agreement between the parties is admissible as to matters upon which such contract is silent if such oral agreement does not tend to vary or contradict the terms of the written instrument. *Huffman v. Ellis*, 64 Neb. 623, 90 N. W. 552; *Providence Jewelry Co. v. Gray Mercantile Co.*, 92 Neb. 633, 139 N. W. 215. But, in the case at bar, it was clear to the trial court that the evidence would vary and add to the terms of exhibit No. 9.

In *Security Savings Bank v. Rhodes*, 107 Neb. 223, 185 N. W. 421, 20 A. L. R. 412, Nebraska authorities were analyzed, and three were overruled, and it was held that a contemporaneous oral agreement, providing that the contract was not to be performed if a certain contingency occurred, could not be shown, as it would have the effect of adding to, varying, or contradicting the express terms contained in the writing, as it would in the case at bar. See *Spiegal & Son v. Alpirn*, 107 Neb. 233, 185 N. W. 415.

When the contract, exhibit No. 9, positively stated that plaintiff released defendant of all claims that he now has, or may have (in the future), against defendant, he cannot now be heard in an attempt to show an oral agreement which would render such words of release meaningless. *Erwin v. Kuhlman*, 130 Neb. 249, 264 N. W. 676.

It is alleged there was fraud in the written contract. Fraud, if proved, would strike down the written contract as a whole. *Paper v. Galbreth*, 121 Neb. 454, 237 N. W. 582. But the plaintiff does not desire to do that, but simply desires to add additional provisions to it.

It is a general rule that fraud must relate to a present or preexisting fact, and cannot ordinarily be predicated

on unfulfilled promises, or statements as to future events. See *Palmetto Bank & Trust Co. v. Grimsley,* 134 S. Car. 493, 133 S. E. 437, 51 A. L. R. 42, and notes.

In the case at bar, some bits of evidence of the alleged oral contract may have found their way, without objection, into this large bill of exceptions, but this would not preclude the trial court from disregarding such testimony in sustaining a motion for a directed verdict. *Bushnell v. Elkins,* 34 Wyo. 495, 245 Pac. 304, 51 A. L. R. 13.

At the close of the 50-page monograph, entitled "Parol Evidence Rule in Nebraska," found in 4 Neb. Law Bulletin, 115, will be found an appendix, giving a four-page synopsis of Nebraska cases in which the rule has been enforced, and an examination of this list will convince any one that it is scarcely true that Nebraska decisions usually find some exception, and allow evidence to be introduced of alleged accident, fraud, or mistake to modify or vary the terms of a written instrument.

In Thayer's Treatise on Evidence at the Common Law, he devotes all of chapter 10 to the parol evidence rule, and begins with the statement: "Few things are darker than this, or fuller of subtle difficulties." He shows that some of the reasons which make it the most difficult branch of the law of evidence are that most of the questions are out of place, that there is a grouping of incongruous matter, and then it is looked at in the wrong focus; that the indiscriminate use of the phrase "parol evidence" has always been one of the sources of confusion. He cites the case of *Collins v. Blantern* (1767) 2 Wils. (Eng.) 341, in which an exception to the rule was first distinctly held, to the effect that an illegality of consideration not appearing on the face of the bond was a good defense; then concludes that there is in reality only one actual rule of evidence included in the entire compass of the so-called parol evidence rule.

Wigmore says that several circumstances should be mentioned in reference to the rule: That the parol evidence rule is in no sense a rule of evidence, but a rule of sub-

stantive law; the rule declares that certain kinds of fact are legally ineffective in substantive law, and forbids the fact to be proved at all, and that the matter excluded is not always strictly parol evidence, so this term "parol" is somewhat misleading. 5 Wigmore, Evidence (2d ed.) 235, sec. 2400.

In our opinion, the grounds set out in Nebraska cases cited by the plaintiff for allowing the introduction of parol evidence do not exist in the case at bar. The final written settlement was demanded by the plaintiff for the express purpose of settling once and for all the unhappy disputes which had been continually taking place. Upon his demand this final settlement agreement was drawn. Exhibits were attached thereto, showing exactly what policies could be reinstated by him, or premiums collected, which would entitle him to additional compensation. After the contract had been drafted to the entire satisfaction of the defendant, then the plaintiff requested the opportunity of taking the contract to a friend in whom he had entire confidence, and at the conclusion of their careful examination he came back to the defendant and demanded but one change in the written contract, viz., that, as he released the defendant from all liability, it should insert a statement to the same effect, and provide also that he be released from all liability, and this change, when inserted in the contract, met all of his demands. While it may be admitted that plaintiff in his brief has pointed out that there are many exceptions to the parol evidence rule as found in our decisions, this court has reached the same conclusion that the trial court did, and finds that the final written agreement was definite, complete, unambiguous, and conclusive between the parties; and, finding no error in the record, the judgment of the trial court is hereby

AFFIRMED.

CARTER, J., concurs in the result.

DAY, J., dissents.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. HOMER D. KIRK, DEFENDANT.
276 N. W. 380

FILED DECEMBER 10, 1937. No. 30304.

1. **Attorney and Client: PRACTICE OF LAW.** The supreme court of this state has the inherent power to define and regulate the practice of law and is vested with the exclusive power to determine the qualifications of persons who may be permitted to practice law.
2. ———: ———. The practice of law includes the preparing and filing of pleadings in the justice court, the trial of cases, the direct and cross-examination of witnesses, argument to the court, and the giving of advice to persons as to their legal rights.
3. ———: ———. In determining the illegal practice of law, it is the character of the act and not the place where the act is performed which is the decisive factor.
4. ———: ———. In construing sections 21-501, 21-603, and 21-904, Comp. St. 1929, relating to procedure in justice court, wherein appear the words, "plaintiff, his agent or attorney," or the words, "defendant, his agent," the term "agent," used in this connection, is to be construed as synonymous with the word "attorney," and only agents who are duly qualified and licensed attorneys may represent litigants in the practice of law in justice court.
5. ———: ———. "One may be guilty of the practice of law without a license, notwithstanding he receives no fee for the service performed." *State v. Barlow*, 131 Neb. 294, 268 N. W. 95.

Original action for contempt by the state, on the relation of the attorney general, against Homer D. Kirk, wherein defendant filed a demurrer. *Demurrer overruled.*

Richard C. Hunter, Attorney General, and *Bert L. Overcash,* for plaintiff.

F. A. Hebenstreit, for defendant.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

MESSMORE, J.

This is an original action for contempt for the illegal

practice of law by the defendant, wherein it is charged in counts 1, 2 and 3 of the information that defendant acted in the capacity of an attorney in proceedings in the county court of Richardson county, Nebraska, which is a court of record.

Counts 4, 5, 6 and 7 of the information charge the defendant with the practice of law in justice court without first having been duly admitted to the bar and licensed to practice law in the state of Nebraska. The defendant by his answer admits each and every allegation contained in counts 1, 2 and 3, and demurs generally to counts 4, 5, 6 and 7 of the information, and admits that he practiced law in justice court, as set out in said counts, but asserts that, assuming the same to be true, these acts on his part do not violate any of the laws of the state of Nebraska or the rules of this court. It is with this demurrer that we are concerned.

The charges contained in counts 4, 5, 6 and 7 of the information, relating to the practice of law by the defendant in a justice court, may be summarized as follows: Each count charges the defendant, being an unlicensed attorney, with commencing actions in behalf of certain plaintiffs against certain defendants, with pretending and purporting to represent and handle the entire litigation in said court and to counsel and advise with the plaintiffs; that he did draw, prepare and file the necessary pleadings in said actions; that he did represent said plaintiffs in the trial of said suits and examine and cross-examine witnesses, and that he presented and argued the cases in said court.

The issue stated is: Is it unlawful for a layman, as an agent, to prepare pleadings and conduct cases in a justice court in this state? The defendant relies entirely on section 7-101, Comp. St. 1929, which reads in part as follows:

"No person shall be admitted to practice as an attorney or counselor at law, or commence, conduct, or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings, or other papers

to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the supreme court of this state."

It will be noted that this statute is affirmative, and it is the fundamental law of this state that a person, not previously admitted to the bar by order of the supreme court of this state, cannot practice law in a court of record. The statute in question is silent as to any court in this state that is not a court of record. It does not prohibit a layman from practicing law in a justice court; neither does it provide for a layman to practice law in a justice court. Defendant contends that it is a function of the legislature of this state to amend the statute, and that it is not within the province of this court to write words into the statute that do not exist therein.

"The Constitution of this state does not, by express grant, vest the power to define and regulate the practice of law in any of the three departments of government." *In re Integration of Nebraska State Bar Ass'n, ante,* p. 283, 275 N. W. 265. In the body of the opinion in that case, quoting from 1 Andrews' American Law (2d ed.), sec. 182, p. 221, it was said: "It is a fundamental principle of constitutional law that each department of government, whether federal or state, 'has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department,* not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the Constitution.' (Cases cited)." It was further said: "The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government."

In *State v. Barlow,* 131 Neb. 294, 268 N. W. 95, it was said: "We have reached the definite conclusion that this court is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law in this state." This court has exclusive power to define

the practice of law. In the body of the opinion in *In re Integration of Nebraska State Bar Ass'n, supra,* it was further said: "The term 'inherent power of the judiciary' means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court."

"The proper administration of justice is the main business of a court, and whatever obstructs or embarrasses its chief function must naturally be under its control." *In re Integration of Nebraska State Bar Ass'n, supra.*

It will thus be seen from the foregoing holdings that this court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law. This brings us to the question: What constitutes the practice of law?

In *State v. Barlow, supra,* it was said in the body of the opinion: "An all-embracing definition of the term, 'practice of law,' would involve great difficulty." In the instant case, the practice of law would include the preparing and filing of the pleadings in the justice court, legal advice to persons represented by the defendant as to their rights in such cases, the direct and cross-examination of witnesses, the argument had to the court as to the legal rights of persons represented by the defendant, and all matters incident and necessary to the trial of said cases in the justice court.

In *Shortz v. Farrell,* 327 Pa. St. 81, 193 Atl. 20, in the body of the opinion it was said: "In considering the scope of the practice of law mere nomenclature is unimportant, as, for example, whether or not the tribunal is called a 'court,' or the controversy 'litigation.' Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor."

In *In re Ripley,* 191 Atl. (Vt.) 918, quoting from *People*

v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901, it was said in the opinion: "Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill."

The defendant, by his acts, comes directly within these definitions of practicing law. The illegal practice of law is to be determined by the character of the act, not the place where the act is performed. *Shortz v. Farrell, supra.*

A justice court in this state is a court created by the Constitution. Const. art. V, sec. 1. The defendant, by his own admission, practiced law in the justice court.

While the defendant does not raise the question as to sections 21-501, 21-603, and 21-904, Comp. St. 1929, relating to justice court procedure, such sections are mentioned in the brief of the state. The sections of the statute referred to provide generally that a plaintiff, his agent or attorney, defendant, his agent or attorney, may file pleadings and maintain proceedings in justice courts. The term "agent," used in this connection, is to be construed as synonymous with the word "attorney," and only agents who are also attorneys may represent litigants in the justice courts.

It is the duty and obligation of this court, vested with the inherent power, as stated in *In re Integration of Nebraska State Bar Ass'n, supra, State v. Barlow, supra,* and cases cited, to protect the rights of the litigants of this state in the courts.

During this particular time, in the history of this state and nation, with its complex society and the availability of persons possessing legal talent, duly licensed to practice law in the courts, the latitude previously had by laymen to practice in justice courts of this state has indeed served its purpose. This court does not, nor does it intend to, deprive persons of carrying on other ordinary business pursuits, such as the mere act of drawing

a promissory note, real estate mortgages, chattel mortgages, deeds or other similar instruments, where the person so drawing them is merely an amanuensis and does not advise or counsel as to the legal effect and validity of such instruments. This court does intend to require the practice of law to be performed by duly licensed practitioners of the law, meeting the qualifications as required by this court. The reason for this is to establish a legal safeguard where persons' rights may not be jeopardized and sacrificed because of the counsel and advice of unlicensed persons, giving or attempting to give legal advice, preparing pleadings, filing cases and examining witnesses in the courts of this state.

The defendant in his brief states that he received no fee for his services in one or more of the cases, as set out in the information. This does not change the situation. In *State v. Barlow, supra,* it was held: "One may be guilty of the practice of law without a license, notwithstanding he receives no fee for the service performed." The defendant also states in his brief that, in the event of the overruling of his demurrer herein, he desires to enter an unqualified plea of guilty to the counts of the information demurred to.

The demurrer is overruled, and defendant's plea of guilty to the four counts noted.

DEMURRER OVERRULED.

JOHN W. PLUMBLY, APPELLANT, V. HARVARD STATE BANK, APPELLEE.
276 N. W. 385

FILED DECEMBER 10, 1937. No. 30067.

Record and evidence examined, and *held* to sustain the findings and judgment of the trial court.

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

Carrico & Carrico, for appellant.

George W. Miller, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

Plaintiff, appellant, brought an action against defendant, appellee, in the district court for Clay county, Nebraska, to cancel a promissory note and chattel mortgage and enjoin threatened foreclosure or interference with plaintiff's use of the mortgaged chattels, alleging want of consideration therefor. A temporary restraining order was granted as prayed and bond furnished as provided by law. Defendant filed answer and cross-petition praying for judgment on the note and foreclosure of the chattel mortgage. Upon trial, the court dissolved the temporary restraining order and found generally for the defendant upon its cross-petition. Whereupon, appeal was taken to this court.

The only question for our determination is whether there was a consideration. The facts are not difficult. Plaintiff admits that he made, executed and delivered the promissory note and chattel mortgage to defendant, and that nothing was paid by him thereon except $35 which was a credit to him by reason of a bill of sale voluntarily given by plaintiff to defendant for a Ford car described in the chattel mortgage at a time when defendant was attempting to make collection of the note.

It appears from the record, and it is undisputed, that plaintiff's sister, Hattie L. Jeffs, was originally indebted to one F. E. Turner who threatened to sue her therefor. Whereupon she and plaintiff gave their promissory note to Turner for the amount of the debt. After this note was due, plaintiff alone renewed it upon two occasions by giving a new note, each time the interest being added to the principal,—the last renewal note being secured by a chattel mortgage. The last renewal note was due on September

1, 1935, but on July 16. 1935, before the same was due, plaintiff, at Turner's request, made, executed and delivered to defendant bank as payee his promissory note due October 14, 1935, which was secured by a chattel mortgage, and on July 17, 1935, the defendant credited Turner with $446.93, the full amount of the principal of the note, less 25 cents filing fee. On May 16, 1936, after this note was due and payable, plaintiff received an extension of time for payment of the obligation to July 15, 1936, by executing and delivering to defendant the note and chattel mortgage in question, whereupon the old note and chattel mortgage were returned to plaintiff.

Defendant was not a holder for value of any note that plaintiff executed to Turner, against all of which plaintiff urges failure of consideration. None of the Turner notes were ever assets of defendant. They were all returned to plaintiff upon the giving of renewal notes. Defenses, if any, that could be urged against him in the original transactions, or any of them, cannot be urged by plaintiff in this action. We, therefore, confine our discussion to the transactions with the bank. Plaintiff's contention that the trial court erred in holding that there was a consideration for the giving of the note and chattel mortgage in question is without support in the evidence or precedent in the law.

The burden of proving want of consideration was upon plaintiff, the party alleging it. *Farmers & Merchants State Bank v. Kuhn,* 125 Neb. 457, 250 N. W. 652; *Neslund v. Kinnan,* 129 Neb. 279, 261 N. W. 358. "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Comp. St. 1929, sec. 62-201. "Value is any consideration sufficient to support a simple contract." Comp. St. 1929, sec. 62-202. See, also, *Cozad State Bank v. McLaughlin,* 128 Neb. 87, 258 N. W. 36. "There are two kinds of consideration,—that which confers a benefit upon the promisor and that which causes a detriment to the promisee.

Either is a valid consideration which will support a contract." *United States Fidelity & Guaranty Co. v. Curry,* 126 Neb. 705, 254 N. W. 430.

Respecting the present transactions, Turner was primarily plaintiff's creditor upon a promissory note secured by chattel mortgage. His existing creditor was paid by his first note and chattel mortgage to defendant bank. He was no longer indebted to Turner but became the debtor of the bank. That this was done before his debt to Turner was due, together with his voluntary payment of $35 to defendant, later made by a surrender of part of the security therefor, implies his knowledge and consent. It is elementary that payment of his obligation by defendant was a sufficient consideration for his note and chattel mortgage to defendant. *Vybiral v. Maly,* 123 Neb. 436, 243 N. W. 268; *Farmers & Merchants State Bank v. Kuhn, supra.* The renewal thereof was likewise as effectual. *Stroud v. Payne,* 124 Neb. 612, 247 N. W. 595.

The law and the evidence both conclusively support the justice of the findings and judgment of the trial court.

AFFIRMED.

FRANK J. FRITSCHE, APPELLANT, V. JOHN H. TURNER, TRUSTEE, ET AL., APPELLEES.

276 N. W. 403

FILED DECEMBER 15, 1937. No. 30099.

1. **Mines and Minerals: LEASES: CONSTRUCTION.** An oil and gas lease, providing that, unless work is commenced by a certain time, or unless the lessee pay a rental stated to renew the lease, it shall terminate, confers an optional right upon the lessee and should be strictly construed in favor of the lessor and against the lessee.
2. **Fraud** is never presumed but must be clearly proved by the party pleading it and relying upon it.
3. **Record** examined, lease ordered canceled, and judgment as to "royalty deed" affirmed.

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

Butler & James, Frank B. Morrison and *Carl E. Peterson,* for appellant.

Don Kelley and *Courtright, Sidner, Lee & Gunderson, contra.*

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

GOSS, C. J.

Plaintiff appeals because the district court refused to cancel an oil and gas lease in which he was lessor and refused to set aside a so-called "royalty deed" made by him.

Plaintiff is the owner of 2,600 acres of land in Frontier county. On September 15, 1932, John H. Turner and others were seeking to acquire a large block of leases of land in that neighborhood with the idea of prospecting for oil and gas. On the day named, plaintiff leased his land for five years, or so long as gas or oil was produced, to John H. Turner, Trustee, one of defendants. Plaintiff was to receive one-eighth of the gross proceeds of the gas or oil. If no well should be commenced on the land by September 15, 1934, the lease was to terminate unless the lessee paid $650 for the succeeding year. Likewise, the commencement of the drilling of a well could be postponed from year to year upon the payment each time of a like annual rental. Farmers Security Bank of Maywood was named as the depository where the rentals might be paid or tenders made to lessor's credit. It was also provided in the lease that, if lessee, his heirs, assigns or legal representatives should fail to pay the rentals within 30 days after they became due, an affidavit before a notary public filed in the recording office should operate as a cancelation of the lease.

On the same day, September 15, 1932, at the same time the Turner lease was executed, plaintiff executed another

instrument in which defendant Charles W. Kelley, Trustee, was the grantee, conveying an undivided one-half interest "to all of the oil, gas and other minerals in and under, and that may be produced from" the land (describing 2,280 acres more or less). This instrument refers to the land as being "now under an oil and gas lease executed in favor of John H. Turner, Trustee," and is expressly made subject to the terms of that lease, but provides that if, for any reason, the lease should be canceled, the grantee Kelley should be considered the owner of one-half of the lease interests and one-half of all oil, gas and other minerals under the land for a period of 20 years and as long thereafter as oil and gas or either of them is produced from said land.

The petition further alleged that John H. Turner, Trustee, and Charles W. Kelley, Trustee, solicited plaintiff to sign the instruments and that the instruments "were represented to be an oil lease," that they were executed by plaintiff without advice of counsel, that plaintiff was fraudulently induced to execute them, that there was no consideration for their execution, and that plaintiff never had any intention of selling or conveying any mineral rights in the land. The petition then alleged that Kelley, Trustee, conveyed part of his interest in the mineral rights to John P. McCoy and that McCoy conveyed to various parties from time to time certain fractions of his interests, and that these conveyances are recorded in the miscellaneous records of the county; that Turner, Trustee, conveyed all his rights under the lease to Tur-Mac Oil Corporation. So the various grantees, eleven in number, were made parties-defendant, in order, probably, to allow plaintiff to quiet his title, as he prayed. Plaintiff further alleged that there was fraud in procuring the instrument conveying the mineral rights in that defendants Turner and Kelley represented to him that it was "a part of the oil lease," that plaintiff never read said purported sale and did not know the contents thereof, but relied on their representations; and that there was no consideration for the execution thereof. The prayer

asked for a cancelation of the lease and of the sale of the mineral, oil and gas rights, and that title be quieted in plaintiff.

The answer admitted the execution of the lease and royalty deed and denied all other allegations of the petition. Defendants Turner and McCoy specifically denied that the royalty deed was represented to be an oil lease, alleged that plaintiff read and examined the deed before he signed, that he received the consideration named, that it was an adequate consideration and that there was an additional consideration in that Turner and McCoy were, as plaintiff knew, obtaining oil leases and royalty deeds for the purpose of raising funds to explore the region, and at the time he executed these instruments plaintiff requested Harry Hall (his banker) to hold the instruments in escrow until the block of leases was core drilled by Turner and McCoy and they were so held until these parties made a complete geological survey of the area and checked it by core drilling nine holes to a depth of over 1,200 feet, whereupon Harry Hall delivered to Turner and McCoy the lease and royalty deed.

The answer further alleged that defendant Big Indian Oil & Development Company, relying upon the validity of the lease and royalty agreement, agreed with Turner and McCoy to furnish them $5,000 and did in fact furnish them over $4,000 to conduct the geological survey, none of which they would have done without the security of the instruments; that, relying upon these agreements, defendant Big Indian Oil & Development Company was thereby induced by plaintiff to change its position, will suffer irreparable damage if plaintiff is permitted to prevail, and plaintiff is thereby estopped to deny the validity of the royalty deed.

The instruments were executed September 15, 1932. Plaintiff testified that they were brought out to his home and that defendant Turner, Harry Hall (who was the banker and notary public), defendant McCoy, and some one else, were there. He thinks McCoy did the talking.

Plaintiff testified that he cannot read, but can sign his name. The petition does not plead that he cannot read. He testified that no money was paid to him that day, but two dollars was paid to him afterwards and they told him the instruments would be kept in the bank "till they started an oil well." On cross-examination he testified that, when the papers were signed, there was no conversation about them except that McCoy said, "We have an oil lease," that he did not ask Hall or any one else to read them to him. There was no suggestion in plaintiff's testimony that Mr. Hall, his banker, took any part in securing the instruments save to take the acknowledgments.

John P. McCoy testified that he was a geologist and interested in getting a block of leases for gas and oil exploration, that he was present when Fritsche signed the instruments, that Hall took the instruments to the bank to hold until certain exploration work was done, that nine holes were core drilled and other geological work was done, that the expense of the exploratory work was $4,200 and that the royalty deed and gas lease were then delivered by Mr. Hall in accordance with the oral agreement made on September 15, 1932; that as consideration for said instruments Mr. Hall paid Mr. Fritsche two dollars and Mr. Fritsche receipted for it; that the exploratory work was an added consideration as it enhanced interest in the lands as oil and gas lands. Plaintiff admitted that he got the two dollars; August 18, 1934, he executed an instrument waiving the rentals from September 15, 1934, to September 15, 1935.

The evidence shows that only about $30 had been deposited with the Maywood Bank to apply on the rentals due September 15, 1935. The suit was commenced October 5, 1935. So the parties making the lease were liable and the lease was subject to cancelation. The district court ignored this, probably because the lease itself provided, as shown in our statement of the facts, for cancelation by another method; and the district court, in effect, decided only that the proofs were not sufficient to cancel

the royalty deed, as to which rights had vested in the appellees, and the evidence of which was not considered by the trial court as sufficient to sustain the burden undertaken by plaintiff and thus to divest appellees of those rights.

In his findings of fact in the decree the trial court, speaking of the royalty deed and passing on that alone, said:

"The plaintiff bases his action upon alleged fraud and misrepresentation and upon alleged failure of consideration. The charge of fraud and misrepresentation is very limited, being, 'that it was signed without advice of counsel' and that it was obtained 'from the plaintiff by fraud and misrepresentation in this, that defendants represented to the plaintiff that the same was a part of the oil lease set forth in paragraph two herein, that plaintiff never read said purported sale and did not know the contents thereof.' There is no charge that the plaintiff was unable to read or illiterate, or that anything was done to prevent his reading the contract or having it read or explained to him or to induce him not to do so. On the trial and in the argument, the issue was broadened out a little by the offer of testimony that plaintiff was unable to read.

"It appears that there were at least three other persons present at the time the contract was entered into by the plaintiff, one of whom was plaintiff's banker or the cashier of the bank with which he had done business for some time; another was one McCoy, whom plaintiff stated that he had never seen before; that he relied upon what McCoy said and appears to have made no further inquiry or investigation. There is a conflict in the testimony of the plaintiff and McCoy but, giving the testimony of the plaintiff the most favorable consideration, the evidence of fraudulent misrepresentation is very meager. Fraud is never presumed but must be proved, and the burden of proving it is upon the party alleging the fraud. The evidence is not sufficient to sustain the charge of failure of consideration. On the issues as made by the pleadings and the

evidence, the court finds generally in favor of the defendants and against the plaintiff."

In *McKinlay v. Feagins,* 82 Okla. 193, 198 Pac. 997, the syllabi say:

"An oil and gas lease contained the following provision: 'If no well be commenced on said land on or before the 26th day of June, 1919, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or to the lessor's credit, in the Farmers' State Bank at Newkirk, Oklahoma, or its successors, which shall continue as the depository, regardless of changes in the ownership of said land, the sum of forty dollars, which shall operate as a rental and cover the privilege of deferring the commencement of a well for six months from said date, and in like manner and upon like payments, or tenders, the commencement of a well may be further deferred for a like period of the same number of months successively.' *Held,* a failure on the part of the lessee to commence the drilling of a well or to pay the rental as stipulated automatically terminated the lease contract.

"An oil and gas lease containing the 'unless' clause confers an optional right upon the lessee, and should be strictly construed in favor of the lessor and against the lessee, and time is of the essence of the contract."

The foregoing case is typical of the almost unanimous holding in all the states where gas and oil are found. We are of the opinion that it would have been better had the trial court canceled the lease itself in so far as it did not interfere with vested rights of the appellees or of any of them; that is, of rights that have vested under the royalty deed as distinguished from the lease.

Plaintiff himself, owner of the land, made to Charles W. Kelley, Trustee, the royalty deed of one-half interest in the oil, gas and minerals that should be produced from his land. So Kelley and his assignees, or grantees, not being parties to the lease, would have vested rights in the oil, gas and minerals produced.

We are of the opinion that the district court properly appraised the evidence and stated the correct rule of law when it found for defendants as to the royalty deed. Fraud is never presumed but must be clearly proved by the party pleading and relying upon it. *Krelle v. Bowen*, 128 Neb. 418, 259 N. W. 48. The proof of fraud is, as the decree stated, very meager. It does not afford sufficient basis for a decree against defendants.

The judgment of the district court is affirmed as to the deed and is reversed as to the lease, and the district court is directed to enter a decree canceling the lease.

AFFIRMED IN PART AND REVERSED IN PART.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

CHARLES P. MEGAN, TRUSTEE, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

276 N. W. 391

FILED DECEMBER 15, 1937. NOS. 30263, 30264.

1. **Taxation.** Courts will not disturb assessments for taxation unless they are clearly shown to transgress reasonable limits.
2. ———: ASSESSMENT: RAILROAD PROPERTY. "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. Approximation to actual value is all that can reasonably be expected. If the value fixed by the state board bears a similar proportion to the actual value that the valuation of other property does, such a valuation for assessment purposes is valid." *Chicago, R. I. & P. R. Co. v. State*, 111 Neb. 362, 197 N. W. 114.

APPEAL from State Board of Equalization and Assessment. *Affirmed.*

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

Richard C. Hunter, Attorney General, and *Edwin Vail, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and KROGER, District Judge.

GOSS, C. J.

Plaintiffs in these two cases appealed from the assessment of the state board of equalization and assessment, fixing valuations of plaintiffs' separate properties for assessment purposes in the state for the year 1937. The cases were certified together, were brought to this court on one record, were briefed together, and were orally argued together. For brevity, plaintiff in first case will be called Omaha railroad and plaintiff in second case will be called Northwestern railroad.

The state board of equalization and assessment assessed the true value of the properties of the Northwestern railroad in this state at $11,021,777 and assessed the true value of the properties of the Omaha railroad in this state at $2,643,895.

While the complaints of these railroads before the state board included other things, the railroads limit themselves in their assignments of error to the following: That the board erred in including as a part of the system value of the Northwestern railroad for 1937 an item of $25,349,809, representing unpaid matured interest on outstanding bonds; and erred in including as a part of the system value of the Omaha railroad for 1937 an item of $11,277,052.50, representing unpaid interest on outstanding bonds. It is stated by appellants that each item was not only a duplication in the market value of the bond itself, but is a gross error *per se* and constitutes no evidence whatever of either system value or of Nebraska value.

The method of fixing the value of a railroad for assessment purposes is rather complicated, especially where such railroad is a part of a large system operating in other states. In view of the facts and the narrowing of the issues by the errors assigned in these cases, it is not necessary to delineate all the elements entering into the matter.

There are various standard methods of valuation of railroads for taxation purposes. For examples: The ad valorem method, by which the property is appraised the same as other property in the state; the capitalized income method, under which the net income is ascertained and the amount thus derived is capitalized at some fair rate of return; and the stock and bonds method, by which the value of the stocks, bonds and other outstanding indebtedness is considered with other property values with a view of arriving at a market value. These are not all the methods, but they suffice to show at a glance some of the more customary methods of valuation.

The Nebraska board in 1937 used the stock and bond method in arriving at the value of all railroads in the state. Where railroad companies are solvent this seems to be conceded to be a fair method, because there is no possible controversy over the matter of the current liabilities of such a railroad. But in the case of both the Northwestern and Omaha railroads, they were insolvent. Probably their inability to pay interest was the cause of their insolvency. By virtue of their insolvency they were not only unable to pay interest on their bonds, but were also unable to fund the interest in new bonds to be issued for that purpose in the customary manner of railroads unable to pay their current indebtedness with reasonable promptness. For this reason, the state board appraised these interest debts as current liabilities and considered them in connection with the current assets in arriving at the real system value of the properties for 1937. Of the system value of the Northwestern railroad 8.23 per cent. was allocated to Nebraska and of the Omaha railroad 9.37 per cent. was allocated to Nebraska. It seems that the unpaid bonds of the Northwestern system bear interest at the rate of $16,000,000 a year. If the roads should not be sold, it is apparent that in a few years their current liabilities will exceed the value of the roads.

We find in the record that the stock and bond method

was begun to be used in Nebraska in 1929 and has continued in use ever since; that in that period the Northwestern railroad has received a decrease in taxation of 63.49 per cent., the Omaha railroad has received a decrease of 63.62 per cent., whereas, the decrease of all taxable property, including railroads, has been 33.56 per cent., and the value of all property in the state, exclusive of railroads, has decreased only 32.72 per cent. We do not quote the figures in dollars and cents though they are in the record. It is suggested by Mr. Smith, Tax Commissioner, that it may be necessary in the future to follow some other method in appraising the value of insolvent railroads.

In the case of *Rowley v. Chicago & N. W. Ry. Co.*, 293 U. S. 102, the court said: "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property."

In the case of *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, the court say: "In determining the amount of the assessment the board was not bound by any formula, rule or method, but for guidance to right judgment it was free to consider all pertinent facts, estimates and forecasts and to give to them such weight as reasonably they might be deemed to have. Courts decline to disturb assessments for taxation unless shown clearly to transgress reasonable limits."

In the case of *Chicago, R. I. & P. R. Co. v. State*, 111 Neb. 362, 197 N. W. 114, this court, in an opinion by Judge Letton, said: "The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertain-

ment of actual value of such property. Approximation is all that can reasonably be expected." The eighth paragraph of the syllabus in that case is as follows: "There are no settled or infallible rules for the ascertainment of the actual value of railroad property for the purpose of taxation. Approximation to actual value is all that can reasonably be expected. If the value fixed by the state board bears a similar proportion to the actual value that the valuation of other property does, such a valuation for assessment purposes is valid."

In view of the fact that the stock and bond method was used by the state board, that it is one of the methods ordinarily used for ascertaining the value of a railroad for equalization purposes, and in view of the fact that the results in the instant cases show that the valuations are equitable and just when the valuations are compared with those of all other property in the state, we find no reversible error in the record.

The findings and judgments of the state board of equalization and assessment are affirmed in both cases.

AFFIRMED.

DAVE YOUNG V. STATE OF NEBRASKA.
276 N. W. 387

FILED DECEMBER 15, 1937. No. 30177.

1. **Burglary**: PROOF. To prove burglary, there must be evidence tending to prove the unlawful breaking and entering, and that such unlawful acts were committed with felonious intent, and such proof may be shown by direct or circumstantial evidence.
2. **Jury**. "Failure to challenge a juror for cause as to his competency, and to examine him or other witnesses in support of the challenge, is a waiver, even though the fact of incompetency is not known to the party until after verdict." 16 R. C. L. 284, sec. 100.
3. **Criminal Law**: OBJECTION TO JUROR: NEW TRIAL. An objection to a juror, raised for the first time in a second motion for a new trial, filed 14 days after the first motion for a new trial, such motion containing no showing of newly discovered evidence,

material for defendant's cause, which he could not, with reasonable diligence, have discovered and produced at the trial, is out of time and not authorized by section 29-2103, Comp. St. 1929, as amended by chapter 65, Laws 1935.

4. **Evidence** examined, and *held* sufficient for the jury to determine whether or not defendant is guilty as charged in the information, beyond a reasonable doubt.

ERROR to the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

J. J. Brown, for plaintiff in error.

Richard C. Hunter, Attorney General, Bert L. Overcash, Francis V. Robinson and *J. H. Falloon, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

EBERLY, J.

Plaintiff in error, Dave Young (hereinafter referred to as the defendant), was convicted in the district court for Richardson county of the offense of breaking and entering with intent to steal, and sentenced to one year in the state penitentiary at hard labor. Motion for a new trial was overruled, and the defendant prosecutes error to this court.

The state's evidence follows: Harold Noah, 16 years old, lived next door north of and in the same block with the Ada Kenn home. He testified that on the night of July 17, 1936, he was sleeping on the south porch of his home, about even with and directly north of the Kenn home, a distance of 50 or 60 feet, when he was awakened by the barking of a dog, and saw a light in the west window on the north side in the one bedroom of the Kenn home; that he called to his mother, who in turn called the police; that he could see quite plainly, was watching the house and did not see any one going in or coming out of the house after he first saw the light and saw the officers go to the house; that from the time he first saw the light until the officers arrived about 15 minutes elapsed. On cross-examination he testified that he was standing

near his mother for a certain interval of time and did not know whether he could quite see the Kenn house during that time; that one of the officers went to the rear and the other to the front door of the Kenn house.

David McCage, night officer, testified that he arrived at the Kenn home between 1:30 and 2 o'clock on the night in question, and, with officer Asendorff, went directly to the house, Asendorff to the rear of the house, which was on the west side towards the alley, and witness to the front, and could see a light in the northwest window; that he went into the house from the east and finally turned into one door in the kitchen, flashing his light, and met Ralph Asendorff coming out; that there was no light in the kitchen, but there was a light in the bedroom; that the bedroom door was open; that defendant came through the doorway, and that neither the defendant nor Ralph Asendorff said anything; that Ralph Asendorff had a hammer in his overalls and a pair of pliers; that defendant had a padlock on his person. The witness went back to the house later, found a crowbar in the bedroom standing by the dresser against the wall; witness noticed that one of the dresser drawers was open, and that a lady's purse on top of the dresser was open. The witness stated that on the previous afternoon he was at the house when they took Ada Kenn to the state hospital, and that the house was then in an orderly condition. On cross-examination he testified to a growth of weeds and brush on the premises, and that the gates were wired, the house being surrounded by a wire fence. This testimony was corroborated by Claude Asendorff, also a police officer and the father of Ralph Asendorff. It was shown that the defendant was dressed in an undershirt, overalls and without shoes. The testimony of Ralph Ramsey, deputy sheriff, disclosed that a search was made of the two men and that pliers, a hammer and a padlock were found. Further evidence in behalf of the state disclosed that on the afternoon that Ada Kenn was taken from her home the doors were nailed shut and the house locked;

also, there was evidence that the doors had been pried open by a crowbar or a pinch bar.

The defendant and Ralph Asendorff testified substantially to the following facts: Defendant, Ralph Asendorff and another party were sleeping in the yard on the defendant's premises, which was across the street from the Kenn home. Asendorff had been awakened by the barking of a dog, and he in turn had awakened the defendant, but did not disturb the third party. They noticed a light, and then went to the Kenn house. The rear door of the house was open and they entered the house through the front door, which was also open. They were there but a short time when the officers arrived. They were taken to the station, searched and placed in jail. The record shows some conversation had between the defendant, Ralph Asendorff and the officers, to the effect that defendant requested the officers to release him and stated that nothing would be said about it. The testimony of the officers was to the effect that no explanation was given, and that a sufficient length of time elapsed in which the defendant could have explained the reason for his being in the Kenn house. The explanation given at the trial was that the defendant and Asendorff had gone to the Kenn house in order to protect the property of Ada Kenn and to see who was there. It is further contended by defendant that the surrounding circumstances, viz., the weeds and accessibility to the basement, providing a place for marauders to hide, the testimony of one witness that he saw two men running down the alley at 2 o'clock on the night in question, and other circumstances all indicated that other persons had been in the house besides the defendant and Ralph Asendorff. Defendant also introduced witnesses who testified as to his previous good reputation. There was evidence of a padlock, similar to the one taken from the defendant, having been in the Kenn home. Defendant's explanation of his possession of the padlock was that he had purchased it at Montgomery Ward's store.

The fact that defendant, having lived in the community for nearly two months, knew that Ada Kenn had been taken to the state hospital; the fact that a hammer had been borrowed from defendant's premises by the officers who nailed shut the doors of the Kenn house; that a dresser drawer in the bedroom was open and a lady's open purse found on the dresser, while the house had been in an orderly condition when Ada Kenn was taken away; the failure of defendant to make an explanation, until the time of his trial, of his presence in the house; the padlock found on defendant which, although not positively identified as the one found in the Kenn home, was similar, in all respects, to the one missing from that house; the fact that the doors in the house were opened with a crowbar or pinch bar, even though the pinch bar was not introduced in evidence as belonging to this defendant or to Ralph Asendorff, but nevertheless a circumstance; the length of time that defendant and Asendorff were in the Kenn house, although the exact length of time was not fixed,—all these facts and circumstances are proper to be weighed against the evidence of the defendant in his explanation of his presence in the Kenn home.

Defendant contends that the verdict is contrary to law and is not sustained by the evidence, and cites section 28-538, Comp. St. 1929, and *Hayward v. State*, 97 Neb. 9, 149 N. W. 105. In the *Hayward* case, in the body of the opinion at page 11, it was said: "It is fundamental that, in order to prove burglary, there must be evidence tending to prove the unlawful breaking and entry, and that such unlawful acts were with felonious intent. * * * The act of breaking may be shown by proof, either direct or circumstantial. * * * The breaking must be accompanied by an unlawful intent; if not, it is not burglary. This intent may also be proved by direct or circumstantial evidence. * * * These rules are fundamental and well understood, are included in the statute," etc. It is for the jury to say, under proper instructions, whether or not

the defendant was guilty as charged in the information beyond a reasonable doubt.

The defendant contends that he was not given a fair trial on account of the misconduct of juror W. L. McCoy, who, on his *voir dire* examination, concealed the fact that he had been present in the courtroom during the trial of Ralph Asendorff, who was informed against jointly with the defendant, and whose trial was had on November 18, 1936, while the trial of this defendant was had on April 13, 1937. The juror was not challenged on this point on his *voir dire;* neither was complaint made in the first motion for a new trial filed on April 16, 1937. In the second motion for a new trial, filed April 30, 1937, the objection as to juror McCoy was first raised and supported by affidavits by members of defendant's family and one other, to the effect that juror McCoy was present at the trial of Ralph Asendorff during most of the time. Two affidavits by juror McCoy stated that he heard a part of the arguments in said case, but not sufficient for him to form an opinion. On his *voir dire* he stated that there was no reason why he would not make a fair and impartial juror and try the case on the evidence and instructions of the court.

It is obvious from the record that the objection to juror McCoy, raised after the trial and for the first time in a second motion for a new trial, clearly out of time, is not well taken and cannot be considered, for the reason that there is no showing of newly discovered evidence, material for defendant's cause, which he could not, with reasonable diligence, have discovered and produced at the trial. Comp. St. 1929, sec. 29-2103, as amended by chapter 65, Laws 1935.

"The general rule as to waiver of lack of qualification of a juror appears to be that qualifications, the lack of which does not affect the ability of the juror to render a fair and impartial verdict, are waived by failure to object to such juror till after verdict. And so it is that failure to challenge a juror for cause as to his competency, and

to examine him or other witnesses in support of the challenge, is a waiver, even though the fact of incompetency is not known to the party until after verdict." 16 R. C. L. 284, sec. 100. See *Seaton v. State,* 109 Neb. 828, 192 N. W. 501; *Hickey v. State,* 12 Neb. 490, 11 N. W. 744; *Ogden v. State,* 13 Neb. 436, 14 N. W. 165; *Turley v. State,* 74 Neb. 471, 104 N. W. 934. To hold otherwise would be to establish a precedent that a defendant, under similar circumstances, might await the decision of the court and jury as to his guilt or innocence, and subsequently raise a question as to the qualifications of a juror to sit.

The county board, 12 days before the beginning of the term of court, selected and certified to the clerk of the district court the names of 80 persons, qualified to sit as jurors at that term of court. Objection was made by defendant's counsel in that these names had not been selected and certified to the clerk at least 15 days before the beginning of the term, as provided in section 20-1603, Comp. St. 1929, as amended by chapter 36, Laws 1931. The court sustained the objection, quashed the entire panel, and called a new jury from the balance of the 80 names submitted to the county board.

In the case of *Fetty v. State,* 118 Neb. 169, 223 N. W. 955, where a jury were selected 13, instead of 15, days before the first session of the term of court, it was held that there was no error in proceeding to trial with the jurors selected. In the body of the opinion it was said that the purpose of this provision of the statute was to give the officers and those drawn for the jury panel "timely notice of their call to jury service. The law does not concern itself in favor of litigants and their counsel who may desire to know in advance of trial the personnel of juries. Indeed, the modern trend is against such a disclosure." The defendant at no time claimed any prejudice by reason of the selection of the jury in the instant case, and raised no objection to it in his original motion for a new trial.

Defendant contends that the county attorney was guilty of misconduct in examining certain witnesses. No objection was interposed to certain questions for which defendant claims misconduct on the part of the county attorney. In asking other questions as to whether or not Ralph Asendorff had been previously convicted of a felony, instead of stating the questions in the proper way, the county attorney designated the offenses with which the said Ralph Asendorff had been convicted, to which an objection was made as having been already asked and answered. Subsequently, an objection was made to the questions as incompetent, irrelevant and immaterial, and the court, in instruction No. 10, informed the jury that such testimony went only to the credibility of the witness and was to be considered by the jury for no other purpose. While it is true that the county attorney did not properly ask the questions, we think there was no prejudicial error in this respect, especially where the court instructed the jury as to the effect of such evidence. The defendant further complains of misconduct on the part of the county attorney in his argument to the jury. While the record discloses the objection, there is nothing in the record as to what the county attorney did tell the jury about Ralph Asendorff, or as to his previous conviction for any offense. In order for a reviewing court to determine misconduct on the part of counsel, in this respect, it would be necessary to have the remarks of counsel made a part of the record, so that the court may be informed in this regard.

For the reasons stated in this opinion, the judgment of the district court is

AFFIRMED.

FRANK HARMER V. STATE OF NEBRASKA.
276 N. W. 378

FILED DECEMBER 15, 1937. No. 30183.

1. **Judgment.** A judgment in another case finding a fact now in issue is ordinarily not admissible.
2. **Criminal Law: NONEXPERT WITNESSES.** Nonexpert witnesses with an intimate personal acquaintance, who had an opportunity to observe the actions and demeanor of a person before, at, and after the time in question, may be permitted to testify as to his sanity or insanity after they have stated the facts supporting their conclusion.
3. ———. An examination of the evidence discloses that plaintiff in error was not prejudiced by any alleged error.

ERROR to the district court for Cass county: JOHN W. YEAGER, JUDGE. *Affirmed.*

C. E. Walsh, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Bert L. Overcash, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

DAY, J.

Harmer was convicted in the district court of the offense of breaking and entering, and was also found to be an habitual criminal. He appeals. The only defense was insanity, and the issues here relate to it.

In the night of April 25, 1936, Harmer was found by an awakened farmer in the farmer's garage at about 3:30 in the morning. Attracted by a light, the owner approached the building with a shotgun, and, when he heard a noise inside, shot the marauder through a hole in the garage. At the owner's command, Harmer, wounded and bleeding, crawled from the building through a hole. He was given medical attention, and removed to a distant hospital. When he recovered, he was returned by the sheriff to the county jail at Plattsmouth.

The garage was locked at the time, and an entry was

made through a hole made by tearing some boards loose from the side. A car inside was "jacked up," and some nuts had been removed which held the whole wheel and tire. Harmer's car was a short distance down the road, and the tire would fit his car.

Harmer was charged with being an habitual criminal in that in February, 1931, he was convicted of hog-stealing; and that in November, 1934, he pleaded guilty to the crime of chicken-stealing. On the latter offense he was paroled in December, 1934, because the docket recited that he was mentally incompetent, and his relatives offered to see that he received immediate medical attention. His parole was revoked in June, 1935, for violation, in that he had, while paroled, stolen chickens.

This simple recital of the evidence relating to the habitual criminal charge is made as an answer to the passionate appeal of the defendant's attorney, to show that Harmer at large has proved to be a menace to society. It seems a fair inference that these convictions may not comprise all of his depredations. Harmer was apparently charged with a felony under section 28-538, Comp. St. 1929. He was also charged with being an habitual criminal. The defense was insanity. The whole matter was properly submitted to the jury. Indeed, there is no complaint as to the instructions. The evidence is amply sufficient to sustain the verdict. It is not in conflict, with the possible exception of evidence of insanity, and the jury have resolved even that point against the plaintiff in error. The determination of this case depends upon the complaint that the trial court prejudicially excluded certain evidence relating to insanity. The court excluded the result of a hearing, including the proceedings, before the commissioners of insanity. This hearing was held after the commission of the complained act, and before the trial.

This is a criminal prosecution where the insanity at the time of the commission of the alleged offense was fully tried under a plea of not guilty. No reversible error could be predicated upon the refusal of the trial judge

to admit in evidence the result, finding, and proceedings of the insanity commission; because, even if admissible here, the defendant was in no way prejudiced. The same witnesses testified before the jury as in the *ex parte* sanity inquisition, and the jury had the benefit of their evidence. Although some states admit such evidence upon the hypothesis that such proceedings are *in rem*, there is no unity of judicial opinion as to this. A well-known author critically states the rule in substance to be that, at common law, a judgment in another case finding a fact now in issue is ordinarily not admissible. See Wigmore, Evidence, 1934 Supp., sec. 1671a. Where the result of an insane inquisition is admissible, the result is competent evidence, but recitals as to symptoms, or as to the cause and progress of the disease, are not competent proof of such facts. See 2 Wharton, Criminal Evidence (11th ed.) sec. 832, citing *People v. Cochran*, 313 Ill. 508, 145 N. E. 207. As stated in the first place, it is not reversible error, because not prejudicial to the rights of the plaintiff in error. The finding of an insanity commission is also subject to an attack before a jury in this jurisdiction.

The trial court also excluded some testimony of Mr. and Mrs. Prall as to the life history of the plaintiff in error. These witnesses were permitted to testify as to many facts which would bear upon the matter under consideration. An examination of the record discloses that many of the questions are not proper. Others are too remote to aid in reaching a verdict; and still others ask witnesses to state conclusions. Our attention is not focused upon any particular questions. The rule relating to nonexpert witnesses was carefully considered in *Torske v. State*, 123 Neb. 161, 242 N. W. 408. After citing numerous authorities, the court in substance held that nonexpert witnesses with an intimate personal acquaintance, who had an opportunity to observe the actions and demeanor of a person before, at, and after the time in question, may be permitted to testify as to his sanity or insanity after they have stated the facts supporting their conclu-

sion. Of course, as stated there, the worth of such an opinion depends upon the facts and circumstances related by the witnesses, as the jury reaches their own conclusion from the facts which they find to be true, aided by the conclusion of the witnesses. With the rule permitting a nonexpert witness to testify in mind, we do not find any prejudicial error in the exclusion of any evidence of Mr. and Mrs. Prall.

Lastly, the plaintiff in error insists that it was error to exclude the statement of the trial court in December, 1934, when his sentence was suspended, and he was released on his own recognizance after he had pleaded guilty to a felony. This is referred to as a parole, and was subsequently revoked as heretofore stated. Let us quote from an exhibit, the journal entry, as follows:

"The information was read to said defendant to which he entered a plea of 'guilty,' and it appearing to the court that the defendant is not mentally competent and his relatives being present in court with him offered to see that the defendant was given medical care immediately."

Mental incompetency is merely the reason given by a trial judge for entering another judgment. A perusal of this entire record is impressive for that it reveals that the plaintiff in error was not prejudiced, but that he had the benefit of every legal safeguard to which he was entitled.

AFFIRMED.

EDNA SMITH, APPELLANT, V. FRANK RIZZUTO, TRUSTEE, APPELLEE.

276 N. W. 406

FILED DECEMBER 15, 1937. No. 30110.

1. Wills: DEVISE TO TRUSTEE. A testamentary trust which devises real estate to a trustee in trust to sell, call in and convert the same into money, with power in his discretion to postpone such sale, and to invest such money derived therefrom, all for the

benefit of a designated *cestui que trust*, conveys the fee simple title thereto to the trustee.

2. ———: ———. The title to the real estate included in such a testamentary trust vests in the trustee immediately upon the death of the testator.
3. Trusts. A testamentary trust once created is not affected by the death of the settlor before notice of the trust to the trustee or acceptance by him.
4. ———: BOND. The provisions of section 30-1801, Comp. St. Supp. 1935, providing for the giving of a bond by a testamentary trustee, are not a bar to the vesting of title to the trust property in the trustee immediately upon the death of the testator. A failure to comply with this statute within twenty days amounts only to a declination of the trust at the end of the period.
5. ———: TRUSTEES: LIABILITY. "The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust." Restatement, Trusts, sec. 264.
6. ———: ———: ———. If the liability, however, was incurred in the proper administration of the trust and the trustee was not personally at fault in incurring the liability, he is entitled to indemnity out of the trust estate.
7. ———: ———: ———. Where liability of a trustee arises from the mere fact that the fee title to the trust property is in the trustee, the liability of the trustee to third persons is limited to the extent to which the trust estate is sufficient to indemnify him where he is without fault and where he is not responsible for the insufficiency of the estate to make indemnity.
8. Landlord and Tenant. While it is the general rule that a landlord is not bound to keep leased premises in repair, in the absence of an agreement to do so, a recognized exception is that a lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the purpose for which they were intended.

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

Johnsen, Gross & Crawford, contra.

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

CARTER, J.

Plaintiff commenced this action against Frank Rizzuto, trustee under the last will of A. R. Rizzuto, deceased, to recover damages for injuries sustained when she slipped on some ice on the porch of an apartment house belonging to the trust estate. The trial court sustained a general demurrer to the petition and dismissed the action. Plaintiff appeals.

The petition alleges that A. R. Rizzuto died on January 11, 1934, leaving a will which contained the following provisions: "I devise and bequeath all my real and personal estate and effects unto my trustee, upon trust to sell, call in and convert the same unto money (with power in his discretion to postpone such sale, calling in and conversion), and after payment of my debts, and funeral and testamentary expenses, to invest the residue of such moneys in his name as trustee, in any of the investments authorized by law, and to stand possessed of such investments and of all parts of my estate for the time being unsold." It is also pleaded that plaintiff was a tenant of defendant in the apartment house during the times hereinafter mentioned.

Plaintiff further alleges that on January 14, 1934, she slipped upon some ice that had been permitted to accumulate upon a porch of the apartment house because of the negligence of defendant in not keeping the gutters, pipes and spouts on the house in a proper state of repair and resulting in the injuries of which plaintiff complains.

We are convinced that the testamentary trust set out in the will of A. R. Rizzuto conveys the fee simple title to the property involved herein to the named trustee in the will. An authoritative text states the rule as follows:

"If the trustee takes an estate in land, the extent of the estate which he takes depends upon the manifestation of intention of the transferor. In the absence of evidence

of a contrary intention of the transferor, the trustee takes an estate of such extent that he may perform the trust by exercising powers which are incident to the ownership of such an estate without the necessity of resorting to powers over an estate not held by him.

"The trustee may take an estate in fee simple although the estate is limited to him without mention of his heirs; and he may take an estate less than a fee although the estate is limited to him and his heirs. If the trustee is given power to make a sale or mortgage of the fee simple or to convey a fee simple to the beneficiaries, the trustee takes an estate in fee simple in the absence of evidence of a different intention of the transferor." Restatement, Trusts, sec. 88, comment *d*.

The situation in the case at bar is identical with that in Illustration 3, sec. 88, Restatement, Trusts, which is as follows: "A, the owner of Blackacre, transfers Blackacre to B in trust to pay the income to C during C's lifetime and with power to sell Blackacre and invest the proceeds and pay the income to C for life. B takes an estate in fee simple in trust."

It necessarily follows that the title to the trust property vested in the trustee immediately upon the death of the testator. This court has repeatedly held that title to land cannot be in abeyance or without an owner, even for a single moment. *Clark v. Fleischmann,* 81 Neb. 445, 116 N. W. 290. A text-writer states the rule to be: "Unless something in the will indicates a contrary intention, a testamentary trust ordinarily goes into effect upon the death of the testator." 69 C. J. 759. It is fundamental that a trust once created is not affected by the death of the settlor before notice of the trust to the trustee or acceptance by him. Restatement, Trusts, sec. 35. See, also, comment *a* thereunder.

Appellee contends that the provisions of section 30-1801, Comp. St. Supp. 1935, requiring all testamentary trustees to give bond to the county court having jurisdiction of the probate of the will which created the trust,

must be complied with before he can be trustee and title to the trust property vest in him. A reading of section 30-1802, Comp. St. Supp. 1935, convinces us that such was not the intention of the legislature. This section reads: "Any person appointed trustee by any will who shall refuse to give the bond herein required or neglect to do so for twenty days after receiving notice that such bond is required shall be deemed to have declined such trust." It is evident that the failure to furnish bond does not prevent the trustee from becoming such upon the death of the testator. A failure to comply with the statute amounts only to a declination of the trust which presupposes the existence of the trustee prior thereto. We necessarily conclude that defendant was, on the date of the injury complained of, the testamentary trustee of the estate of A. R. Rizzuto and that title to the real estate included in the trust vested in defendant immediately upon the death of the testator.

It is the general rule that a "trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust." Restatement, Trusts, sec. 264. Comment *a* thereunder states the scope of the rule to be as follows: "The rule stated in this section is applicable whether the trustee committed the tort intentionally or negligently or without fault, whether his conduct consisted in action or failure to act, and whether or not he was violating his duties as trustee in acting or failing to act." We therefore conclude that the petition states a cause of action against the defendant.

The question immediately arises as to the nature of the liability and the right of the defendant to be indemnified from the trust estate. While "the trustee is personally liable to third persons for torts committed by him in the course of the administration of the trust, if the liability was incurred in the proper administration of the trust and the trustee was not personally at fault

in incurring the liability, he is entitled to indemnity out of the trust estate." Restatement, Trusts, sec. 247, comment *a*. As to whether a trustee is personally liable for the amount of a judgment in excess of the amount that the trust estate is able to pay raises another question. We are constrained to the view that, if the liability arises from the mere fact that the fee title to the trust property is in the trustee, the liability of the trustee to third persons is limited to the extent to which the trust estate is sufficient to indemnify him where he is without fault and where he is not responsible for the insufficiency of the estate to make indemnity. See Restatement, Trusts, sec. 265.

Appellee contends that the defendant cannot be sued in his capacity as trustee and for that reason the petition does not state a cause of action. The action was commenced against "Frank Rizzuto, trustee under the last will of A. R. Rizzuto, deceased." We are of the opinion that Frank Rizzuto is personally designated a defendant and that the addition of the words signifying that he was a trustee is merely *descriptio personæ* and surplusage. *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475; *Belvin's Ex'rs v. French*, 84 Va. 81, 3 S. E. 891. We do not doubt that there are cases where the trust estate may be sued directly by one claiming damages for which the trust estate might be liable, as where the instrument creating the trust makes the trust estate liable, or where it comes within one of the recognized exceptions to the general rule. As this case is one falling within the general rule, the defendant personally is the proper defendant and we hold that he is so designated by the petition.

Appellee further contends that a landlord is not bound to keep leased property in repair unless he contracts to do so. While this is a proper statement of the general rule, a recognized exception is that a lessor is bound to exercise reasonable care in keeping premises used in connection with but not demised to the lessee reasonably safe for those having lawful occasion to use them for the

purpose for which they were intended. *Randall v. First Nat. Bank*, 102 Neb. 475, 167 N. W. 564; *Blotcky v. Gahm*, 108 Neb. 275, 187 N. W. 640; *Markussen v. Mengedoht*, 132 Neb. 472, 272 N. W. 241.

After giving the allegations of fact contained in the petition the weight to which they are entitled on general demurrer, we have come to the conclusion that the petition states a cause of action and that the trial court erred in sustaining the demurrer and dismissing the action. The judgment of the trial court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

JOHN J. CARMODY, APPELLANT, V. L. L. CORYELL OIL COMPANY, APPELLEE.
276 N. W. 383

FILED DECEMBER 15, 1937. No. 30139.

1. **Action.** Ordinarily, where a statute gives a right that did not previously exist and prescribes a remedy for the enforcement of the same, that remedy is exclusive.
2. **Master and Servant.** Under the National Industrial Recovery Act there are only two methods of enforcing a Code, one by a suit in equity to restrain violations and the other by criminal prosecutions, and as to both only the United States district attorney can institute the proceedings. 48 U. S. St. at Large, 195, ch. 90, sec. 3 (c); 48 U. S. St. at Large, 195, ch. 90, sec. 3 (f).
3. ———. Under this act, a private person, firm or corporation cannot maintain an action for damages for the violation of a Code of fair competition promulgated under the act.

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

Burbank & Burbank, for appellant.

Richard B. Travis and *Tunison & Joyner, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

CARTER, J.

Plaintiff commenced this action against the L. L. Coryell Oil Company to recover the difference in the amount of wages paid him as an employee in 1933 and 1934, and the amount he was entitled to receive under the President's Reemployment Agreement and the Code of Fair Competition for the petroleum industry promulgated under the National Industrial Recovery Act of June 16, 1933. Plaintiff also sues on the assigned claims of 29 other employees who were similarly situated. The trial court sustained an objection to the introduction of any evidence on the ground that the court was without jurisdiction of the subject-matter and dismissed the action. Plaintiff's motion for a new trial was overruled and this appeal taken therefrom.

The record discloses that on June 16, 1933, the National Industrial Recovery Act went into effect. On August 19, 1933, the Code of Fair Competition for the petroleum industry was approved by the president and went into effect on that date. The Coryell Oil Company subsequently complied with the petroleum Code. On May 27, 1935, the United States supreme court, in the case of *A. L. A. Schechter Poultry Corporation v. United States*, 295 U. S. 495, 79 L. Ed. 1570, declared the National Industrial Recovery Act to be in violation of the Constitution of the United States and consequently void. It is the contention of plaintiff that, as defendant complied with the National Industrial Recovery Act and the Code promulgated thereunder, defendant has waived his right to question the constitutionality of the act.

Plaintiff cannot recover in this action for another reason. It is a settled rule of law that, where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Blain v. Willson*, 32 Neb. 302, 49 N. W. 224; *Heist v.*

Jacoby, 71 Neb. 395, 98 N. W. 1058.

The act itself provides in part as follows: "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any Code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to institute proceedings in equity to prevent and restrain such violations." 48 U. S. St. at Large, 195, ch. 90, sec. 3 (c). The act also provides: "When a Code of fair competition has been approved or prescribed by the president under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense." 48 U. S. St. at Large, 195, ch. 90, sec. 3 (f).

There is no provision in the act, nor does it authorize a provision to be placed in any Code, giving the right to any private individual to commence an action to compel obedience to the act or any Code promulgated under it. See *D. R. Wilder Mfg. Co. v. Corn Products Refining Co., supra.*

In *Purvis v. Bazemore*, 5 Fed. Supp. 230, the court in dealing with the same clause said: "This clause, in my opinion, contemplates that actions to restrain violations of the National Industrial Recovery Act should be brought by the United States acting through its district attorneys and not by any individual members of an industry, and the district attorney is not movant here, but persons engaged in the same industry are complainants, and I do not believe they have any standing in court to ask for an injunction under the National Industrial Recovery Act."

In *Progressive Miners of America Local Union No. 109 v. Peabody Coal Co.*, 7 Fed. Supp. 340, the court in discussing the same clause of the act said: "The rule is

that, where a statute gives a new right and declares the remedy, any one seeking or relying on the right so given is confined for his remedy to that which is prescribed in the statute. 1 C. J. 988-990; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 28 Sup. Ct. Rep. 726, 52 L. Ed. 1096; *French v. Willer*, 126 Ill. 611, 18 N. E. 811, 2 L. R. A. 717, 9 Am. St. Rep. 651; *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. Rep. 398, 59 L. Ed. 520, Ann. Cas. 1916A, 118. The same rule would apply to a new right given by a Code which, as here, has the force of law, where the Code specifically declares the remedy. That it should apply to a Code such as we have here seems apparent."

Also, in the case of *National Foundry Co. v. Alabama Pipe Co.*, 7 Fed. Supp. 821, in discussing the same point the court said: "Clearly, neither of these sections authorizes any individual, firm, or corporation to sue at law or indeed in equity, for damages resulting from Code violations, or to petition for an injunction to prevent and restrain such violations. Since there is no such provision in the act, it must be concluded that it was not the intention of congress to permit any such multiplicity of suits as would arise from the bringing of actions by private parties."

Other cases sustaining our position that the district court was without jurisdiction of the subject-matter are: *Bookbinders' Trade Ass'n v. Book Manufacturers' Institute*, 7 Fed. Supp. 847; *Stanley v. Peabody Coal Co.*, 5 Fed. Supp. 612; *Harper v. Southern Coal & Coke Co.*, 73 Fed. (2d) 792.

It having been determined that the district court did not have jurisdiction of the subject-matter of the action, it is not necessary for us to pass on other questions raised in the briefs. The trial court properly dismissed the action.

AFFIRMED.

HAROLD F. ANSNES, APPELLEE, V. LOYAL PROTECTIVE INSURANCE COMPANY, APPELLANT.
276 N. W. 397

FILED DECEMBER 15, 1937. No. 30098.

Witnesses: PRIVILEGED COMMUNICATIONS. Where plaintiff offers evidence of his physical condition, he thereby waives the right conferred by section 20-1206, Comp. St. 1929, as to any physician who shall have attended him, even though such physician attended him before the time fixed by plaintiff's testimony as the beginning of his disability.

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

Shull & Stilwell and *Sidney T. Frum,* for appellant.

Bliven & McKinley and *S. W. McKinley, Jr., contra.*

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

KROGER, District Judge.

This is an appeal by the defendant from a judgment in favor of plaintiff on a health and accident insurance policy.

The defense interposed was a denial of liability on the ground that the plaintiff, in the written application for the insurance, made certain false statements regarding his previous health and concealed and suppressed facts regarding his then state of health, which information was material to the risk, and that had plaintiff truthfully stated the facts regarding his previous condition of health and his then condition, a policy would not have been issued.

The application for the insurance was made on June 19, 1933, and plaintiff testified that he became disabled on July 14, 1934, and that his disability has continued since that time. He described with considerable detail his physical condition, and called as a medical witness one Dr. Neil, who stated that plaintiff became his patient

on July 14, 1934, and testified fully as to plaintiff's physical condition at the time he first examined him and on subsequent dates.

The defendant produced as a witness one Dr. Legg and attempted to show by this witness that in 1931 and in 1932 and again in February, 1933, the witness had treated the plaintiff for pneumonia and that in February, 1933, advised plaintiff that he was suffering from endocarditis. This testimony was objected to by the plaintiff as being privileged under section 20-1206, Comp. St. 1929; the objection was sustained, and this ruling of the trial court is the principal error relied upon by appellant.

Section 20-1206, Comp. St. 1929, provides: "No practicing * * * physician * * * shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice."

Section 20-1207, Comp. St. 1929, however, provides: "The prohibitions of the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred; and if a party to any action * * * shall offer evidence with reference to his physical or mental condition, or the alleged cause thereof, * * * the right conferred by section * * * 20-1206 shall be deemed to have been waived as to any physician or surgeon who shall have attended said party."

Appellee contends that the waiver contemplated by section 20-1207 applies only to any physician who might have examined him since the time the disability in controversy began, and that since plaintiff and his physician fixed the beginning of disability as of July 14, 1934, and their testimony as to his physical condition was confined to that date and times subsequent thereto, there was no waiver of privilege as to any physician who might have examined him before that date. The difficulty with that line of reasoning is that section 20-1207 makes no such

distinction and the courts are not inclined to read into a statute exceptions that the legislature has not seen fit to make. The purpose of the enactment making disclosures by a patient to his physician confidential was to encourage the patient to more freely disclose his ailments in the knowledge that such information could not be divulged to his humiliation or disgrace. Where the patient himself makes a disclosure of his condition, there can be no further humiliation or disgrace in showing that such condition existed over a longer period of time than the patient in his disclosure might indicate. Such was the purpose of the testimony offered by the defendant in this case and the evidence was material to the issues and should have been received. The statute was never intended as a cloak for injustice or fraud and to give it the construction contended for by appellee would, in many instances, lead to just that result.

The identical question was before this court in the case of *Friesen v. Reimer*, 124 Neb. 620, 247 N. W. 561, where it was held that, if a plaintiff in a suit for personal injuries testifies with reference to her physical condition, she will be deemed to have waived her right of privilege.

Appellee attempts to distinguish *Friesen v. Reimer, supra*, from the case at bar because in that case the physician had examined the patient after the accident for which plaintiff was then seeking to recover damages. However, the physician was permitted to testify as to plaintiff's condition as it existed for several years prior to the accident in controversy and the holding was that in this there was no error.

We conclude that the trial court erred in rejecting the testimony of defendant's medical witness.

Another error assigned by appellant and discussed in the brief was that the court erred in giving instruction No. 8, in that in said instruction the court assumed the existence of certain facts concerning which there was no testimony. There is merit in the criticism of this instruction, but in view of the fact that a retrial of this

case is necessary and the error will not likely occur again, no further discussion is deemed necessary.

For the reasons stated, the judgment of the trial court is reversed and the cause remanded.

REVERSED.

GEORGE A. LANDGREN, APPELLANT, V. HOWARD W. HAMILTON, APPELLEE.
276 N. W. 659

FILED DECEMBER 17, 1937. No. 30089.

1. **Elections: CONTEST: PROCEDURE.** "The right, conferred by statute on a candidate for public office to contest the election of his apparently successful rival, is a special statutory proceeding, and all the conditions prescribed for its exercise must be strictly followed." *Wilson v. Matson*, 110 Neb. 630, 194 N. W. 735.
2. ———: ———: **BOND.** The filing of a bond for costs within 20 days after the votes are canvassed, as required by section 32-1020, Comp. St. 1929, is necessary to give the court jurisdiction. *Wilson v. Matson*, 110 Neb. 630, 194 N. W. 735.
3. ———: ———: ———. A bond, purporting to be given for costs under section 32-1020, Comp. St. 1929, but in which the liability of the sureties is limited to a stated penalty of $200, does not satisfy the provisions of the statute.
4. ———: ———. In an action involving an election contest, jurisdictional defects may be raised at any time before the trial ends.
5. ———: ———. *Held*, that the trial court was without jurisdiction and that the action was properly dismissed.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Waring & Waring and *Sloans, Keenan & Corbitt*, for appellant.

Robert G. Simmons, Hamilton & Landis and *Frederick Wagener, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

GOSS, C. J.

George A. Landgren and Howard W. Hamilton were candidates for the office of county judge of Fillmore county at the general election held November 3, 1936. As the result of the official canvass of the votes, Hamilton was declared elected and received his certificate of election. Landgren undertook to contest the election. Being a contest for the office of county judge, it was heard by the district court. Comp. St. 1929, sec. 32-1008. Defendant specially appeared and filed a motion to quash. It was overruled. Defendant then demurred on the grounds, among others, that the court had no jurisdiction of the parties or of the subject of the action, and that was overruled. Then defendant, preserving his special appearance, filed his motion to dismiss for the reason, among others, that the district court was without jurisdiction because plaintiff had failed to give bond conditioned as required by the laws of Nebraska. That motion was overruled. Thereupon, preserving his objections theretofore made, defendant also pleaded to the merits and the case was tried upon the petition, answer and reply. After a three days' trial to the court, the final journal entry, dated December 18, 1936, shows that the court sustained the motion of defendant to dismiss the action for eleven specified reasons. For the purposes of a decision here, it is necessary to quote only the tenth reason, which reads as follows: "That the plaintiff and contestant had not filed a bond conditioned to pay all costs, as required by the laws of Nebraska."

From the order dated December 28, 1936, overruling plaintiff's motion for a new trial, appeal was taken here.

After setting forth the necessity of filing a complaint, its time of filing, and its necessary contents, section 32-1020, Comp. St. 1929, says: "The contestant must also file a bond, with security to be approved by the clerk of the court or county judge, as the case may be, conditioned to pay all costs in case the election be confirmed, the complaint dismissed, or the prosecution fail."

The transcript does not show the times of filing, but the complaint was probably filed November 13, 1936, and the bond probably filed the same day as it was approved by the clerk of the court on that date. The body of the bond reads as follows:

"Know all men by these presents:

"That we, George A. Landgren, as principal, and Earl H. Wilkins and Carl E. Schneider as sureties, both of the county of Fillmore, and the state of Nebraska, are held and firmly bound unto Howard W. Hamilton for the use and benefit of himself and all persons interested, in the penal sum of Two Hundred and no/100 Dollars, for the payment of which we hereby bind ourselves, our heirs, executors, administrators and assigns.

"Whereas, George A. Landgren has commenced proceedings in the district court of Fillmore County, Nebraska, to contest the election of said Howard W. Hamilton to the office of County Judge of said county.

"Now, therefore, the condition of this obligation is such that, if the election of the said Howard W. Hamilton is confirmed, the complaint dismissed, or the prosecution fail, and said George A. Landgren shall pay all the costs of this case, then this obligation shall be void, otherwise to be and remain in full force and effect."

Construing section 2070, Comp. St. 1922, which is identical with section 32-1020, Comp. St. 1929, the late Judge Good said, in the syllabus of *Wilson v. Matson,* 110 Neb. 630, 194 N. W. 735:

"The right, conferred by statute on a candidate for public office to contest the election of his apparently successful rival, is a special statutory proceeding, and all the conditions prescribed for its exercise must be strictly followed.

"The filing of a bond for costs within 20 days after the votes are canvassed, as required by section 2070, Comp. St. 1922, is necessary to give the court jurisdiction to hear and determine an election contest."

In that case it was held in plain words that the provision of the statute "is clearly intended to be mandatory."

The court then said: "The rule is quite generally recognized that, in special proceedings, statutory requirements must be strictly complied with. Where a new remedy is created by statute, all the conditions prescribed for its exercise must be strictly observed. The legislature, in conferring the right of a candidate to contest the election of his rival, may impose such conditions as it deems proper. That the right to contest is a special proceeding and that the prescribed procedure and conditions must be strictly followed is generally recognized by the authorities," citing many cases.

The effect of *Platte Valley Public Power and Irrigation District v. Feltz*, 132 Neb. 227, 271 N. W. 787, is that jurisdictional defects may be raised at any time.

It may be thought that the penalty of $200 stated in the first paragraph of the bond as the limit of the liability of the sureties is enlarged by the provision in the last paragraph of the bond, but a more than superficial perusal of that condition shows that, if Landgren lose the contest and pay the costs, then the sureties will not be held; but if Landgren lose the contest and fail to pay the costs, then this obligation shall "be and remain in full force and effect." Then what does it bind the sureties to do? The answer is, to pay the costs up to the $200 they have agreed to pay and no more. Such a bond is not the bond contemplated by the mandatory statute fixed by the legislature for such special proceedings as this.

The conclusion to which the argument leads us is that the district court lacked jurisdiction to hear and decide the case upon the merits. This renders it unnecessary for us to decide the case upon the merits, as shown by the evidence preserved in the bill of exceptions. Whether the district court really intended to decide as we do the point upon which we rule is not clear from the record itself. But that is unimportant for, as the transcript shows, the court dismissed the action upon this and all other grounds contained in the motion of defendant. So we are satisfied to affirm the judgment of the district court and do so.

AFFIRMED.

KATHERINE WALTER, APPELLEE, V. SCHOOL DISTRICT NO. 34, PERKINS COUNTY, APPELLANT.
276 N. W. 666

FILED DECEMBER 17, 1937. No. 30109.

Courts. On appeal from the county court to the district court in an action for breach of contract for services of a school teacher for a definite term on a monthly salary, where she was discharged without cause in the midst of the term, the unpaid salary for full performance, in absence of any mitigation in damages, may be recovered on the appeal after expiration of the entire term of employment with the cause of action unchanged, though a smaller amount only may have been recoverable before expiration of the term, when the cause was tried in the county court.

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

Hastings & Hastings, for appellant.

Bruce K. Lyon, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

ROSE, J.

This is an action to recover damages for breach of a written contract evidencing the employment of Katherine Walter, plaintiff, to teach school in District 34, Perkins county, defendant, for the term of nine months, beginning September 2, 1935, for the salary of $60 a month.

Plaintiff taught school under her contract from September 2, 1935, until January 7, 1936, and had received for her services $240. She was discharged by defendant January 9, 1936, commenced this action in the county court of Perkins county February 6, 1936, to recover the stipulated salary of $60 a month to the end of the term, or for the remainder of $300. The county court sustained the claim of plaintiff in full and entered judgment in her favor for $300. Defendant appealed to the district court.

On appeal, plaintiff pleaded her qualifications, her con-

tract, her performance of duties as teacher until discharged, her discharge by defendant without just cause, her willingness to perform her contract in full, and her inability to procure other employment. In a lengthy answer defendant admitted execution of the contract, but charged plaintiff was not properly qualified to teach school in District 34; accused her of inefficiency, incompetency and negligence, giving instances; alleged good and sufficient cause for her discharge; pleaded she made false representations to procure the contract and was not entitled to any damage. Upon a trial before a jury, plaintiff proved the allegations of her petition. Defendant, at the close of the evidence on behalf of plaintiff, without offering any proof, moved the court to direct a verdict in her favor for damages on the basis of $60 a month from January 9, 1936, the date on which she was discharged, until February 6, 1936, the date of bringing her suit in the county court. The district court overruled this motion and defendant elected to stand upon it. As a result, the jury were excused and judgment was rendered in favor of plaintiff against defendant for $300, interest and costs. Defendant appealed to the supreme court.

The contention of defendant is that plaintiff was only entitled to damages at the rate of $60 a month from the date on which she was discharged until she brought her suit in the county court—January 9, 1936, until February 6, 1936. Defendant argues that it is only where the action is brought after the entire term of employment has expired, where there has been no opportunity for new employment or for other earnings in the meantime and where there has been no mitigation of damages, that the stipulated compensation is recoverable to the end of the term, citing *Carstens v. McDonald,* 38 Neb. 858, 57 N. W. 757; *Terry v. Beatrice Starch Co.,* 43 Neb. 866, 62 N. W. 255; *Hixson Map Co. v. Nebraska Post Co.,* 5 Neb. (Unof.) 388, 98 N. W. 872; *Fahey v. Updike Elevator Co.,* 102 Neb. 249, 166 N. W. 622; *Kring v. School District,* 105 Neb. 864, 182 N. W. 481; *Helwig v. Aulabaugh,* 83 Neb. 542,

120 N. W. 162; *Wirth v. Calhoun*, 64 Neb. 316, 89 N. W. 785.

If that is law in Nebraska, there are nevertheless other principles that control the decision in view of the undisputed facts. On appeal from the county court to the district court in an action for breach of contract for services of a school teacher for a definite term on a monthly salary, where she was discharged without cause in the midst of the term, the unpaid salary for full performance, in absence of any mitigation in damages, may be recovered on the appeal after expiration of the entire term of employment with the cause of action unchanged, though a smaller amount only may have been recoverable before expiration of the term, when the cause was tried in the county court. On undisputed facts proved by plaintiff at the time the case was tried on appeal in the district court, the measure of damages was the unpaid salary of $60 a month to the end of the term, or $300, interest and costs. The case was tried there October 14, 1936, after expiration of the entire term fixed by the contract, without any evidence of mitigation in damages.

Plaintiff introduced in evidence a certificate of the state superintendent of public instruction showing her qualifications to teach during the time stated in the contract of employment. The contract itself is in the record and it provides she shall receive no salary after her dismissal, if discharged for sufficient cause, thus implying contemplation of damages, if discharged without sufficient cause. There is no evidence of cause for her dismissal. She testified she could not get other employment. By motion of defendant in open court to allow her some partial damages, her dismissal without just cause was conceded. She was turned off in the midst of the school year. The key to the schoolhouse was taken from her. She offered to perform her contract to the end pursuant to its terms. Defendant continuously prevented her from doing so and from recovering anything until she closed her evidence in the district court. There had been no

tender of damages for the period between her dismissal and the bringing of her suit. After expiration of the entire term, defendant filed in the district court July 15, 1936, the answer denying liability for any damages. This answer contained the unproved charges of fraud, incompetency and negligence.

On appeal from the county court to the district court, the procedure pointed out by statute is as follows:

"The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." Comp. St. 1929, sec. 21-1305.

Interpreting statutory procedure a rule formerly stated reads thus:

"A case must be tried in the district court upon appeal upon the issues tried in the lower court. This does not mean that no issuable fact can be pleaded in a petition in the district court that was not alleged in the bill of particulars in the lower court. If the identity of the cause of action is preserved in the petition it is sufficient." *Jacob North & Co. v. Angelo,* 75 Neb. 373, 381, 105 N. W. 1089, 110 N. W. 570.

This was quoted and followed in *Weideman v. Estate of Peterson,* 129 Neb. 74, 261 N. W. 150. See, also, *Swenson Bros. Co. v. Commercial State Bank,* 98 Neb. 702, 154 N. W. 233. In an earlier case the court announced the following principle:

"On appeal, the amount of damages claimed on the same causes of action may be increased, if not beyond the jurisdiction of the lower court." *Plano Mfg. Co. v. Nordstrom,* 63 Neb. 123, 88 N. W. 164.

The cause of action was the same in both trial courts. In both, plaintiff claimed $300 for breach of the same contract. The petitions were the same, except that in the county court at the time of the trial the entire term of employment had not expired, while it had expired at the time of the trial in the district court. In both courts

plaintiff was entitled to recover some damages. The recovery in the district court was within the jurisdiction of the county court. To plaintiff's claim for $300, as pleaded, tried and determined in the district court, there was no defense, though the contentions of defendant were well presented in good faith.

AFFIRMED.

STATE, EX REL. WILLIAM H. WRIGHT, ATTORNEY GENERAL, APPELLEE, V. FREDERICK W. BARNEY, JUSTICE OF THE PEACE, ET AL., APPELLANTS.

276 N. W. 676

FILED DECEMBER 17, 1937. No. 30058.

1. **Pleading.** "Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling." *Worrall Grain Co. v. Johnson*, 83 Neb. 349, 119 N. W. 668.
2. **Appeal.** "Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed." *McIntyre v. Mote*, 77 Neb. 418, 109 N. W. 763.
3. ———. "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined." *Backes v. Schlick*, 82 Neb. 289, 117 N. W. 707.
4. **Constitutional Law.** "While the legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them." *State v. Nebraska State Bank*, 124 Neb. 449, 247 N. W. 31.
5. ———. "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." *State v. State Bank of Minatare*, 123 Neb. 109, 242 N. W. 278.
6. **Common Law.** "So much of the common law of England as is applicable to and not inconsistent with the Constitution of the United States, with the organic law of this territory (state), or with any law passed or to be passed by the legislature of this territory (state)," was adopted and declared

to be and now is the law within Nebraska. I Complete Session Laws, 1855-1865, p. 144.

7. ———. The words of the enactment "common law of England," as construed by this court, refer "to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil law system." *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705.

8. Prohibition. The doctrine of "prohibition" not only involves the definition of a substantive right, but has at all times constituted an essential remedy of the common law of England, administered through and by its superior courts of the common law as part of their common-law jurisdiction.

9. Common Law. The form and terms of our statute enacting the "common law of England" are a valid and effective exercise of legislative power, and, subject to the limitations therein expressed, create and constitute the "common law of England" a part of our substantive law, and are effective to substantially adopt as part thereof the procedure of "prohibition" as it existed at common law, and vest our district courts with original jurisdiction to administer the same.

10. ———. "The common law is in force in the various states of the Union, except in so far as it has been abolished by statute, as to the remedies for enforcing rights and redressing wrongs." 12 C. J. 194.

11. Action. Our Code provides that there shall be but one form of action, which shall be called a civil action. That provision has not changed the substantive rights of the parties. The substance of the common-law rules of legal procedure, and the principles by which the different forms of actions were previously governed, still remain as before. The abolition of the common-law names and forms of action has not and cannot change the essential character of judicial remedies.

12. ———: COMMON LAW. "An affirmative statute giving a remedy not known to the common law does not take away the common-law remedy." 12 C. J. 194. And, "A statute made in the affirmative, without any negative, express or implied, does not take away the common law." 12 C. J. 187.

13. Common Law. "When a statute abrogating a rule or principle of the common law is repealed, the common-law principle or rule is *ipso facto* revived, unless there is something to show a contrary intent on the part of the legislature." 12 C. J. 187.

14. Prohibition. The history of the enactment and repeal by the Nebraska legislature of the statutory provisions relative to the writ of certiorari in no manner supports the conclusion that the effect thereof is to abolish the writ of prohibition.

15. ———. "The writ of prohibition (in modern practice) is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction." 21 Standard Encyclopedia of Procedure, 801.
16. *State v. Hall*, 47 Neb. 579, 66 N. W. 642, *State v. Troup*, 98 Neb. 333, 152 N. W. 748, and *State v. Fulton*, 118 Neb. 400, 225 N. W. 28, examined and distinguished.
17. **Prohibition.** The district courts of this state have ample powers to administer, in proper cases, the remedy which a writ of prohibition affords.
18. **Pleadings** examined and *held* to support the judgment of the trial court.

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

Richard F. Stout, C. J. Campbell and *J. Jay Marx*, for appellants.

Richard C. Hunter, Attorney General, Perry, Van Pelt & Marti, Norval Brothers, Albert Johnston, William Niklaus, Hall, Cline & Williams and *Woods, Aitken & Aitken, contra.*

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

EBERLY, J.

This action was commenced in the district court for Lancaster county on November 19, 1936, by a "Petition for a Writ of Prohibition," in which the State of Nebraska, ex rel. William H. Wright, Attorney General, was plaintiff, and Frederick W. Barney, Justice of the Peace, and William R. Linch and Thomas P. Johnson were defendants. These defendants each separately demurred to the petition, which demurrers were by the trial court overruled. The defendants then separately answered in writing, their pleadings each being entitled "Answer * * * to petition and return to alternative writ of prohibition." To the defendants' pleadings the plaintiff replied by a general denial. The issues so formed came on to be heard in the

district court without the intervention of a jury, and the state introduced its evidence, at the close of which the defendants each moved the court orally for a dismissal of plaintiff's petition for the reason that the court had no jurisdiction to issue a writ of prohibition, and that the evidence presented was "wholly insufficient to support the writ." This motion was denied by the trial court. The defendants elected to offer no evidence in their behalf. Thereupon the district court entered findings generally in favor of plaintiff, and awarded a permanent writ of prohibition against the defendants as prayed. From the order of the trial court overruling their separate motions for new trial, defendants appeal.

The defendants failed to preserve the evidence adduced at the trial by a proper bill of exceptions duly allowed and settled by the district court, a fact which materially affects the scope of review on appeal.

It will be noted that, after the demurrers of the defendants were overruled, they each answered, and, upon issues joined, trial was had on the merits. As applicable to these facts, the rule approved in this jurisdiction is: "Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling." *Worrall Grain Co. v. Johnson,* 83 Neb. 349, 119 N. W. 668. See, also, *Palmer v. Caywood,* 64 Neb. 372, 89 N. W. 1034; *Citizens State Bank v. Pence,* 59 Neb. 579, 81 N. W. 623; *Lederer v. Union Savings Bank,* 52 Neb. 133, 71 N. W. 954; *Buck v. Reed,* 27 Neb. 67, 42 N. W. 894.

So too, "Under the practice of this court, where the record contains no bill of exceptions and the pleadings are sufficient to support the judgment of the trial court, it will be affirmed." *McIntyre v. Mote,* 77 Neb. 418, 109 N. W. 763. See, also, *McDaniel v. McDaniel,* 131 Neb. 639, 269 N. W. 380.

For, "In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was

correctly determined." *Backes v. Schlick,* 82 Neb. 289, 117 N. W. 707. See, also, *Hayes v. Pilger,* 110 Neb. 609, 194 N. W. 727; *In re Estate of Raymond,* 128 Neb. 568, 259 N. W. 522.

In view of the restrictions embodied in the instant record, the first, and probably the controlling, question is as to the existence of the remedy afforded by the writ of prohibition, and the jurisdiction of the district courts of this state to administer the same. We here use the term "jurisdiction" as expressing the concept of legal power to interpret and administer the law in the premises.

Section 1, art. V of our Constitution, provides: "The judicial power of the state shall be vested in a supreme court, district courts," etc.

Section 2, art. V, includes: "The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

Section 24, art. I of 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."

Section 9, art. V of the Constitution, provides: "The district courts shall have both chancery and common-law jurisdiction, and such other jurisdiction as the legislature may provide."

By the terms of these constitutional provisions, district courts were endowed alike with chancery and common-law jurisdiction. These terms "chancery" and "common-law" jurisdiction must be read in the light of their historical use and definition when incorporated as a part of the Constitution of 1875. Within their respective spheres each must be given identical force and effect.

In construing these constitutional provisions, in *State v. Nebraska State Bank,* 124 Neb. 449, 247 N. W. 31, it was announced, viz.: "This court is committed to the view that not only is equity jurisdiction conferred by the terms of the Constitution, but that, as thus conferred, it is beyond

the power of the legislature to limit or control; that while the legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. *Lacey v. Zeigler,* 98 Neb. 380; *State v. State Bank of Minatare,* 123 Neb. 109; *Burnham v. Bennison,* 121 Neb. 291." See, also, *State v. Farmers State Bank,* 121 Neb. 532, 237 N. W. 857; *Hall v. Hall,* 123 Neb. 280, 242 N. W. 607.

It is obvious that the exclusive and preeminent nature of the equity jurisdiction conferred on the district courts by these constitutional provisions is equally true of the common-law jurisdiction likewise vested in the same tribunals.

And, we are also committed to the view: "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." *State v. State Bank of Minatare,* 123 Neb. 109, 242 N. W. 278. See, also, *State v. Mitchell State Bank,* 123 Neb. 120, 242 N. W. 283.

Consistent with these constitutional provisions, in 1879 the legislature of that year enacted the following: "The district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." Comp. St. 1929, sec. 27-302.

The territorial legislature of Nebraska had by an enactment under the title, "An Act to put into force in this territory the common law of England," approved March 16, 1855, provided "That so much of the common law of England as is applicable to and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, be and the same is adopted and declared to be law within said territory." I Complete Session Laws, 1855-1865, p. 144. This provision was reenacted by the territorial legislature of 1866. II Complete Session Laws, 1866-1877, p. 12.

The "organic law" thus referred to expressly provided that the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this organic act, and provided for the organization of a territorial supreme court and territorial district courts; and also provided that the supreme court and district courts, respectively, shall possess chancery as well as common-law jurisdiction.

The state Constitution of 1866, by section 1, art. XI, directed: "And all laws now in force shall remain in force until altered, amended, or repealed by the legislature; Provided, wherever the word territory shall occur, it shall be construed to mean state, whenever it may be necessary, in order that such laws may conform to the state government."

In the Constitution of 1875 a similar provision continuing in force and effect legislation previously adopted forms a part of section 1, art. XVI thereof, and which in turn was carried into and forms a part of section 1, art. XVII of the Constitution as amended in 1920. Of the legislation thus so carefully preserved, a part thereof appears now as section 49-101, Comp. St. 1929, substantially unchanged except so far as alteration of terms was essential to conform to the fact of the adoption of state government.

The words of the enactment "common law of England," as construed by this court, refer "to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or Civil law system." *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705. See, also, *Meng v. Coffee*, 67 Neb. 500, 507, 93 N. W. 713; 12 C. J. 188.

One of the controlling questions now being considered is whether the common-law remedy of "prohibition" is embraced in our adopting statute as an integral part of our "common law."

As to the historical origin of this remedy under consideration, in High, Extraordinary Legal Remedies (3d

ed.) 707, it is stated: "The writ of prohibition is of very ancient origin, and it may be said to be as old as the common law itself. As indicating its early origin, it may be mentioned that Glanville, whose treatise, written about 1181, is the earliest known work upon English law, gives several forms of the writ as then in use."

In 8 Bacon, Abridgment of the Law, 206, the existence, use and purpose of the remedy of prohibition as defined by the common law of England from time immemorial is discussed in the following language:

"As all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was (a) framed; which issues out of the superior courts of common law to restrain the inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, etc., upon a suggestion that the cognizance of the matter belongs not to such courts. * * *

"The object of prohibitions in general is, the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice."

It follows that the doctrine of "prohibition" not only involved the definition of a substantive right, but has at all times constituted an essential remedy of the common law of England, administered through and by its superior courts of the common law as part of their common-law jurisdiction.

It must also be conceded that the form and terms of our

statute enacting the "common law of England" are a valid and effective exercise of legislative power. 59 C. J. 610; *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412.

It follows that the result of the legislative adoption of the common law of England, in view of our applicable constitutional provisions, was, subject to the limitations in that act expressed, effective to adopt as part thereof the procedure of prohibition as it existed at common law, and vested our district courts with original jurisdiction to administer the same.

See, also, Comp. St. 1929, sec. 20-2225.

Indeed, in discussing this subject, as presented by practice arising in the several states of the Union under modern conditions, a recognized authority on the subject says: "The writ of prohibition may be defined as an extraordinary judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is an original remedial writ, and is the remedy afforded by the common law to correct encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them by law. The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law entrusted." High, Extraordinary Legal Remedies (3d ed.) 705.

The generally accepted principles of construction applicable to our present situation seem to be: "The common law is in force in the various states of the Union, except in so far as it has been abolished by statute, as to the remedies for enforcing rights and redressing wrongs. And the

general rule is that an affirmative statute giving a remedy not known to the common law does not take away the common-law remedy." 12 C. J. 194.

It is the contention of appellants that, "Under original territorial act, the writ of certiorari (thereby authorized and provided for) was sufficiently broad to include the writ of prohibition and was the equivalent of such writ, but such writ was abolished under the Code Laws of 1857, 1858, 1859." With this contention, we cannot agree. Speaking generally such is not the effect of the adoption of the Civil Codes. "The Code provides that there shall be but one form of action which shall be denominated a civil action. This provision has not changed the substantive rights of the parties. The substance of the common-law rules of legal procedure, and the principles by which the different forms of actions were previously governed, still remain as before. As it has been said, the abolition of the common-law names has not and cannot change the essential character of judicial remedies. And the common-law names are still used in Code states for convenience." 24 Standard Encyclopedia of Procedure, 374. See, also, Comp. St. 1929, sections 20-101, 20-102, 20-103; *Milwaukee, L., H. & T. Co. v. Ela Co.*, 142 Wis. 424, 125 N. W. 903; *Hopkins v. Washington County*, 56 Neb. 596, 77 N. W. 53.

It is obvious that the rights secured by our legislative adoption of the common law of England were not substantially affected by the change of the form of procedure effected by the Codes; and if a change actually occurred it must arise from specific provisions incorporated in such Codes.

It is true, however, that by sections 545-552 of an act adopting certain parts of the Code of Iowa, enacted by the territorial legislature, and approved March 16, 1855, provisions were made for a writ of certiorari, and the practice thereunder regulated. I Complete Session Laws, 1855-1865, p. 39. On this same date, March 16, 1855, our act adopting the common law of England was likewise approved. I Complete Session Laws, 1855-1865, p. 144. It is also

true that this portion of the Iowa Code so adopted was carried into and incorporated in the Code of Nebraska, passed and approved February 13, 1857, as chapter XXXIV thereof. This chapter XXXIV was in turn wholly repealed by section 621 of the Code of Civil Procedure, passed and approved November 1, 1858.

We submit that even conceding arguendo the "broadness" of the certiorari provisions referred to, as claimed by appellants, their conclusions that thereby the writ of prohibition was abolished in Nebraska may not be sustained. Nowhere in these statutory enactments is the remedy by prohibition or by writ of prohibition referred to or abolished *eo nomine*. Nor is that the necessary effect of the statutory language involved. The new Code writ of certiorari, in so far as it differs from certiorari at common law, must be deemed a statutory remedy. *Sherwood v. Arnold*, 80 Mich. 270, 45 N. W. 134. While these statutory provisions were in force, and prior to repeal thereof in 1858, they were plainly within the general rule of statutory construction hereinbefore stated, viz.: "An affirmative statute giving a remedy not known to the common law does not take away the common-law remedy." 12 C. J. 194. Hence, the writ of prohibition was not abolished by the original enactment enlarging the scope of certiorari known at common law. For, it is also a maxim of the common law that "A statute made in the affirmative, without any negative, express or implied, does not take away the common law." 12 C. J. 187. See, also, Beale, Cardinal Rules of Legal Interpretation (2d ed.) 336.

But, as we have seen, all these statutory provisions contained in chapter XXXIV of the Nebraska Code adopted and approved February 13, 1857, were absolutely repealed without any further expression of legislative intent. The controlling rule of construction, after this complete repeal (again conceding arguendo appellants' contention as to the implications carried by the original enactment), is: "When a statute abrogating a rule or principle of the common law is repealed, the common-law principle or rule is *ipso*

facto revived, unless there is something to show a contrary intent on the part of the legislature." 12 C. J. 187. See, also, *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91; *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 357; 1 Lewis' Sutherland, Statutory Construction (2d ed.) 573.

It is obvious that the history of the enactment and repeal by the Nebraska legislature of the statutory provisions relative to the "writ of certiorari" in no manner supports the conclusion that the effect thereof is to abolish the writ of prohibition. Nor is this conclusion in any manner affected by section 49-302, Comp. St. 1929, which was first enacted by the legislature of this state by an act approved February 21, 1873. Gen. St. 1873, 1056, ch. 79.

Furthermore, the common-law writ of prohibition was wholly distinct from a writ of certiorari, both as to relief accomplished and theory on which the remedy was administered.

"The writ of prohibition (in modern practice) is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction. Prohibition differs from certiorari in that the normal function of the latter remedy is to review action already completed at the time of the issuance of the writ, while the writ of prohibition will not lie where the act complained of has been fully performed. Certiorari, moreover, is a continuation of the original proceeding, while prohibition is separate and distinct therefrom." 21 Standard Encyclopedia of Procedure, 801.

Prohibition is a preventive remedy rather than a corrective one. *Havemeyer v. Superior Court*, 84 Cal. 327, 389, 24 Pac. 121; *State v. Crosby*, 92 Minn. 176, 99 N. W. 636; *State v. Burckhartt*, 87 Mo. 533; *Thomson v. Tracy*, 60 N. Y. 31; *State v. Stackhouse*, 14 S. Car. 417.

A careful consideration of the statutory certiorari as embodied in the Nebraska legislation discloses that, to

what extent it may have been broadened, it ever remained to be applied as a corrective remedy, and was but a continuation of the original proceeding. Thus, it never occupied the field, or accomplished the purpose, of a writ of prohibition, and never, either expressly or by necessary implication, operated to abolish that writ as an available remedy at common law in a court of competent jurisdiction within this state.

While it is true, as we have seen, that section 1, art. V of our Constitution, provides that the judicial power of the state shall be vested in the tribunals therein named, and by section 2, art. V of the Constitution, the original jurisdiction of the supreme court as distinguished from its appellate jurisdiction is limited to "all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, (and) habeas corpus," we are committed to the view that the limits of the constitutional jurisdiction thus conferred may not be increased or extended either by consent of parties or legislative enactment. *Bell v. Templin*, 26 Neb. 249, 41 N. W. 1093; *Edney v. Baum*, 70 Neb. 159, 97 N. W. 252; *State v. Hall*, 47 Neb. 579, 66 N. W. 642; *Larson v. Wegner*, 120 Neb. 449, 233 N. W. 253.

It must be conceded that the subject of "prohibition" is not, by the terms of the Constitution, expressly enumerated as one over which the supreme court has original jurisdiction. Therefore, original jurisdiction over this subject must be deemed vested in the district courts alone.

In this situation appellants cite *State v. Hall*, 47 Neb. 579, 66 N. W. 642, *State v. Troup*, 98 Neb. 333, 152 N. W. 748, and *State v. Fulton*, 118 Neb. 400, 225 N. W. 28.

The *Hall* case involved an original application for a writ of prohibition made in the supreme court, and the decision therein as to jurisdiction was limited to, viz.: "The Constitution has not conferred upon this (the supreme) court original jurisdiction to award a writ of prohibition as an independent remedy." This principle has no application to the instant case which was commenced in the district court.

In the *Troup* case, there is involved an original proceeding in mandamus to compel respondent to reinstate a case which had been by him dismissed. Obviously, the sole issue presented for decision was a question of mandamus. In addition, the dismissal complained of was completed and the case fully disposed of by Judge Troup when that proceeding was commenced, so that the situation presented was one to which prohibition at common law was wholly inapplicable.

In the *Fulton* case, there is presented an appeal from the allowance of a permanent writ of mandamus by judgment of the district court for Fillmore county. The subject of "prohibition" was neither presented by the issues, involved in, nor decided by the judgment appealed from.

It is plain, therefore, that the true doctrine announced by each of the three cases last referred to, in view of the issues involved therein, in no manner tends to support the position of appellants in the instant case, which is an original application for a writ of prohibition instituted in the district court for Lancaster county. That court was unquestionably possessed of ample powers to administer, in a proper case, the remedy which a writ of prohibition affords.

In the case now before us, among the material allegations of the amended petition and contained in the exhibits made a part thereof are the following:

The official capacity of the relator, and the respondent Barney as justice of the peace in Lancaster county, Nebraska; that Charles Carr, acting for and in conjunction with William R. Linch, purchased certain premium notes given for hail insurance to the Lincoln Hail Insurance Company of Lincoln, Nebraska; that upon these notes the respondents Linch and Johnson have filed, before said Barney as justice of the peace, about 1,800 actions against the makers thereof, all of whom were nonresidents of Lancaster county; that Charles Carr was collusively joined in each of these actions as defendant therein, and that service of summons upon each of the defendants who are non-

residents of Lancaster county is claimed to have been made by registered mail; that each of said notes is by its terms payable to the Lincoln Hail Insurance Company; that on the back of each of the 1,800 notes is written the name "Charles Carr," but no liability of Carr on the notes sued upon is set forth; that respondent Barney, justice of the peace, kept no dockets, and that none were kept of any of the 1,800 cases so filed in his court, which are described and referred to in the amended petition, and that the only record kept was upon envelopes which contained the files in each case of the 1,800 so commenced; that the answer day was fixed by the terms of the summons issued therein about the 9th day of September, 1936, and though special appearances were timely filed, no hearing was had prior to the 13th day of November, 1936, or more than seven weeks subsequent to the filing of the same; and that no continuances were ever taken by the parties to said litigation or by the attorneys representing them; that at the time said special appearances came on for argument the respondent Barney announced he was "argument proof," in effect stating that he would overrule the special appearances, right or wrong; that the defendant in said actions, Charles Carr, was not a *bona fide* defendant, but the plaintiffs in said actions and the defendant Charles Carr and the respondent herein, Barney, as justice of the peace, have colluded to deprive the defendants in said actions of their rights; that said Carr was a former vice-president of the Lincoln Hail Insurance Company, and a relative of the respondent Linch; that said Carr was represented by the same attorney in the action involving the receivership of the Lincoln Hail Insurance Company as was the respondent Linch; that in said receivership action the respondent Linch made the original offer and changed the offer in open court in relation to the purchase of the notes upon which the actions against the nonresident defendants were based; that the respondent Linch furnished the funds and was actually the purchaser of said notes at said receivership sale; that Carr was a straw man used by

Linch to perpetrate a fraud upon the makers of the notes; that the defense of the defendants, nonresident of Lancaster county in each of said cases to the merits, depended upon separate and distinct facts; that said defendants named as such in the 1,800 cases thus commenced resided in all and various parts of the state; that they were sued for a small amount in comparison with the expense necessary to defend said actions and to perfect an appeal and said defense and appeal would require an expenditure equal to the amount for which said defendants were sued; that an appeal to the district court in all of said cases in which special appearances were filed would clog and congest the courts of the state of Nebraska; that the acts of the respondent Barney in attempting to wrongfully exercise jurisdiction and in colluding with the respondents Linch and Johnson and the defendant Charles Carr would bring the courts of the state of Nebraska into disrepute, tend to the scandal and disgrace of the state of Nebraska and its judiciary department, and make it impossible to get a just and equitable determination of the actions pending before said respondent Barney.

Sections 21-1801, 21-1802, 21-1803 and 21-1804, Comp. St. 1929, are the controlling statutes applicable to the instant record in the justice court, and must be substantially complied with. The docket entries must be made by the justice as these statutes direct.

In *Bishop v. Lincoln Baseball Club,* 98 Neb. 558, 153 N. W. 586, Rose, J., in delivering the opinion of this court, says in part, concerning the practice in justice court: "The docket entry must be made at the time the judgment is rendered. Rev. St. 1913, sec. 8533. Judgments enforcing rights and authorizing the seizure of the property of litigants are not left to the uncertain memory of judicial officers or to memoranda prepared by them on loose papers. * * * The law does not recognize as a judicial record the unofficial minutes of a justice of the peace. *Beuerlein v. Hodges,* 10 N. Y. Supp. 505." See, also, *Muller v. Plue,* 45 Neb. 701, 64 N. W. 232.

In the case of *In re Estate of Green*, 102 Neb. 306, 167 N. W. 68, this court announced the following:

"Section 8406, Rev. St. 1913, providing that upon return day a justice of the peace may, without consent of parties, adjourn the trial for a period not exceeding eight days 'if the justice be actually engaged in other official business,' does not authorize the justice to make such adjournment at a time subsequent to the return day.

"An unauthorized continuance or adjournment of a case will oust a justice of the peace of jurisdiction to take any further action in it."

It clearly appearing from the allegations set forth in the petition, which in this proceeding must be accepted as fully supported by the evidence, that defendant Carr is not a real party in interest, and that there is no issuable controversy between Carr and the respondents Linch and Johnson, the rule announced by this court in *Platte Valley Irrigation District v. Bryan*, 130 Neb. 657, 266 N. W. 73, is applicable, viz.: "Where an action is brought and service had upon one defendant in the county where the petition is filed, the action cannot be said to be rightfully brought in the county so as to authorize issuance of summons to a second defendant in another county, where it develops that the plaintiff is unable to present an issuable controversy as to the first defendant, and has no reasonable basis for a cause of action against him, and where no issue of fact is presented to establish that such defendant has any substantial interest in the suit adverse to the plaintiff."

It is clear, therefore, that whatever jurisdiction may have been at one time acquired by Justice Barney, it has been wholly lost by his failure to conform to the applicable statutes.

Viewing the record in this case in its entirety, we are fully confirmed in the opinion that the facts involved amply justify and require the issuance of a permanent writ of prohibition, and that the action of the trial court in so doing is fully justified, and it is

AFFIRMED.

IN RE ESTATE OF AMOS GREENAMYRE. SOLOMON GREENAMYRE, APPELLANT, V. MARGARET LANDES ET AL., APPELLEES.

276 N. W. 686

FILED DECEMBER 17, 1937. No. 30150.

1. **Appeal.** An order overruling a special appearance is not a final order.
2. **Statutes.** When a new law is remedial only, and relates to procedure, it is not objectionable on the ground of being retrospective, and will apply to all actions, whether accrued or pending, as well as to future actions.
3. **Appeal.** A dismissal of a petition in error by the district court, for the reason that the transcript upon which the service in district court was based disclosed no final order of the county judge, is not erroneous for the reason that without further service an amended transcript lodged after service had been made did show a final order.

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

Littrell & Patz, for appellant.

Perry, Van Pelt & Marti and *J. P. O'Gara, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

PAINE, J.

This action was brought from the county court to the district court as a proceeding in error, and brought to this court on appeal. The county court overruled objections of the appellant to its jurisdiction, and the district court dismissed the petition in error for the reason that no final reviewable order was entered by the county court.

Amos Greenamyre, father of the appellant and the appellees, died testate in Lancaster county on April 18, 1926, leaving a widow and eleven children. Deceased made his last will and testament on June 17, 1915, the witnesses thereto being G. P. Putnam, Jr., Ollie Reitter, and E. J. Clements.

In the second paragraph of this will he gave to his wife,

Margaret S. Greenamyre, certain personal property, and then provided that she should have the income and use of all of his property, both real and personal, so long as she lived.

The third paragraph of the will reads as follows: "3. I give, devise and bequeath to my children George W. Greenamyer, Maggie Landis, Myrtle Butler, Daisy Parmeley, Lillian Talbot, Solomon Greenamyer, Howard Greenamyer, Rose Snow, Katherine Schmitt, Susan Clawson and Harold Greenamyer all of the residue of my property both personal and real after the termination of the life estate of my said wife, to be equally divided among them share and share alike, save and except that the share of my son Howard shall be $1,000 less than that of each of the other children. I have heretofore given to my said son $1,000 as an advancement and for that reason have willed him $1,000 less than to each of the others."

The fourth paragraph provided that his widow and two sons, Solomon and Howard, should be joint executors of the will, for which services they were to be paid only their necessary expenses in attending thereto.

It appears that the mother did not assume the duties of an executrix, and that Howard Greenamyre, the second executor, removed from the state of Nebraska and did not act, and hence Solomon Greenamyre alone was left to act under the will.

It is charged that attorneys for Solomon Greenamyre then prepared a decree, which was duly signed by the county court, finding that a trust was created under the last will and testament, and that a consent and authorization of such trust was signed by all of the heirs, stating that there was a trust expressed in said will, and that Solomon Greenamyre was a fit and proper person to be appointed by the court as trustee to take over all real and personal property of the estate and act as trustee, and that he accepted the appointment as trustee, and furnished a bond, fixed and approved by the county court, in the sum of $8,000, and it was provided that the trustee should

maintain a home for the mother, with expenses of upkeep, medical and surgical attention, nurse and hospital, and pay costs of insurance, repairs, and taxes which might be necessary to provide Margaret S. Greenamyre with a home and all other necessities during her lifetime, and that said trustee should keep an accurate record of the income and disbursements from and out of said property, and give an account annually to the county judge of Lancaster county, Nebraska; that said trustee should be allowed a reasonable compensation for his services and necessary expenses, including a reasonable attorney fee. The mother died June 28, 1930.

On April 5, 1935, the appellees herein filed a petition in the county court of Lancaster county, alleging that Solomon Greenamyre was appointed trustee under the last will and testament of his father, Amos Greenamyre, gave bond in the sum of $8,000, and received as such trustee $8,237.80. Appellees further alleged that said trustee had come into other funds in addition to the interest received on said funds; that no reports were made to the county court and no satisfactory accounting made of receipts and disbursements, although demand had been made therefor, and that said trustee has mismanaged said assets, and praying that a citation issue, commanding the trustee to appear on a day to be fixed by the court and render a full accounting of said trust funds. On April 5, 1935, an order was made that said trustee appear in the county court on April 29, 1935, and render an accounting and show cause why he should not be removed, a citation therefor being duly issued. Said citation and return was duly served on the trustee in Antelope county, Nebraska, by the sheriff of said county. On April 18, 1935, the trustee filed a special appearance for the sole and only purpose of objecting to the jurisdiction of the court, and the court overruled said special appearance, and gave said trustee seven days to comply with the citation, and prior to the date set for hearing the appellant trustee filed his petition in error and præcipe in the district court for Lancaster county, with

transcript of proceedings in the county court. Said trustee later moved the district court for permission to file an amended petition in error so as to include a later order of the county court entered October 22, 1935, in which the trustee was removed from his trust, and J. P. O'Gara was appointed trustee. The appellees filed an answer to the amended petition in error, reciting all the facts and praying that said amended petition in error be dismissed, and on January 22, 1937, the judge of the district court dismissed the trustee's petition in error for the reason that no final reviewable order had been entered by the probate court. A motion for a new trial was overruled, and said action was appealed to this court.

Appellant cites the case of *In re Estate of Frerichs*, 120 Neb. 462, 233 N. W. 456, which holds that under our statutes the probate jurisdiction of the county court ceases when an executor, who is also a trustee under the will, makes his final settlement.

And, again: "Precatory expressions are to be given their ordinary significance, and will not be held to create a trust, unless it clearly appears from the terms and dispositions of the will and the circumstances, relevant to proper construction, that such expressions were used in an imperative sense, and that the creation of a trust was intended by the testator." *Howells State Bank v. Pont*, 113 Neb. 181, 202 N. W. 457.

Appellant says this court held that an action to declare a trust and that the administrator is a trustee, to define his duties, and to recover possession of land for the trustee, is not within the jurisdiction of the county court, and is within the jurisdiction of the district court, sitting as a court of equity. *Gotchall v. Gotchall*, 98 Neb. 730, 154 N. W. 243.

It may be admitted that these and many other authorities cited tend to support the appellant's contention. However, the facts are much stronger in the case at bar, for it is not disputed that the same counsel as now appears for appellant prepared the decree of the county judge finding that

the will itself provided for a trustee, and such decree fixed his bond, approving the same, and authorizing the trustee to proceed with his duties. When he accepted such trust under written consent of all of the heirs, and under a decree prepared by his own attorney, it would seem as if he must abide by it and manage and distribute the funds in accordance therewith.

When a guardian, after acting for two and a half years under an appointment of a probate court in California, denied the jurisdiction of that court to direct his acts, that court said that many authorities attest the rule that a guardian who has procured his own appointment is estopped from denying, and will not be heard to deny, the jurisdiction of the court by the order of which his appointment was made. *Guardianship of Di Carlo,* 3 Cal. (2d) 225, 44 Pac. (2d) 562, 99 A. L. R. 990.

The Nebraska cases hereinbefore set out, as to lack of jurisdiction of the probate court to appoint and manage a trustee not specifically named in the will, were decided before the enactment by the Nebraska legislature in 1931 of the statute relating to trust estates in the county court. Chapter 42, Laws 1931, invests county courts with jurisdiction over trust estates. It provides generally that a trustee may be appointed by any county court to carry out the provisions of any will which creates a trust without naming a trustee, and that he shall give bond, and file an inventory, and render account of the trust estate in his hands. The county court is authorized to settle accounts and close such trust estate.

We see no reason why this statute passed in 1931 does not apply to all existing trusts and trusteeships in the county court, even though the appointment was made prior to the enactment of the statute.

A very similar situation existed in Missouri, in the case of *McManus v. Park,* 287 Mo. 109, 229 S. W. 211, and it was argued there that the law could not be retrospective in operation. But the court held to the contrary, for this applies only to statutes which would affect vested rights,

and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode.

This Nebraska law of 1931, now cited as sections 30-1801 to 30-1805, Comp. St. Supp. 1937, was intended to remedy certain defects, and it controls the handling of the trust estate in the case at bar, without violating any rights of the parties thereto. Such a law applies to all trustees appointed either before or after its enactment, for it deals with procedure only. "Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 1225, sec. 674.

The appellant filed a special appearance in the county court. It was overruled and petition in error lodged in the district court. An order overruling a special appearance is not a final order. It is governed by the same rule as a plea in abatement. *Bartels v. Sonnenschein,* 54 Neb. 68, 74 N. W. 417; *State v. State Bank of Omaha,* 131 Neb. 223, 267 N. W. 532; *Goldie v. Stewart,* 5 Neb. (Unof.) 523, 99 N. W. 255; *Gaines v. Warrick,* 113 Neb. 235, 202 N. W. 866; *Grimes v. Chamberlain,* 27 Neb. 605, 43 N. W. 395.

In the case at bar, the first transcript filed contained no final order, and a summons in error issued on such a record was void. And a later transcript of additional action taken by the county court could not give jurisdiction by virtue of the summons in error issued and served before any final order had been entered in the county court. *New Home Sewing-Machine Co. v. Thornburg,* 56 Neb. 636, 77 N. W. 86; *Slobodisky v. Curtis,* 58 Neb. 211, 78 N. W. 522. See third opinion in *Ritchey v. Seeley,* 68 Neb. 129, 97 N. W. 818, by Judge Holcomb.

The county court was right in its ruling, and the district court was likewise right, and, finding no error in the record, the judgment of the lower court is hereby

AFFIRMED.

OTTO A. BERGENDAHL, APPELLEE, V. HENRY RABELER, APPELLANT.

276 N. W. 673

FILED DECEMBER 17, 1937. No. 30188.

1. **Evidence.** Ordinarily, the speed of an automobile is not a matter of exclusive expert knowledge and skill and any one with a knowledge of time and distance is a competent witness to give an estimate.
2. ———. Where it appears that a witness had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject.
3. **Automobiles.** The duty of the driver of a vehicle about to enter a street intersection to look for vehicles approaching the same intersection implies the duty to see that which was in plain sight, unless some reasonable excuse for not seeing is shown.
4. **Negligence.** When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury.
5. **Automobiles.** Where the negligence of the driver of an automobile in which plaintiff is riding as a passenger is the sole proximate cause of a collision in which plaintiff is injured, plaintiff cannot recover from a third person for such injury.
6. ———: NEGLIGENCE. Although the negligence of the driver of an automobile will not ordinarily be imputed to a passenger therein when the passenger has no control over the car or driver, the passenger may not recover from a third person for injuries suffered in a collision when the negligence of the driver is the sole proximate cause of the accident.
7. **Negligence.** Although the question of proximate cause is ordinarily for the determination of the jury, where, upon the evidence produced, only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury.

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

Moyer & Moyer, Baylor & Tou Velle and *George Healey*, for appellant.

J. J. Harrington and *Deutsch & Young, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and KROGER, District Judge.

CARTER, J.

This action was brought by plaintiff, as the next friend of his daughter, Sonja Bergendahl, a minor, to recover damages for injuries suffered in an automobile accident. A verdict for $4,983.34 was returned by the jury and judgment entered thereon. From the overruling of his motion for a new trial, defendant appeals.

This is the second appearance of this case in this court. *Bergendahl v. Rabeler*, 131 Neb. 538, 268 N. W. 459. All of the facts and circumstances surrounding the accident are correctly set out in the former opinion and will be considered as if a part of this opinion in our discussion of the case.

The situation may be summarized as follows: It had been customary for Otto A. Bergendahl to take his two daughters, Sonja and Lillie, to and from school. On the day of accident he was unable to do so because of illness. He thereupon procured Kenneth Wehenkel, a neighbor boy of the age of 18 years, to drive the car. While driving south on Fifth street in the city of Norfolk, accompanied by Sonja and Lillie Bergendahl, their car collided with defendant's car in the intersection of Fifth street and Michigan avenue, causing the injuries to Sonja Bergendahl of which complaint is made.

There is no question that the Bergendahl car was traveling south and the defendant's car east and that defendant was entitled to the right of way at the intersection. The record fully establishes the fact that the brakes on the Bergendahl car were practically useless for braking purposes.

The testimony of plaintiff's witnesses is that the Bergendahl car was traveling at a speed of 20 to 25 miles an hour before it entered the intersection and was reduced 5 to 10 miles an hour before the accident occurred. Defendant testifies that it was traveling from 30 to 35 miles an hour.

Defendant testifies that his car was traveling from 10 to 12 miles an hour as it entered the intersection. The testimony of Wehenkel, Sonja and Lillie Bergendahl is to the effect that defendant was traveling from 40 to 45 miles an hour. The testimony of the three last-named witnesses is to the effect that they looked to the right before entering the intersection at a point where they could see at least 100 feet up the street and that they did not see defendant's car until a collision was imminent and that they based their judgment as to the rate of speed upon a brief glance in that direction immediately before the accident. This court has held that the speed of an automobile is not a matter of exclusive expert knowledge or skill and that any one with a knowledge of time and distance is a competent witness to give an estimate. *Patterson v. Kerr,* 127 Neb. 73, 254 N. W. 704; *Serratore v. Miller,* 130 Neb. 908, 267 N. W. 159. But it is very evident from the record that these witnesses had no reasonable time, means, distance or opportunity to formulate a basis for an opinion as to the speed of defendant's car. Such evidence is not sufficient to sustain a finding of excessive speed when it conflicts with other evidence and there is no additional testimony on the subject. The record shows that the collision occurred four or five feet south of the center of the intersection. It further appears that defendant turned his car south in an attempt to avoid the accident and that Wehenkel turned east trying to avoid the collision. It appears that the right spring horn of the Bergendahl car struck the left front wheel of the defendant's car causing the cars to crash or sideswipe each other. Defendant's car proceeded southwest to a point 12 or 14 feet south of the south line of the intersection. The Bergendahl car proceeded southeast and overturned on the sidewalk on the south line of the intersection. These facts clearly indicate that defendant's car was traveling at no greater rate of speed, if not less, than the Bergendahl car. Under this state of facts, we come to the conclusion that the evidence will not sustain a finding of excessive speed on the part of the defendant. In *Showers*

v. Jones Co., 126 Neb. 604, 253 N. W. 902, we said: "He said he was uncertain which way to travel, whether to turn south or continue east and slackened speed with the intention of turning south, but finally concluded to go east; that as he came into the intersection he slowed down to about 20 miles an hour; that he heard the truck, looked up and saw it for the first time about 15 or 20 feet to his left; that he then turned his car to the right in an attempt to avoid the collision. Osborn testified that in his opinion plaintiff's truck was traveling at the rate of 40 miles an hour, but it is extremely doubtful whether this testimony should have been received as he was hardly in position to make a reliable estimate." This case is in point as to the weight to be given to the evidence of plaintiff's witnesses on the matter of the speed that defendant's car was traveling.

The only other allegation of negligence charged against the defendant is that he failed to keep a proper lookout. The record is devoid of any evidence on this subject unless it can be inferred that the happening of the accident is evidence of it. This, of course, is not the case, as negligence must be affirmatively established. The record shows that defendant was traveling at a reasonable rate of speed and was either the first to enter the intersection or was at least approaching the intersection at approximately the same time as the Bergendahl car, within the meaning of section 39-1148, Comp. St. Supp. 1937. See, also, *Spittler v. Callan*, 127 Neb. 331, 255 N. W. 27. Defendant not only had the right of way, but he had a right to assume that his right would be respected by a driver approaching from the north. The driver of the Bergendahl car testified that he looked to the right at a point where he could see for more than 100 feet west of the intersection. The evidence is convincing that he either did not look, or, if he did, that he did not see defendant's car approaching the intersection. The evidence conclusively establishes the fact that defendant's car was within 100 feet of the intersection at the time the driver of the Bergendahl car looked to his

right. Under these circumstances, the driver of the Bergendahl car was negligent either in not looking to his right, or, if he did look, in not seeing defendant's car approaching. We have said: "The duty of the driver of a vehicle * * * to look for vehicles approaching on the highway implies the duty to see what was in plain sight." *Vandervert v. Robey,* 118 Neb. 395, 225 N. W. 36, citing *Kemmish v. McCoid,* 193 Ia. 958, 185 N. W. 628. We are constrained to the view that the proximate cause of this accident was the lack of brakes upon the Bergendahl car and the negligence of its driver in the operation of the car. Plaintiff advances the argument that the lack of adequate brakes was not a contributing cause to the accident for the reason that the driver of the car attempted to avoid the collision by increasing its speed and not by the use of brakes. This argument is untenable. Ordinarily, the driver of a car has two methods of avoiding a collision. He may slow down or stop his car, or he may speed it up. But where the braking equipment is faulty he has no choice, and knowing that fact, his only opportunity of avoiding collisions is by increasing his speed. To say that, under such a situation, a failure to have usable brakes is not a contributing cause lacks all the elements of reason and logic. The evidence does not in our opinion establish any negligence on the part of the defendant, and if any of the evidence might by favorable construction be construed to be proof of negligence, it certainly was no part of the proximate cause of the collision. The accident would have happened irrespective of any of the acts of the defendant herein claimed to constitute negligence. The applicable rules are as follows: Where from the evidence it appears that the injury would have occurred whether the defendant was negligent or not, his negligence cannot be deemed the cause of the injury. *Davis v. Union P. R. Co.,* 99 Neb. 769, 157 N. W. 964. "In an action to recover damages for a personal injury, the defendant is entitled to a directed verdict when the evidence is insufficient to show that the alleged negligence was the proximate cause of the injury." *Benson v. Peters,*

82 Neb. 189, 117 N. W. 347. "It is a well-settled rule that the negligence of one person cannot be the basis of an action for damages resulting to another unless it be shown that such negligence was the proximate cause of the injury to the damaged party." *Wagner v. Watson Bros. Transfer Co.*, 128 Neb. 535, 259 N. W. 373. See, also, *Seaboard Air Line R. Co. v. Watson*, 94 Fla. 571, 113 So. 716; *Espy v. Ash*, 42 Ga. App. 487, 156 S. E. 474; *Hinnant v. Atlantic Coast Line R. Co.*, 202 N. Car. 489, 163 S. E. 555.

It was held in the former opinion "that Wehenkel, the driver of the Bergendahl car, was under the facts above outlined guilty as a matter of law of negligence that formed a part or all of the proximate cause of plaintiff's injuries to such an extent as to prohibit a recovery, on account of the facts of this case, by him or by any one to whom his negligence was imputed." *Bergendahl v. Rabeler, supra.* The record before us sustains the same conclusion. The contention is, however, that Sonja Bergendahl was a passenger in the Bergendahl car and that she may recover damages from any one whose concurring negligence contributed to her injury.

The applicable rule is that, where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the resulting damages, though one of them alone might not have caused the injury. *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794; *Andrews v. Clapper, ante*, p. 110, 274 N. W. 209. But if the alleged negligence of the defendant was not a cause of the accident and the collision would have occurred even if defendant was not negligent, but had driven where he did drive, then, even though he was negligent, he would not be liable since in such case his negligence would have created a mere nonacting condition that formed no part of the proximate cause of the injury of which plaintiff complains. In order for plaintiff to recover, it must be established by a preponderance of the evidence that, except for the negligence of the defendant, the accident would not have occurred. The record will not support a finding that such

was the case. In fact, the record fails to establish by a preponderance of the evidence that defendant was guilty of any negligence. The proximate cause of this accident was the negligence of the driver of the Bergendahl car in operating his car without brakes, his failure to look to his right for cars approaching the intersection, or, if he did look, his failure to see that which was in plain sight, and his failure to yield the right of way to defendant's car approaching from the right at approximately the same time. This being true, plaintiff cannot recover. The trial court erred in not sustaining defendant's motion for a directed verdict made at the close of all the evidence. The case has been twice tried in the district court and we necessarily conclude that the record before us contains all of the material evidence available. There is nothing to be gained by another trial of the case. The judgment of the district court will therefore be reversed and the case dismissed.

REVERSED AND DISMISSED.

WILLARD A. PRINCE ET AL., APPELLEES, V. PATHFINDER LIFE INSURANCE COMPANY, APPELLANT.

276 N. W. 661

FILED DECEMBER 17, 1937. No. 30122.

1. **Evidence**: HYPOTHETICAL QUESTIONS. "Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony." *Landis & Schick v. Watts*, 82 Neb. 359, 117 N. W. 705.
2. ———: ———. "If the evidence is conflicting as to a material matter, the hypothetical question asked the expert witness is not objectionable because it recites such matter as a basis for his opinion. It is for the jury to determine whether such an hypothesis is warranted by the evidence." *Van Dorn v. Kimball*, 100 Neb. 590, 160 N. W. 953.
3. ———: ———. The hypothetical question in this case examined and *held* to fairly reflect the facts either admitted or proved by the witnesses, and to contain substantially the undisputed pertinent facts in the case.

4. **Attorney and Client: FEES.** In determining the value of attorney's fees, the following elements should be considered: The importance and result of the case; the difficulties thereof; the degree of professional skill; diligence and ability required and exercised; the experience and professional standing of the attorney, and the prominence and character of the parties where they affect the importance of the litigation; the questions of law raised, and the time and labor necessarily required in the performance of duties.
5. ———: ———. "The importance of a cause to a client is worthy of consideration in determining the value of the professional services of the attorney employed therein." *Selover v. Bryant*, 54 Minn. 434, 56 N. W. 58.
6. **Trial.** "In a law action, where the evidence is in substantial conflict, the decision of fact is for the jury." *Dworak v. Shire*, 126 Neb. 474, 253 N. W. 655.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

William H. Wright, Ray M. Higgins and *Stevens & Stevens*, for appellant.

B. J. Cunnningham and *Prince & Prince, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

MESSMORE, J.

This is an appeal from the district court for Hall county, Nebraska, wherein the jury returned a verdict for the plaintiffs below in the sum of $8,524, for legal services and expenses, from which verdict and judgment thereon the defendant appealed to this court on two items: First, for services in aiding the reorganization of the defendant company, and, second, for legal services in the case of William Ritchie and others against Pathfinder Life Insurance Company, total amount of which is $5,000. The fees for other services rendered by the plaintiffs, in the amount of $3,524, are not a part of this appeal.

The plaintiffs' amended petition alleges services performed in the reorganization of defendant company, and for legal services in the case of William Ritchie and others against the company; that the plaintiffs are and have been

for a number of years practicing attorneys in the city of Grand Island, Nebraska; that defendant is a mutual legal reserve life insurance company; that its principal place of business is at Grand Island; that it has a membership of over 4,000 and assets in excess of $1,362,000; that on February 5, 1935, the company was involved in litigation in an action brought in the district court for Hall county by one William Ritchie and others, claiming to be members of the company, in which charges were made against directors and officers of the company for their conduct of the affairs of the company, particularly in regard to a proposed change in the nature of the company from a mutual reserve life insurance company to a joint stock company; that on February 10, 1935, a supplemental petition was filed, in which the officers of the company were charged with malfeasance and misfeasance in handling the affairs of the company; that on February 11, 1935, one Joseph Carl McReynolds filed a petition in intervention and asked for the appointment of a receiver; that the director of insurance for the state of Nebraska threatened to take over the company and place it in the hands of a receiver; that on or about April 1, 1935, while said litigation was pending, the plaintiffs were employed as counsel for the company. The evidence as to their services will be hereinafter covered. The answer is a general denial and admits the appointment of the plaintiffs as attorneys for the company, and that Conn Moose was director of insurance for the state of Nebraska.

The evidence reflects the following: D. O. Beckmann, clerk of the district court for Hall county, identified several exhibits in the case of Ritchie against the defendant company and the pleadings filed by the defendant company in such case. W. A. Prince, one of the plaintiffs, testified that he was 72 years of age, was admitted to the practice in 1888; practiced at Grand Island, and enumerated the different courts in which he practiced. He first contacted the defendant company between the 10th and 15th of April, 1935, when he was interviewed by Mr. Pletcher, then presi-

dent of the company, by Mr. Pope and one or two other directors, in which interview they suggested that the company was involved in litigation. A resolution was passed by the directors of the defendant for the employment of plaintiffs as attorneys on April 23, 1935, and the witness stated he desired to take full control and responsibility in the litigation against defendant. At that time there were five attorneys employed by defendant, and the general counsel for the company was not in a position to represent it, but did counsel with the plaintiffs. Plaintiffs immediately started to assist in the reorganization of the company. It was deemed necessary to have a new president of the company, and the name of David Kaufmann was suggested. Plaintiff W. A. Prince met with Mr. Kaufmann several times, in an attempt to persuade him to accept the presidency of the company; also counseled with the president of the Grand Island chamber of commerce who was a partner of Mr. Kaufmann, and with the director of insurance. Mr. Moose was demanding the resignation of the directors and president of defendant company, and insisting upon a reorganization, as was also Mr. Ritchie, who brought the suit in his own behalf and for several members of the company, for a restraining order and an injunction, the purpose of which was to prohibit the company from changing from a mutual legal reserve life company to a joint stock company. By such action Ritchie forced the return of the sum of $207,000 used by the company in the purchase of the National Old Line Insurance Company of Kansas, and the return of $5,000 attorney's fee, paid to an attorney in Omaha, but the action was not dismissed. Mr. Ritchie objected strenuously to the old directors and president carrying on, and had previously submitted some names for directors and president. Mr. Kaufmann was acceptable to him.

During the progress of the Ritchie litigation and before the reorganization, the company was losing greatly in its membership and had lost approximately 1,000 members. Mr. W. A. Prince persuaded Mr. Kaufmann to accept the

presidency of the company and assured him of his co-operation in meeting the demands made by Mr. Kaufmann before he would accept. He persuaded Mr. Pletcher, former president of the company, to resign, and prevailed upon Mr. Moose, director of insurance, who was threatening to place the company in the hands of a receiver, and threatening to persuade the attorney general to take over the company, to wait for a period of five days to enable plaintiffs to prepare a plan to present for the reorganization of the company. The plan was presented and finally accepted. It embodied the resignation of certain directors, the dismissal of the Ritchie case, certain legal services to be rendered in what is known as the Stapleton case, and a waiver of liability as to certain directors, who resigned, and retention of certain experienced directors. In the Ritchie case a brief was prepared by the plaintiffs, presented to the trial court, together with an answer, requesting that those desiring to intervene be limited as to time. The purpose of the answer was to prohibit a multiplicity of suits, presumably by certain attorneys, who might file claims against defendant for services rendered. Certain motions were also filed in the Ritchie case, and finally a dismissal of such action was had.

The appellant by its testimony endeavors to minimize the value of the services of the plaintiffs, so far as the Ritchie case is concerned, in that all the necessary work had been performed by Mr. Ritchie and his associates to complete the objective sought for in said litigation, contending that meetings had been had by Mr. Ritchie and others with the director of insurance, relative to the resignation of certain directors and the president of defendant company. The Ritchie case had developed to the point where a restraining order had been issued, the case continued, and an adjudication thereof had, so far as the purchase of the Kansas insurance company and the recovery of certain fees, paid to attorneys in that matter, were concerned. However, the case was not dismissed. The appellant contends that the only duty for the plaintiffs to per-

form in the Ritchie case was to see that the action was dismissed.

The appellant contends that the court erred in overruling defendant's objection to a hypothetical question, propounded to N. P. McDonald, L. B. Stiner and James M. Lanigan, attorneys, who testified to the value of services rendered by the plaintiffs and gave their opinion, as experts, of the reasonable amount of fees that should be allowed for such services. The hypothetical question covers many pages in the record, details extensively the services alleged to have been rendered by the plaintiffs, and will not be repeated herein except for parts thereof which the appellant contends are erroneous.

Appellant contends, first, that the hypothetical question erroneously conveyed the impression that plaintiffs were responsible for the adjustment of all of the matters pertaining to the Ritchie case, for the reason that the evidence showed that the plaintiffs were not employed by the company or by any one in connection with the transaction until the Ritchie case had arrived at a point where the one remaining thing to be done was to dismiss it; second, that the hypothetical question stated that the plaintiffs were employed on April 9, 1935, and that they had familiarized themselves with certain pleadings and had worked on the Ritchie case continuously from April 9, 1935, to April 29, 1935, whereas the evidence showed that plaintiffs were first employed on April 9 by one Frank Pope, a director of the company, personally, for investigation of the rights of Mr. Pope and his liability; that the plaintiffs' employment was first discussed on April 13, 1935, and the employment by resolution was had on April 23, 1935; and, third, that the hypothetical question assumed that plaintiffs were exclusively responsible for the selection of Mr. Kaufmann, president of the company, and the directors, and for the resignation of certain officers and directors, whereas, in fact, Ritchie and other plaintiffs in the Ritchie case, cooperating with the defendant company, had or received the agreement to resign of all the officers, and had selected

David Kaufmann as president and the new members on the board in place of the officers removed.

The evidence reflects that Mr. Prince, senior, did talk with certain directors of the company on or about the 13th of April, 1935, desired to take over exclusive control of the litigation in question if employed by the company, and that it was agreed that a formal resolution to this effect would be passed, which was done on April 23, 1935. The evidence further reflects that W. A. Prince and David Kaufmann were personal friends; that the company was involved in serious litigation at the time of plaintiffs' employment. Several conferences were had with the president of the chamber of commerce, with Mr. Kaufmann, with the attorneys interested in such litigation, and the evidence further reflects that Mr. Prince in no instance took credit for anything further in the Ritchie suit than as contended for by defendant, except that he did insist that he performed services of value to the defendant, a local company with which he was thoroughly familiar, knew most of the parties and was acquainted with the conditions to such an extent that his services were of value. The record does not disclose that Mr. Prince represented Mr. Pope, a director, and it is shown by the evidence that he did go over the pleadings, the petition of the plaintiffs in the Ritchie case, the supplemental petition, and all other pleadings incident to said case when such were called to his attention by Mr. Pope. Mr. Prince furnished and presented the plan as contended for by him and had it accepted, which plan stabilized the company and satisfied all concerned. He made no statement that he had anything to do with the Ritchie case, so far as the return of the $207,000 and the 5,000-dollar attorney's fees were concerned, and, obviously, such part of the hypothetical question was for the purpose of showing the nature of the litigation still pending. The company was solvent; even so, the conditions, as they existed at the time of plaintiffs' employment, could still place the company in a chaotic condition where the appointment of a receiver would be necessary, and it must

be admitted that at that time the director of insurance was still making demands for the resignation of the officers and directors of the company, as were Mr. Ritchie and others.

The value of plaintiffs' services was a question for the jury. The testimony of the plaintiffs and of the expert witnesses in this regard fixed the minimum and maximum fee for all services rendered from $8,500 to $15,000. The two items for which the plaintiffs seek recovery are so closely connected that to separate them and make a distinct charge for each item would be difficult. The services should be considered in their entirety, so far as the Ritchie case and the reorganization of the defendant are concerned, because each is a part of the other.

In *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N. W. 70, it was held: "Error is not committed in permitting a hypothetical question which fairly reflects the case as made by the plaintiff because other facts afterwards established by the defendant's evidence are not included in the question." And in *Malcolm v. Evangelical Lutheran Hospital Ass'n*, 107 Neb. 101, 185 N. W. 330, it was held: "It is sufficient in propounding a hypothetical question to limit the question to the statement of facts containing the idea upon which the evidence is elicited or brought out."

"If the evidence is conflicting as to a material matter, the hypothetical question asked the expert witness is not objectionable because it recites such matter as a basis for his opinion. It is for the jury to determine whether such an hypothesis is warranted by the evidence." *Van Dorn v. Kimball*, 100 Neb. 590, 160 N. W. 953.

"Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony." *Landis & Schick v. Watts*, 82 Neb. 359, 117 N. W. 705.

The hypothetical question in the instant case examined and found to fairly reflect the facts either admitted or proved by the witnesses, and to contain substantially the undisputed pertinent facts in the case.

The appellant further contends that the verdict is excessive, is not supported by the evidence, and is contrary to law.

"In proving the reasonable value of an attorney's services it is not absolutely necessary that the evidence of expert witnesses should be given. The fact may be sufficiently established by the evidence of other witnesses, and by the circumstances of the case." Annotation, 20 Am. & Eng. Ann. Cases, p. 55, and cases therein cited.

"It is well settled that the opinion evidence of expert witnesses, as to the value of an attorney's services, is not conclusive; nor is it binding either on the court or on the jury. But such evidence is to be taken into consideration, with all the other evidence in the case, in arriving at a conclusion as to the just value of the services performed." Annotation, 20 Am. & Eng. Ann. Cases, p. 56, and cases cited therein.

"The importance of a cause to a client is worthy of consideration in determining the value of the professional services of the attorney employed therein." *Selover v. Bryant,* 54 Minn. 434, 56 N. W. 58.

In *Babbitt v. Bumpus,* 73 Mich. 331, 41 N. W. 417, it was held: "In a suit by an attorney to recover the value of his services, he may show by his own testimony his experience and knowledge, and give his judgment as to such value."

In determining the value of attorney's fees, the following elements should be considered: The importance and result of the case; the difficulties thereof; the degree of professional skill, diligence and ability required and exercised; the experience and professional standing of the attorney, and the prominence and character of the parties where they affect the importance of the litigation; the questions of law raised, and the time and labor necessarily required in the performance of duties. See 5 Am. Jur. 379, sec. 198; *In re Estate of Rhea,* 126 Neb. 571, 253 N. W. 876; 6 C. J. 760.

In *Dworak v. Shire,* 126 Neb. 474, 253 N. W. 655, it was held: "In a law action, where the evidence is in substantial conflict, the decision of fact is for the jury."

We believe that the jury had full opportunity to weigh the evidence in this case, to determine the reasonable value of the services rendered, and, as constitutional triers of fact, found for the plaintiffs in the amount asked for, and that subsequently the district court had the opportunity, on the motion for a new trial, to determine whether the value of the services was excessive and whether a remittitur should be required. Other assignments of error are without merit.

For the reasons given in this opinion, the judgment of the district court is hereby

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1938

APPLER R. WRIGHT, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT ET AL., APPELLANTS: HAROLD KRAMER ET AL., APPELLEES.

277 N. W. 53

FILED JANUARY 4, 1938. No. 30135.

1. **Waters**: PUBLIC POWER DISTRICTS. Public power districts, provided for in article 7, ch. 70, Comp. St. Supp. 1935, are governed as to their appropriation, crossing and use of highways by the statutes relating to irrigation districts, so far as they are applicable.
2. ———: ———. Section 39-821, Comp. St. 1929, makes it the duty of a public power district to build a bridge over any public highway crossed by a canal.
3. **Highways**. Section 39-101, Comp. St. 1929, puts all public roads under the supervision of the county board and requires that board "to see that the laws in relation to them are carried into effect."
4. ———: VACATION. No public road laid out in pursuance of law and no road opened by a county board and traveled for more than 10 years shall be vacated or changed without the consent of a majority of the rural voters living within two miles of the road. Comp. St. 1929, sec. 39-103; *Feuerstein v. Saunders County*, 110 Neb. 121, 193 N. W. 256.
5. **Estoppel**. "Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based." *Parkins v. Missouri P. R. Co.*, 76 Neb. 242, 107 N. W. 260.
6. **Record** examined and judgment affirmed.

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

C. N. McElfresh, August Wagner and *Carroll Thompson,* for appellants.

G. F. Rose, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

GOSS, C. J.

Loup River Public Power District, hereinafter called the district, and the county of Nance, defendants, appeal from a decree ordering the district to construct two bridges across the canal and drainage district where they cross two township highways.

Plaintiff alleged that he was a resident elector of Genoa township, Nance county, outside of any city or village, and represents himself and more than 50 others similarly situated; that as a part of the township road system there was, and has been for 25 years, a road running north and south through the centers of sections 13 and 24 connecting the streets of Genoa and the township north thereof and state highway No. 39 at the south thereof near the south side of section 24; and during all of the time there has been a public highway running east and west through the center of section 23 connecting with other highways; that this east and west highway affords a short cut for through traffic between and over state highways Nos. 22 and 39 (the former running in a generally easterly and westerly direction from Fullerton through Genoa to Columbus, and the latter running in a slightly northwesterly direction from Silver Creek to Albion) of three-quarters of a mile, while the distance required by the proposed road is about two and three-quarter miles; that defendants are constructing a canal for the diversion of water from the Loup river and a drainage ditch alongside said canal through Genoa township; that the route of the canal and drainage ditch intersects and crosses said north and south township road at a point approximately 30 rods south of the northwest quarter of section 13 and crosses the east and west road through section 23 parallel with and adjacent to the Union

Pacific Railroad right of way, which right of way passes through section 23 from a northeasterly to a southwesterly direction; that defendants, unless restrained, will completely obstruct the two highways by the canals and retaining walls of about eight feet in height on each side, with no bridges across as required by law. Plaintiff prayed an injunction against the obstruction and a mandatory injunction requiring bridges to be erected on the course of the two highways.

By an amended answer of defendants, the district, its general manager, and representatives of the contractor, it was pleaded that the county board of Nance county, by motion, directed the district to build the bridge on the road running east and west through the center of section 23 on a right angle to the canal and railroad track in a northwesterly direction, according to a plat filed in the office of the county clerk, to be built of steel and concrete, with a 20-foot roadway; that the county advised the district, and it in turn published a 20 days' notice, of a letting of contract and let it to contractors who delivered material and began the construction of the bridge; that plaintiff knew of the passing of the motion and proceedings and made no objection until the contract was let, the bridge material delivered, and the construction commenced; that a change of plan to a bridge running due east and west, instead of at a right angle to the canal and railroad, would now damage the district in excess of $5,000; and that, by reason of the facts, plaintiff and others similarly situated are estopped from questioning the construction of the bridge and from insisting that defendants construct a bridge in an east and west direction in lieu thereof; further answering, defendants alleged that in 1912 Nance county established a highway running north and south through the center of section 13, but that later it became a part of the state highway system and was abandoned by the state highway and thereafter the county board did not petition to reestablish it as a county road and it ceased to exist as such.

Defendants admit that the district crossed what was formerly known as state highway No. 39, being the above-mentioned road in section 13, but alleged that, before it crossed through section 13, an agreement was reached with the city council of Genoa and the township board of Genoa township whereby it was agreed that, in lieu of a bridge on the old highway No. 39, the district would purchase a 66-foot strip along the south side of the canal through section 13, extending from the west line of old highway No. 39 to the east line of Chestnut street in Genoa and would grade and gravel the strip; that the agreement was published and of general knowledge, that the agreement and plan were known to the board of supervisors of Nance county, and the board, with full knowledge of the plans and purposes, made no objection, and the members of the county board verbally approved the elimination of the bridge on said old highway No. 39 and the construction of the detour in lieu thereof; that, in pursuance of said agreement, the district purchased the strip, graded and graveled it at an expense of more than $2,000; that no protest was made by plaintiff or any one to said arrangement and all parties are estopped from demanding the bridge over the old road.

The amended reply is a general denial and then alleged: That, while the north and south road was used a few years as state highway No. 39, that highway was partially rerouted and the road in question reverted and is now and has been for years a township road, worked and maintained as such and never at any time has been vacated; alleged use of the road by plaintiff and others interested with him in driving stock to the city stockyards; alleged that the rerouting of the road and its traffic a distance of 850 feet to Chestnut street (where the canal is bridged farther north) will close the north and south road and create a continuing public nuisance; alleged that the proposed change in the east and west road in section 23 will result in a change of over 400 feet, will create three dangerous curves and will create a continuing public nuisance;

that no petition was ever presented to the county board of supervisors of Nance county requesting the changes in either of the highways and that the board was without jurisdiction or authority to authorize any such change in the two roads; that the township board of Genoa township was without authority to make any contract to that effect with defendants.

The county of Nance answered that the county board passed a motion that the district be authorized to build a bridge at the place where it was built and alleged that the best interests of all persons interested would be best served by the construction of the bridge at that point.

The record contains a petition of intervention of Genoa township, adopting the petition and amended reply of plaintiff.

The district court found for plaintiff and intervener and decreed that the district must construct bridges and approaches across the canal and drainage ditch on the two roads in question. The court wrote nine pages of opinion covering the points raised by appellant and it was preserved in the record before us.

We have set out the pleadings rather fully in the hope of helping to make the geography of the situation more understandable. We think we have thus shown that the two roads on which plaintiff seeks to have bridges built are ordinary public highways and that the district has not built bridges across the district canal and the drainage ditch alongside the canal.

The statutory powers of public power districts such as defendant district are set forth in article 7, ch. 70, Comp. St. Supp. 1935. Under section 70-707, Comp. St. Supp. 1935, the use and occupation of highways are controlled, as far as applicable, by the provisions of law pertinent to irrigation districts. Section 39-821, Comp. St. 1929, makes it the duty of the governing board of any irrigation or drainage district to build and maintain all bridges and approaches necessitated by the crossing of a public highway, under the supervision of the county board or govern-

ing body of a municipality if under the jurisdiction of such board or municipality. Section 46-128, Comp. St. 1929, authorizes the construction of any such works across any highway which the route of a canal may cross, but requires the board, when it has crossed such a highway, to restore the road so crossed "to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness."

Section 39-101, Comp. St. 1929, puts all public roads under the supervision of the county board and requires the board "to see that the laws in relation to them are carried into effect." Section 39-103, Comp. St. 1929, says: "All roads within this state which have been laid out in pursuance of any law in this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board of any county and traveled for more than ten years, are hereby declared to be 'public roads,' and no such road or any part thereof shall be vacated or changed without the consent of the majority of the voters living within two miles of the road and not living in a village or city." Section 39-104, Comp. St. 1929, says in part: "Any person desiring the establishment, vacation or alteration of a public road, shall file in the clerk's office of the proper county a petition signed by at least ten electors residing within five miles of the road proposed to be established or vacated."

In *Feuerstein v. Saunders County*, 110 Neb. 121, 193 N. W. 256, this court, by the late George A. Day, held that the county board is without jurisdiction to vacate a public road "where the proceedings of the board fail to show that a majority of the electors residing within two miles of the road sought to be vacated, and not residing within a village or city, have consented thereto, as provided by section 2565, Comp. St. 1922 (now sec. 39-103, Comp. St. 1929)." The record does not show any such petition for the vacation of the public roads. This decision and the mandatory language of the statute are binding upon us unless it is shown that, by reason of estoppel, the statute does not apply in this particular case.

There is no persuasive evidence of estoppel against plaintiff and none at all against the other parties similarly situated, represented by him in prosecuting this case. "Where a party pleads and relies on an estoppel, the burden of proof is upon him to establish the facts upon which the estoppel is based." *Parkins v. Missouri P. R. Co.*, 76 Neb. 242, 107 N. W. 260.

Defendants argue that the road has never been vacated and that the decision is therefore based upon a false premise. That argument is grounded upon the provisions of section 46-128, Comp. St. 1929, relating to the construction of bridges over highways by irrigation boards. It provides that such bridges be constructed "in such manner as to afford security for life and property; but the board shall restore the same, when so crossed or intersected, to its former state as near as may be, or in a sufficient manner not to have impaired unnecessarily its usefulness. * * * And if * * * the owners and controllers of the property, thing or franchise so to be crossed, cannot agree upon * * * the points or the manner of the crossings, the same shall be ascertained * * * in all respects as is provided in respect to the taking of land."

We fail to see how the change of a road by a detour for a greater distance away than is authorized by statute, and the entire cessation of the use of a public highway, is justified by that or any other section we can find that is applicable to the present instance. The latter part of section 46-128, as quoted above, seems to contemplate that, when the district wants to cross a highway and to do away with the highway at the point crossed, without putting a bridge for travel over the canal, it must condemn the part of the road so taken. Section 39-103, heretofore quoted, permits no exceptions; but defendants claim that such an exception was engrafted by the passage of section 70-706, Comp. St. Supp. 1935. This section gives a power district board authority to "enter into any kind of contract or arrangement with any person, firm, corporation, state, county, city, village, governmental subdivision or agency, or with the

government of the United States or with any officer, department, bureau or agency thereof, or with any corporation organized by federal law, including the Reconstruction Finance Corporation, or any successor thereof, or with any other body politic or corporate, for any of the purposes above mentioned or for or incident to the exercise of any one or more of the foregoing powers."

We are of the opinion that by such general language the legislature did not intend thereby to make an exception to section 39-103, requiring notice to and consent of a majority of the rural voters interested before a public country road can be vacated.

We have examined the many other sections cited as giving the authority necessary to justify the acts of defendants and the county board but find them inapplicable. We have also examined their authorities cited, find in them no justification for the acts of defendants, and do not think it necessary to analyze them.

We are of the opinion the judgment of the district court was right and it is

AFFIRMED.

FRED F. SHIELDS COMPANY, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.
276 N. W. 925

FILED JANUARY 4, 1938. No. 30138.

1. Carriers: FREIGHT RATES. In Nebraska the power to fix intrastate railroad rates for the shipment of freight was committed by Constitution and statute to the Nebraska state railway commission.
2. ———: ———. An intrastate freight rate between two stations in Nebraska, when fixed by the Nebraska state railway commission, remains in force until changed by that tribunal.
3. ———: ———. The Nebraska state railway commission may make different intrastate freight rates from the initial shipping point to different places in the same switching district at the station to which the shipments are consigned, where the difference in conditions so warrants.

4. ———: ———. Where the legal railroad freight rate of 60 cents a ton for carloads of sand and gravel from Allis to Ralston and Omaha was changed by order of the Nebraska state railway commission to 45 cents a ton to Ralston, the reduction *held* not applicable to Omaha with a longer haul of 7.6 miles and other different burdens of transportation, though Ralston is in the Omaha switching district.

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

Hugh La Master, for appellant.

J. W. Weingarten and *W. P. Loomis, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ROSE, J.

This is an action at law to recover alleged overcharges exacted by defendant from plaintiff for transporting carloads of sand and gravel by rail from Allis, Nebraska, to Omaha. Plaintiff, Fred F. Shields Company, operated a sand and gravel pit at Allis. The Chicago, Burlington & Quincy Railroad Company, defendant, operates a railroad between Allis and Omaha.

The substance of the claim for damages is that defendant, beginning March 17, 1931, and continuing through October 31, 1931, charged and received an excessive freight rate of 60 cents a ton for carload shipments of sand and gravel from Allis to Omaha, instead of the lawful rate of 45 cents a ton, the gross charges and payments for that period being $11,750.83 and the aggregate for lawful charges being $8,813.34, making the overcharges $2,937.49, for which judgment is demanded. The shipments and freight charges exacted are enumerated in the petition.

The answer of defendant denied that an excessive rate was charged or paid for plaintiff's shipments of sand and gravel in carloads from Allis to Omaha during the period between and including March 17, 1931, and October 31, 1931, and alleged that the lawful freight rate for such shipments, as incorporated in the published tariffs, sched-

ules and classifications filed with and fixed by the Nebraska state railway commission, was three cents a hundred weight or 60 cents a ton. The facts on which each party relies are stated in detail in the respective pleadings.

A jury was waived and the cause tried before the district court. There was a general finding in favor of defendant, and the action was dismissed. Plaintiff appealed.

The controversy over the rate for shipments of sand and gravel from Allis to Omaha arose from diverse views of the parties on the rate actually fixed by the Nebraska state railway commission for the transportation services performed by defendant for plaintiff between and including the dates March 17, 1931, and October 31, 1931. The power to fix intrastate freight rates for common carriers was committed by Constitution and statute to the commission. The position of plaintiff is that the legal rate in controversy was 45 cents a ton from Allis to Omaha. The contention of defendant is that it was 60 cents a ton between those places. The solution of the problem must be found in the records of the rate-making body, called for convenience the "Commission."

The undisputed evidence is that the commission, December 4, 1923, authorized the rate of three cents a hundred weight, or 60 cents a ton, on sand and gravel from Allis to Omaha, the rate paid by plaintiff. That rate appeared in the published tariffs, schedules and classifications of defendant and was effective January 15, 1924. Prior to plaintiff's shipments there was no specific order of the commission changing or modifying in direct terms the 60-cent rate from Allis to Omaha. That rate remained continuously in force throughout the period of plaintiff's claim unless a valid change was authorized by the commission. Comp. St. 1929, sec. 75-712; *Katz-Craig Contracting Co. v. Chicago, St. P., M. & O. R. Co.*, 93 Neb. 674, 141 N. W. 1131.

The view which plaintiff takes of the record is that the commission changed the 60-cent rate on sand and gravel from Allis to Omaha to 45 cents and that the latter rate applied to the shipments for which the higher rate was

charged and paid. The proofs show clearly that, on application of defendant, the commission made an order dated May 28, 1931, effective the same day, fixing the rate on sand and gravel from Allis to Ralston at 45 cents a ton. There was elaborate argument by plaintiff on the propositions that the commission considered Omaha the same as Ralston for the purpose of this 45-cent rate which, as asserted, should have read Allis to Omaha; that by order of the commission Ralston had been abandoned as a regular railroad station and the mileage to and from that point eliminated from the tariffs and Omaha substituted for Ralston for the purpose of distances and rates; that the commission had put Ralston in the Omaha switching district, where it became a part thereof, making the 45-cent rate the rate to Omaha. In the advocacy supporting these propositions, there is emphasis on the fact that the original rate was 60 cents a ton to both Ralston and Omaha and that defendant was directed by formal order of the commission November 18, 1929, "To revise and amend its tariffs in such a manner as to include what is now known as 'Ralston' within the switching district of Omaha and South Omaha, and to list as in accordance with proposed tariffs, now filed with the commission, Ralston industries as being within the Omaha-South Omaha switching district, and to carry such industries in its switching tariffs." The order also directed defendant to remove the name of Ralston as a station from its table of official distances and to cancel any and all class and commodity rates published specifically between Ralston and other stations in Nebraska.

However plausible the argument on these propositions may be regarded, the deduction of plaintiff is refuted by undisputed facts and the law applicable thereto. The haul from Allis to Omaha is 7.6 miles longer than to Ralston. While plaintiff's carloads of sand and gravel were being transported to Omaha during 1931, Ralston was a shipping point, where there were local side-tracks, stockyards and a station-house in charge of an agent. The service of the carrier was greater to Omaha than to Ralston. The switch-

ing expenses of defendant at Omaha were greater than for local switching at Ralston. The latter is an incorporated village outside the city limits of Omaha. The switching facilities at the two points of destination were different. The application for a reduced rate to Ralston, without changing the fixed 60-cent rate to Omaha, was made by defendant. The department of public works in charge of public-road building joined in the application for the purpose of procuring a reduced rate on sand and gravel to Ralston where vast quantities of those materials were required for the paving of public highways. Defendant was confronted by an emergency created by the competition of trucks and, to meet it, demanded the 45-cent rate to Ralston without asking for any reduction in the 60-cent rate to Omaha. The commission declared an emergency, made the reduced rate effective May 28, 1931, and provided that it should expire December 31, 1931, unless sooner changed or canceled. This action was taken after Ralston had been canceled as a regular station and had been included in the Omaha switching district. It is well-settled law that a rate-making commission may make a difference in rates from the initial shipping point to different places in the same switching district, where the difference in conditions so warrants. The emergency order reducing the rate from 60 cents a ton to 45 cents a ton on shipments from Allis to Ralston without disturbing the 60-cent rate to Omaha is clear. The same reduction of the rate to Omaha is not implied by orders and records of the commission or by conditions and circumstances. A 45-cent rate to Omaha was not published in the tariffs. In the proper view of the entire record, there were no overcharges on the shipments enumerated in plaintiff's claim. The dismissal below, therefore, is supported by the evidence and is free from error.

AFFIRMED.

CARRIE A. QUIVEY, APPELLANT, V. CITY OF MITCHELL, APPELLEE.
GARNETTE E. HALL, APPELLANT, V. CITY OF MITCHELL, APPELLEE.
277 N. W. 50

FILED JANUARY 4, 1938. Nos. 30129, 30130.

1. **Eminent Domain.** A city is liable to an owner of abutting real estate for damages caused by changing the grade of a street.
2. ———. The measure of damages in a case where abutting property is injured by the city changing the grade of a street is the depreciation in the value caused by the construction and permanent maintenance of the grade.
3. ———. "Special benefits, which should be deducted from damages sustained by real estate by reason of a public improvement, must be such as specially benefit the particular property damaged, aside from the benefits conferred upon other property generally in the neighborhood of or adjacent to the improvement." *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721.
4. **Appeal.** The finding of a trial judge in a law action has the force of a verdict and will not be disturbed upon appeal unless clearly wrong.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

F. J. Reed, for appellants.

Floyd E. Wright, contra.

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

DAY, J.

These are actions to recover damages from the city of Mitchell for the change of grade of a street. The two cases were consolidated for trial in the district court, and in this court, because of their similarity. Hall's action also included assignments of sixteen other owners of real estate upon the street. All of these claims were submitted on the same evidence, and the questions presented are identical. The evidence, of course, differs upon the ownership of certain property, and the damages, but all of the claims are

based upon the damages to various pieces of abutting property upon the same street which was graded and paved. Upon the trial, a judgment was rendered in favor of the city of Mitchell, and an appeal was taken to this court.

Some years ago the city of Mitchell created a paving district to grade and pave a portion of Broadway street. The paving was to be twenty feet in width in the center of the street. The cost was to be met by a special assessment against the abutting property. As a preparation for this improvement, the city constructed a storm sewer which was also to be paid for by a special assessment.

The plaintiffs allege that in 1931 the city, for the use and benefit of the public, caused the street in front of their property to be graded to an unusual and excessive grade, raising the level of the street from two to three feet. The grade was about thirty feet wide, and in the center was placed a strip of paving twenty feet wide. They assert that it left the space between the edge of the paving and the curb line so deep that it was unfeasible, and in many cases impossible, to park a motor vehicle along the curb line in front of the various residences, and that egress was difficult and dangerous; that the dirt upon the street immediately in front of the property washed down and across the sidewalk; and that large volumes of water collected during the rainy season; and that the owners were precluded from improving the intervening street, or of paving to the curb line; and that the property was left practically unsalable for residence purposes; and that there is no other street or alley for entrance purposes to said property.

The city in its second amended answer admitted that the street was graded and paved as alleged, but avers the fact to be that the property is now better drained than before, but that the plaintiffs are estopped because they knew the street was to be graded and failed to complain or to take any action to stop said improvement. The city further answers, stating that the plaintiffs cannot claim damages because they joined in a petition for the paving,

and for the further reason that the cost of grading the street was included in the cost of the paving. The answer claims that the plaintiffs are estopped from claiming damages because, at the time of the levy of the assessment for the paving, the property owners objected to such levy for the reason that their property was damaged rather than benefited, and that this damage was taken into consideration at that time, and cannot now be considered. The city also pleads the statute of limitations.

The plaintiffs filed a motion to strike parts of the answer, and left, according to the appellants' complaint, but the one issue: "Was the property damaged by change of grade, and, if so, how much?" The first question presented for our determination is whether any of the issues stricken out by the order of the trial judge were defenses to the action. The city of Mitchell elected to join issues, and to go to trial upon the pleadings as they were limited by the order of the court. There is no need in this opinion to call attention to 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." An examination of the answer and the ruling of the court thereon, appearing in both transcripts, of course starts with this background. It appears from the face of the petition that the defense of the statute of limitations was properly stricken. The answer itself shows that the action was not barred by the statute of limitations. The allegation that the work was done by the department of roads and irrigation in the state of Nebraska was also stricken. It was not material who actually did the work, and unless the plaintiffs could prove that the city was the motivating force, their cases would fail.

But there is a vital reason which prevents the appellants' complaint in this court, and that is that the motion striking these defenses was that of the appellants. They cannot cause and induce the trial court to commit an error, and then be heard to complain of that error here. That rule is too well established in the state to require argu-

ment. The city of Mitchell is the appellee here, and did not file a cross-appeal. The city prevailed in the district court, and so was not prejudiced by any of these rulings. The defenses of the city of Mitchell of estoppel were stricken out, and the same rule precludes our consideration of them. Estoppel, by the signing of the petition for the paving, and by the judgment of the city council, sitting as a board of equalization in assessing the benefits, is a very interesting and intriguing question not presented by this record. The court restrains itself from the temptation to discuss the interesting theoretical issues involved, when they are not pertinent to any issue presented here. The trial court, at the request of the appellants, narrowed the issue to the extent of the damages, if any, caused to abutting property by the change of grade.

A city is liable to an owner of abutting real estate for damages caused by changing the grade of a street. *Hammond v. City of Harvard,* 31 Neb. 635, 48 N. W. 462; *Stocking v. City of Lincoln,* 93 Neb. 798, 142 N. W. 104.

The city, it is charged here, changed the grade by elevating the street. This was done by grading and laying the center thereof with a strip of paving. While the record indicates that the grade was not changed as much as the plaintiffs contend that it was, it was raised some. The evidence is in dispute as to the exact extent of the raise. As stated, if the change of grade caused damage, the city is liable for the same. The measure of damages in a case where abutting property is injured by the city changing the grade of the street is the depreciation in the value caused by the construction and permanent maintenance of the grade. *City of Omaha v. Flood,* 57 Neb. 124, 77 N. W. 379; *City of Harvard v. Crouch,* 47 Neb. 133, 66 N. W. 276; *Omaha Belt Ry. Co. v. McDermott,* 25 Neb. 714, 41 N. W. 648.

The only evidence in this case is that of engineers that the cost of paving the property, filling in the lots, seeding the lawn, and raising the sidewalks, will be a certain amount. There was no serious objection to this line of

testimony, but at best it would only be some evidence corroborative of the damage. The trial judge viewed the street and the various parcels of property involved, and concluded that there was no damage. There is no witness who fixes the damage at any certain amount. There are other considerations to be taken into account in the question of damages. This court has heretofore enumerated them in several cases. For example: "Special benefits, which should be deducted from damages sustained by real estate by reason of a public improvement, must be such as specially benefit the particular property damaged, aside from benefits conferred upon other property generally in the neighborhood of or adjacent to the improvement." *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721. In later cases the court set out the rule substantially the same, but somewhat elaborated: "The special benefits which may be properly set off against damages are such as increase the value of adjacent property, and these benefits are none the less special because an increased value has been thereby added to many adjacent private properties other than that to which a particular litigation is pending. Common benefits are such as are enjoyed by the public at large without reference to the ownership of private property adjacent to the public improvement out of which arose the benefits under consideration." *Barr v. City of Omaha*, 42 Neb. 341, 60 N. W. 591. See, also, *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752.

There is no evidence in the case as to any amount of damage. Some witnesses say that the property is not as attractive and not as desirable as before. Others say it is not as valuable. The engineers testify as to the cost of restoring it to its relative position to the graded street. The property may be more valuable with the street paved. This is not a high grade. The engineers' findings indicate that the relative position of the houses to it are from 0 to 1.7 feet. Trial to a jury was waived. The trial court viewed the street and the property involved in this case and found that there was no damage. This finding is sup-

ported by the evidence of the record. The finding of a trial judge in a law action has the force of a verdict and will not be disturbed upon appeal unless clearly wrong. *Dickerson v. Surety National Farm Loan Ass'n*, 127 Neb. 67, 254 N. W. 679; *Ayres v. Atlas Ins. Co.*, 123 Neb. 285, 242 N. W. 604; *Bodge v. Skinner Packing Co.*, 118 Neb. 179, 224 N. W. 9. The finding is not clearly wrong in this case, because it is the only one which is supported by the evidence. The evidence in this case does not show that the appellants have suffered any damage in the depreciation of their property caused by the construction and the maintenance of the grade of this street. Since there is no damage, other errors, even if presented here, would not be prejudicial to the appellants, and would not constitute reversible error.

AFFIRMED.

HARRY A. TUKEY, PLAINTIFF, V. DOUGLAS COUNTY ET AL., DEFENDANTS.
277 N. W. 57

FILED JANUARY 4, 1938. No. 30260.

1. **Taxation:** PENALTIES. Impositions made by legislative authority for failure to pay taxes when due, whether designated as interest, penalties or costs, are in fact penalties.
2. ———. A tax is not a debt in the sense that it bears interest after it becomes due, in the absence of a statute so providing.
3. ———: PENALTIES. Penalties for nonpayment of taxes are creatures of statute and the legislative authority creating them may waive or remit them.
4. ———: ———. The imposition of penalties for nonpayment of taxes is a method commonly used to induce prompt payment of a tax. The remission of penalties on unsold delinquent taxes is likewise a method that may be employed to induce payment of such taxes.
5. **Constitutional Law.** Such remedial statutes are a legal exercise of the sovereign power of the state to enforce the collection of taxes.
6. ———. Penalties for nonpayment of taxes are punitive in

their nature and their remission by the legislature is an act of grace that is therefore not subject to the provisions of section 18, art. III of the Constitution.

7. ———. Chapter 167, Laws 1937, commonly called the delinquent tax law, *held* not violative of the Constitution of this state.

Original action by Harry A. Tukey against county of Douglas seeking a declaratory judgment to determine the constitutionality of a legislative act relating to revenue. *Act held constitutional.*

Edward F. Leary and *S. L. Winters,* for plaintiff.

James T. English, Jack W. Marer, Thomas C. Quinlan, Seymour L. Smith, Frank H. Woodland and *Dana B. Van Dusen,* for defendants.

Richard C. Hunter, Attorney General, and *Milton C. Murphy, amici curiæ.*

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

CARTER, J.

This is an original action under the declaratory judgment law in which plaintiff seeks a determination of the constitutionality of chapter 167, Laws 1937, commonly referred to as the delinquent tax law.

The substance of the act is that any interest due on any delinquent general tax (general real property tax or personal tax), delinquent on or prior to the day on which this act becomes a law, shall be remitted and canceled and need not be paid in event, but only in event, the original amount of such tax be paid on or before December 31, 1938, with interest thereon at the rate of 7 per cent. from the date on which this act becomes a law until such payment is made. The act specifically excludes delinquent taxes sold at tax sale prior to the effective date of the statute.

Two other statutes in many respects similar to the one now before us have been declared unconstitutional by this court in *Tukey v. Douglas County,* 129 Neb. 353, 261 N.

W. 833, and *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317. While many constitutional questions have been raised by the pleadings, the only one deserving our consideration is whether the act is violative of section 18, art. III of the Constitution. In all other respects the act complies with constitutional requirements under the authority of *Steinacher v. Swanson, supra.*

The provisions of section 18, art. III of the Constitution are in part as follows: "The legislature shall not pass local or special laws in any of the following cases, that is to say: * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted." This provision has been construed by this court to prohibit class legislation which does not operate equally and uniformly upon all members of the class brought within its operation. *State v. Hall,* 129 Neb. 669, 262 N. W. 835.

In the consideration of this case it must be borne in mind that the various impositions made by legislative authority for failure to pay taxes when due, whether designated as interest, penalties, costs, or anything else, are in fact penalties and not debts, and are in reality no part of the tax. *Steinacher v. Swanson, supra.* In *Livesay v. DeArmond,* 131 Or. 563, 284 Pac. 166, the court in apt language said: "It is to be observed that this act does not confer any authority to waive or reduce a tax; the authority granted is confined to a waiver or a reduction of the penalty and interest imposed for failure to pay the tax. It seems desirable to notice the distinction between a tax and any sums exacted by law for the failure to promptly pay it. Such exactions are often termed interest, yet the reasons which support them are unlike those upon which interest charges are founded. * * * From *Colby v. City of Medford,* 85 Or. 485, 167 Pac. 487, we quote: 'In passing, it may be noted that when interest is charged on a delinquent tax it is not regarded as interest in the sense that it is a consideration for the forebearance of money,

but it is deemed to be a penalty; and when interest, so called, is charged, it is sustained on the theory that it is a means to insure prompt payment of the tax and it is not a part of the tax. *State v. Superior Court,* 93 Wash. 433, 161 Pac. 77.' * * * Since these charges are punitive in nature, and are imposed to spur on the property owner to a prompt payment of the tax it would seem to follow that the constitutional requirement that 'all taxes shall be levied and collected under general laws operating uniformly throughout the state' does not apply to these charges. * * * Since these charges are imposed for punitive, as distinguished from revenue purposes, there would seem to be no greater occasion for subordinating statutes imposing them to constitutional provisions enjoining uniformity in taxation than subjecting any other penal statute to the same clause of our Constitution. Constitutional requirements in regard to uniformity of taxation are restricted to measures which seek to raise revenue, and have no application to burdens imposed which are not, properly speaking, taxes." See, also, *State v. Koeln,* 332 Mo. 1229, 61 S. W. (2d) 750.

A text-writer states the rule to be: "The requirement of equality and uniformity applies only to taxes in the proper sense of the word * * * and not to such as are of an extraordinary and exceptional kind * * * or to other burdens, charges, or impositions which are not properly speaking taxes." 61 C. J. 106. "And, in the absence of some provision in the organic law to the contrary, the legislature may remit penalties incurred by taxpayers for delinquencies in compliance with the tax law, and this it may do by enacting a statute which expressly provides for remission." 61 C. J. 1493.

In *Jones v. Williams,* 121 Tex. 94, 45 S. W. (2d) 130, 79 A. L. R. 983, the court said:

"We come now to the question of the power of the legislature to remit penalties imposed for tax delinquencies. * * *

"The tax cases cited proceed upon the principle that a

penalty is not a part of the tax proper, and is therefore subject to legislative control. Other cases involving the disposition of tax penalties and other constitutional questions support the rule. * * *

"The act before us not only releases all accrued 'interest and penalties' on delinquent state taxes, but makes the remission apply to named districts and subdivisions of the state. This does not affect the validity of the act. The districts named are merely subdivisions of the state, and the legislature has the same power to provide or change the remedies for the collection of taxes, including the remission of penalties, due its subdivisions, as it has for the state at large. 4 Cooley, Taxation (4th ed.) sec. 1821."

In *State v. Coos County,* 115 Or. 300, 237 Pac. 678, the court expressed the rule in this language: "We have heretofore held that the increased percentage and other burdens, prescribed by the legislature for nonpayment of taxes, are in the nature of penalties and are not part of the taxes. *Colby v. City of Medford,* 85 Or. 485, 527, 167 Pac. 487. They have been prescribed as a means of inducing the taxpayers to pay promptly, but they are distinctive from the tax itself. Taxes are a contribution prescribed by the statute and levied by the authorities for the support of the government; and, as stated in *State v. Galveston, H. & S. A. Ry. Co.,* 100 Tex. 153, 97 S. W. 71, the penalties are somewhat in the nature of a fine upon a delinquent taxpayer for his delay in paying his taxes. They are not levied by the counties as part of the taxes, but are creatures of the statute, and *what the statute has imposed, by way of penalty, the statute can remit.*" (Italics ours.) See, also, *State v. Baltimore & O. R. Co.,* 3 How. (U. S.) *534; *United States v. Morris,* 10 Wheat. (U. S.) 246, 287.

It is clear, therefore, that the act does not provide for the commutation or remission of a tax. It has to do only with the remission of a penalty that was imposed to induce the prompt payment of the tax. That the legislature has the power to impose such penalties cannot be questioned. If it has the power to impose a penalty when the

tax becomes delinquent, to induce payment, it would seem that it would have the power to remit the penalty to induce the payment of delinquent taxes. The remission of a penalty is an act of grace on the part of the legislature to which constitutional provisions as to uniformity do not ordinarily apply. The imposition of the penalty is punitive in its character and it is generally held to be the rule that an act remitting or waiving such a penalty is unaffected by constitutional requirements of equality and uniformity as to operation.

A tax is not a debt, and, as a result, does not bear interest, in the absence of a statute. Clearly, if the collection of interest, costs or any other penalty is dependent upon the existence of a statute, such penalties cannot be collected if the statute has been repealed or a statute enacted that waives or remits them.

In a case where the same principle is involved, a tax was levied under a statute passed in 1862. A penalty of 12 per cent. per annum after the tax was delinquent was imposed. Subsequently the statute was repealed. In holding that the tax could be collected and that the penalty could not, the court said:

"The general principle of the law on the subject is entirely clear. The repeal of a penal statute puts an end to all prosecutions under it. * * *

"In view of this rule, I have not been able to perceive any ground on which to sustain this demand for this penal interest. It has always been held that interest does not inhere in a tax as a legal incident. *City of Camden v. Allen*, 2 Dutcher (N. J.) 399. This 12 per cent. has no existence, then, except by virtue of the act of 1862, and when that act was repealed, it fell with it. * * * My first impression was, that this interest might be regarded as a mere incident to the tax, and that in this mode its existence might be continued. But the defects of this theory are two-fold: First, the 12 per cent. is a penalty, and not a mere incidental part of the sum to be paid; and, in the next place, even if it should be regarded as an incident, it is alto-

gether a statutory incident, and consequently would expire with the law from which it proceeded." *Town of Belvidere v. Warren R. Co.*, 34 N. J. Law, 193. See, also, *Henry v. McKay*, 164 Wash. 526, 3 Pac. (2d) 145.

Defendant contends that the case of *Steinacher v. Swanson, supra,* is authority for holding that the present act is violative of section 18, art. III of the Constitution. With this we cannot agree. It is true that we held that the act considered in that case violated this provision of the Constitution in that it permitted certain delinquent taxpayers to pay their delinquent taxes in instalments and thereby discriminated against delinquent taxpayers who had paid their taxes in full prior to the date of the act and against those whose taxes had been sold to private purchasers prior to the effective date of the act, but we did not hold that the remission of penalties therein provided was in violation of section 18, art. III of the Constitution. This is evidenced by the following quotation from that opinion: "We are aware that some authorities hold that constitutional requirements as to uniformity of operation do not apply to statutes providing for a waiver or remission of a penalty. Penalties, including interest and costs, are generally considered punitive in their nature and a statute remitting them is one of grace to which the question of uniformity has no application. But, as to the extensions of time for payment of the principal amount due as taxes, the question of uniformity of operation upon a class becomes important. To say that one delinquent taxpayer can have an extension of time for the payment of his taxes, while another delinquent taxpayer, because of the arbitrary classification made by the legislature, must pay in full, including all interest, penalties and costs, is such discrimination as to warrant the holding that the classification is unreasonable and arbitrary and therefore void." *Steinacher v. Swanson, supra.*

We necessarily conclude that interest charged against a delinquent taxpayer is in fact a penalty, that it is not a part of or incident to the tax and exists only by legislative

pronouncement, that the legislature authorizing it has the power to remit or waive the penalties on unpaid and unsold taxes by a repeal of the original law or a new statute expressly doing so, and that a statute purporting to waive or remit a penalty is one of grace and not subject to the uniformity provisions of section 18, art. III of the Constitution.

For the reasons herein stated, we are of the opinion that the act before us meets all constitutional requirements.

JUDGMENT ACCORDINGLY.

IN RE ESTATE OF JOSEPHA WOTKE.
DAVID SEIFERT, APPELLEE, V. FRED B. WOTKE, APPELLANT.

277 N. W. 45

FILED JANUARY 4, 1938. No. 30157.

1. **Wills: PLEADING.** Where a petition for probate of a will alleges that testatrix died leaving a last will and testament, and the contestant's answer alleges the lack of mental ability and testamentary capacity to make a will, thus joining the issues on the question of testamentary capacity, then contestant is bound by his answer, and a subsequent objection to the introduction of testimony, for the reason that such petition did not allege testamentary capacity and did not contain facts sufficient to constitute a cause of action, is without merit.
2. ———: **BURDEN OF PROOF.** "The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator." *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650.
3. ———: ———. Where a *prima facie* case is made as to testamentary capacity and ability of deceased to transact ordinary business, and contestant offers no evidence touching the testamentary capacity of deceased, then such proof, in this respect, on part of proponent of will is sufficient.
4. **Appeal.** "When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong." *Vohland v. Barron*, 126 Neb. 50, 252 N. W. 470.

APPEAL from the district court for Howard county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Charles Dobry, B. J. Cunningham and *W. P. Lauritsen,* for appellant.

T. T. Bell, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

MESSMORE, J.

This case was tried in the district court for Howard county; jury waived. The will in question was admitted to probate. Contestant appeals.

The contestant contends that the court erred in admitting the will to probate without the allegation and proof of testamentary capacity of deceased, over objections of contestant made before the introduction of any evidence.

The petition on appeal alleges, in substance, that Josepha Wotke died at her home in Howard county on August 4, 1935, leaving a last will and testament; sets forth the heirs and property of the deceased, the filing of the will for probate; provides for notice of hearing, and prays that the will be admitted to probate. The contestant's answer consists, in part, of a general denial, and objections to the probate of the will, because (1) it was not executed as required by law; (2) Josepha Wotke did not have mental ability and testamentary capacity to execute a will, and was not of sound mind and memory.

Both proponent and contestant cite *Seebrock v. Fedawa,* 30 Neb. 424, 46 N. W. 650, wherein it was held: "The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator." This holding was followed in *Murry v. Hennessey,* 48 Neb. 608, 67 N. W. 470, and in *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902.

In *In re Estate of Strelow,* 117 Neb. 168, 220 N. W. 251, we 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." In that case we find for the first time the words "alleging" and "proving." The contestant cites *In re Estate of Slattery,* 125 Neb. 194, 249 N. W. 597, which follows *In re Estate of Strelow,* in so far as requiring the testamentary capacity to be alleged and proved is concerned. The opinion in *In re Estate of Slattery, supra,* indicated that an objection to the petition of the proponent, to make such petition more definite and certain by alleging the testamentary capacity of the testator in more detail, was sustained, and the opinion further indicated that the question should be raised in the county court for the first time, being the court of original jurisdiction in all matters pertaining to the probate of wills (Const. art. V, sec. 16), and did not change the effect and holding in the case of *Seebrock v. Fedawa, supra.*

In the instant case, the contestant's answer put in issue the testamentary capacity of the deceased, and, in the absence of a demurrer to the petition, we deem this sufficient.

Relative to the question of burden of proof, in the body of the opinion in *In re Estate of Bayer,* 119 Neb. 191, 227 N. W. 928, we find this language (p. 192): "In this state the burden is upon the proponents of a will to prove, not only the execution of the will, but the capacity of the testator. In *Seebrock v. Fedawa,* 30 Neb. 424, it was said: 'It is the duty of the proponents in the first instance to offer sufficient testimony of the capacity of the testator to make out a *prima facie* case.' We are not prepared to say that, where the proponents prove the testator to have been capable of transacting ordinary business, he is required to go further in order to make a *prima facie* case of testamentary capacity. The proponents having established a *prima facie* case as to the testamentary capacity of the deceased, it is necessary, in order to defeat the will, that the contestants introduce sufficient evidence to overcome the presumption arising out of the *prima facie* case made by proponents. The burden of proof does not shift, but the burden of going ahead, as some authorities put it, does."

In the instant case, under the statement of law as made

in *In re Estate of Bayer, supra,* the proponent made a *prima facie* case as to the testamentary capacity of Josepha Wotke, that she was capable of transacting ordinary business.

At the time the will in question was made, Josepha Wotke was living in Columbus, Nebraska. Accompanied by her granddaughter, who lived with her, she went to the office of Becher, Hockenberger & Chambers in Columbus for the purpose of making a will. The will was dated March 7, 1918. In October, 1918, Josepha Wotke removed from Columbus to the home of her daughter and son-in-law in Boelus, Nebraska. After her death, the son-in-law, David Seifert, proponent, and John Seifert, her grandson, went to Columbus, contacted Fred B. Wotke, the contestant, and the three of them visited the office of Becher, Hockenberger & Chambers, and directed that the will of Josepha Wotke be sent to the courthouse in St. Paul, Nebraska. The evidence further discloses that Josepha Wotke transacted her own ordinary business affairs.

The will is simple and direct, conveys her intentions and disposes of $5,000 of personal property by giving to her daughter, with whom she lived, all of her estate after the payment of her just debts, with the exception of $10 to each of her two sons. There is no evidence on behalf of the contestant that in any way seeks to discredit the testimony of the proponent, or to the effect that Josepha Wotke was not of sound mind; or to the effect that she did not know the objects of her bounty or amount of her property; or to the effect that she was incapable of transacting ordinary business. In fact, her testamentary capacity is questioned only as a matter of law, and not by any evidence adduced on behalf of contestant.

The contestant further contends that the will in question is a forgery, on the theory that there is a difference in the spelling of the deceased's name in the will, which difference appears in none of her signatures which contestant or proponent is able to find, namely, that the signature in the will is spelled J-o-s-e-p-h-a; that the char-

acteristics in the writing of the person who signed the alleged will, according to the handwriting expert, differ from the characteristics of Josepha Wotke; and that there is an apparent erasure under the letter "a," the last letter of her first name. The evidence in this respect adduced by the contestant consisted of the testimony of a handwriting expert, who detailed the characteristics of the handwriting of Josepha Wotke, together with his reasons for declaring that, in his opinion, her signature to the will was a forgery. The proponent's explanation of the difference in spelling, as disclosed by the evidence, is that Josepha Wotke, when a girl, learned to write in the original German, using in her name the letters "pha;" that in later years, in lieu of the letters "ph" she used the letter "f" in writing her name. It is true that no handwriting of hers was produced to show this change in spelling. Therefore, the exhibits did express her signature as spelled J-o-s-e-f-a, while the signature to the will was spelled J-o-s-e-p-h-a. The deceased's daughter testified positively that the signature to the will was her mother's signature. One Jacob Louis, a bookkeeper and cashier of a bank, who had witnessed the signature of Josepha Wotke on several occasions, testified for the proponent that the signature in the will was the signature of Josepha Wotke. Later, in testifying for the contestant, he declared the signature to the will to be a forgery, corroborating, in this respect, the testimony of contestant's expert witness. The grandson of the deceased, who had seen her sign her name, testified that the signature in the will was that of the deceased. He based his testimony on the comparison of signatures on exhibits with the signature in the will.

Therefore, we have a situation where one expert witness testifies for the contestant; two witnesses, closely related to the deceased, testify for the proponent as to the genuineness of her signature in the will, and one witness subsequently changes his testimony. This presents a question of fact, in direct conflict, for the trial judge to determine. The testimony of experts is not conclusive, although the

authorities, as indicated by contestant, give it greater weight, ordinarily, than that of lay witnesses, but the court would not be bound to take such evidence as conclusive, as weighed against other evidence as to the signature of a testator to a will, and if, after a careful analysis of such evidence, the trial judge believes that the signature to a will is the signature of the deceased, then, unless he is clearly wrong in his analysis, the effect of his judgment in this respect is the same as that of a jury and it will not be disturbed.

The contestant questions the signatures of the attesting witnesses to the will and claims the same to be forgeries. The evidence in this respect discloses that Gus G. Becher testified positively that the signatures of the attesting witnesses, M. Brugger and H. F. J. Hockenberger, were genuine; that he knew them well in their lifetime; knew their handwriting and had seen it on many occasions because he was subsequently a member of the firm, taking the place of his father, since deceased. Likewise, Phil R. Hockenberger, a son of the attesting witness, H. F. J. Hockenberger, who was a member of the same firm for years and who had seen his father sign his name on numerous occasions, testified that the signature of his father in the will as attesting witness was genuine. In this evidence and in the testimony of the expert, called for the contestant, together with that of the witness Louis, wherein he testified first for the proponent as to the genuineness of Hockenberger's signature, and later for the contestant, stating that Hockenberger's signature was a forgery, we have a conflict in the testimony for the trial judge to determine. There seems to be no doubt as to the genuineness of the signature of M. Brugger as an attesting witness to the will.

"When a jury is waived and a law action is tried to the court, findings of fact have the same effect as findings of a jury. They will not be set aside unless clearly wrong." *Vohland v. Barron,* 126 Neb. 50, 252 N. W. 470. See *Elmcreek Ditch Co. v. St. John,* 127 Neb. 253, 255 N. W. 16; *Nelson v. Nelson, ante,* p. 458, 275 N. W. 829.

It is true that in situations, as arose in the cases of *In re Estate of O'Connor,* 101 Neb. 617, 164 N. W. 570, and *In re Estate of O'Connor,* 105 Neb. 88, 179 N. W. 401, naturally and necessarily greater credence would be given to the testimony of expert witnesses on handwriting than occurs in the instant case, for the reason that, in the *O'Connor* case and those of like nature, unknown claimants were seeking large amounts of money, basing their stories on fanciful situations which are not apparent in the instant case.

The judgment of the trial court admitting the will to probate is

AFFIRMED.

R. F. ERWIN, APPELLEE, V. AUGUST H. BRUNKE ET AL., APPELLANTS.

277 N. W. 48

FILED JANUARY 4, 1938. No. 30133.

1. Mortgages: FORECLOSURE: SALE: CONFIRMATION. On motion for confirmation of a sale of mortgaged premises, a finding under section 20-1531, Comp. St. Supp. 1937, "that a subsequent sale would not realize a greater amount" is sufficient to sustain a decree of confirmation without a further finding "that the said property was sold for fair value, under the circumstances and conditions of the sale."
2. ———: ———: ———: ———. Failure of court, in decree of confirmation, to "direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale," as provided by section 20-1531, Comp. St. 1929, as amended in 1933, *held* not prejudicial, where the clerk had, in fact, entered such decree on the journal as provided by section 20-1318, Comp. St. 1929.
3. ———: ———: ———: ———: WRIT OF ASSISTANCE. A district judge at chambers, on ten days' notice to adverse parties, or where hearing is had on agreement and stipulation of both parties to the action under section 27-317, Comp. St. 1929, has jurisdiction to enter an order directing the issuance of a writ of assistance on confirmation of a sale of real property. *Hartsuff v. Huss,* 2 Neb. (Unof.) 145, 95 N. W. 1070, distinguished.

APPEAL from the district court for Johnson county: JOHN B. RAPER, JUDGE. *Affirmed.*

C. A. Sorensen, for appellants.

Charles A. Dafoe, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

This is an appeal from a decree in a foreclosure proceeding confirming a sale of real estate and ordering the issuance of a writ of assistance. While the case was pending in the district court for Johnson county, the proceedings from which the appeal was taken were had before the presiding judge of that court, sitting at chambers in Pawnee county. The record discloses jurisdiction for the hearing of motion to confirm sale and of the objections thereto to have been conferred by stipulation and agreement of the parties. There is no bill of exceptions, and the sufficiency of the evidence to support the findings and decree is not presented by the record. It is argued by appellants that the findings of the trial court are insufficient to support the decree for the reason that the court did not find that "property was sold for fair value under the circumstances and conditions of the sale." Section 20-1531, Comp. St. 1929, as amended in 1933, authorizes a confirmation where court finds that the sale has in all respects been made in conformity to law, and (1) "that the said property was sold for fair value, under the circumstances and conditions of the sale," or (2) "that a subsequent sale would not realize a greater amount." It is not essential to the validity of the sale that findings of the court should include both provisions (1) and (2) above set out; either finding alone is sufficient.

Our attention is directed to the provisions of section 20-1531, *supra,* as amended, "Provided, however, that if such sale pertains to mortgaged premises being sold under foreclosure proceedings and the amount of such sale is

less than the amount of the decree rendered in such proceedings, the court may refuse to confirm such sale, if, in its opinion, such mortgaged premises have a fair and reasonable value equal to or greater than the amount of the decree;" and appellants suggest that said provision makes it obligatory upon the court to find, before confirming sale, that the fair and reasonable value of the land is not greater than the amount of the decree. We do not so construe it. The power sought to be conferred thereby is permissive only. Further, the record in this case does not disclose that "the amount of such sale is less than the amount of the decree," such facts not appearing in the transcript filed in this court.

The complaint that the decree of confirmation did not direct the clerk "to make an entry on the journal that the court is satisfied with the legality of such sale" is not forceful. While section 20-1531, *supra,* provides for such order, section 20-2209, Comp. St. 1929, requires the journal to be kept by the clerk of the court, and section 20-1318, Comp. St. 1929, provides that "all judgments and orders must be entered on the journal of the court." This statute made it the duty of the clerk to enter the decree of confirmation on the journal. In this instance the clerk did so enter the decree, and the transcript discloses the volume of the journal and page where found. The failure of the decree of confirmation to embody an order for the entry on the journal under such circumstances was not material to the validity of the proceedings.

Complaint is further made that there is no compliance with the provisions of section 20-1531, *supra,* as amended, "the court shall in any case condition the confirmation of such sale upon such terms or under such conditions as may be just and equitable." Experience has demonstrated that, although the sale proceedings may be regular and purchasers entitled to confirmation, equities may require that transfer of possession be delayed a given time for some reason which to the trial court may seem adequate. In this case, so far as the record discloses, no equities justifying

a conditional order of confirmation were found to exist, and the court therefore made an absolute order conditioned that the clerk issue a writ of assistance to put the purchaser in possession of the premises. This order was within such provision of the statute.

It is finally urged that a district judge at chambers is without jurisdiction to grant a writ of assistance; and *Hartsuff v. Huss,* 2 Neb. (Unof.) 145, 95 N. W. 1070, is relied upon. We do not deem that citation controlling in the instant case. At the time that decision was made, the jurisdiction of district judges at chambers was much more limited than at present. That decision was made in 1901; and in 1913 the statute (section 27-317, Comp. St. 1929) was amended by conferring jurisdiction upon a district judge at chambers to "hear and determine motions and demurrers" upon ten days' notice, and to "hear and enter judgments in equity cases upon agreement and stipulation of both parties to the action." The record disclosed that the motion to confirm sale and objections thereto "comes on for hearing to the court, in chambers in the district courtroom in the courthouse at Pawnee City, Pawnee county, Nebraska, by stipulation and agreement of plaintiff, R. F. Erwin, and defendants (named), said stipulation and agreement being made in open court." The district judge thus had jurisdiction both of the parties and of the subject-matter and was acting within the powers conferred upon a district judge at chambers under the provisions of the statute last cited. The writ of assistance was merely incidental to the confirmation of the sale and the order for the execution of the deed, and the district judge, under the facts disclosed by the record, was acting within his jurisdiction in entering the order for the writ of assistance.

AFFIRMED.

HARRY L. STEPHENSON, APPELLEE, V. DE LUXE PARTS COMPANY, APPELLANT.
277 N. W. 44

FILED JANUARY 4, 1938. No. 30095.

1. Appeal. Where defendant, in an action for damages, refers to an insurance company being interested, he will be deemed to have waived any error committed by plaintiff in making a similar reference.
2. Trial. It is not error to withdraw issue of contributory negligence from jury where there is no evidence to support it.

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

Rinaker & Delehant and *M. S. Hevelone,* for appellant.

Kenneth S. Wherry and *J. A. McGuire, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and KROGER, District Judge.

KROGER, District Judge.

This is an appeal from a judgment in favor of plaintiff for property damages resulting from an automobile collision.

There are three principal assignments of error, the first being that the court erred in denying defendant's request for a mistrial when plaintiff, as a witness, testified that after the accident he talked with the manager of the defendant company, and in response to the question as to what the conversation was, he stated that he informed defendant's manager that there had been a collision and where, and that the manager then called the insurance company. This was the only reference by plaintiff to there being any insurance involved. Appellant contends that under the holding of this court in the case of *Fielding v. Publix Cars, Inc.,* 130 Neb. 576, 265 N. W. 726, and *Bergendahl v. Rabeler,* 131 Neb. 538, 268 N. W. 459, this reference to insurance constituted reversible error. The record discloses, however, that a Mr. Culver, who was an officer and manager of defendant company, was called as a witness

by the defendant and, in giving his testimony as to what repairs his company had made on plaintiff's car, volunteered the information that "there seemed to be a little misunderstanding between him (plaintiff) and the insurance company, so we discontinued work on the car." From the foregoing it will be seen that defendant itself injected the matter of insurance into the case, and under those circumstances any error committed by plaintiff in making reference to insurance was without prejudice to the defendant.

The next assignment of error is that the court erred in refusing to admit evidence of contributory negligence. We have carefully examined the record and we fail to discover where any evidence of contributory negligence on the part of the plaintiff was offered or where the trial court refused to accept evidence of contributory negligence and our attention is not called to any such evidence by appellant's brief.

The third assignment of error is that the court erred in failing to submit the issue of contributory negligence to the jury. As previously stated, the record is bare of any evidence of contributory negligence on the part of the plaintiff. The mere fact that contributory negligence may be pleaded as a defense does not justify the submission of that issue to the jury where there is no evidence to support it. *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19.

The judgment appealed from is

AFFIRMED.

IN RE ESTATE OF THOMAS J. O'BYRNE. MARY MCGUIRE, APPELLEE, V. ESTATE OF THOMAS J. O'BYRNE ET AL., APPELLANTS.

277 N. W. 74

FILED JANUARY 7, 1938. NO. 30167.

1. **Automobiles: INJURIES TO GUEST.** Generally, an automobile host is liable for injuries to a guest caused by a defective au-

tomobile, where the defect is known to him, but not known or discoverable by the guest.

2. ———: ———: GROSS NEGLIGENCE. Whether a failure of an automobile host to warn his guest of a known latent defect is gross negligence is a question of fact to be determined by the jury from the circumstances of the case.

3. ———: ———: ———. "Gross negligence" within the meaning of the statute, as fixing host's liability to guest, must be determined by the circumstances of the case. Comp. St. Supp. 1937, sec. 39-1129.

4. ———: ———. Evidence does not prove a latent defect in the car was known to the host, or caused the accident.

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

Lanigan & Lanigan and *Cleary, Suhr & Davis,* for appellants.

Wear, Boland & Nye and *P. J. Kerrigan, contra.*

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

DAY, J.

A claim was filed by Mary McGuire in the county court of Greeley county against the estate of the Reverend Thomas J. O'Byrne. It was disallowed, and appeal was perfected to the district court, where a jury returned a verdict in favor of the claimant for $2,000. The administrator appeals to this court.

The claim was for injuries sustained by the claimant while riding as a guest in an automobile owned by Father O'Byrne. At the time of the accident Hugh McGuire, husband of the claimant, was driving the automobile as agent of the owner. The claim for liability is based upon the failure of the owner to notify the claimant of a defect in the steering apparatus of the car which caused the accident. The Reverend O'Byrne lived at O'Connor and was pastor of the church there. He had been in bad health for several months, and had taken medical treatment in Grand Island and Omaha. Upon one of these occasions he stayed at the home of the claimant and her husband. During one of his

visits in Omaha, while he was in a hospital there, he left his car at their home. On the day of the accident the claimant and her husband had been with the Priest on a trip to O'Connor. Returning home, at a point in the highway between Monroe and Columbus, the accident occurred. The claimant was seriously injured. Father O'Byrne died soon after, not as a result of the accident, and did not testify at the trial of this case.

The question presented upon this appeal by the pleadings was the propriety of the trial court directing a verdict for the defendant at the close of the testimony. The only issue is the liability of the owner of the automobile for the accident. The liability is predicated upon the failure to notify a guest of a defective steering gear.

There is no evidence in the record that Father O'Byrne ever personally operated the car. There is evidence that other men drove the car, and, at the time of the accident, Hugh McGuire was driving it at the Priest's request. According to the testimony, Mr. McGuire was an experienced automobile driver, and it is obvious that the accident did not occur without cause. At the time, Father O'Byrne was a passenger in the car, and it is equally apparent that he would not have knowingly exposed himself to an unreasonable risk. The cases are not entirely in accord regarding the liability of the owner or operator of an automobile for injuries to a guest caused by its defective condition. But it is generally held in the absence of guest statutes that one is liable to his guest for injuries caused by a defective latent condition of which he is aware. The rule is stated in 4 Blashfield, Cyclopedia of Automobile Law and Practice, 150, as follows: "He is answerable for injuries to guests caused by a defective or dangerous condition of the automobile of which he is or should be aware, which defect is not reasonably obvious to the guest and is unknown to him, if he should realize the unreasonable risk to the guest created by such defect."

A sister state says: "Automobile host is liable for injuries to his guest caused by known defective condition of

the car if he should have realized * * * unreasonable risk to the guest, to whom the defect was not * * * reasonably obvious, and the host failed to give warning." *Waters v. Markham,* 204 Wis. 332, 235 N. W. 797.

The Wisconsin court in the case of *O'Shea v. Lavoy,* 175 Wis. 456, 185 N. W. 525, states that the situation was analogous to the case of one invited into a home, and that the legal relation was that of licensor and licensee. In *Waters v. Markham, supra,* the court came to the conclusion upon this theory for the rule appearing in Restatement, Torts, sec. 342, where the rule applicable is stated in the following language: "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein." The rule in *Waters v. Markham, supra,* seems to be fair and just, defining the liability of host for injuries to his guest caused by a defective automobile.

In *Petteys v. Leith,* 62 S. Dak. 149, 252 N. W. 18, the court said: "Host must give warning of any known concealed defect in automobile to guest who does not assume danger from such defect unknown to him."

An authority states the rule in other language: "It is held that a guest who comes upon the premises or enters a vehicle of another must take such premises or vehicle as he finds them and as it pleases the owner, in the exercise of his right of dominion over his own property, to maintain the same, provided, of course, such owner does not fail in the duty of informing or warning the guest of that which might be considered a trap or concealed defect, or does not, by any act of his, create a new danger." 5 Am. Jur. 630.

In *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77, the court said that the owner of an automobile is liable for the death of his guest only if he knew of a dangerous condition, realized the risk, and believed that the guest would not discover the latent condition and failed to warn him. The rule to be deduced from the authorities is that an automobile host is liable for injuries to a guest caused by a defective automobile where the defect is known to him, but not known or discoverable by the guest. In the state of the record of the present case, the automobile host is liable for the injuries to his guest if the defect was known to him and was not discoverable by the guest, and if he failed to warn the guest of the defect.

The burden of proof, of course, is on the plaintiff who must prove the allegations of his petition that the claimant, a guest, was injured as a result of gross negligence on the part of the host. The claimant's right to recover is limited by section 39-1129, Comp. St. Supp. 1937. This statute is considered in *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96, and other subsequent cases. It is in that case that the meaning of "gross negligence" is determined. That case is authority for the rule that the evidence of gross negligence within the meaning of the statute, as fixing host's liability to guest, must be determined by the circumstances of the case.

There is a question whether, under our "guest statute," the owner of an automobile is always grossly negligent if he knows of a latent defect, undiscoverable to his guest, and fails to warn him of the danger. He surely must realize the danger to which he subjects his guest. In *Gifford v. Dice*, 269 Mich. 293, 257 N. W. 830, it was held that a motorist under the circumstances of that case was only ordinarily negligent, and was not liable under their guest statute. It is not important here, for the evidence in this case does not disclose that the host was negligent in any manner.

An examination of the record fails to reveal that the defective steering gear in the automobile involved in this

case was the cause of the accident. Immediately following the accident, the driver of the car, the husband of the claimant, made a written statement that he did not know what had caused the accident. At that time he said that, in attempting to pass another car, he was unable to turn his car back into the road, and that this was probably caused by soft road or gravel. Even at the time of the trial he does not testify that the accident was caused by a defective steering gear. He does state that probably there was some defect in the steering gear or "wish-bone" of the car. This court cannot draw a conclusion when the witness who was most concerned with this accident, driving the car, could not at the time, nor at this time, draw a positive conclusion as to the cause of the accident.

In order to recover in this case, it would be incumbent upon the claimant to prove that Father O'Byrne, the owner of the car, had knowledge of the defect in the automobile. The proof offered by the claimant is that a young man, Cavanaugh, who frequently drove this car for Father O'Byrne, had, upon two occasions when accompanied by Father O'Byrne, experienced accidents resulting from the condition of the steering gear. In order for the owner to become liable, it must appear that the existence of the defect was known to him. The evidence is that Cavanaugh told Father O'Byrne that he had better trade his new car for another make. The record indicates that this was said rather facetiously, and in a sort of jocular derision. The evidence is that Cavanaugh never mentioned the defective steering gear, and that, when he examined the car, he did not find any defect in the steering gear. The accidents referred to were very slight, and merely caused the car to leave the road momentarily. There is no evidence that the owner knew of a defective condition in the steering gear, or that it was the cause of the slight accidents. It is not evident that the owner realized that there was any risk in driving the car, because he frequently rode in it afterwards. The car was driven many times thereafter by Cavanaugh. It was driven many times by Mr. McGuire

prior to the accident in this case. There is, therefore, a lack of evidence that there was a defect in the car, and that the defect was known to the owner to be a hazardous risk for those riding therein. The claimant, therefore, not having established by any evidence that the owner of the automobile was grossly negligent, there cannot be any recovery.

REVERSED AND DISMISSED.

WILLIAM PACKER ET AL., APPELLANTS, V. SNYDER, MALONE, COFFMAN COMPANY, INC., APPELLEE.
277 N. W. 60

FILED JANUARY 7, 1938. No. 30137.

1. **Courts: PLEADING: AMENDMENT.** In an action in the municipal court for conversion of cattle, a father brought the action as plaintiff. Upon appeal to the district court, the evidence disclosed that his son was a partner in the cattle business. *Held*, it was proper to allow the petition to be amended to make the son also a party plaintiff.
2. **Pleading: AMENDMENT.** In appeals from the municipal court, the pleadings may be amended by leave of district court at any time to correspond with the proof, or to supply any deficiency or omission in the allegations, when substantial justice will be promoted thereby.
3. **Appeal.** In a case such as this, where the trial court sought to correct a supposed error in permitting the name of the plaintiff to be changed by amendment, and dismissed the action, this court, in reversing the judgment of dismissal, if no other error is presented in the record, will remand the case, with directions that the verdict and judgment be reinstated.

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

Waldron, Newkirk & Mathews, for appellants.

S. L. Winters, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

PAINE, J.

This is a suit brought in the municipal court of Omaha

by William Packer against Snyder, Malone, Coffman Company, Inc., for an alleged conversion of eight head of cattle. Verdict and judgment were set aside by trial judge, and case dismissed on his own motion.

The defendant corporation was a live stock commission firm, doing business at the Union Stockyards in Omaha. The answer was a general denial. A jury was waived, and after trial in the municipal court judgment was rendered in favor of the plaintiff in the sum of $350. Defendant appealed to the district court. The plaintiff filed a petition, and the answer of the defendant was again a general denial. The case proceeded to trial to a jury, and plaintiff testified that he owned the cattle in controversy and was entitled to the possession thereof. Plaintiff's son, Perley Packer, was called as a witness, and testified that the cattle belonged to him and his father as a copartnership. Thereupon, the attorney for the plaintiff asked leave to amend his petition by adding the name of Perley Packer as a plaintiff. It appears that the original petition, as amended by interlineation in the district court, was lost, and the trial judge granted leave to substitute a copy thereof, in which copy appear the words, "William Packer and Perley Packer, Plaintiffs," but in paragraph 1 thereof it is alleged that they were copartners, doing business as a copartnership.

At the close of the evidence the trial court gave some eight instructions to the jury, which returned a verdict for $350, with interest at 6 per cent. from July 20, 1934, and thereupon a judgment was entered in the sum of $399.58 in favor of the plaintiff. A motion for new trial being filed, the motion was sustained and a new trial ordered, and thereafter the court on its own motion dismissed the action at the costs of plaintiff, it being stated in the order of dismissal that the reasons therefor were given in a letter dated January 15, 1937, and a copy mailed to each of the attorneys, and a copy being attached to the order of dismissal. It is stated in the letter that the court finds it was in error in having permitted amendment of

the petition, changing the plaintiff by adding Perley Packer, and making the plaintiff a copartnership, as in all cases of appeal from a municipal court to the district court the district court may permit amendments, but it also specifically provides that the plaintiff in the court below shall be the plaintiff in the district court; that the plaintiff in the court below was William Packer, an individual, and that since the amendment the plaintiff is a copartnership. In this letter to the attorneys Judge Leslie seems to have some doubt whether there was sufficient proof made of the value of the cattle at Omaha, where the conversion took place. From this order dismissing the action, the plaintiff, a copartnership, has appealed to this court.

Section 22-1105, Comp. St. 1929, provides: "The plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." The attorney for the appellee also calls our attention to section 21-1305, Comp. St. 1929, which reads the same.

This question was before the court in *Baxter v. The Maccabees,* 124 Neb. 160, 245 N. W. 415, in which this court discussed the matter at considerable length, and held generally that, in appeals from the municipal court, the provisions of the municipal court act relating to such appeals are necessarily controlling, and cites section 22-408, Comp. St. 1929, which reads: "The pleadings may be amended by leave of court at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omission in the allegations, when, by such amendments, substantial justice will be promoted."

In the case of *Omaha Furniture & Carpet Co. v. Meyer,* 80 Neb. 769, 115 N. W. 310, an action was begun under the name of Omaha Furniture & Carpet Company in replevin in the justice court. Before trial in the justice court, the sole proprietor of this business asked to substitute his individual name for his trade-name, which re-

quest was denied, but on appeal to the district court the substitution was permitted by Judge Redick, and on the second appearance of the case in this court, in an opinion written by Judge Fawcett, a very pertinent comment was made that there is no such thing as a vested right in a technical error or defect in the pleadings or the parties to the action, and the amendment permitted in the district court did not affect the substantial rights of the defendant, and that the change was not a change in the real parties in interest, but by inadvertence or mistake the suit had been commenced in the wrong name.

In *Van Dyk v. Mosterdt*, 171 Ia. 3, 153 N. W. 206, Van Dyk brought action claiming that he was the owner of a half interest in a certain stallion, and had turned the stallion over to a practical horseman to keep, who used said stallion in hauling sand in August, overheated it, and it died, and that the value of his half interest in the horse was $500, for which amount he claimed judgment. During the trial of the case, on the request of the plaintiff's attorneys, the partnership was substituted as plaintiff in the action, and this is alleged as error because the action was originally brought in the name of one of the partners upon a cause of action existing in favor of a partnership claim. The statute of Iowa provides, as does our Nebraska statute, that the court may, in furtherance of justice, permit a party to amend any pleading by adding to or striking out the name of a party, and the Iowa court said the original plaintiff was without capacity to sue upon a partnership claim; that the transaction upon which the action was based remained the same, and was the same cause of action that was sought to be enforced after the substitution of the partnership as plaintiff. See, also, *Myers v. Chicago, B. & Q. R. Co.*, 152 Ia. 330, 131 N. W. 770; *Jensen v. Chicago, M. & St. P. R. Co.*, 198 Ia. 1267, 201 N. W. 34.

In the trial of municipal court cases, it is clearly provided in section 22-1618, Comp. St. 1929: "All provisions of the Code of Civil Procedure and all other provisions of the statutes of the state of Nebraska, not in conflict with

the provision of this act and relating to matters for which no specific provision has been made herein shall govern and apply to actions in the municipal court."

In the case at bar, a father and his son owned the cattle which had been taken from them. The father, in beginning the case against the commission firm, stated that they were his cattle, and he was named as plaintiff. The son went upon the witness-stand and disclosed that he had an interest in the cattle with his father, and it was entirely proper in this case, when one partner had begun an action in his own name, to add, with the permission of the court, the name of the other partner, and this court cannot see any reason why this change was in any way prejudicial to the appellee, as the issues were not changed in any way.

It is right for the court, in every stage of an action, to disregard any error or defect in the pleadings which does not affect the substantial rights of the adverse party. Comp. St. 1929, sec. 20-853.

In the case at bar, the evidence introduced without objection clearly proved the ownership of the cattle, the pleading was rightly amended, and will upon appeal be considered as amended to correspond with the proof. *Allertz v. Hankins,* 102 Neb. 202, 166 N. W. 608; *Berwyn State Bank v. Swanson,* 111 Neb. 141, 196 N. W. 125.

The appellee, in discussing the case of *Baxter v. The Maccabees, supra,* calls our attention to the fact that in that case, as well as in *Short v. Bollen,* 130 Neb. 728, 266 N. W. 635, this court had entirely overlooked its earlier decision in *Sturgeon v. Wilson,* 107 Neb. 109, 185 N. W. 270, which holds directly to the contrary. It appears in Shepard's Nebraska Citations that this last case has never been cited up to this time. The present municipal court act was chapter 82, Laws 1929, and the opinion in *Sturgeon v. Wilson, supra,* was released on November 17, 1921, and hence that decision could have no possible reference to a law enacted eight years later.

Some discussion was had in the argument as to the doubt expressed by the trial judge, in his letter hereinabove re-

ferred to, as to whether sufficient evidence was given of the value of the cattle taken from the plaintiff. It was held in *Richtmyer v. Mutual Live Stock Commission Co.*, 122 Neb. 317, 240 N. W. 315, that evidence of the value of the cattle at the place of the original taking, or at the place of disposal, is relevant, and in this case the bill of exceptions shows that there was evidence given of the value of the cattle at both places. The trial court should have had no doubt on this question.

In a case such as this, where the trial court sought to correct a supposed error, and vacated the verdict and judgment thereon and dismissed the action, this court established a precedent in *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335, of making a final disposition of the case.

This case having been already tried to a jury in the district court, we have reached the conclusion that there is no other prejudicial error in the case, and therefore the case is remanded to the district court, with directions that the verdict of the jury and the judgment founded thereon in that court be reinstated.

REVERSED.

CARTER, J., dissenting.

I am unable to agree with the majority opinion. The action was one in conversion, the ownership of the cattle being a material issue. The change in parties plaintiff after the appeal was lodged in the district court must of necessity change the issues and require other and different evidence to sustain them. The applicable rule is stated in *Sturgeon v. Wilson*, 107 Neb. 109, 185 N. W. 270, wherein the court said: "When an appeal is taken from municipal court to district court, the case is to be tried in appellate court upon the issues that were presented in the court from which the appeal is taken."

The statute specifically provides that the plaintiff in the court below shall be the plaintiff in the district court and that the parties shall proceed in all respects and in the same manner as though the action had been originally instituted in such court. Comp. St. 1929, sec. 22-1105. The

writer of the majority opinion relies upon section 22-408, Comp. St. 1929, which reads in part: "The pleadings may be amended by leave of court at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omission in the allegations, when, by such amendments, substantial justice will be promoted." This section, under the ordinary rules of statutory construction, cannot abrogate the provisions of section 22-1105, Comp. St. 1929. This court should give effect to both sections and not assume that the legislature was doing a vain thing when it passed section 22-1105. To me this opinion not only improperly ignores the applicable statute, but it also is contrary to the rule established in this state by a long line of well-reasoned decisions.

ELDRED, District Judge, concurs in the dissent.

FRED M. MILLER, APPELLEE, V. AXEL E. OLANDER, APPELLANT.

277 N. W. 72

FILED JANUARY 7, 1938. No. 30155.

1. **Assault and Battery.** Assault and battery consists in an injury actually done to the person of another in an angry, resentful, or insolent manner.
2. ———. One attacked in his dwelling place may await his assailant and use force to repel him, although he could have prevented the attack by closing the door, and thus excluding the assailant from the premises.
3. **New Trial.** New evidence which is not merely cumulative, but which consists of new and positive facts which, if believed by the jury, might cause them to arrive at a different verdict, will warrant a new trial.

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

Mossman, Anderson & Meissner, for appellant.

Frost, Hammes & Nimtz, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

PAINE, J.

This is an action to recover damages for an assault and battery. A judgment was entered for $1,500, being the amount of the verdict of the jury. A motion for a new trial was overruled, and the defendant appealed.

The assault took place on February 14, 1936. The plaintiff was a young man 16 years of age at that time, and the defendant was 74 years of age. The plaintiff was living with his parents and sister in an apartment house owned by the defendant, at 1307 South Twenty-fifth avenue, Omaha, and next door to the house in which the defendant lived. There were six apartments in the apartment house.

On the day of the assault the young man was at home taking care of his mother, who was sick in bed with double pneumonia. In attempting to get some water in which to give her medicine, he discovered that the water was shut off. He went over to his landlord and asked if the water had been shut off, and the landlord denied that the water had been shut off. The young man went back home, secured water from an adjoining apartment, and an hour or so later the furnace in their apartment began cracking and snapping, and, thinking there was some danger if the water was shut off, because it was a very cold day and the furnace was hot, he went across to the home of the defendant between 4 and 5 o'clock in the afternoon. He knocked at the door and the defendant came to the door, and he asked him if he could go down in the basement to see if the water was shut off. Plaintiff testifies that the defendant thereupon called him a deadbeat and crook, pushed him and hit him on the head with a flashlight, and when he fell on the steps he kicked him in the back a couple of times, and defendant slammed the door and went back in the house. The brother-in-law of the plaintiff testified that he quit work at 3:30 that afternoon, and was going by the house to see how the mother was getting along just as the

defendant hit the plaintiff with a flashlight and knocked him down, and saw him kick him a couple of times while he was on the ground. He described the flashlight as the regular five-cell flashlight, with a large head on it, and that he hit him with the large end; that he assisted him home into the house and stayed around there for an hour and a half; that the boy was sick and vomited, and had a big lump on the right side of his head about the size of an egg.

The plaintiff testifies that he did not work again for months. Dr. William J. Nolan testified that the plaintiff came to his office on February 20; that there was a bruised and discolored area, about 1½ by 2 inches, over the right frontal and parietal region of his head; that his neck muscles were stiff, spastic, and painful; that there was rigidity and pain in the back muscles in the lumbar region, and the patient was unable to bend or turn his spine in any direction; that there were also symptoms that led him to diagnose concussion of the brain, as there was dizziness and tottering when the patient stood up with his eyes closed; that he was unable to maintain his balance, was sick at his stomach, and the light hurt his eyes; that he put him under the infra-red ray lamp on his back and on his neck, and had ice-packs put on his head when he went home; that he strapped up his back with adhesive plaster criss-crossed, including the hips and small of the back; that he saw him daily for some time, and gave him treatments with infra-red lamp, and after a while saw him every second or third day, and that he was under his care during the whole year following the assault.

The defendant tells a different story of the assault. His answer to question 531 is: "Well, what he came over for, he ran into the place and called me a son-of-a-bitch and asked why I turned off the water. I says, 'I have not turned off the water,' and he started at me, and of course I didn't take it." He testifies that he ordered him to get out of there, and pushed him out of the east door, and admits that he kicked him "one in the behind." Defendant said that

the flashlight he had was a copper flashlight, about eight inches long, and that the head of the flashlight is a little larger.

The defendant sets out 11 assignments of error: First, the refusal of the court to direct a verdict for the defendant, the overruling of objections to testimony, and sustaining of plaintiff's objection to testimony offered by the defendant, especially the refusal of the court to permit the defendant to show that the plaintiff was not legally entitled to the possession of the premises, and that a judgment for restitution had been granted to the landlord against the tenants, and that the defendant was entitled to refuse water to the premises at the time the assault took place.

The defendant also sets up as error the giving of instructions Nos. 7, 8 and 9, and insists that the verdict was grossly excessive and the result of passion and prejudice. The first paragraph of instruction No. 7 reads as follows: "Assault and battery consists in an injury actually done to the person of another in any angry, revengeful or insolent manner." And defendant calls our attention to the case of *Sanderson v. Huffman*, 132 Neb. 321, 271 N. W. 870, in which this court held: "Mere anger on the part of a defendant at the time of making an alleged assault * * * will not, of itself, make such an assault unlawful." However, the paragraph of instruction No. 7 above quoted was taken from the early case of *McClure v. Shelton*, 29 Neb. 370, 45 N. W. 689, except that the word "rude" has been omitted, and in the text in that case, in the opinion written by Judge Maxwell, it is said that the instructions as a whole state the law correctly, and the instruction has been used by many district judges, without objection. We see no objection to this instruction.

The affidavits and exhibits offered in support of the motion for new trial throw several sidelights upon the case.

It appears that the plaintiff carried a Mutual Benefit Health and Accident policy at the time of the assault. He filed a claim, describing the assault, and set out that he

was unable to work from February 14 to March 16, and upon this claim he was allowed and drew $5 a week for only three weeks, a total of $15.

Affidavits of witnesses, which defendant had been unable to find before the trial, are to the effect that six days after the assault, when the Millers moved out of the apartment, the plaintiff helped in carrying out furniture. And, also, that before May 15, 1936, plaintiff was again working at "Jim's Auto Parts" establishment, doing heavy work in wrecking automobiles and loading the steel into freight cars, and that plaintiff made no complaint.

The defendant also calls our attention to Restatement, Torts, sec. 75, which reads: "Under the statement in subsection (2, a), one attacked in his dwelling place may await his assailant and use deadly force to repel him though he could prevent the assailant from attacking him by closing the door and so excluding the assailant from the premises."

The defendant has filed a large number of affidavits, setting out evidence which he was unable to obtain at the trial, such as the claim of $15 received upon plaintiff's accident policy, the evidence of Roy W. Miller, who states positively that the plaintiff was back working in Jim's Auto Parts as early as the first week in April, and affidavits of witnesses who would testify as to his condition, and that plaintiff grossly exaggerated his injuries to the jury.

In considering the ruling upon the motion for a new trial, we find that in section 20-1142, Comp. St. 1929, the seventh ground for new trial sets out: "Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." This section was discussed at length in *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298. To warrant a new trial on the ground of newly discovered evidence, it must, in every case, appear that the evidence could not have been discovered by due diligence. *Erwin v. Watson Bros. Transfer Co.*, 129 Neb. 64, 260 N. W. 565.

In examining the affidavit filed by Walter L. Anderson, attorney for defendant, he describes the efforts that he made to locate witnesses prior to the trial; that his client had suffered a loss of memory, and was unable to assist him or to relate the facts, or to tell whether any one was present at the time of the assault, and affirms on oath that neither he nor his client were able to find the witnesses or to secure their evidence until just before these affidavits were signed.

If this evidence was merely cumulative it would not warrant a new trial, for the addition of a few more witnesses on the same question of fact does not justify a new trial, for juries are instructed that they should not be controlled by mere number of witnesses to a given fact. The new evidence appears to be positive, and it might cause the jury to take an entirely different view of the case, or in any event would undoubtedly affect the amount of the verdict of the jury returned, and this court has reached the conclusion that the verdict of $1,500 in this case was excessive under all the evidence.

Without discussing the many other errors set out in the motion for new trial and brief of the defendant, we have stated enough upon which we base our conclusion that the verdict and judgment of the jury must be set aside and the cause remanded for a new trial.

REVERSED AND REMANDED.

ROSE, J., dissents.

LLOYD DOAN, APPELLEE, V. HAROLD HOPPE ET AL., APPELLANTS.
277 N. W. 64

FILED JANUARY 7, 1938. NO. 29935.

1. **Automobiles: RIGHT OF WAY.** The provision in section 39-1148, Comp. St. Supp. 1935, that "the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder," is limited in its application

to subdivision (a) of the act and applies only to vehicles approaching and entering intersections at approximately the same time.

2. ———: ———: INSTRUCTIONS. Where the evidence discloses that defendant's car struck plaintiff while crossing a street between intersections, it is error to instruct the jury that unlawful speed on the part of defendant would forfeit the right of way given him by section 39-1148, Comp. St. Supp. 1935.
3. ———: DUTY OF PEDESTRIANS. A pedestrian crossing a street at a place other than a street intersection or crosswalk in direct violation of a city ordinance is required to keep a constant lookout for his own safety in all directions of anticipated danger.
4. ———: DUTY OF MOTORISTS. The driver of an automobile having the right of way between street intersections is not required to anticipate that pedestrians will violate an ordinance prohibiting them from crossing a street at a point other than a crosswalk.
5. ———: ———. When the driver of the car has the right of way but the situation is such as to indicate to the mind of an ordinarily prudent person that to proceed would probably result in injury to a pedestrian, it is his duty to exercise ordinary care to prevent the injury, even if the pedestrian may have been negligent.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. Opinion on motion for rehearing of case reported in 132 Neb. 641. *Former opinion disapproved and judgment of district court reversed.*

Burkett, Wilson & Van Kirk, for appellants.

Baylor & Tou Velle and *George Healey, contra.*

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

CARTER, J.

This is an action to recover for injuries sustained by a pedestrian when struck by defendant's automobile. The verdict of the jury was for the plaintiff in the amount of $2,000, for which judgment was entered. Defendant's motion for a new trial was overruled and defendant appeals.

A former opinion of this court appears at 132 Neb. 641,

272 N. W. 763. The case is again before us after a reargument. The facts are stated in the former opinion and will not be repeated in detail here.

The evidence shows that plaintiff was crossing O street in Lincoln in the middle of the block between Seventeenth and Eighteenth streets when the accident occurred. The defendant was driving west on O street when he struck plaintiff. There is sufficient evidence in the record, if believed, to sustain a finding by the jury that defendant drove his car at an excessive rate of speed.

In the charge to the jury the trial court stated the law, in part, to be as follows: "You are instructed that the statutes of Nebraska provide that the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have. If, therefore, from a preponderance of the evidence, you find that the defendant Harold Hoppe, at the time and place in question, was driving an automobile at a speed which, under these instructions and the evidence, was unlawful, then you are instructed that he thereby forfeited any right of way, and that the defendants had no right of way over the plaintiff, Lloyd Doan."

The section of the statute upon which this instruction is based is as follows: "(a) When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in section 18. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder. (b) The driver of a vehicle approaching but not having entered an intersection shall yield the right of way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle, provided the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required by section 16. The driver of any vehicle upon a highway within a business or residence district shall yield the right of way to a pedestrian

crossing such highway within any clearly marked crosswalk or any regular pedestrian crossing included in the prolongation of the lateral boundary line of the adjacent sidewalk at the end of a block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices. Every pedestrian crossing a highway within a business or residence district at any point other than a pedestrian crossing, crosswalk or intersection shall yield the right of way to vehicles upon the highway." Comp. St. Supp. 1935, sec. 39-1148.

It will be noted that the provision for the forfeiture of the right of way because of excessive speed appears only in subdivision (a) of the statute and by the use of the words "which he might otherwise have hereunder" is limited to that subdivision. Subdivision (a) applies only to vehicles approaching or entering intersections at approximately the same time and the legislature clearly intended by this provision to prevent one by the use of excessive and unlawful speed from acquiring a right of way he would not have had otherwise. It is a recognition by the legislature of the dangers growing out of a situation permitting one to race for a right of way at an intersection. But this statute can have no application where the accident occurred in the middle of a block as in the case at bar.

Plaintiff relies upon the case of *Logan v. Schjeldahl*, 66 N. Dak. 152, 262 N. W. 463, to sustain his contention that excessive and unlawful speed upon the part of the defendant Hoppe forfeits the right of way that he otherwise had over plaintiff under the statute. The statute involved was practically identical with ours. In that case the defendant drove down a highway at a speed found to be from 60 to 70 miles an hour and struck a car entering the highway from a private road. This situation was covered in the exception contained in subdivision (a), as it is in our statute also, by giving the driver on the highway the right of way over those approaching an intersection on a private road from either the right or the left. The North Dakota

court in effect said that the exception as it was written was in effect a part of subdivision (a) by reference and that the clause providing for a forfeiture of the right of way by the use of unlawful speed was applicable. The decision is not authority for plaintiff's contention that the instruction was properly given under the facts shown in the instant case. The provision relied on applies only to subdivision (a) of this statute, and no other. We necessarily conclude that the trial court's instruction hereinbefore quoted was improperly given and was prejudicial to the rights of the defendant.

Defendant contends, however, that the evidence is insufficient to sustain a judgment in any amount and that the action ought to be dismissed by this court.

It is not disputed that the statute gave the driver of the car a right of way over plaintiff at the place where the accident occurred. Comp. St. Supp. 1935, sec. 39-1148. The evidence also discloses that an ordinance of the city of Lincoln provides that no pedestrian shall cross any street at a place other than a crosswalk and provides a punishment for its violation. The first question to be considered is the degree of care placed upon one who "jaywalks" across a street contrary to the city ordinance. This court has held many times that the violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. The mere fact that a pedestrian walks across a street between intersections contrary to ordinance is not of itself negligence. But, one who does so must necessarily be required to exercise a greater degree of care than one who walks across a street at a crosswalk where protection is afforded by giving the pedestrian the right of way.

In the case of *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866, the court in a case involving a similar situation said:

"This ordinance not only gives the right of way to

vehicles between intersections of streets, but practically denies to pedestrians the right to cross any street except at street intersections or places designated as crosswalks. A pedestrian, who crosses the street at a place other than at street intersections or crosswalks, does so in direct violation of the specific provisions of this ordinance. Manifestly, this ordinance was passed with the view of lessening, if possible, the number of injuries occurring in city streets, as the result of pedestrians being run over by automobiles. * * *

"Under the doctrine of these cases, and others which might be cited, it must be held that if the plaintiff, at the time of his injury, was crossing the street between intersections, he did so in violation of the ordinance we have quoted and was guilty of negligence as a matter of law. It would not, of course, necessarily follow from this that, in a case where the plaintiff admits violation of the ordinance, he should be nonsuited, because it would still be for the jury to determine certain other features, such as whether his negligence contributed to his injury, or whether the defendant saw or should have seen him in time to have avoided the injury. * * * To say the least of it, the court may say, as a matter of law, that where one is on the street in violation of the express provisions of an ordinance, reasonable care, under the circumstances, requires him to constantly observe."

We have come to the conclusion that one who crosses a street between intersections, contrary to the provisions of a city ordinance, is required to keep a constant lookout for his own safety, and if he fails to so do he is guilty of contributory negligence as a matter of law. This, of course, does not mean that it is a duty to look one way and continue so to look, but rather to look in the direction or directions of anticipated danger, and to continue to be alert to safeguard against injury.

In determining whether the negligence of the plaintiff was such as to bar a recovery, we are impressed with the rule stated in *White v. Davis*, 103 Cal. App. 531, 284 Pac.

1086, wherein the court said: "There seems to be a general rule running through the cases where a pedestrian, or one standing on a highway, is injured by an automobile, which usually determines whether the question of contributory negligence is one of law, or of fact. Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or in other words, when he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury." Applying such rule to the facts before us in the case at bar, we conclude that the case is one for the determination of a jury.

While the driver of an automobile across intersections where there are no traffic signals is charged with notice that a pedestrian has the right of way, and is required to accord such to the pedestrian, yet as between intersections the automobile has the right of way and the driver has a right to assume that pedestrians will observe this rule. He is not required to anticipate that a pedestrian will violate the rule. It must also be borne in mind, however, that a driver of a car, even though he has a right of way, and even though a pedestrian may be negligent, owes a duty to such pedestrian which has been expressed by this court in substance as follows: Where a driver of a car has the right of way, but the situation is such as to indicate to the mind of an ordinarily prudent person that to proceed would probably result in a collision, it is his duty to exercise ordinary care to prevent a collision. In other words, it then becomes his duty for his own safety, and that of others, to avoid an accident if reasonably possible. *Thrapp v. Meyers,* 114 Neb. 689, 209 N. W. 238; *Serratore v. Miller,* 130 Neb. 908, 267 N. W. 159.

After a reargument of the case, we think we erred in the former decision. It will therefore be set aside in so

far as it conflicts with this opinion. Because of errors of law in the instructions to the jury, the judgment is reversed and the cause is remanded to the district court for a new trial in accordance with the rules of law set forth in this opinion.

REVERSED.

ROSE, J., dissenting.

In my judgment the decision of the majority is the result of a radical departure from the law applicable to the issues and the evidence. As I read the opinion, it is at variance with a controlling city ordinance which takes the right of way from a motorist while driving at an unlawful speed in violation of traffic regulations.

The city of Lincoln owns the fee to the streets of Lincoln and it has power under its home rule charter to regulate traffic in its streets. In the exercise of that power the city by ordinance declared:

"Motor vehicles shall be driven at a rate of speed that is reasonable and proper having regard for the traffic and roadway and the condition of the street, and shall at all times be under the control of the driver."

The same section limits the speed to 25 miles an hour where plaintiff was injured by defendant and that rate even is unlawful unless it "is reasonable and proper having regard for the traffic and roadway and the condition of the street." In addition, the car "shall at all times be under the control of the driver." The same section of the ordinance provides:

"It shall be unlawful for any person to operate a motor vehicle at a greater rate of speed than herein set forth, or in violation of any of the provisions hereof."

Another section of the traffic ordinance provides:

"No vehicle shall be driven, used, operated, parked, or stopped in a careless, reckless, negligent manner, or in such a manner as to endanger life, limb, person or property, nor in such a manner as to endanger or interfere with the lawful traffic or use of the streets."

The evils against which the city ordinances are directed

are common knowledge communicated to the city council and to the courts by current history. In this country as many as 38,000 human beings are killed in a single year by misuse of motor vehicles. From the same cause in the same time, maimed and mutilated human bodies run into the hundreds of thousands. In the fast-moving carnival of death and mutilation the city of Lincoln has had its toll. Morgues are burdened with the dead, hospitals with the bleeding and mutilated and the alms houses with the paupers. Speed of motor vehicles driven by negligent, reckless or wanton drivers is known to be a prolific cause of the bloody work. The appalling situation called for legislation applicable to the city of Lincoln, an educational center where students pour into the streets by thousands, where commercial business attracts shoppers, where conventions and motion pictures attract throngs and where football games fill the public arteries of travel with automobiles and human beings.

The automobile brought into streets and highways an instrument for the destruction of human life and property hitherto unknown. The human organism of those who negligently drive automobiles in the streets is not adjusted to the destructive agency they undertake to guide and control. Evil consequences are augmented by the cunning and skill of modern engineers who have silenced the natural roar of fast revolving wheels until they no longer operate on human nerves or otherwise arouse the mind to the sense of danger produced by excessive speed and amazing power. It requires mental effort on the part of a driver, incased in steel for personal protection and otherwise surrounded by comforts, to obey the law and thus protect others from the destructive forces which the city ordinances require him to direct and control for public and private safety—an energy which, according to the evidence, defendant kept in repose.

In adopting the traffic regulations quoted, the city legislature had in mind calamities inflicted by means of motor vehicles unlawfully or negligently operated. The creation

of excuses to relieve motorists from responsibility for the consequence of their own lawless, reckless, negligent or wanton acts was never the aim of the city lawmakers. The majority opinion states: "There is sufficient evidence in the record, if believed, to sustain a finding by the jury that defendant drove his car at an excessive rate of speed." The violence of the impact and the surrounding circumstances in connection with oral testimony indicate a speed of at least 40 miles an hour. The instruction for which the judgment is reversed did not permit a recovery by plaintiff unless defendant drove at an unlawful speed. I did not discover any statute or ordinance requiring a pedestrian to yield the right of way to a lawless motorist going 40 miles an hour where the speed limit was not over 25 miles, where he was required to drive at a speed that was reasonable and proper, having regard for the traffic, where no motorist could lawfully drive in a "careless, reckless and negligent manner," where he could not lawfully drive "in such a manner as to endanger life, limb, person or property." The municipal law distinctly says it shall be unlawful to operate a motor vehicle at a greater rate of speed than that limited by the ordinance. This means that defendant had no right of way in the street when he struck plaintiff while going at the rate of more than 25 miles an hour and violating other traffic regulations. On sufficient evidence the jury found he exceeded the speed limit. He was therefore a public and private menace with no right of way in the street.

Plaintiff, a pedestrian without any means of locomotion except what nature provided, had little potential power to destroy lives or property of others in comparison with a speeding automobile. Owners of cars parked between intersections have the right to back them carefully into the lanes of travel. Policemen and firemen have a right to rush into the streets between intersections. If a driver drops dead at the wheel, a passenger in the car may stop it between intersections and with proper caution get out into the street for whatever is necessary. For numberless

purposes men may be lawfully in lanes of travel between intersections and motorists are under a duty in congested districts to observe what is ahead of them and stop or set their pace accordingly. When they perform this duty they see a man negligently in the street in front of them as well as persons and objects there without negligence.

By ordinance the city of Lincoln may lower the speed of automobiles in the streets and restrict other forms of negligence and lawlessness in city traffic to a greater reasonable extent than restrictions imposed by general acts of the legislature. The following was long recognized law:

"The fact that the legislature has provided limitations upon the speed of such vehicles will not prevent further restriction by the city if the same are reasonable and are made necessary by special conditions and circumstances that were plainly not considered by the legislature, and do not prohibit or restrict the free use of the streets." *Christensen v. Tate,* 87 Neb. 848, 853, 128 N. W. 622. See, also, *Bodkin v. State,* 132 Neb. 535, 272 N. W. 547.

The instruction condemned by the majority as erroneous and prejudicial to defendant states: "The statutes of Nebraska provide that the driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have." The reference to the immaterial statutes instead of the pertinent ordinances did not affect plaintiff's clear right of recovery or the measure of his damages. Except for the harmless reference, the instruction was correct. The reversal is a violation of the statutory and judicial rule that a judgment shall not be reversed for a mere harmless error in the instructions. The judgment should have been affirmed. The reversal is a denial of justice.

I am directed by Chief Justice Goss to say that he concurs in this dissent.

VILLAGE OF DESHLER, APPELLEE, V. SOUTHERN NEBRASKA POWER COMPANY, APPELLANT.

277 N. W. 77

FILED JANUARY 7, 1938. No. 30140.

1. **Evidence.** Secondary evidence may be admissible to supply that part of a legislative record which is lost or destroyed to show that certain steps were taken upon which the record is silent.
2. ———. Where such record is intact, parol evidence is not admissible to fill out its omissions.
3. **Municipal Corporations:** ORDINANCES: ADOPTION. Where the minutes of a village board show that an ordinance was adopted, but the record is silent as to the reading of the ordinance and it is not affirmatively shown that it was not read, it will be presumed to have been duly read as required by statute.
4. ———: ———: TITLE. The provision of the statute that ordinances shall contain no subject which shall not be clearly expressed in their titles is mandatory and renders the portion not expressed in the title entirely void.
5. ———: ———: VALIDITY. Where an ordinance is published in pamphlet form by public authority with the other ordinances of the municipality, the village may not question its validity on the ground that it was not legally adopted when it would prejudice the rights of those against whom its invalidity is asserted.
6. **Estoppel.** In a proper case, a municipality, like individuals, may be estopped by its acts or laches.
7. ———. Evidence examined and *held* to constitute a state of facts to which an estoppel *in pais* applies.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Stubbs & Stubbs and *B. F. Napheys, Jr.*, for appellant.

Perry, Van Pelt & Marti, contra.

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

CARTER, J.

This is a suit in equity to enjoin the defendant company from continuing to occupy the streets and alleys of the village of Deshler with its electric distribution system. The trial court granted a mandatory injunction ordering the defendant to remove all poles, wires, transformers, cross-

arms and other equipment in the streets and alleys of the village within 90 days from the date of the decree. From this order, defendant appeals.

The record discloses that in 1912 an application for a franchise permitting the construction and operation of an electric light plant and distribution system was made to the village of Deshler by the Bokenkamp brothers. The franchise was not granted, but the applicants proceeded to construct a plant and distribution system notwithstanding. In 1917 or 1918 the partnership was dissolved and a corporation known as the Deshler Light & Power Company succeeded to all the rights in the plant and distribution system formerly held by the partnership. In 1924 the defendant, Southern Nebraska Power Company, purchased the electric plant and distribution system of the Deshler Light & Power Company. On July 1, 1935, a written notice was served on defendant to remove its property from the streets and alleys of the village for the reason that it had no franchise, and, after a refusal to comply, this suit was instituted.

Defendant contends that it has a franchise to carry on its business within the village until the year 1940 by virtue of chapter 35 of the 1915 revised ordinances of the village of Deshler. A brief history of this chapter is necessary to a determination of its validity.

The record discloses that on July 6, 1915, the village board appointed Post & Post, of Columbus, Nebraska, to revise and prepare all village ordinances in printed and indexed form. It further appears that George R. Mann became associated with the firm of Post & Post and actually performed the services with reference to the revision of the village ordinances. On September 7, 1915, the village board considered ordinance No. 49, the same consisting of existing ordinances as revised by George R. Mann. It, however, included chapter 35 which purported to be an ordinance granting a 25-year franchise to the Deshler Light & Power Company. It is conceded that no prior franchise ordinance had ever been passed, but defendant

contends that the adoption of ordinance No. 49, purporting to reenact all previous existing ordinances and the franchise ordinance therein shown as chapter 35, constituted a grant of a franchise to the Deshler Light & Power Company.

The record of the proceedings of the village board on September 7, 1915, shows that a motion was made and seconded "that said ordinance No. 49 being an ordinance, revising, classifying and indexing all the ordinances of a general nature be advanced to its first reading and rules suspended." The record further discloses that the rules were suspended and the ordinance placed on second and third reading and a unanimous affirmative vote noted in the minutes. The record does not show that ordinance No. 49, or any part of it, was ever read. No mention is made in the minutes of the grant of a franchise or of the specific provision of the ordinance covering that subject.

The defendant offered the testimony of George R. Mann to the effect that on September 7, 1915, an ordinance designated as chapter 35 of ordinance No. 49 was presented to and adopted by the village board which purported to grant a 25-year franchise to the Deshler Light & Power Company. The records were searched and no evidence of such an ordinance was found. The defendant offered in evidence a carbon copy of the original ordinance claimed to have been adopted and which had been retained in the files of Mr. Mann. The trial court excluded this evidence and we think properly so. Secondary evidence is admissible in a case such as we have before us where the minutes of the board have been lost or destroyed. We know of no rule, however, that permits secondary evidence to be offered where the board proceedings are complete and plain in their meaning. In other words, secondary evidence is not competent to establish the acts of a legislative body where the minutes are available and the record merely silent as to the acts attempted to be proved. *Hull v. City of Humboldt,* 107 Neb. 326, 186 N. W. 78. We necessarily conclude that the trial court properly rejected this evidence.

The next question is whether the passage of ordinance No. 49, in the manner in which it was passed, was valid and sufficient to grant a franchise to the Deshler Light & Power Company.

The statute governing the enactment of an ordinance such as we have here before us provides that it "shall be fully and distinctly read on three different days, unless three-fourths of the council or trustees shall dispense with the rule; and, in case the above rule shall be suspended, such ordinances, with the yeas and nays called and recorded, shall be read by title one time, when introduced, shall be read by title a second time after the rule shall have been dispensed with, shall be read at large and then put upon final passage." Comp. St. 1929, sec. 17-520. In the case at bar, the rules were suspended and the yeas and nays taken and noted in the minutes after each "reading." The record does not disclose that the ordinance was ever read. Neither is there any evidence that the ordinance was not read. Under such circumstances, the presumption is that the statute was complied with and that the ordinance was read, as by statute required. *Hull v. City of Humboldt, supra.* Plaintiff further contends that ordinance No. 49 was not properly published. The applicable statute is in part as follows: "And all ordinances of a general nature shall, before they take effect, be published within one month after they are passed, in some newspaper * * * or by publishing the same in book or pamphlet form. * * * When ordinances are printed in book or pamphlet form * * * the same need not be otherwise published." Comp. St. 1929, sec. 17-519. The ordinance in question was printed in pamphlet form, a copy thereof appearing in the record as exhibit No. 14. We necessarily conclude that, under the state of the record, ordinance No. 49 was regularly passed, approved and published.

There is no competent evidence in the record of the passage, approval and publication of an ordinance granting a franchise to the Deshler Light & Power Company prior to the passage of ordinance No. 49. Chapter 35 was

therefore in fact a new ordinance adopted by the village when it was passed, approved and published as a part of ordinance No. 49.

The title to ordinance No. 49 is: "An ordinance revising, collecting, classifying, dividing into chapters and sections and reenacting all the ordinances of a general and permanent nature of the village of Deshler, Nebraska, in force and effect at the date of the passage and approval hereof; and providing for the publication and distribution of this revision ordinance."

The governing statute is: "Ordinances shall contain no subject which shall not be clearly expressed in its (their) titles, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Comp. St. 1929, sec. 17-520. It seems clear to us that the title to an ordinance revising, classifying and indexing the ordinances of a village in force and effect on the date of its passage is not broad enough to include a new ordinance purporting to grant a 25-year franchise to a private company. The inclusion of chapter 35, the franchise ordinance, in ordinance No. 49 is violative of the mandatory provisions of section 17-520, Comp. St. 1929, and therefore of no force and effect.

Defendant contends that the village is estopped to deny the validity of the purported franchise ordinance. The record discloses that defendant has maintained and extended its transmission lines since the publication of ordinance No. 49. In fact, defendant purchased the whole system from the Deshler Light & Power Company since the publication of the invalid franchise ordinance. The evidence shows that defendant has expended a sum in excess of $20,000 in improving its electric plant and distribution system, exclusive of maintenance costs. Defendant has operated within the village for more than 20 years without objection on the part of the village or any one under the assumption that it had a 25-year franchise.

During all of this period the village has stood by and done nothing, permitting the defendant to construct and improve its works and enter into contracts with the public generally, even with the village itself. In a case very similar in principle, the supreme court of Illinois said: "It is insisted by appellant here that the doctrine of estoppel *in pais* has no application to this case, for the reason that the village authorities are not shown to have done any affirmative act calculated to influence others to act on the faith of said invalid ordinance. Theirs, it is said, is no mere nonaction. The judgment of the circuit court being rendered on the issues joined without evidence, must rest on the allegations of the answer not denied by the pleas. But among such allegations is the averment, that after the attempted passage of the disconnecting ordinance the village board caused it to be published, with its other ordinances, in pamphlet form. Here, certainly, was an affirmative act. Was it calculated to lead others to act upon the supposition that the ordinance was valid? Our statute provides that when city or village ordinances are printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city council, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances, as of the date mentioned in such book or pamphlet, in all courts and places, without further proof. (Rev. Stat. sec. 4, chap. 24.) Certainly respondents and all others had a right to act on that which relators had made legal evidence of the passage of the ordinance, which they now seek to treat as invalid." *People v. Maxon,* 139 Ill. 306, 28 N. E. 1074.

The Nebraska statute is very similar to that in Illinois and provides as follows: "All ordinances shall be passed pursuant to such rules and regulations as the council or board of trustees may provide; and all such ordinances may be proved by the certificate of the clerk, under the seal of the city or village, and when printed or published in book or pamphlet form, and purported to be published

by authority of the city or village, shall be read and received in evidence in all courts and places without further proof." Comp. St. 1929, sec. 17-521.

A text-writer states the rule to be as follows: "The doctrine of estoppel has often been applied when the question of the validity of an ordinance has been raised. * * * Thus where the ordinance is published in pamphlet form by public authority with the other ordinances of the municipality, a city cannot question its validity, on the ground that it was not validly adopted. Its publication estops the city from so doing." 2 McQuillin, Municipal Corporations (2d ed.) sec. 843.

In the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, this court said: "The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter."

In the case of *Omaha & C. B. Street R. Co. v. City of Omaha*, 90 Neb. 6, 132 N. W. 731, this court said:

"We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to

permit the city to destroy plaintiff's property and business, which it has thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein. * * *

"It appears that the injunction by its terms was made perpetual, and, if not modified, may be at some future time construed so as to forever prevent the city from ousting the plaintiff from its streets and alleys under any circumstances. It seems clear that the operation of the order of injunction should not extend beyond the date of the expiration of the plaintiff's franchise, and that the defendant should only be restrained from interfering with or destroying the plaintiff's conduits, poles, wires and other property without compensation while the present conditions exist, and until the expiration of the plaintiff's *alleged or colorable franchise.*" (Italics ours.)

In another case involving the same principle, this court said: "The doctrine of estoppel *in pais* is applicable to municipal corporations, and it is equally true that city councils or public authorities will be estopped or not as justice and right may require. There may be cases where to assert a public right would be an encouragement and promotion of fraud, but where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights so acquired, then the doctrine of equitable estoppel will be applied." *State v. McIlravy*, 105 Neb. 651, 181 N. W. 554.

Under the authorities cited, we conclude that the facts are such that the doctrine of laches applies and that the village of Deshler is estopped to claim the invalidity of the so-called franchise ordinance. The village of Deshler is not entitled to a mandatory injunction under the issues raised in this case prior to the date of the termination of defendant's alleged or colorable franchise. For the reasons stated, the decree of the district court is reversed and the suit dismissed.

REVERSED AND DISMISSED.

ROSS JACKSON V. STATE OF NEBRASKA.

277 N. W. 92

FILED JANUARY 7, 1938. No. 30091.

1. **Criminal Law**: APPOINTMENT OF ASSISTANT COUNSEL. Whether in the prosecution of a felony the court should, on application of the county attorney, appoint counsel to assist in the prosecution as provided by section 26-904, Comp. St. 1929, presents a question addressed to the sound discretion of the trial court, and error cannot be predicated thereon in the absence of a showing that the appointment operated to prejudice rights of the defendant.
2. ———: ARGUMENT. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.
3. ———: EVIDENCE. The testimony of a witness under oath face to face with defendant in open court at a preliminary hearing with the opportunity given for cross-examination is admissible upon a subsequent trial for the same offense when the personal attendance of the witness at the trial cannot be had.
4. ———: ———. Whether the prosecution has sufficiently established the unavailability of the witness as a foundation for the admission of such testimony is within the sound discretion of the trial court, and error cannot be predicated thereon unless an abuse of discretion is affirmatively shown.
5. **Information**: HOMICIDE: INSTRUCTIONS. If an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge; and when the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees under proper instructions to the jury for their determination.
6. **Homicide.** Evidence examined and *held* sufficient to sustain the verdict and not warrant a reduction of the sentence imposed by the trial court.

ERROR to the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Affirmed.*

W. I. Tillinghast, Beeler, Crosby & Baskins and *Robert* B. CROSBY, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and CHAPPELL, District Judge.

CHAPPELL, District Judge.

The plaintiff in error, hereafter called defendant, was informed against in the district court for Keith county, Nebraska, for the crime of murder in the first degree in the fatal shooting of one Charles Beekin on July 2, 1936. Upon trial to a jury he was convicted of manslaughter and sentenced by the trial court to the Nebraska state penitentiary for nine years at hard labor. He prosecutes error to this court.

Defendant claims many errors in the trial of the case, but actually relies upon four, to wit: The appointment of Murl Maupin as special prosecutor to assist the county attorney and his purported misconduct in final summation to the jury; the admission of the testimony of a witness, Alice Du Charme, given under oath at the preliminary hearing in the county court, when she was not present at the trial of the case; insufficiency of the evidence to sustain the verdict; and that the sentence of the trial court is excessive.

Immediately preceding the trial, Murl Maupin of North Platte, Nebraska, was appointed by the court as special prosecutor to assist the county attorney in the trial of defendant. Defendant's counsel objected in open court in the absence of the jury panel to his appointment. Thereupon, Mr. Maupin was promptly sworn and interrogated by the court, the county attorney and attorney for defendant. This evidence discloses that at some time prior to the day of the fatality defendant and his wife had consulted him briefly and informally relative to the custody of a child or children then living with their mother, Alice Du Charme, and the deceased. He was never employed, retained or further consulted in that matter or any other for them or their family or friends, and never had received any compensation from them or any of them. He was not related to any of the parties; had no interest in the case or the

result thereof; and had no interested client. On the morning of the shooting he rode with the sheriff and the county attorney to the scene of the shooting at LeMoyne, Nebraska, but never made any further investigation of the facts until called into the case by the county attorney a short time before the trial.

The guiding legal rule governing appointment of special assistants to aid the county attorney in the prosecution of criminal cases under section 26-904, Comp. St. 1929, is enunciated in *Barr v. State,* 114 Neb. 853, 211 N. W. 188: "Whether, in the prosecution for a felony, the court should, on the application of the county attorney, appoint counsel to assist in the prosecution, presents a question addressed to the sound discretion of the court." Error cannot be predicated thereon in the absence of a showing that the appointment operated to prejudice rights of the defendant. See, also, *Dobry v. State,* 130 Neb. 51, 263 N. W. 681; *Baker v. State,* 112 Neb. 654, 200 N. W. 876; *Gragg v. State,* 112 Neb. 732, 201 N. W. 338. We find nothing in the record showing that Maupin's appointment operated to prejudice the rights of this defendant.

During argument to the jury the assistant prosecutor said "that the jury should go out into the jury room and consider the evidence fairly and extend mercy in that manner, and should extend more mercy to the defendant than Ross Jackson showed to Charley Beekin." Defendant's counsel took exception to this remark and asked that the court "instruct the jury and to warn the attorney against such language and use in such matters." Whereupon the court said in part: "I wish counsel for the prosecution would be careful and stay within the record." In *Cooper v. State,* 120 Neb. 598, 234 N. W. 406, this court said: "It is the duty of the prosecuting attorney to conduct the trial in such a manner as will be fair and impartial to the rights of the accused, no matter how guilty, in his opinion, defendant may be; and this rule applies to special counsel assisting the prosecuting attorney." We still earnestly adhere to its admonition, but cannot conclude that it has ap-

plication to this case requiring a reversal. Remarks of the prosecutor in final summation of the evidence to the jury which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. *Mason v. State,* 132 Neb. 7, 270 N. W. 661; *Dobry v. State, supra; Argabright v. State,* 62 Neb. 402, 87 N. W. 146. Like complaint is made of another statement of lesser consequence which we deem it unnecessary to discuss.

During the trial the state offered in evidence, and the trial court received over objections of defendant's counsel, all the testimony both direct and cross-examination of one Alice Du Charme as given by her under oath in the county court at the preliminary hearing for the same offense. Defendant concedes that she appeared in person at the preliminary hearing, gave testimony under oath, and that defendant met her there face to face. It appears from the record that she was there subjected by defendant's counsel to a long and searching cross-examination. No contention is made that her testimony was not accurately taken in shorthand by a reporter employed by defendant, correctly transcribed by her, and a true copy thereof furnished the county attorney. Does this violate section 11, art. I of the Constitution, which provides in part: "In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel * * * and * * * meet the witnesses against him face to face"?

Untrammeled courts of England and America have jealously protected this right of a defendant since Lord Coke, in commenting upon Magna Charta shortly after 1600, said: "That the lords ought to hear no evidence but in the hearing and presence of the prisoner." At the same time they have protected the public by refusal to permit a defendant to abuse this sacred right and thereby destroy the public's lawful protection. As early as 1884, in *Hair v. State,* 16 Neb. 601, 21 N. W. 464, this court held that the evidence of a deceased witness upon a former trial of the same party for the same offense, being there brought face

to face with the accused and cross-examined by him, was competent upon a subsequent trial and not in violation of this constitutional right. In *Koenigstein v. State,* 103 Neb. 580, 173 N. W. 603, we said that when a witness, now living, has been previously examined in open court with the opportunity for cross-examination, which has been fully availed of, and the witness cannot be produced for examination at the second trial, the evidence so given upon a former trial for the same offense may be used at the second trial. See, also, *Meyers v. State,* 112 Neb. 149, 198 N. W. 871; *Trobough v. State,* 122 Neb. 7, 238 N. W. 771; *Brunke v. State,* 105 Neb. 343, 180 N. W. 560.

We fail to find in modern decisions or text-books that the courts deem it of any importance whether such testimony was adduced at a preliminary hearing before a committing magistrate or in a former trial for the same offense. In 15 A. L. R., beginning at page 458 and continuing to and including page 564, we find cases and an exhaustive legal and historical discussion of this question, citing English and American cases based upon the common law, statutes and similar constitutional provisions. The almost unanimous rule now is that the testimony of a witness under oath, face to face with defendant in open court in the regular course of a judicial proceeding, with the opportunity given for cross-examination, whether given at a preliminary hearing or in a previous trial for the same offense, is admissible upon a subsequent trial of the cause when the personal attendance of the witness at the trial cannot be had.

The record discloses that the absent witness Alice Du Charme lived with her three small children at Ogalalla, Nebraska, at the time of the preliminary hearing. She later talked with the county attorney several times in his office, assuring him that she and the children would be available at all times as witnesses against defendant at the trial. She desired to place her three children in a boarding school at the Cheyenne Agency in South Dakota. The county attorney knew this, but she and the children left

sooner than anticipated and before the county attorney had knowledge and time or opportunity to serve subpœnas. The defendant's wife, Lillian Jackson, with whom the witness and her three small children lived for some time after the alleged crime, took them out of the state of Nebraska to Cheyenne Agency, South Dakota, in defendant's car. She testifies that the witness Alice Du Charme told her on the road up that "she wouldn't come back, she didn't want to come back." The county attorney thereafter wrote the school and the witness and received replies assuring him that they would all be available for the trial the week of October 24, 1936. The letters are in evidence. A subpœna was issued for service by the sheriff upon the witness and her children. He found the children, but the witness Alice Du Charme had disappeared on October 23, 1936. Diligent search by the sheriff and the police of other cities could not locate her before the trial began on October 27, 1936. It is admitted that she was absent from the state and that no one knew her whereabouts. She was absent from the state without procurement of the prosecution and, upon diligent inquiry, could not be found. 8 R. C. L. 214, sec. 211. The mere fact that the witness was not placed under subpœna before she left the state does not raise a presumption of bad faith or amount to such lack of diligence as, of itself, to forbid the use of the testimony. *State v. Nelson,* 68 Kan. 566, 75 Pac. 505. Whether the prosecution has sufficiently established the unavailability of a witness who testified at the preliminary hearing as foundation for the admission of such testimony upon subsequent trial of the cause is within the sound discretion of the trial court, and error cannot be predicated thereon unless an abuse of discretion is affirmatively shown. *Koenigstein v. State, supra; Meyers v. State, supra;* 8 R. C. L. 216, sec. 213. We must, therefore, conclude that her testimony was properly admitted as a matter of compelling necessity to avoid a failure of justice.

Bearing in mind the complaint by defendant of the insufficiency of the evidence to sustain the verdict of the

jury, we have given careful study of the entire bill of exceptions. We deem it unnecessary to set out the evidence in full in this opinion. It appears that defendant, a brother-in-law of deceased, with whom he was on friendly terms, came into the pool-hall operated by the deceased, and that a heated and violent quarrel quickly ensued, during which threats and epithets freely passed between them, at the climax of which defendant hurried to his car parked in the middle of the street in front of the place, got his gun, a .22 caliber automatic target pistol, and returned. The quarrel continued, and defendant shot three times at deceased, emptying his gun. The first bullet passed through the carotid artery in the neck, and deceased quickly collapsed and was dead. The other two bullets went wild, one striking the wife of defendant in the upper arm. Defendant claims that deceased had a shotgun in his hands into which he pumped a shell and which he pulled to his shoulder and aimed at him before the shooting occurred; that his wife was present and involved in the quarrel, and he shot in self-defense and in defense of his wife. There is evidence to sustain this contention, but, likewise, there is evidence by witnesses for the state that defendant, upon his return with the gun, was in a violent passion and stood in the place shaking his gun and pointing it at deceased; whereupon, deceased said, "Get the hell out of here. I don't want no trouble and go on," and started to a back room, but before he could get inside the door defendant shot him; that, after the deceased was shot, he did reach for and get his shotgun and pumped a shell into the magazine thereof, but collapsed with the gun under him before he could leave the back room. After a consideration of all the evidence we have come to the conclusion that the evidence is sufficient to sustain the verdict.

Section 28-401, Comp. St. 1929, provides: "Whoever shall purposely and of deliberate and premeditated malice * * * kill another; * * * every person so offending shall be deemed guilty of murder in the first degree." Section 28-402, Comp. St. 1929, provides: "Whoever shall purposely

and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." Section 28-403, Comp. St. 1929, provides: "Whoever shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act, shall be deemed guilty of manslaughter." Where an information charges the crime of murder in the first degree, murder in the second degree and manslaughter are included in the charge, and where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury for their determination. *Haddix v. State,* 76 Neb. 369, 107 N. W. 781; *Boche v. State,* 84 Neb. 845, 122 N. W. 72; *Denison v. State,* 117 Neb. 601, 221 N. W. 683; *Lillard v. State,* 123 Neb. 838, 244 N. W. 640. The trial court carefully and properly instructed the jury upon all of these issues, including the defendant's theory of self-defense and defense of his wife and we will not disturb their verdict.

The sentence of the court was not excessive and a reduction thereof is not warranted by the evidence. We fail to find considerations in the evidence such as to induce a tendency to be more lenient than the trial court. The trial court saw the witnesses, heard the evidence upon which the jury, under proper instructions, rendered a verdict. The supreme court will not often reduce the sentence imposed by the trial court when, as in the case at bar, the crime was a crime of violence. See *Peterson v. State,* 115 Neb. 302, 212 N. W. 610.

We find no error prejudicial to the defendant, and the judgment (and sentence) of the trial court is

AFFIRMED.

LLOYD HARRISON V. STATE OF NEBRASKA.

277 N. W. 96

FILED JANUARY 12, 1938. No. 30184.

1. **Criminal Law**: INSTRUCTIONS. "In a criminal prosecution, the trial court in giving instructions may describe the offense in the language of the statute." *Alt v. State*, 88 Neb. 259, 129 N. W. 432.
2. ———: ———. "All instructions given should be considered in determining whether a particular instruction is prejudicial." *Foreman v. State*, 126 Neb. 619, 253 N. W. 898.
3. ———: AFFIRMANCE. Under the mandate of section 29-2308, Comp. St. 1929, if the supreme court, in a criminal case, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred, it must affirm the judgment.

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

Richard F. Stout and *Jay O. Rodgers*, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

GOSS, C. J.

Defendant was convicted on an information charging that he did forcibly break and enter a motor vehicle with the intent to steal therefrom property of value contained within the automobile. He brings proceedings in error to reverse the judgment based on the verdict.

By section 28-596, Comp. St. Supp. 1935, the legislature provided: "Every person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with intent to commit the crime of larceny, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than one year nor more than two years." This created a new substantive crime.

There was sufficient evidence to be considered by the jury that defendant reached through an opening in the side of the truck and removed and took away a carton containing 30 pounds of butter. Defendant's brief concedes that the evidence "was technically sufficient, if believed, to establish the fact."

While the information charges that defendant did forcibly break and enter the motor vehicle with intent to steal property of value and instruction number 2 to the jury states the elements along lines upon which the burden of proof is upon the state, yet instruction number 3 explains to the jury that the law provides that any person who shall break and enter, or enter without breaking, at any time, any motor vehicle, with intent to commit the crime of larceny or steal property, shall be deemed guilty of a felony. Then the instruction says: "If the evidence in this case fails to show that the defendant did break into the motor vehicle * * * it would be sufficient, under the charge, that the state shall prove by evidence beyond a reasonable doubt that the defendant, Lloyd Harrison, entered the truck in question without actually breaking into it, with intent to steal property of value."

The giving of each of these instructions is assigned as error.

Instruction number 2 charged both breaking and entering, and if the jury found that he both broke and entered the automobile the offense must be complete. Instruction number 3 covers the offense committed if the defendant did not use force to break into the automobile, with the intent to steal property of value. South Dakota has a very similar statute, which provides: "Every person, who breaks or enters, in the day or in the nighttime * * * any building, booth, tent * * * or any other structure * * * in which any property is kept, with intent to steal therein or to commit any felony, is guilty of burglary." Defendant was charged with "breaking and entering." The court there said, on a contention similar to that raised in the case at bar: "It will be observed that this section does not require

a 'breaking,' but 'entering' alone is sufficient to constitute the crime, and, though the information charges both the breaking and entering, the crime will be complete whether the entry was accomplished by means of force or without it. The contention is that an actual forcible breaking and entering must be read into this section. The statute seems to us too plain to require a discussion of this proposition." *State v. Vierck*, 23 S. Dak. 166, 120 N. W. 1098.

Taken together, the instructions use practically the language of the statute. "In a criminal prosecution, the trial court in giving instructions may describe the offense in the language of the statute." *Alt v. State*, 88 Neb. 259, 129 N. W. 432.

The instructions given by the trial court are to be considered as a whole in considering whether there was error in them. "All instructions given should be considered in determining whether a particular instruction is prejudicial." *Foreman v. State*, 126 Neb. 619, 253 N. W. 898.

We have examined the charges of error based upon alleged misconduct of the prosecutor and find them without any special merit.

After an examination of the entire record, we consider that no substantial miscarriage of justice has actually occurred and therefore, under the mandate of section 29-2308, Comp. St. 1929, the judgment is

AFFIRMED.

LLOYD E. PETERSON, APPELLANT, V. BRINN & JENSEN COMPANY, APPELLEE.
277 N. W. 82

FILED JANUARY 12, 1938. No. 30158.

1. **Automobiles: COLLISION: LIABILITY OF EMPLOYER.** In determining whether an employer is liable for the negligent acts of a traveling salesman in colliding with another automobile, the test of the employer's control should be directed to the portion of the employment directly connected with the factor whereby liability is sought to be established.

2. ———: ———: INDEPENDENT CONTRACTOR. If a traveling salesman owns and uses his own car, for which he has secured the license, and the employer has no right to direct when or how the car shall be run or managed, then, in respect to the operation of such automobile, the salesman is an independent contractor.
3. Master and Servant: INDEPENDENT CONTRACTOR. An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.
4. Automobiles: COLLISION: LIABILITY OF EMPLOYER. Where the proof fails to establish that a traveling salesman was acting within the scope of his employment, or engaged in any business for his employer, at the time of committing the negligent acts charged, the employer cannot be held therefor.

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

Wear, Boland & Nye and *Tyler & Peterson,* for appellant.

Brogan, Ellick, Shoemaker & Fitzgerald, contra.

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

PAINE, J.

This is an action for personal injuries, brought against an employer whose traveling representative negligently caused the injuries to plaintiff by colliding with his car. The trial court sustained a motion for a directed verdict for defendant at the close of plaintiff's testimony, and plaintiff appeals.

The petition alleged the corporate existence of defendant; that on February 21, 1935, and for a long time prior thereto one John R. Porter was an employee, servant, and agent of defendant, and on said date said Porter, while acting within the scope of his employment and engaged in business of the defendant, negligently drove his car against and into an automobile in which plaintiff was then riding.

The amended answer admitted that defendant was a corporation; admitted the ownership by Porter of the Chevrolet coach, bearing an Iowa license number, involved

in the accident, and affirmatively alleged that Porter was hired by defendant company as a traveling salesman, and that he was not at any time during his employment under the control of the defendant company, and was not on any business of or for defendant at the time of the accident, and asks that the action be dismissed.

The plaintiff's testimony disclosed that at about 9 o'clock on the evening of the 21st day of February, 1935, the plaintiff, Lloyd E. Peterson, and his law partner, Varro E. Tyler, were returning to Nebraska City from Plattsmouth in a Plymouth automobile, driving at about 40 miles an hour; that at a point on U. S. Highway No. 75 about 8½ miles north of Nebraska City John R. Porter, driving about 65 miles an hour, over on the wrong side of the center of the road, crashed into their car, and plaintiff suffered serious injuries including the loss of an eye in the accident.

This appeal does not involve any question of negligence or the severity of the injuries. At the close of the plaintiff's evidence a motion for a directed verdict was sustained, and the assignments of error relate to that ruling.

It is the contention of the defendant that Porter was an independent contractor, which fact relieved defendant from all liability. Plaintiff insists that this disputed point was a question of fact for the jury to determine.

The plaintiff called as his witness Lothardt M. Jensen, who testified that he is vice-president of the Brinn & Jensen Company, defendant, which is a Nebraska corporation, engaged in the wholesale wrapping-paper business; that John R. Porter was employed by their company as a salesman, and that he was assigned to a particular territory, including in a general way Winnebago, Nebraska, on the north, Auburn, Nebraska, on the south, and Guthrie Center, Iowa, on the east. He testified that Porter used his own automobile, and covered his territory about every five weeks. He made collections, and had collected $10 for the company on the day of the accident. He testified that Porter was paid a commission, computed on the gross

profit to the company on his orders, and against this he had a drawing account; that if at any time the company was dissatisfied with his work he could be discharged.

In the brief of plaintiff several pages are taken up with conflicts in the testimony of Jensen as given at the hearing in the compensation case involving the same accident, that given by him in the case at bar, and his admissions made in a conversation with the plaintiff and his wife, wherein plaintiff asked him on March 20, 1935: "What is the fact with reference to whether Mr. Porter was in your employ on the night of this accident?" Mr. Jensen answered: "He was working for us; our men are in our employ day and night when they are on the territory." Plaintiff charges that Mr. Jensen made many denials of earlier testimony that he had given in the compensation case tried in Nebraska City, and set out in parallel columns in his brief conflicting portions of his evidence. The decision in that matter, which involved this same accident, was written by Judge Good, and is found in *Porter v. Brinn-Jensen Co.*, 131 Neb. 611, 269 N. W. 96, in which opinion compensation was denied.

It has been said: "Where an appellate court has put a construction on a certain contract in one litigation, ordinarily the same construction will be placed on the same contract in a different litigation between other parties." 14 R. C. L. 78, sec. 16.

It may be admitted at the outset that defendant's motion to direct verdict admits truth of plaintiff's evidence and every inference reasonably permissive therefrom, and the trial court, in ruling on such motion, must consider plaintiff's evidence in the most favorable light, and with strongest inferences reasonably deducible therefrom in plaintiff's favor.

This court has examined with care the evidence of Mr. Jensen, which it is claimed by plaintiff is conflicting. Considering all of his testimony with the other facts in the case, we do not reach the same conclusions in reference thereto as reached by plaintiff.

In *Stockwell v. Morris*, 46 Wyo. 1, 22 Pac. (2d) 189, a salesman for the Maytag company, driving his own automobile, collided with another. It is held in this case that, in determining whether a tort-feasor is a servant rather than an independent contractor, the test of the employer's control should be directed to the portion of the employment directly connected with the factor whereby liability is sought to be established.

Discussing the distinction between an employee and an independent contractor, the tests formerly given to determine that one was an independent contractor embraced such facts as whether he was called upon and performed work for any one he wished; whether he could perform the work himself, or employ others whom he paid; whether he or an employer had the right to discharge workmen whom he employed. This question has today become one of the most difficult which any court must solve. Not only is there a failure to agree upon the definition of these terms between the state courts, but the same court will be found to have handed down decisions which cannot be reconciled. The question as to whether one is a servant or an independent contractor is discussed in more than 25 separate annotations in the A. L. R. series of reports. The ones in 17 A. L. R. 621, 19 A. L. R. 226, 29 A. L. R. 470, 54 A. L. R. 627, 61 A. L. R. 223, and 107 A. L. R. 419, will be found helpful. Some cases state that the ultimate test is determined by the control reserved in the employer, and that one cannot be an independent contractor unless he is what the word indicates—independent of his employer in all the details relating to their relationship.

However, in some forms of employment the management reserves the right to give the most detailed instruction as to the manner and form in which the work is accomplished, even though there is no doubt whatever that the person so directed and instructed is an independent contractor, while on the other hand some high-grade employees have the greatest latitude in managing all of the details of their department as to employment of help and hours of labor

and methods employed, yet no one would argue that the head of such department was not strictly an employee. Therefore, it will be seen that the right of a person to control the progress of the work up to the final result is not always a true test. In fact, the words "independent contractor" have been so extended at the present time as to be almost a misnomer, and the term is often used simply to show that there are no contractual relations which would bind the principal.

In some cases relating to traveling salesmen, we find that a traveling salesman has been held to be an employee, even though he traveled on commission. Among them, in *Riggs v. Standard Oil Co.*, 130 Fed. 199, where an oil salesman was paid on a commission basis and had the right to employ others to do his work, he was held not to be an independent contractor.

But, in another case of a commission salesman, *Aldrich v. Tyler Grocery Co.*, 206 Ala. 138, 89 So. 289, 17 A. L. R. 617, he was held to be an independent contractor. Shook was a city salesman for the defendant company. He owned and maintained the automobile which caused the death of plaintiff's intestate. He was paid a percentage on orders taken and accepted. He collected bills due the company. The company was only concerned in the result of his efforts as a salesman. It did not control when, how, or where he secured the orders, except that he was not to work another salesman's trade. The method, means, and occasions of his calling upon the trade were left entirely to him, and it was held that such a salesman, whose movements are in no way controlled by his employer, is, with respect to the operation of his car, an independent contractor, so that his employer is not answerable for injuries caused by his negligent operation of the car.

In *Nettleship v. Shipman* (1931) 161 Wash. 292, 296 Pac. 1056, it was held that, where the control over a salesman was very general, the employer being interested only in the results obtained, and the salesman paying for the license for his automobile and all expenses, the defendant

should not be held liable under the doctrine of respondeat superior, and the action was reversed and dismissed.

In *Dohner v. Winfield Wholesale Grocery Co.* (1924) 116 Kan. 237, 226 Pac. 767, a grocery salesman, who was paid a salary of $175 a month and certain commissions, and who used his own automobile at his own expense, and whose movements were not controlled by his employer, except that he was required to make his territory once each week, was held to be an independent contractor with respect to his automobile. Other cases holding to the same rule are *Heinrich v. Pictorial Review Co.*, 326 Pa. St. 470, 192 Atl. 645, and *Wescott v. Young*, 275 Mass. 82, 175 N. E. 153.

The California court said that an automobile salesman, working on commission, with no expense account, but who was furnished gas and oil for his car, but not controlled as to where he should go to find prospects, was engaged in business for himself as truly as is a contractor who engages to construct a building, and was held to be an independent contractor. *Barton v. Studebaker Corporation* (1920) 46 Cal. App. 707, 189 Pac. (2d) 1025.

In *Wesolowski v. John Hancock Mutual Life Ins. Co.*, (1932) 308 Pa. St. 117, 162 Atl. 166, 87 A. L. R. 783, Adams was a solicitor of life insurance, on a salary of $15 a week and commissions. His territory was about a mile square, in the city of Philadelphia. The company had the right to his exclusive services and to fix his working hours. He sometimes walked and sometimes drove his Ford car. He collided with, and severely injured, a boy 15 years of age, who was riding a bicycle. The jury returned a verdict of $21,000 for the boy and $1,600 for his parents. Judgments entered in favor of the defendant company *non obstante veredicto* were upheld by the supreme court, the court saying that no former decision had been made by that court on the issues involved.

The real test of an independent contractor is whether or not the master has any authoritative control with respect to the manner in which the details of the work are to be performed, and this test must, in the last analysis, deter-

mine the essential nature of the relationship. 1 Labatt, Master and Servant (2d ed.) 56, sec. 18.

If but one inference can be drawn from the evidence, then the question of whether the relation is that of employer and independent contractor, or that of master and servant, is for the court. *Chicago, R. I. & P. Ry. Co. v. Bennett,* 36 Okla. 358, 128 Pac. 705, 20 A. L. R. 678.

In 1 Restatement, Agency, 11, sec. 2, is this definition: "(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."

It is stated in the briefs that Judge Redick, as trial judge in the case at bar, based his ruling in the case almost entirely upon the case of *Pyyny v. Loose-Wiles Biscuit Co.* (1925) 253 Mass. 574, 149 N. E. 541, in which it was said that the defendant company was without right to direct the manner in which its traveling salesman should control his car, and assumed no obligation except to pay so much per mile for its operation; that it was the salesman's duty to obtain a license to operate his car, and to keep it in repair and pay the expense of operating it. He had no regular hours to work, and his time was his own, and his sole business was to sell for the defendant company. In the morning of the day of the accident he sold orders, then attended an Elks Field Day picnic in the afternoon, then went to a sales meeting, after which he started out in his automobile with a friend whom he had found at the picnic, and a collision occurred. A verdict given for the plaintiff was set aside, and judgment was entered for the defendant.

Many of the cases in which the *Pyyny* case has been cited with approval are collected in *American Nat. Ins. Co. v. Denke* (1936) 95 S. W. (2d) (Tex. Com. App.) 370. The gist of these decisions is that the employee is not an agent of his employer in respect to the operation of his automobile, but is an independent contractor.

A late case, decided in June, 1937, is *Kennedy v. American Nat. Ins. Co.*, 107 S. W. (2d) (Tex.) 364, which held that recovery might have been had if representative had been using his own automobile within the scope of his employment at the time of the accident, for he must be driving at the time in discharge of duties of his employer.

Coming now to our Nebraska cases, we find that in *Showers v. Lund*, 123 Neb. 56, 242 N. W. 258, many Nebraska cases have been cited to prove that there is no hard and fast rule by which to determine whether one sustains the relation of an employee or that of an independent contractor.

In *Schou v. Village of Hildreth*, 127 Neb. 784, 257 N. W. 70, it was held that one engaged by the village to care for a swimming pool, whose compensation was $20 for three months plus the receipts of the pool, is an employee, and not an independent contractor.

The term "independent contractor" signifies one who contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. *Hines v. Martel Telephone Co.*, 127 Neb. 398, 255 N. W. 233; *Bodwell v. Webster*, 98 Neb. 664, 154 N. W. 229.

In the case of *Priest v. Business Men's Protective Ass'n*, 117 Neb. 198, 220 N. W. 255, the wife of an insurance solicitor was denied compensation for his death. Many cases from Nebraska and other states were reviewed in this opinion, holding that Priest was an independent manager of their insurance agency, not subject to the company's control as to the manner in which such agency should be conducted.

In the case of *Aeschleman v. Haschenburger Co.*, 127 Neb. 207, 254 N. W. 899, a drug salesman selling on commission was held by this court to be an employee, and not an independent contractor. An examination will show the difference between the position of the salesman in this case and the case at bar, for in this case he was required to make certain calls each week, and to be at the home

office each week end, where he assisted in the work in the office. He was required to keep in constant touch with the office, and occasionally was ordered to make emergency service calls. This court said that the character of supervision exercised by his employer made the relationship a closer one than that in *Johnston v. Smith*, 123 Neb. 716, 243 N. W. 894, and *Christensen v. Protector Sales Co.*, 105 Neb. 389, 181 N. W. 146.

We believe that we are well supported by the authorities in declaring that, where the proof fails to establish that a traveling salesman was acting within the scope of his employment, or engaged in any business for his employer, at the time of committing the negligent acts charged, the employer cannot be held therefor, and the judgment of the trial court is

AFFIRMED.

WINIFRED WHITE, APPELLEE, V. WASHINGTON NATIONAL INSURANCE COMPANY, APPELLANT.
277 N. W. 69

FILED JANUARY 12, 1938. NO. 30141.

1. Insurance: INJURIES: PROOF. A plaintiff suing for death benefits under an accident policy limiting the recovery to injuries sustained "by the burning of any * * * dwelling-house * * * in which the insured shall be at the beginning of such fire" must prove that the injuries resulted from the burning of the building itself.
2. ———: ———: ———. In such a case, the fact that the injuries resulted from the burning of a dwelling-house may be established by circumstantial evidence.
3. ———: ———: QUESTION FOR JURY. In an action on such a policy, where there is evidence that a dwelling-house was partially destroyed by a fire following an explosion, and deceased in his escape from the building received burns which subsequently caused his death, there being no direct evidence of how deceased became afire, the question whether the injuries were sustained by reason of the burning of the dwelling-house or otherwise is for the jury.

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

Brogan, Ellick, Shoemaker & Fitzgerald, for appellant.

Robert Smith and *Brome & Thomas, contra.*

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

CARTER, J.

This is an action by the beneficiary under an accident insurance policy to recover benefits accruing on account of the death of her son, the assured. The verdict of the jury was for the plaintiff in the sum of $1,500 and judgment was entered thereon. From the overruling of its motion for a new trial, the defendant appeals.

The policy provides for the benefits for which this action was brought if the insured shall sustain injuries as described in the insuring clause and such injuries shall be sustained: "(c) By the burning of any * * * dwelling-house * * * in which the insured shall be at the beginning of such fire, and is burned by such fire or suffocated by the smoke therefrom."

The evidence discloses that John Andrew Lowe, the insured, was heating a can of paint remover in the kitchen of the Martha Taylor Smith home when an explosion occurred. The kitchen was in flames immediately and resulted in considerable damage to the room and contents before the fire was extinguished. The insured escaped from the room but was so badly burned that he died the next morning. Clara Bell Jones, a maid employed in the Smith home, was in the kitchen at the time the explosion happened. She testifies that she was getting a drink of water at the time and had her back turned to the stove when the explosion took place. She did not see the insured at the time of or following the explosion until he was taken from the house. She first noticed that her clothing was afire and ran upstairs where she succeeded in putting out the fire in her clothing. It is quite evident from her testimony

that she was so excited at the time that she remembers very little of what happened after the explosion occurred. All of the other evidence, other than that there was an explosion followed immediately by a fire, is circumstantial. Defendant contends that this evidence is insufficient to sustain the jury's finding that insured was injured "by the burning of any * * * dwelling-house" and that he was in fact injured by the explosion and the fire resulting therefrom.

The use of the words "by the burning of any * * * dwelling-house * * * in which the insured shall be at the beginning of such fire" unmistakably requires the burning of a dwelling-house, either in whole or in part, as a condition precedent to liability on the part of the insurer. The evidence in this case shows that the building as well as the contents was badly damaged by fire. The doors, windows and casings were all burned and charred. The description given by the witnesses indicates that the whole kitchen was in flames. The only question remaining is whether there was any evidence of a substantial nature tending to prove that the insured sustained his injuries by reason of the burning of a dwelling-house sufficient to justify the submission of the case to the jury.

There is no evidence in the record as to the exact time the insured got afire. No one is able to testify that the explosion produced the fire that burned him because no one saw it. Circumstantial evidence is of course competent to establish the causal connection between the burning of the building and the injuries suffered by the insured.

In *Hiatt v. Travelers Ins. Co.*, 197 Ia. 153, 197 N. W. 3, the court said:

"The inflammable portions of the building in question were on fire, and were burned. 'The doorway and casings around the door were all in flames, and burning. We had to crouch down to get out, and the flames from the door and casings would touch as he (Hiatt) came through. The doorway was all blazing. As he crouched through the doorway, the flames licked down and came across his body.

The flames went against his body—the whole body.' There is no dispute in the evidence that the doorway was all ablaze as Hiatt made his exit from the building. * * *

"Was it for the trial court to say whether the injuries to the plaintiff were caused by the burning of the gasoline through the explosion, or the burning of the contents of the building, or by the burning of the building? Would reasonable minds differ, under the evidence of this case? Here we have a fire shown, a fire touching and enveloping the body of the insured. No one testifies that fire touched the body of decedent in any other manner, except it may be inferred from the circumstances that his clothing caught fire while passing between the cars. It may not be said that there was no causal connection between the burning of the building and the injuries causing the death of the decedent. We find testimony bearing on the question at issue, and there was room for fair-minded men to conclude from the proofs offered by plaintiff that the burning of the building was an operating agency in bringing about a result which is alleged as a basis of recovery."

In a similar case the Minnesota court, after reciting the facts, said: "While it is somewhat vague and uncertain as to just what portion of the building was burned, and the extent of the burning, it is nevertheless apparent that there was a general conflagration of considerable dimensions, and we cannot say that there was no evidence of the burning of the building. Under the instruction given, the verdict implies a finding that Mrs. Kleis' death was caused by the burning of the building while she was therein, and we cannot say that there was no evidence to sustain this finding." *Kleis v. Travelers Ins. Co.*, 118 Minn. 422, 136 N. W. 1101.

In *Commercial Casualty Ins. Co. v. Adkisson*, 152 Okla. 216, 4 Pac. (2d) 50, the court in a similar case said: "In an action on accident policy providing for triple indemnity if the insured receives fatal injuries 'in consequence of the burning of any hotel while the insured is therein,' where deceased was in her room, an explosion occurred therein,

the bedding, clothing, and woodwork of said room in said hotel became on fire and deceased ran into the hall of said hotel in flames, it is a question of fact for the jury to pass on from the evidence and all inferences or conclusions which may be reasonably and logically drawn therefrom as to whether deceased caught fire from the burning of said hotel or from other causes, under proper instructions of the court."

In *Curran v. National Life Ins. Co.*, 251 Pa. St. 420, 96 Atl. 1041, the court in a like case said: "To hold as matter of law that plaintiff failed to prove sufficient facts to take the case to the jury, would prevent recovery in most cases of this kind, because of the difficulty of proving the origin of the fire, thus imposing on the policyholder a burden not contemplated by the contract. Defendant insured against bodily injury sustained through 'the burning of a building, while the beneficiary is therein.' The burning of the building and the presence of the beneficiary therein is conceded, the only question being as to the manner in which the fire was communicated to the insured, the proof as to this being purely circumstantial. 'In a question of circumstantial evidence, the proof derived from the circumstances is a question of natural presumption, and is to be found by the jury. The strength of the proof depends on the probability resulting from the facts. The presumption thus arising being a natural one is to be determined necessarily by the jury, and not by the court. It is the right of the party to have this submitted to the jury, unless it be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances. If in such a case as this we say that all the combined circumstances afford no evidence, we take from the party the right of trial by jury, a right of the utmost importance in a matter in which the natural instinct and judgment of men are the legal and constitutional right of a party.' *Brown v. Schock*, 77 Pa. 471, 479. Defendant's rights were carefully and amply safeguarded in the charge, and the question was for the jury. *Taylor v. General Acci-*

dent Assurance Corporation, 208 Pa. St. 439; *Hill v. Central Accident Ins. Co.*, 209 Pa. St. 632."

Also, in *Aetna Life Ins. Co. v. Smith*, 19 Fed. (2d) 140, the court stated: "The evidence failed to show that the death of the insured was caused by the explosion of gasoline. It is conjectural how much gasoline was left in the bucket, as the insured had been cleaning parts of his automobile with it for several hours. He was alive after that explosion, and might have continued to live if he could have escaped from the garage without going through the flames that came up from the burning floor. Those flames were of sufficient size and intensity, and covered enough space along the narrow passageway to the door, to be the efficient cause of death. The conclusion is that it was not error to submit the case to the jury."

Other cases supporting the contention of plaintiff are *Messervey v. Standard Accident Ins. Co.*, 58 Fed. (2d) 186; *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N. E. 550.

We have examined the authorities cited by defendant and find that they do not support the contention of the insurance company under the facts involved in this case. We are of the opinion that the trial court properly submitted this case to the jury under the authorities hereinbefore cited. The judgment is

AFFIRMED.

RALPH DUNCAN, APPELLANT, V. A. HOSPE COMPANY ET AL., APPELLEES.

277 N. W. 339

FILED JANUARY 21, 1938. No. 30117.

1. **Workmen's Compensation: AGREEMENT FOR COMPENSATION: PLEADING: DEMURRER.** A demurrer is good against a petition of an employee suing an employer and his insurance carrier, alleging an oral agreement settling and agreeing to pay definite compensation to employee, but which agreement never had been submitted to and approved by the compensation commissioner or by a compensation court.

2. ———: ———. An agreement to pay compensation must be approved by a compensation commissioner or by a compensation court or it is void; part payment will not make such an agreement actionable at common law.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Johnsen, Gross & Crawford, for appellant.

Votava, McGroarty & Sklenicka, contra.

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

GOSS, C. J.

Plaintiff alleged that, on or about November 15, 1932, he was an employee of A. Hospe Company, earning $22 a week, and, arising out of and in the course of his employment, was injured, losing the sight of his left eye; that Employers Mutual Casualty Company, also a defendant, had entered into a contract of compensation insurance for A. Hospe Company; that on or about March 10, 1933, defendants orally agreed with plaintiff to pay him compensation at the rate of $15 a week on the basis of 98.6 per cent. loss of the sight of his left eye, or a total of 122.25 weeks, based on the provisions of the Nebraska workmen's compensation law of 125 weeks; that immediately after the oral agreement was made defendants and each of them, in pursuance of said agreement, began paying plaintiff compensation at the rate of $15 a week and paid him for a total of 25 weeks, at which time, in violation of their agreement, they refused to make further payments and are indebted to plaintiff for the balance, including penalty of 50 per cent. under the workmen's compensation law, and interest, for all of which plaintiff prayed judgment.

To this petition defendants demurred for the reason that the petition failed to state a cause of action. The demurrer was sustained, plaintiff elected to stand on his petition, the petition was dismissed with prejudice, and plaintiff appealed.

The argument for plaintiff is (1) that a demurrer to a pleading admits the truth of all material and relevant facts well pleaded, whether in reality true or untrue (*Dodson v. Woolworth Co.*, 118 Neb. 276, 224 N. W. 289); (2) that the action set out in plaintiff's petition may and should be brought at common law; (3) that defendants' agreement to make payments to plaintiff, as set out in the petition, is supported by a valid consideration and is therefore binding on defendants; and (4) that defendants cannot escape liability on the agreement by claiming that it was not submitted to the court for approval, in view of the fact that they have recognized the binding character of the agreement by making part payment of the agreed amount.

It is fundamental, of course, that a demurrer admits the truth of all material and relevant facts well pleaded. But when the legislature, by statute, creates rights which did not exist at common law, can it be said, legally, that one whose cause of action arises under such a statute can, by virtue of that statute, state a cause of action at common law, or is his alleged agreement unenforceable because it shows on its face that plaintiff did not comply with the statutory requirements?

It is shown by the petition that no settlement agreement was ever approved by the compensation commissioner or by the compensation court. Indeed, the alleged agreement never went beyond the oral stage.

The questions presented suggest the consideration of several sections of the Nebraska workmen's compensation law.

Section 48-133, Comp. St. 1929, says in part: "Provided, that all disputed claims for compensation or benefits shall be first admitted (submitted) to the compensation commissioner, as provided in section 3680 (48-139)."

Section 48-136, Comp. St. 1929, provides: "(Settlement Between Parties, When Binding) The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of

this article: Provided, that a copy of such settlement shall be filed with the compensation commissioner, and no such settlement shall be binding unless in accord with the provisions of this article."

Section 48-141, Comp. St. 1929, is as follows: "All settlements by agreement of the parties with the approval of the compensation commissioner and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment: Provided, however, no settlement shall be final unless it be in conformity with the provisions of this article, a finding by the compensation commissioner, the district court or any appellate court."

Section 48-147, Comp. St. 1929, provides in part: "Every policy for the insurance of the compensation herein provided, or against liability thereof, shall be deemed to be made subject to the provisions of this act."

Some other sections contain the same idea, but for sake of brevity they are not quoted.

In *Zurich General Accident & Liability Ins. Co. v. Walker*, 128 Neb. 327, 258 N. W. 550, the same question arose on suit by the insurance company to recover premiums on its employer's liability policy. The employer's answer and counterclaim set up that one of his employees was injured and he made settlement, for which he prayed recovery. It did not appear that the matter had ever been presented to and adjudicated by the compensation court. Plaintiff demurred to the counterclaim and raised the question in the county and district courts, in both of which judgment went against plaintiff. In the supreme court the judgment was reversed on the theory that the approval of the compensation commissioner was absolutely necessary to any valid settlement under the compensation law; and that "Neither the county court nor the district court have any original jurisdiction to determine the legality of a claim for compensation of an employee against an employer arising under the provisions of the workmen's compensation act."

In *Jones v. Rossbach Coal Co.*, 130 Neb. 302, 264 N. W. 877, this court said: "It is the universal rule that, where employer and employee are operating under the workmen's compensation law, and the employee suffers injury by reason of an accident, arising out of and in the course of his employment, he must look exclusively to the compensation act for his remedy. *Freese v. Morrell & Co.*, 58 S. Dak. 634, 237 N. W. 886."

Appellant relies strongly upon the case of *Adel v. Casualty Co.*, 188 Ia. 1, 175 N. W. 846. In that case defendant's demurrer was overruled and the judgment was affirmed by the supreme court, though the agreement between the employer and employee had never been submitted to the compensation commissioner, and, as in the case at bar, it had been partly performed. It is to be noted that the opinion contained this expression: "We are not to be understood, however, as holding that failure to refer the matter to the adjudication of the commissioner may not be pleaded as a defense." This Iowa case does not support the general weight of authority on the point.

If there was no approval of the contract by the compensation commissioner or compensation court, the agreement to pay compensation was void and part payment could not make it enforceable in a suit at common law.

The judgment of the district court is

AFFIRMED.

JOSEPH P. WEYRENS, APPELLANT, V. SCOTTS BLUFF COUNTY MEDICAL SOCIETY ET AL., APPELLEES.
277 N. W. 378

FILED JANUARY 21, 1938. NO. 30165.

1. Associations: GRIEVANCES: REMEDIES. "It is a general rule of equity that, when a member of a voluntary, unincorporated association is aggrieved or feels injured by any action taken by the officers or committees of the association, within the scope of their authority and pertaining to its affairs, and where the laws and rules of the association provide a means of redress,

he should first exhaust the remedies provided by the laws and rules of the association before applying to the civil courts." *Crisler v. Crum*, 115 Neb. 375, 213 N. W. 366.

2. ———: ENFORCEMENT OF RULES. "A court of equity will not inquire into the regularity or validity of disciplinary proceedings by a voluntary, unincorporated association, not organized for profit, against one of its members, when no civil or property right of such member will be affected." *Rogers v. Tangier Temple*, 112 Neb. 166, 198 N. W. 873.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Morrow & Morrow, for appellant.

Mothersead & York and *Howarth N. Olsen, contra.*

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

GOSS, C. J.

This was a suit in equity against Scotts Bluff County Medical Society and its officers, seeking a decree that the action of the society purporting to terminate the membership of plaintiff therein was void and enjoining the society from depriving him of his rights as a member in good standing. After trial, the decree found for defendants, dismissed the petition with prejudice and dissolved the restraining order. Plaintiff appealed.

Plaintiff is a physician and for about 10 years, ever since he settled in Scottsbluff, had been a member of the county medical society. This society was a voluntary association of physicians, organized under the auspices of the Nebraska State Medical Association, which, in turn, was a part of the American Medical Association; that is, it united with similar organizations in other states and territories to form the American Medical Association. Plaintiff comlained, and the evidence tended to show, that he had been expelled from the Scotts Bluff County Medical Society. Plaintiff had been on the staff of the West Nebraska Methodist Hospital and, inasmuch as the rules of that hospital permitted only members of the county medical

society to be on its staff, he was dropped from that staff as a result of being expelled from the county medical society. That is one of only two hospitals at Scottsbluff, the other, plaintiff complains, being small and not having facilities or equipment permitting the treatment of certain surgical cases in which he has considerable practice, and thus he was limited in his facilities for hospitalization of such cases. The hospital in question was not a party to the suit.

The evidence shows that the difficulty arose over fees for the care of relief patients. The doctors of the county had been caring for such patients at a rate of about 50 per cent. of the usual charges for others, but this arrangement was terminated early in August, 1935, by a resolution of the county medical society, adopted by a vote of 15 to 4. The resolution declared that it would be considered a breach of professional ethics for any member of the society to deal individually with county or state units on the subject. Plaintiff was one of those who opposed the resolution and later he carried out his opposition by contacting official parties in charge of such patients and caring for them on such a reduced basis. He was notified that he had violated the rule adopted in August, 1935, was present at a meeting when the matter was considered and where, as a result of his conduct, he was expelled from membership in the county society. One of his complaints was that he was not given a trial. As such matters usually go in such organizations, he had all the trial then asked for or that was necessary. He was present. He had admitted the infraction of the rule adopted and had argued against applying it. Any other or further trial would be futile and was unnecessary in the circumstances.

The Scotts Bluff County Medical Society was a component part of the Nebraska State Medical Association. The printed constitution and by-laws of that association were introduced in evidence. Section 6, chapter XV, of the by-laws, says: "Any physician who may feel aggrieved by the action of his society * * * in refusing him member-

ship, or in suspending or expelling him, shall have the right of appeal to the councilor of his district, and finally to the council of the association."

Also, the county society had a constitution and by-laws, which were introduced in evidence. These by-laws provided that a member could be censured, suspended or expelled on investigation of charges, trial and conviction. It further provides that a member expelled for any cause should be eligible for membership after one year from the date of expulsion on the same terms and in the same manner as original applicants. Plaintiff never asked for any rehearing and never appealed, but brought this suit in equity instead, seeking to enjoin the county society and its officers from preventing him from continuing as a member of the county society with all its privileges.

There are two reasons why plaintiff cannot be restored by a court of equity to his position as a member of the local society.

First. He has not exhausted his remedies by appealing from the order of expulsion. When he became a member of this voluntary, unincorporated society, he assented to the rules governing the society. Before he can have recourse to the court for his expulsion, he is bound by the reasonable and uniform rules of that society, provided they do not contravene the laws of the land or offend public policy. These rules governing members stand that test.

"It is a general rule of equity that, when a member of a voluntary, unincorporated association is aggrieved or feels injured by any action taken by the officers or committees of the association, within the scope of their authority and pertaining to its affairs, and where the laws and rules of the association provide a means of redress, he should first exhaust the remedies provided by the laws and rules of the association before applying to the civil courts." *Crisler v. Crum,* 115 Neb. 375, 213 N. W. 366.

Second. No civil or property right of plaintiff has been invaded by the disciplinary action of defendant society. It is true he alleges and claims that his ability to increase his

income has been reduced by being dropped from the staff of the West Nebraska Methodist Hospital. That hospital is not a party, but the evidence shows that one of its rules required the members of its staff and physicians serving patients within the hospital to belong to the county society. Plaintiff knew this rule and took the consequences when he knowingly and deliberately violated the rule set up by the county society. If the hospital chooses it may change its rule. As it now stands, this rule of the hospital results in inconvenience and some loss of income to plaintiff, but this cannot be attributed to the county society as a deprivation of a property right of plaintiff.

The applicable rule is laid down by this court in these words: "A court of equity will not inquire into the regularity or validity of disciplinary proceedings by a voluntary, unincorporated association, not organized for profit, against one of its members, when no civil or property right of such member will be affected." *Rogers v. Tangier Temple,* 112 Neb. 166, 198 N. W. 873. For the same principle see, also, *Deloisted v. Hilson,* 120 Neb. 788, 235 N. W. 340, and cases cited therein.

The judgment of the district court is

AFFIRMED.

EUGENE FIELDING, APPELLEE, V. PUBLIX CARS, INC., APPELLANT.

277 N. W. 331

FILED JANUARY 21, 1938. No. 30254.

1. **Pleading.** "Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." *Nason v. Nason,* 79 Neb. 582, 113 N. W. 139.
2. **Trial: INSTRUCTIONS.** In instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party, if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.
3. **Carriers.** Common carriers of passengers in taxicabs "are re-

quired to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence." *Griffen v. Lincoln Traction Co.*, 118 Neb. 459, 225 N. W. 232.

4. **Damages.** Verdict of $5,000 for negligence causing the breaking of the jaw bone of a passenger in a taxicab and resulting damages *held* not excessive under the evidence outlined in the opinion.

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

Wear, Boland & Nye, for appellant.

L. Q. Hills and *Gaines, McLaughlin & Gaines, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ROSE, J.

This is an action to recover damages in the sum of $15,000 for alleged negligence resulting in personal injuries to plaintiff.

Publix Cars, defendant, is a corporation conducting the business of a common carrier of passengers for hire in the city of Omaha. While plaintiff was a passenger in a Plymouth sedan taxicab, operated by defendant in or near the intersection of Forty-ninth and Izard streets, Omaha, September 1, 1933, he suffered injuries of which he complains.

The principal charge of negligence is that Elmer Denson, defendant's driver of the cab, stopped it with a jerk and thus threw plaintiff from the rear seat forward, striking his face against the back of the front seat and breaking his right lower jaw bone.

Publix Cars, defendant, as a common carrier of passengers in the city of Omaha, and plaintiff, as a passenger for hire in a cab operated by it, are facts admitted in the answer, but the negligence pleaded by plaintiff is denied and due care on the part of defendant pleaded. There was a general denial of unadmitted allegations in the petition.

Upon a trial of the cause the jury rendered a verdict in

favor of plaintiff for $5,000. From judgment thereon defendant appealed.

A former trial of the same cause resulted in a judgment in favor of plaintiff for $5,000, but it was reversed on appeal for error in the proceedings. *Fielding v. Publix Cars, Inc.*, 130 Neb. 576, 265 N. W. 726.

The present appeal is directed to criticism of six instructions to the jury and to their verdict as excessive. Fragments of the following instruction are challenged as prejudicially erroneous:

"The plaintiff was a due passenger in the defendant's car in the residence part of the city, and was injured to some degree at the time that the car came to a stop near the end of his journey.

"The plaintiff brings this action for damage money for claimed injuries then received, as he claims, and in his petition as a basis for his action, he charges that the defendant's servant, the driver in charge of the defendant's cab was negligent, which negligence, he claims, was the proximate cause of his injuries, and were as follows:

"That the operator of the taxicab brought the cab to a sudden and violent stop, resulting proximately in the rebreaking of his jaw, and compelling him for a long time to suffer pain and incur medical, surgical and hospital expenses, and which resulted, also he claims, in abscesses and different operations, to ameliorate his condition, and the removal of teeth, and the malformation of his jaw, and the loss of motion to his jaw, and weakened and nervous condition and bad health, all as the proximate result of his claimed injuries, and compelling him to incur the necessary expenses to alleviate his condition and further dentistry bills.

"And the plaintiff sues for claimed damages compensating him for each and severally the stated things proximately resulting from his said claimed injuries, as he claims proximately resulting from the negligence of the defendant's operator in so suddenly stopping his said car."

It is argued by defendant that the trial court, in the

first paragraph of the instruction quoted, erroneously assumed the facts that plaintiff was injured near the end of his journey and that he was injured when the car came to a stop near the end of the journey, and invoked the rule that: "An instruction is erroneous which assumes a fact as established which is material to the case and as to the existence of which the evidence is conflicting." *Howe v. Provident Loan & Investment Co.*, 130 Neb. 469, 265 N. W. 255.

Under an established rule of pleading, defendant admitted in its answer what the trial court stated in the first paragraph of the instruction to the effect plaintiff "was injured to some degree at the time that the car came to a stop near the end of his journey." Defendant alleged in its answer:

"A year prior to the happening of said alleged accident plaintiff had received a fractured jaw at the place and in the identical location where he claims to have received an injury in the accident of September 1, 1933, which fracture was sustained by plaintiff on September 4, 1932, as the result of being struck with a gas pipe, and any disability which plaintiff may have suffered in his jaw was the result of having been struck with the gas pipe on September 4, 1932, and was in nowise connected with or grew out of the alleged accident of September 1, 1933. * * * Whatever slight injury, if any, plaintiff may have received in said alleged accident of September 1, 1933, was the direct and proximate result of his own negligence and want of care which caused and directly contributed to cause whatever slight injury he may have sustained, if any."

The "accident" to which defendant referred in its answer occurred September 1, 1933, near the end of plaintiff's journey. The answer contains the further pleas that "any disability which plaintiff may have suffered in his jaw was the result of having been struck with a gas pipe on September 4, 1932, and was in nowise connected with or grew out of the alleged accident of September 1, 1933,"

and that "whatever slight injury, if any," he may have received in the accident of September 1, 1933, was the result of his own negligence.

The rule of pleading which treats the answer as an admission that plaintiff "was injured to some degree at the time the car came to a stop near the end of his journey" was stated as follows:

"Facts alleged in a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." *Nason v. Nason,* 79 Neb. 582, 113 N. W. 139. See, also, *Dwelling House Ins. Co. v. Brewster,* 43 Neb. 528, 61 N. W. 746; *Oliverius v. Wicks,* 107 Neb. 821, 187 N. W. 73; *Miller v. Drainage District,* 112 Neb. 206, 199 N. W. 28; *Home Fire Ins. Co. v. Johansen,* 59 Neb. 349, 80 N. W. 1047; *State v. Hill,* 47 Neb. 456, 66 N. W. 541.

The first paragraph of the instruction was not only justified by the answer, but no other rational conclusion than that stated therein could have been reached by the jury in view of all the evidence. Furthermore, the language criticized did not assume plaintiff was injured by the negligence of defendant and did not mislead or confuse the jury in any respect. From every standpoint, therefore, this criticism is without merit.

Another fragment of the same instruction is also challenged as erroneous in stating a portion of plaintiff's claim that: "The operator of the taxicab brought the cab to a sudden and violent stop, resulting proximately in the rebreaking of his jaw." The use of the word "rebreaking" is criticized as erroneous. There was no controversy over the established fact that a highwayman struck plaintiff with a gas pipe September 4, 1932, and fractured his right lower jaw bone. The physician promptly employed by plaintiff testified he treated him continuously until October 24, 1932; that there was then a bony union of the broken parts of the jaw; that plaintiff was discharged on the latter date as cured. The case was tried by plaintiff on the

theory there was a bony union after the highwayman's assault and by defendant on the theory there never was any permanent union before the accident of September 1, 1933. The experts disagreed in their opinions on the condition of the first fracture prior to the later accident. On behalf of defendant there is expert testimony to the effect that the parts separated by the fracture of 1932 were not permanently united by bony tissue, but there was an admission, binding on defendant, of a fibrous union that held the parts in place and permitted use of the jaw. Consequently, the fibrous union, if the only one, was subject to fracture. The answer states in substance that the alleged fracture of 1933 was in the identical location of the alleged fracture of 1932. Under the pleadings and evidence, therefore, the trial court did not err or confuse the jury or prejudice defendant by the use of the word "rebreaking."

Misstatements of defendant's position in fragments of another instruction are also assigned as error. The criticism is directed principally to statements of defendant's theory to the effect that there was nothing more than a union of a fibrous nature and that the injuries, if any, were slight. As already explained, witnesses for defendant itself testified there was a fibrous union which held the parts in place and permitted a use of the jaw. In addition, the answer to the petition admitted that plaintiff was injured while a passenger for hire in the cab operated by defendant. In connection with the pleadings and the evidence, the instructions as a whole were not prejudicially erroneous in the respects indicated.

An instruction defining the degree of care required of common carriers of passengers for hire is the subject of another assignment of error. The proper standard of care was stated as follows:

"They are required to exercise the utmost skill, diligence and foresight consistent with the business in which they are engaged for the safety of the passengers, and they are liable for the slightest negligence." *Griffen v. Lincoln Traction Co.*, 118 Neb. 459, 225 N. W. 232.

The instruction on this subject departed from the strict language of the rule, but not from the substance of it. There was no material difference in import to mislead the jury. This assignment of error is therefore overruled.

Parts of other instructions are also condemned by defendant as erroneous, but they did not permit any recovery of damages for the injury inflicted by the highwayman; but an examination of the criticisms in connection with the entire charge to the jury and with the pleadings and the evidence fails to disclose any error prejudicial to defendant.

It is earnestly insisted that the verdict of $5,000 is excessive. The jury evidently believed the witnesses who testified that the first fracture healed and that there was a solid union of the two parts of the jaw bone prior to the fracture of September 1, 1933. As the result of defendant's negligence and the injury in the cab, the evidence adduced by plaintiff tends to prove he was in the hospital several days; pus and bone came out of his jaw from the later fracture; submitted to surgical operations seven or eight times; went to physician every day for three months; required attention of physician for a year; could not chew food or speak distinctly; was nourished by soft or liquid food; lost upper teeth; able to eat and speak normally before but not after injury in the cab; suffered intense pain; lost sleep; was nervous; face scarred and disfigured; earned 35 to 50 dollars a month before injury in cab but nothing substantial afterward; was able to work before but not afterward; permanently injured and disfigured; hospital bills, $53.85; dental surgery, $450; physician's charges, $254; expectancy of life, 25.71 years. This is a mere summary of facts evidenced by a great volume of testimony. Witnesses so testifying, having been believed by the jury from competent proofs, there does not seem to be any substantial ground for a finding that the verdict is excessive. In the review of the entire record, assigned error prejudicial to defendant has not been found.

AFFIRMED.

EDWARD L. RZESZOTARSKI, ALSO KNOWN AS ED L. RESE, APPELLANT, V. AMERICAN SMELTING & REFINING COMPANY, APPELLEE.

277 N. W. 334

FILED JANUARY 21, 1938. No. 30182.

1. **Master and Servant:** SAFETY APPLIANCES. Where an employer provides his foundry with ample ventilation and equips a cupola furnace with a fan at the bottom thereof, sufficient to force fumes and dust in such furnace that may come off of scrap and pig iron being heated therein, so that the amount of fumes or dust, if any, emitted from such furnace when its door is open to permit charging thereof is negligible, and such foundry is inspected about twice a year by a representative of the department of labor of Nebraska, who made no additional requirement respecting such foundry, *held*, that such employer has complied with section 48-403, Comp. St. 1929.
2. ———: ———. "Where appliance furnished employee to protect him from lead dust and fumes was of standard make and in common use, and had adequately protected employees for many years, and there was no substantial evidence that there was any defect therein, or that any better type was known, issue of negligence in not furnishing proper appliance should not have been submitted to the jury." *Grant Storage Battery Co. v. De Lay*, 87 Fed. (2d) 726.
3. ———: ———. "When a master who operates a smelting and refining plant equips such plant with approved safety appliances and orders a servant to wear a respirator furnished by the master; instructs him generally as to the danger of contracting the occupational disease known as plumbism; informs him of the manner in which such disease may be contracted, the nature and consequences thereof, the master will not be held liable in damages to such servant who contracts such disease while in the employ of the master." *Ahrens v. American Smelting & Refining Co.*, 132 Neb. 460, 272 N. W. 235.
4. **Trial:** PEREMPTORY INSTRUCTION. "Where the evidence is insufficient to sustain a verdict in favor of plaintiff, the trial court may give a peremptory instruction in favor of defendant." *Campbell v. Columbia Casualty Co.*, 125 Neb. 1, 248 N. W. 690.

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

G. H. Seig, for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

MESSMORE, J.

This is an appeal from the district court for Douglas county. At the close of the evidence, the trial court sustained a motion by defendant for a directed verdict. From this ruling the plaintiff appeals.

Plaintiff's first cause of action was based on the factory act, citing section 48-403, Comp. St. 1929, in that defendant failed to furnish and provide proper fan, or other mechanical device, as would substantially carry away all dust and other impurities that might arise in the place of employment; set forth the employment engaged in by plaintiff; alleged that certain lead fumes were emitted from the cupola furnace attended by him, from which he contracted plumbism, or lead poisoning. In his second cause of action plaintiff alleged defendant failed to furnish him with a safe place to work, or with proper equipment for such work; and prayed for recovery of $2,995.

Defendant's answer admitted the operation of a smelting and refining factory; denied that the processes carried on by it involved great danger to persons employed in its plant; admitted the employment of plaintiff, and alleged that plaintiff was properly warned and instructed as to his employment, and failed to make use of the appliances and equipment made available to him by defendant; assumed the risk arising out of his employment, and was guilty of contributory negligence. Plaintiff's reply denied the right of defendant to rely upon the doctrine of assumption of risk or contributory negligence, as to that part of plaintiff's cause of action involving defendant's failure to comply with section 48-403, Comp. St. 1929, known as the factory act.

The evidence discloses that plaintiff was a man 34 years of age, had completed the sixth grade in school, had previously engaged in farming, and was unacquainted with

the work in which he was employed by defendant. He was employed on March 30, 1934. Two or three days thereafter he was examined by defendant's physician and was put on the construction gang. He was given a respirator and a book of instruction on safety rules, which detailed the care to be used in and about his work. The plaintiff kept this book and read it, and, in addition, signed an agreement of employment that he would follow all rules and regulations of the company in the course of his employment. The defendant, being engaged in the smelting and refining business, where there is some danger of lead poisoning being contracted in certain parts of the factory, provides these safety rules and regulations for the protection of its employees.

Plaintiff continued for about a week in his first employment, shoveling battery plates from box cars. He wore his respirator, as instructed. He contends that in handling the lead battery plates there was considerable dust when the plates were shoveled into wheelbarrows, wheeled outside of the car, and dumped. Subsequent to this work the plaintiff helped to dig a ditch for a water main, in which work he was engaged for about a week. He was next employed in the foundry, where he stayed until he left the service in June, 1935. In the foundry he was started at shoveling sand as a helper, assisting with the furnace and in charging it, which means throwing scrap iron and pig iron into the furnace where it melts, and putting in a certain amount of coke with every 800 pounds of iron. Plaintiff worked in the foundry until the middle of August, 1934, when he was laid off for a week. Upon his return to work he was given the job of cupola man; that is, he was required to take care of and charge the cupola furnace.

The foundry building is about 48 feet long and 59 feet wide on the ground floor, including two wings and an additional room 21 by 25 feet. There are 11 windows, each containing 18 panes of glass, 14 by 20 inches, each window measuring 5 by 7 feet, all of steel wall construction. These windows are located on the north of the foundry. On the

south are seven large and three small windows and a door; on the east five large windows and one small door, and on the west one large window, three medium and one small window. Such windows are equipped with ventilation tap capable of being opened, and when opened are tipped out and swing on a center pivot. The cupola furnace is located in about the center of the east and west way and on the north side of the main building of the foundry, is a round shaped iron pipe, set on four legs approximately three feet off the ground, the bottom of which is composed of a sheet-iron plate, with hinged doors to hold the charge as it is put in. It is brick-lined, and its inside diameter is about 30 inches. At the place of the fire, due to burning, the base is increased to about 36 inches. There is an opening in the roof of the factory through which a pipe extends from the cupola furnace. Under the furnace there is a fan which encourages the fire and drives the smoke and fumes of the fire through the stack to the outside of the building. The furnace is charged once in ten days for a period of three hours at a time. Pig and scrap iron are charged into the furnace, to be melted down for castings. The pig and scrap iron are on the outside of the foundry building proper and brought in, to be charged into the furnace. The plaintiff, in charging the furnace, stood at the furnace door about ten feet above the floor, with his head two or three feet from the ceiling of the building.

Plaintiff contends that when the furnace is charged the opening into which the charge is put emits a considerable amount of fumes, some of which are caused by large jagged pieces of scrap iron and the manner in which they are lodged in the furnace, being the dust from other parts of the refinery; that is, on the pig and scrap iron that composes the charge, and which dust, plaintiff contends, is lead dust, and that when working on the outside of the factory he inhaled such dust; that it got into his clothing and on his person.

Located 60 feet northeast of the foundry is what is

known as the bag house. In this building are suspended long woollen bags for the purpose of catching fumes and dust which are brought to the bag house from the refinery through a large flue pipe which runs from the refinery several hundred feet away, past the north side of the foundry to the bag house. This flue pipe is a large tube, six feet in diameter, made of molded sheet and air-tight except that there are clean-out holes on the bottom, approximately 12 feet apart, which are opened twice a year for the purpose of cleaning out any dust that accumulates in the flue. At the northwest corner of the foundry is another opening which is not closed but kept open to admit cool air to cool off the gases as they proceed towards the bag house. Plaintiff contends that in this process the lead dust taken from the bag house to gondola cars blows over and settles on the iron outside of the foundry, to be used therein. The hole left open in the flue pipe is in close proximity to the foundry. It was the practice to take lead oxide in wheelbarrows and dump it into gondola cars, this work being carried on immediately outside of the foundry in which plaintiff worked, and in the immediate vicinity of the iron material that went into the foundry. The defendant now transfers the lead oxide from the bag house in carts, with canvas tops for the purpose of keeping the dust from blowing. The men engaged in this work are equipped with helmets, hip boots, rubber gloves, and other necessary appliances.

Plaintiff claims that the respirator furnished him was defective, and that he was told it need not be used in the foundry. He testified, in substance, that he wore the respirator when there was any dust and whenever he was told to wear it; that he was warned to wear it at all times when engaged in his work; that he did wear it three or four times when he worked in the foundry while they were digging out the kettles and once when he cleaned out the furnace; that when he went into the foundry he was admonished to get a clean pad for the respirator. There is evidence that some of the employees did not wear the

respirator in the foundry, and some evidence that the respirators were not needed. One witness, who had worked 18 years for the company in the foundry, wore his respirator when the material was poured into the molds from the furnace to make the castings. This caused a water gas or steam which will burn, and the men were required to take a hot iron rod and stick it into the sides of the sand mold, which caused this gas to burst into flames. This gas did not contain lead fumes. This witness testified that there is an air pressure from the fan underneath the furnace which makes an up-draft of 16 to 18 ounces of air, and that nothing comes out of the door except a few sparks; that wind carries the smoke and gas outside through the stack.

The evidence in behalf of the plaintiff, relative to the respirator and its defects, is not impressive, when we consider the fact that the appliance furnished him was one of standard make, and, if defective in any manner, he could have obtained, for the asking, a new one, or the parts thereof that might be required. There is no smelting or refining of lead carried on in the foundry where the plaintiff worked.

The chemists testified that, where scrap and pig iron are used as a basis for casting, and assuming that such iron is covered with a certain amount of lead oxide, and taking into consideration the relative degree of heat required to melt lead and iron, any lead fumes that might be emitted from the furnace door when opened would be negligible.

The defendant company held monthly meetings to instruct its employees on safety and cleanliness and how to guard against lead poisoning. The employees were examined monthly by the company physician to ascertain whether any symptoms of lead poisoning were present. At the time of plaintiff's illness, he was attended by the company physician and his assistant; was visited by the superintendent or personnel officer of the factory and was examined by another physician; was confined in a hos-

pital, examined by another doctor for defendant; later treated by still another physician, not connected with the company, who taped his back, and, lastly, was treated by a doctor who diagnosed his disease as lead poisoning. The other physicians made no such diagnosis.

Plaintiff contends that the trial court was in error in directing a verdict in favor of the defendant, for the reason that defendant violated section 48-403, Comp. St. 1929. Plaintiff cites several cases wherein the violation of a statute imposing a duty on an employer to furnish certain safety devices and machinery and provide employees with a safe place in which to work constitutes negligence *per se*. *McCarthy v. Village of Ravenna*, 99 Neb. 674, 157 N. W. 629; *Butera v. Mardis Co.*, 99 Neb. 815, 157 N. W. 1024; *Walker v. Klopp*, 99 Neb. 794, 157 N. W. 962; *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87; and for violation of a city ordinance, holding to the same effect, *Tralle v. Hartman Furniture & Carpet Co.*, 116 Neb. 418, 217 N. W. 952.

The cases cited are distinguishable from the case at bar, in that the facts in each of the cases disclose the violation of a statute, while in the instant case the evidence discloses that the defendant has complied with the statute.

Section 48-403, Comp. St. 1929, reads as follows: "If in any of the aforesaid places (which would include defendant's factory), any process is carried on by which dust or fumes are caused, which may be inhaled by the persons employed therein, or if the air should become exhausted or impure, there shall be provided a fan or other such mechanical device as will substantially carry away all such dust or fumes or other impurities, subject to the approval of the department of labor."

After a careful reading of the section above quoted, we believe that the words "substantially carry away all such dust or fumes or other impurities" mean to carry away such dust, fumes or other impurities to a high degree. The foundry in question was well ventilated; the fan under the furnace was capable of forcing and did force the fumes and smoke, in a very large degree, through the

stack to the outside of the building. The testimony of the chemists conclusively shows that very little, if any, lead dust is on the scrap and pig iron that are charged into this furnace. Relative to the respirator, some of the men did not wear them in the foundry. One witness in particular wore his respirator only on occasions. The warnings and instruction given to the plaintiff at the time he assumed employment would seem to be complete.

In *Grant Storage Battery Co. v. De Lay*, 87 Fed. (2d) 726, it was held: "In action for lead poisoning by employee in storage battery factory where dust and fumes were caused which might be inhaled, defendant had burden of showing that installation of fan or other device for carrying away dust and fumes as required by Nebraska statute was not practicable," citing section 48-403, Comp. St. 1929.

The above holding does not mean that a factory is not properly equipped, in the first instance, for the work carried on therein, where the evidence discloses that it has complied, as nearly as practicable, with the statute, and has been inspected about twice a year by the department of labor, with such department making no additional requirements. We cannot start with the premise, in view of such facts and circumstances, that the equipment and appliances of the foundry in question are inadequate. In *Grant Storage Battery Co. v. De Lay, supra,* the facts indicate that plaintiff worked in a dangerous place, without any apparent protection for his safety. Such is not true in the case at bar for the reasons hereinbefore given. It will be noted that in *Grant Storage Battery Co. v. De Lay, supra,* the court held that the defendant was not an insurer of the safety of the place in which the plaintiff was working, but was required only to exercise ordinary care in furnishing him a safe place in which *to work.* And it was likewise required to exercise only ordinary care to warn and instruct him as to the dangers of his occupation that were not obvious. The court in that case also held: "Where appliance furnished employee to protect him from lead

dust and fumes was of standard make and in common use, and had adequately protected employees for many years, and there was no substantial evidence that there was any defect therein, or that any better type was known, issue of negligence in not furnishing proper appliance should not have been submitted to the jury." We believe that the above case conclusively and properly states the rule in Nebraska.

The case of *Ahrens v. American Smelting & Refining Co.*, 132 Neb. 460, 272 N. W. 235, states the rule as follows:

"A servant accepting the employment of the master assumes all ordinary risks and dangers incident to his employment, or the conditions under which his work is performed, which are known to him or, in the exercise of ordinary care, would be apparent and obvious to persons of his experience, intelligence or understanding.

"When a master who operates a smelting and refining plant equips such plant with approved safety appliances and orders a servant to wear a respirator furnished by the master; instructs him generally as to the danger of contracting the occupational disease known as plumbism; informs him of the manner in which such disease may be contracted, the nature and consequences thereof, the master will not be held liable in damages to such servant who contracts such disease while in the employ of the master."

It is contended by plaintiff that the *Ahrens* case, above cited, did not involve the factory act. Regardless of this, the law in that case is acceptable as to the duties and obligation of an employer, such as the defendant in the case at bar, in providing for the care and safety of its employees. We believe that the defendant in the instant case took every necessary precaution for the safety of the plaintiff in the foundry in which he worked.

In *Wiseman v. Carter White Lead Co.*, 100 Neb. 584, 160 N. W. 985, cited by plaintiff, it is apparent that the employee was not properly warned and that the necessary precautions had not been taken. That case is not analogous

to the case at bar where no such risk as in the *Wiseman* case was evident, and the rule as stated in the *Wiseman* case is correct.

To hold that defendant should be required to place ventilating fan or mechanical device in the foundry in which plaintiff worked, other than the equipment which existed there at that time, and in view of the instruction that the plaintiff received relative to lead poisoning, with no further proof than was made by plaintiff, would be tantamount to imposing on defendant a duty that would be unreasonable of performance. Some reasonable duty should be imposed upon the employee, and every employee should assume to follow carefully and considerately the regulations made by the employer necessary and incident at least to a reasonable performance of his duties as an employee.

Section 48-403, Comp. St. 1929, requires an employer's equipment in a foundry to be approved by the department of labor. The evidence discloses that a representative of that department had visited defendant's foundry, where the plaintiff worked, during its operation, and that no recommendation as to any or further equipment, which might be necessary to comply with the section of the statute quoted, was made by such representative to the defendant.

The trial court, in directing a verdict in behalf of the defendant and against the plaintiff on the evidence adduced on the two causes of action, as pleaded by the plaintiff in his petition, was correct.

AFFIRMED.

DOUGLAS COUNTY, APPELLEE, V. VILLAGE OF RALSTON ET AL.: BETH SMITH, APPELLANT.

277 N. W. 341

FILED JANUARY 21, 1938. No. 30136.

1. **Statutes.** Where the intent of the legislature and the object and purpose of a law are obvious and are not inconsistent with

the terms of the law itself, such intent and purpose should not be defeated merely because not declared in the most complete and accurate language.

2. **Taxation**: LIENS: FORECLOSURE: SALE: CONFIRMATION. In an action for foreclosure of a tax lien on real estate under section 77-2039, Comp. St. Supp. 1935, a purchaser at sheriff's sale made pursuant to decree in such case must pay all taxes becoming due or delinquent during the pendency of the action or after sale has been held, as a condition precedent to a confirmation of the sale.

3. ———: ———: ———: ———: ———. Where such statute grants the owner of the fee or any person having legal interests in lands two years from the date of sale in which to redeem, and further provides that the court may, at any time after two years, on motion of the county attorney, confirm the sale, *held*, that the provision for delay of two years was for the benefit of the owner of the fee or person having legal interest in the lands, and where such owner or person legally interested in the lands files a waiver of his right to redeem during such period, the court may proceed at once to hear a motion to confirm sale.

4. ———: ———: ———: ———: ———. In such case, where county attorney fails to move for confirmation of sale after a waiver of right to redeem within two years has been filed by parties entitled to make redemption, the purchaser at sheriff's sale may properly move for confirmation thereof.

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

William A. Ehlers, for appellant.

James T. English, Walter E. Schroeder and *Harry L. Welch, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, PAINE, CARTER and MESSMORE, JJ., and ELDRED, District Judge.

ELDRED, District Judge.

This action was brought by the county of Douglas, appellee, to foreclose liens for delinquent taxes on real property situated in the village of Ralston, pursuant to the provisions of section 77-2039, Comp. St. Supp. 1935. The petition was filed November 12, 1935. Decree of foreclosure was entered March 14, 1936. The property was

sold by the sheriff under the decree on June 2, 1936; the return indicating property involved herein to have been sold to Beth Smith, appellant. On July 24, 1936, a waiver of right of redemption and consent to confirmation of sale was filed by defendants village of Ralston and William A. Ehlers. On November 13, 1936, appellant, Beth Smith, filed a motion to confirm sale of the property shown to have been sold to her.

Douglas county, appellee, filed objections to the confirmation of the sale for the reasons, among others: (a) That the purchaser has not complied with that part of section 77-2039, Comp. St. Supp. 1935, requiring payment of subsequent taxes, those taxes which had accrued during the pendency of action or after the sale had been held; (b) that the motion is not filed by the county attorney; (c) that two years have not elapsed since the date of sale; and (d) that the purchaser named was not the actual purchaser, but that the real purchaser was the former owner of the lots, William A. Ehlers.

At the hearing on the motion to confirm sale, there was received in evidence an exhibit containing a statement of regular county, state and village taxes unpaid, which were assessed and levied in August, 1935, and became a lien January 1, 1936; and special assessments with interest thereon, on the several tracts, levied prior to the commencement of the action, but not delinquent at the time action was commenced and not included in the petition, these items aggregating $764.64. The trial court found that, subsequent to the amount there shown, the 1936 county taxes have become due, and instalments of special taxes have become delinquent; that taxes and assessments set forth in said statement were levied and assessed prior to the commencement of the action, were not included in the petition filed herein, had become due and delinquent since the commencement of the action, and that said amounts which have become so due and delinquent on each respective tract and parcel of land since the commencement of the action should be paid pursuant to the provi-

sions of said section 77-2039, Comp. St. Supp. 1935, as a condition precedent to confirmation. And on such finding the court decreed that the motion of Beth Smith, appellant, for confirmation of sale be denied and overruled on the ground that the purchaser has not complied with that part of said section 77-2039, Comp. St. Supp. 1935, requiring the payment of subsequent taxes, those taxes which became due or delinquent during the pendency of the action, or after the sale had been held, as to each separate tract or parcel of land, except as to certain lots not involved in this appeal, as to which sales were confirmed. It was further ordered and decreed by the court that if and when the purchaser, Beth Smith, shall show to the court on proper application therefor that the taxes and assessments on any separate tract or any number of tracts or parcels of land have been paid, as provided by said section, she shall have confirmed in her the sale as to such tracts, and a deed made by the sheriff in the manner and form provided by law. From this decree the purchaser, Beth Smith, has appealed. No cross-appeal has been filed.

The appellant makes three assignments of error, all of which may be embodied in one proposition; that is, that the decree of the trial court is contrary to the express provisions of section 77-2039, Comp. St. Supp. 1935, under which the action was brought. Appellant's contention being that there were no taxes or special assessments levied subsequent to the commencement of the suit; and that she is not required by the provisions of the statute under which the action is maintained to pay the taxes or assessments levied prior to the commencement of the action, as a condition precedent to the confirmation of sale. She further contends that upon confirmation she is entitled to a deed passing title free and clear of all liens of every nature.

Section 77-2039, Comp. St. Supp. 1935, so far as material to the questions here involved, reads:

"Counties shall have a lien upon real estate within their boundaries for all taxes due thereon to the state, county

or any subdivision thereof. After any parcel of real estate has been offered for sale for taxes for three consecutive years, and not sold for want of bidders, the county commissioners shall make and enter an order directing the county attorney to foreclose the lien for all taxes then delinquent, in the same manner, except as herein provided, and with like effect as if such lien were a mortgage. * * * After twenty days from the date of the decree an order shall issue for the sale of every parcel covered thereby but not theretofore redeemed. The sale shall be conducted in the same manner as sales of real estate upon execution, and each parcel shall be sold to the highest bidder for cash; provided, however, that no parcel shall be sold for a less sum than the amount of bid plus the costs apportioned against it to the date of the sale. The purchaser shall pay all taxes which may thereafter be levied against the parcels purchased by him, as the same shall fall due. * * * At any time after the expiration of two years the court shall, on motion of the county attorney, examine the proceedings, and, if they are found to be correct, and if the subsequent taxes have been paid to date, shall make and enter an order of confirmation, and shall direct the sheriff to make and deliver to the purchasers without further cost to them, a sheriff's deed for any real estate not redeemed. No sales shall be confirmed and no deeds shall be ordered by the court until all taxes accruing subsequent to the foreclosure have been paid."

Under the statute, only taxes delinquent may be included in the petition. If, as appellant contends, she is not required to pay the taxes levied before suit commenced but not delinquent, as a condition precedent to confirmation, and that upon confirmation she gets a title free and clear of all liens of every nature whatsoever, then the taxes levied but not delinquent became automatically canceled, and the property relieved of all lien or claim therefor. Such could not have been the intention of the legislature in the passage of the law. The general purpose of the act evidently was to provide a means whereby the de-

linquent taxes might be cleared up and the lands placed back on the tax list as revenue producing property. Where any other reasonable construction is possible, it should not be so construed as to afford a means through which property may be relieved from its just burden of taxation. When this section is considered in its entirety, there appears no difficulty in reconciling the different provisions so as to accomplish the intent and purpose of the legislature.

The law provides for the foreclosure of the lien of the county for all taxes "then delinquent;" that is, for all taxes delinquent at the time of the commencement of the foreclosure proceeding. The foreclosure is in the same manner and with like effect as a mortgage foreclosure, except as provided in said statute. The exceptions, other than the right to a two-year period of redemption, relate to payments the purchaser is required to make in addition to the sum bid, as a condition precedent to confirmation. In addition to certain costs he is required to pay, "The purchaser shall pay all taxes which may thereafter be levied against the parcels purchased by him, as the same shall fall due." Standing alone, this language would possibly afford some foundation for appellant's contention that she was only required to pay taxes thereafter levied. But, the section contains a further provision, "If the subsequent taxes have been paid to date;" this clearly refers to taxes subsequent to those involved in the suit. The section further provides: "No sales shall be confirmed * * * by the court until all taxes accruing subsequent to the foreclosure have been paid." Some consideration is given by counsel in briefs as to the meaning of the word "accruing," as here used. In Bouvier's Law Dictionary, we find the term defined: To grow to; to be added to; to become a present right or demand. So, while some of the taxes involved may have been previously levied or have been owing at time of the commencement of the action, they were not delinquent at that time, and appellee had no present right or demand therefor. The clause, "subse-

quent to the foreclosure," as here used, must be construed to mean subsequent to the commencement of the foreclosure proceedings. No other logical conclusion can be arrived at. To hold, as suggested, that the foreclosure continues until confirmation would make the provision last referred to meaningless.

There is also some discussion in briefs as to the distinction between general taxes and special assessments; but they are all tax liens, and the statute here involved provides for the foreclosure of "the lien for all taxes then delinquent." The distinction urged is not of importance in this proceeding.

While the provisions of this act are not entirely clear and specific, its manifest purpose and intent is obvious, and the construction given by the trial court is not inconsistent with the terms of the law. Therefore, the purpose and intent of the legislature should not be defeated merely because not declared in the most complete and accurate language. *In re Arrigo*, 98 Neb. 134, 152 N. W. 319.

We conclude that the trial court properly refused to confirm the sales involved herein for the reasons stated in its finding and decree heretofore set out.

Some other questions are discussed in the briefs, such as the effect of the tax lien foreclosure on instalments of special assessments not included in the foreclosure proceedings and subsequently becoming due, as well as, what is conveyed by the sheriff's sale, and the nature of the title acquired by the purchaser on confirmation of sale under such a proceeding. These questions are not involved under the record here presented.

Appellee urges that the trial court had no jurisdiction to act upon the motion to confirm sale until after expiration of two years from the date thereof. While the statute is silent as to the reason for granting the period delaying the confirmation for two years, we are impressed with the view that it was to protect the owner's right of redemption, which is provided for by a prior provision of the same section, which reads: "The owner of the fee or

any person having a legal interest in any separate parcel may redeem at any time within two years from the date of the sale thereof." The provision for postponing the confirmation for two years being for the benefit of the defendant, on waiver by him of that right, the court could confirm the sale at any time.

The contention of appellee that the court could act only upon the motion "of the county attorney" for confirmation cannot be sustained. While it is possible the county attorney may be under no obligation to ask for confirmation prior to the expiration of two years from the date of sale, yet, the provision of the statute that the court should examine the proceedings and, if found correct, confirm sale "on motion of the county attorney" was doubtless incorporated into the law with the view of securing a confirmation of the sale in the purchasers "without further cost to them" as by said law provided. A bidder at a sheriff's sale has such an interest in the proceedings as entitles him to move for confirmation.

It is further urged by the appellee that Beth Smith was not the real purchaser at said sale; that William A. Ehlers, the former owner of the property, or a part of it, purchased said property at the sale for himself in the name of Beth Smith, a stenographer in his office. There are some circumstances shown by the evidence which lend force to such contention; but the only direct evidence on that subject is the testimony of Mr. Ehlers, who testifies that he acted for and on behalf of Beth Smith, the purchaser at the sale; that Beth Smith furnished the money for the purchase of the lots. The burden of proof on this issue was upon the appellee and we find such issue not to have been sustained by the required weight of evidence. Decree of district court

AFFIRMED.

ETHEL G. SMITH, APPELLANT, V. EPSTEIN REALTY COMPANY ET AL., APPELLEES.
277 N. W. 427

FILED JANUARY 27, 1938. No. 30128.

1. **Negligence.** The duty of an owner of a building extends no further than to use reasonable care and prudence in keeping his building safe for persons rightfully entering it or passing by it.
2. ———. It is not negligence for a storekeeper to fill his show-window with stock so attractively displayed as to cause a woman passing along the sidewalk to stop and step back into a recess to more closely examine such display, even though such woman deliberately opens a door and falls down a stairway leading from such recess in front of the show-window.
3. **Jury.** It is erroneous to submit a case to a jury and permit a jury to speculate with the rights of a litigant, when no question for the jury is involved.

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

Leigh & Krajicek and *Henry J. Beal,* for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

PAINE, J.

This is an action for personal injuries sustained in a fall down a stairway. Defendants alleged the accident was due to the negligence of the plaintiff. At the close of plaintiff's evidence the court sustained motion for directed verdict. The jury were thereupon discharged and the cause dismissed.

This action was brought by the plaintiff, Ethel G. Smith, to recover damages for personal injuries sustained by her as a result of a fall down a stairway in a building facing west, located at 4821 South Twenty-fourth street, in the city of Omaha, Nebraska, at noon on May 4, 1935. The defendant Epstein Theatres Corporation owned the building, and leased the basement to the defendant Einsel W. Brackay, who had conducted a pool and billiard parlor.

The storeroom on the street floor was leased to the Safeway Stores, Incorporated, who operated a retail grocery store there under the trade-name of Piggly Wiggly. The entrance to the Piggly Wiggly was by a door flush with the sidewalk, located near the north end of the store. At the south end of the store there was a recessed space about six or seven feet back from the sidewalk, which led to two doors. The north one, next to the display window of the Piggly Wiggly, led to the billiard parlor down 16 steps; the adjoining door led upstairs to law offices and other rooms. There was no entrance to the Piggly Wiggly store from this recessed portion of the sidewalk.

Among the acts of negligence, it is alleged that this recessed space back from the sidewalk was poorly lighted and negligently constructed by the owner; that the attractive display window constituted a nuisance and a danger, which invited the public to view the same; that there were no warning signs; that the stairway led to the basement, which entrance was unguarded. However, up and down the frame, or casing, of the door is painted in large letters the word "Billiards."

The plaintiff claims to have made some purchases in the Piggly Wiggly store, leaving them there while she went to a bakery in the block to the south for bread. She returned and stepped into this recessed place, looking at the show-window, and opened the screen door leading down into the billiard hall, and fell down the stairs, thinking she was going into the grocery store, the entrance of which was near the north end of the store and on the sidewalk line. Plaintiff claims to have suffered a sprained ankle and bruises on the hip, shoulder, and chest wall, also a shock to her nervous system, which permanently injured her health. However, after the accident she went back to the store and got the groceries.

Upon cross-examination plaintiff seemed a little uncertain whether she might have bought the groceries in the Hinky-Dinky store, which was the second door north of the Piggly Wiggly, and the entrance to which was a re-

cessed opening back from the sidewalk. At any rate, she testified this was the only time she had been in the Piggly Wiggly store.

The defendants' motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence admitted favorable to the plaintiff and all inferences deducible therefrom. *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902; *Melson v. Turner,* 125 Neb. 603, 251 N. W. 172.

If from the entire evidence different minds may draw different conclusions, it is error on the part of the trial court to direct a verdict. *Rhoads v. Columbia Fire Underwriters Agency,* 128 Neb. 710, 260 N. W. 174.

The question arises, is there competent evidence from which the plaintiff's allegations may reasonably be inferred?

As to the owner of the building, it has been held by this court that the full duty of an owner of a building extends no further than to use reasonable care and prudence in keeping his building safe for persons rightfully entering it or passing by it. *Knies v. Lang,* 116 Neb. 387, 217 N. W. 615, 57 A. L. R. 1022.

The law does not forbid business to be conducted in basement rooms. The recess was lighted by sunlight at noonday. The door opened outward, so that plaintiff was compelled to step back, and could scarcely fail to see the word "Billiards," in large letters, painted on the white door-jamb. In addition to that, just below the glass on the show-window to which plaintiff was attracted was a large wooden sign, reading "Billiard Parlors," which could be read from across the street. We cannot find in the facts established that the owner of the building was negligent in its construction, or that the proprietor of the billiard parlor was negligent in the manner in which this doorway was maintained.

Now we will consider the liability of the defendant Safeway Stores, Inc. If this plaintiff went in the store and bought groceries there, she would be an invitee, but

if she had fallen into the basement inside of such store while buying goods, that fact would not of itself raise a presumption of negligence, but all the facts would be submitted to a jury and the jury would be instructed that the storekeeper is not an insurer of the safety of the customer, but must exercise reasonable and ordinary care and prudence under all the facts and circumstances. However, in the case at bar plaintiff had left the store and gone a block away to shop at another store. Upon her return, and while still quite a distance away from the door leading into the store, she stepped back into a recess from the sidewalk and opened a door, and fell down a stairway leading to a billiard parlor in the basement. She had not reentered the premises of the Safeway Stores, Inc., and was about 40 feet therefrom when the accident occurred. It is attempted to fasten liability upon this defendant for the accident because the store had a display in the window which caused her to step back into the recess. Since when has it become negligence for a storekeeper to fill his windows with fresh stock so attractively displayed as to cause women to pause and examine it? We fail to find the allegations of negligence against the owner of the Piggly Wiggly store supported by sufficient evidence to require the submission of that question to the jury. *Glenn v. W. T. Grant Co.*, 129 Neb. 173, 260 N. W. 811; *Rogers v. J. C. Penney Co.*, 127 Neb. 885, 257 N. W. 252; *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190; *Kresge Co. v. Fader*, 116 Ohio St. 718, 158 N. E. 174, 58 A. L. R. 132; *Blodgett v. B. H. Dyas Co.*, 4 Cal. (2d) 511, 50 Pac. (2d) 801; *Collins v. Sprague's Benson Pharmacy*, 124 Neb. 210, 245 N. W. 602; *Woolworth Co. v. Conboy*, 170 Fed. 934, 23 L. R. A. n. s. 743; *Dickson v. Emporium Mercantile Co., Inc.*, 193 Minn. 629, 259 N. W. 375. See annotations 33 A. L. R. 181, 43 A. L. R. 866, 46 A. L. R. 1111, 58 A. L. R. 136, and 100 A. L. R. 710.

In a very similar case which came before the Alabama court some 20 years ago, it was said: "She is shown not to have exercised the slightest degree of care to ascertain

what was beyond the door which separated the vestibule from the floor to the main office. Her own evidence shows that this door was shut, that she herself opened it, and stepped or walked right through as if the floors were on a level, and fell down the steps in consequence of her own negligence, in failing to ascertain whether or not there were steps or stairs connecting the two floors." *Hertz v. Advertiser Co.*, 201 Ala. 416, 78 So. 794, L. R. A. 1918F, 137.

It may be admitted that under the Constitution the right of trial by jury is guaranteed to all citizens. This right cannot be violated by a legislative act, or by judgment of the court, yet not all cases must be submitted to a jury. It is just as erroneous to submit a case to a jury, and permit the jury to speculate with the rights of a litigant, when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has that right. *J. C. Penney Co. v. Robison*, 128 Ohio St. 626, 193 N. E. 401, 100 A. L. R. 705.

The trial court could not escape the necessity of directing a verdict for the defendant in the case at bar. If he had allowed the case to go to the jury, and a verdict had been returned for the plaintiff, then he would have been compelled to set it aside on the motion for a new trial because of the failure of the plaintiff to prove actionable negligence.

Finding no prejudicial error in the record, the judgment is hereby

AFFIRMED.

MARTIN ENGEBRETSON, TRUSTEE, APPELLANT, V. RALPH M. WEST ET AL., APPELLEES.
277 N. W. 433

FILED JANUARY 27, 1938. No. 30173.

1. **Bankruptcy.** Property that is once in the custody of the bankruptcy court cannot be taken over and administered without

the consent of the bankruptcy court in which such matter is pending.

2. ———. The United States Constitution confers upon congress the power to establish uniform laws upon the subject of bankruptcy; therefore, the two-year statute of limitations (Bankruptcy Act, sec. 11-d) must supersede all statutes of limitations passed by the various states in order to preserve uniformity.

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

Weaver & Giller and *M. E. Culhane,* for appellant.

Clinton Brome and *David A. Fitch, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and YEAGER, District Judge.

PAINE, J.

This is an action by a trustee in bankruptcy, seeking to recover from the defendants a money judgment for the alleged wrongful conversion of certain assets belonging to the bankrupt corporation. Demurrer to petition sustained, and action dismissed. Plaintiff trustee appeals.

In the petition filed in this case by the trustee in bankruptcy of the Brictson Manufacturing Company, it is alleged that said corporation was adjudicated bankrupt on August 21, 1929, in an action in the United States district court for the district of South Dakota. Plaintiff alleges he was elected trustee and is now so acting and was duly authorized by the referee in bankruptcy to bring his suit. He further alleges that, at the time the petition in bankruptcy was filed against said Brictson Manufacturing Company, it was the owner of certain property, set out in detail, consisting of cash, in the amount of $14,383.88, and United States Liberty bonds, United States War Savings stamps and certificates, serial numbers being given, together with other bonds, all of the fair market value of $78,398.88, and at all times since the plaintiff was elected and qualified as trustee of said bankrupt estate he has been, and is now, entitled to the immediate possession of said property; that on September 7, 1929, the defendants,

Ralph M. West, John T. Marcell, and Harry S. Byrne, had actual notice and knowledge that said corporation had been adjudicated bankrupt, and that, without making application to, or without the consent of, the district court of the United States for the district of South Dakota, or of plaintiff, the three defendants did unlawfully and wrongfully obtain possession of all of the property described herein, then owned by the plaintiff, and did wrongfully and unlawfully convert the same from the plaintiff's use to their own use and purpose; that said property so converted was of the value herein set out, and that plaintiff has been damaged in that amount, with interest at 7 per cent. from the date of said conversion; that on February 1, 1930, and at various times since said date the plaintiff has demanded of the defendants possession of the property; that defendants have refused to give possession thereof to the plaintiff, and plaintiff therefore prays judgment in the sum of $119,103.12, with interest at 7 per cent. from February 17, 1937.

To this petition a general demurrer was filed March 18, 1937, by Ralph M. West, one of the defendants, on the ground that the petition did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court.

A second demurrer was then filed by the defendants Marcell and Byrne on March 26, 1937, setting up three grounds of said demurrer, the first being the same as set up in the first demurrer, the second ground that there is a defect of parties, and the third ground being that it appears upon the face of the petition that the alleged cause of action is barred by the statute of limitations, and this demurrer was sustained. The court stated orally, according to the argument of counsel in this court, that the statute of limitations was the only question involved. Plaintiff having elected to stand on his petition, the court dismissed the plaintiff's case.

The error relied upon for reversal was that the district court erred in failing to overrule the demurrer on the

ground that section 11-d of the national bankruptcy act, which reads as follows: "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed," superseded the limitation law of the state of Nebraska.

The defendants maintain that the bankruptcy limitation, as found in section 11-d, applies only to causes of action arising prior to the filing of the petition in bankruptcy, and has reference to disputes arising between the bankrupt and adverse claimants prior to the filing of the bankruptcy proceedings, and that, as the conversion is alleged to have occurred on September 7, 1929, and demand made February 1, 1930, and the petition was not filed until March 9, 1937, therefore the action is barred by the statute of limitations of the state of Nebraska.

The plaintiff trustee insists that any state law which conflicts with the bankruptcy act is superseded by that act. In 1902 Commissioner Duffie wrote two opinions for this court which should be carefully considered in passing upon the case at bar. The first is *Shreck v. Hanlon,* 66 Neb. 451, 92 N. W. 625. His second opinion is *Sheldon v. Parker,* 66 Neb. 610, 92 N. W. 923. While a slight modification of the opinion was made on rehearing, which did not affect the following holding, the first paragraph of the syllabus in each of these cases reads as follows: "Where a person has been declared a bankrupt under the act of congress approved July 1, 1898, the trustee appointed in that proceeding may maintain an action to set aside a conveyance made by the bankrupt at any time within two years after the estate has been closed, provided the action was not barred by the laws of this state at the time the petition in bankruptcy was filed."

Two decisions are cited by the appellee, *Dushane v. Beall,* 161 U. S. 513, and *Hammond v. Whittredge,* 204 U. S. 538, which were decided under the bankruptcy law of 1867, which was very different from the present law, in that it read: "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bank-

ruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." Rev. St. U. S., sec. 5057. The present law in section 11-d reads as hereinbefore set out.

Thus, we see that the two sections differ in this: That in the law of 1867 the limitation commenced to run from the time the action accrued in favor of the trustee, while in the present statute it runs for two years from the time the estate is closed.

In *Fuller v. Rock*, 125 Ohio St. 36, 180 N. E. 367, it was held that section 11-d of the bankruptcy act is superior to state law as to the period of limitation within which such act may be maintained, provided the action was not barred by the state law at the time of filing the petition in bankruptcy, and the court held that, the action not being barred at the time of the adjudication of the bankrupt, the federal statute of limitations supersedes the state statute of limitations.

The defendants insist that several of these cases relate to causes of action arising before bankruptcy, which is not true in the case at bar.

In *Devoy v. Superior Fire Ins. Co.*, 239 App. Div. 28, 265 N. Y. Supp. 432, the supreme court of New York considered this section 11-d of the bankruptcy law. A fire loss occurred April 5, 1930, and the owner corporation was adjudicated bankrupt October 30, 1930. More than a year thereafter the trustee brought suit on the policy. The policy contained the provision in New York standard forms that suit must be brought within one year after the fire occurred. The defendant asserts that the federal provision is paramount *except* where a state statute prescribes a shorter period, so far as claims vesting in the bankrupt before it was adjudicated are concerned. The court say: "A proceeding in bankruptcy is a proceeding *in rem* as well as *in personam*. Hence, when the federal court takes jurisdiction of the estate of a bankrupt, all the regulatory

provisions of the bankruptcy act immediately attach. One of these is contained in section 11, subdivision d, of the bankruptcy act. The act of congress on this subject of limitation of actions in respect of bankrupt estates supersedes all others." "The one-year limitation contained in the policy is in every respect a state statute of limitations and may not be viewed as a provision supplementing the federal enactment on the subject of bankruptcies."

The New York court cites *Shreck v. Hanlon,* 66 Neb. 451, 92 N. W. 625, and *Sheldon v. Parker,* 66 Neb. 610, 92 N. W. 923. It adds that the cases cited preclude adopting the contrary holding in *Davis v. Willey,* 273 Fed. 397, which case was also cited to this court by Mr. Fitch in his final argument. Should the holding in *Davis v. Willey, supra,* be followed, section 11-d would apply only to that limited class of actions where trustee alone has right of action. It should apply also to those cases where trustee derives his right from transfer from the bankrupt or his creditors.

The latest case, *Stanolind Oil & Gas Co. v. Logan,* 92 Fed. (2d) 28, is from the circuit court of appeals of the fifth circuit, and a rehearing was denied September 30, 1937. It was a suit by the trustee in bankruptcy to regain actual possession of a mineral lease. The facts briefly were that the Virginia Oil & Refining Company was adjudged bankrupt and a trustee was appointed on March 10, 1923. He collected over $50,000, and in reference to the east Texas leases upon unproved oil ground he said "that there were a great many leases in the assets of said estate, which were all wild cat, and which your trustee, using his best efforts, endeavored to sell but was absolutely unable to do so, and, although he still holds same, they are, in his opinion, worthless." The trustee was discharged October 14, 1926, and the referee issued an order closing the estate on November 2, 1926, but the bankrupt has never been discharged. In 1930 oil was discovered in the east Texas field, and at least one of these leases became very valuable. It was held in this case that a trustee in bankruptcy may surrender unprofitable property as a

part of the estate, and if he abandons it the title revests in the bankrupt, but that the closing of the proceeding without such abandonment by the trustee would not have that effect, and the record does not show that the trustee ever intended to abandon the lease. Property that is once in the custody of the bankruptcy court cannot be taken over and administered without the consent of the bankruptcy court. It was held that the state court did not have jurisdiction over the lease, and the sale of the lease by a receiver appointed by the state court was an absolute nullity. The provision of section 11-d of the bankruptcy act, as found in 11 U. S. C. A., sec. 29-d, barring suits against the trustee unless brought within two years after the estate is closed, applies to causes of action existing before bankruptcy, but does not apply to proceedings on a cause of action arising after bankruptcy in the course of administration. The court therefore held in effect that nothing had occurred which would set in motion section 11-d of the bankruptcy law.

It might be enlightening to examine a case in which the United States supreme court held against the trustee in bankruptcy on this two-year limitation. A bankrupt was alleged to have conveyed land in fraud of creditors, and the two years having passed, as provided in section 11-d of the bankruptcy act, the trustee petitioned to have the proceedings reopened on the ground that he had just discovered the acts of fraud. Justice Holmes, in denying the right to reopen, said: "That during the pendency of the original proceeding the trustee suspected the alleged fraud, made some inquiries, but dropped the matter because he thought that it was not worth while, that is, that it would not pay to go farther." It was held that the bankruptcy court cannot, under section 2 (8), remove the bar of section 11-d at its own will simply because a trustee may have changed his mind. *Kinder v. Scharff*, 231 U. S. 517.

"The trustee may not bring action, nor be sued, subsequently to two years after the closing of the estate; but, within that period, state statutes of limitation are, as to

the trustee, suspended, except as to causes of action barred thereby before the bankruptcy." 5 Remington, Bankruptcy, 491, sec. 2344. See *Meikle v. Drain,* 69 Fed. (2d) 290; 2 Loveland, Bankruptcy, 1049, sec. 539; *Hansen v. California Bank,* 17 Cal. App. (2d) 80, 61 Pac. (2d) 794.

The United States Constitution (sec. 8, art. I) confers on congress the power to establish uniform laws on the subject of bankruptcy; therefore, the two-year statute must supersede all statutes of limitation passed by the various states, in order to preserve uniformity. The fact that the bankruptcy courts recognize the statute of exemption to the head of a family, and certain other state statutes, does not in any way violate our holding in this case.

The filing of the petition in the case at bar was a command to all having possession of the property which the bankrupt at that moment owned to hold the same subject to the orders of the court, and the trustee can proceed in either a state or a federal court to secure actual possession of the assets of the bankrupt estate.

The sufficiency of the demurrer must be determined from the face of the petition. All facts well pleaded are to be taken as true, and all reasonable and fair intendments that can be implied from its allegations are to be indulged in.

In the opinion of this court, the petition does state facts sufficient to constitute a cause of action, and the limitation of the bankruptcy act supersedes the statute of limitations of the state of Nebraska, and the order of the district court in sustaining said demurrer is reversed and the cause is remanded for further proceedings.

REVERSED.

ELSIE HAMSHER, APPELLANT, V. DENA FISHER: JAMES FAIRHEAD, ADMINISTRATOR, ET AL., APPELLEES.
277 N. W. 380

FILED JANUARY 27, 1938. NO. 30015.

Partition: PLEADING. Where a petition praying for the partition of an heir's undivided interest in an estate alleges that bond has been given for the payment of all debts, allowances and expenses, in accordance with section 30-1304, Comp. St. 1929, it is sufficient to state a cause of action even though a decree of heirship or a decree of distribution had not been previously entered in the proceeding for the probate of the estate.

APPEAL from the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Reversed.*

Ralph W. Slocum and *Thomas E. Dunbar,* for appellant.

William H. Pitzer and *Marshall Pitzer, contra.*

Heard before ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and HASTINGS and RINE, District Judges.

CARTER, J.

The plaintiff commenced this suit to obtain a partition of certain real estate in Otoe county. Two of the defendants demurred to the petition and the trial court dismissed the suit. From this order, plaintiff appeals.

The petition discloses that Henry J. Abker died intestate on January 24, 1932, seised of the real property involved herein and of which plaintiff claims to be the owner of a one twenty-fourth interest. A petition for the administration of the estate was filed in the county court of Otoe county on January 28, 1932, and on February 24, 1932, an administrator was appointed. On June 19, 1936, the date the partition suit was filed, it appears that the administration of the estate had not been completed and that neither a decree of heirship nor a decree of distribution had been entered in the probate proceeding.

The basis of the demurrer was that the "administration of the estate of Henry J. Abker is incomplete and that there is a continued liability on the real estate sought to be partitioned in this action for unsatisfied undetermined

estate obligations, the determination of which is within the jurisdiction of said county court, and for these reasons this court is without jurisdiction to entertain and consider issues in an action in partition of said land."

Defendants overlook the fact that the petition alleges that plaintiff has given a bond to the county judge of Otoe county to secure the payment of her just proportion of the debts, allowances and expenses of the estate remaining unpaid. This is a compliance with section 30-1304, Comp. St. 1929, and entitled the plaintiff to maintain the partition suit even if the administration of the estate is not completed. This rule was announced in the early case of *Alexander v. Alexander,* 26 Neb. 68, 41 N. W. 1065, wherein the court said: "An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate have been paid or provided for, unless he give a bond with approved sureties to pay the same." Other cases supporting this rule are *Schick v. Whitcomb,* 68 Neb. 784, 94 N. W. 1023; *Markle v. Markle,* 120 Neb. 412, 232 N. W. 770; *Blochowitz v. Blochowitz,* 130 Neb. 789, 266 N. W. 644; *Ladman v. Ladman,* 130 Neb. 913, 267 N. W. 188.

Assuming the truth of all allegations of fact in plaintiff's petition that are well pleaded, as we are required to do on demurrer, we conclude that the petition states a cause of action in partition and that the district court for Otoe county was clothed with jurisdiction to hear the same.

Defendants contend that the appeal should be dismissed for the reason that there was no final order entered from which an appeal could be taken. The judgment of the trial court discloses that, after the demurrer to the petition was sustained, the plaintiff elected to stand on her petition and the petition was dismissed. This is a final order from which an appeal can be taken and is so fundamental that no citation of authority is required.

For the reasons herein given, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

HAZEL SUHR, ADMINISTRATRIX, APPELLEE, V. HARRY LINDELL ET AL., APPELLANTS.
277 N. W. 381

FILED JANUARY 27, 1938. No. 30152.

1. **Trial.** "It is proper practice for court to refuse to submit to jury defense not supported by evidence." *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677.
2. ———. "Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458.
3. **Negligence.** Where an accident occurs between two trucks, and the physical facts do not show, beyond reasonable dispute, that the negligence, if any, of one driver is more than slight, as compared with the negligence, if any, of the other driver, then the degree of negligence, if any, of both drivers is a question for the jury.
4. **Evidence: RES GESTÆ.** "A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo*, 130 Neb. 564, 265 N. W. 737.
5. ———: ———. Under the facts and circumstances in this case, the statements made by an injured person within a few minutes after the accident relative to the cause of such injury were admissible in evidence as a part of the *res gestæ*, but subsequent statements made by the injured person to his employer, in explanation of the accident, were erroneously admitted as a part of the *res gestæ*.
6. ———: ———. The admission or exclusion of statements as a part of the *res gestæ* rests largely in the discretion of the trial court. Such discretion is not an absolute discretion to be exercised arbitrarily, but a legal discretion, the abuse of which constitutes reversible error.
7. ———: ———. Statements made by an injured person relating to his physical condition and his then settled belief that he would not recover were erroneously admitted as a part of the *res gestæ*, such statements constituting a mere conclusion of the declarant.

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

Courtright, Sidner, Lee & Gunderson and *L. R. Doyle,* for appellants.

Robins & Yost, contra.

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

MESSMORE, J.

This is an appeal from the district court for Dodge county, wherein a jury awarded plaintiff damages on two causes of action: $6,000 on the first cause of action for pain and suffering endured by plaintiff's husband, and $8,000 on the second cause of action for pecuniary damages for the benefit of plaintiff and her minor children.

Plaintiff's petition alleged certain damages growing out of an automobile accident, which occurred on June 2, 1936, on a highway in the suburbs of Fremont, Nebraska. The defendants' answer denied negligence and pleaded specific acts of negligence on the part of Martin Suhr, the deceased. Plaintiff replied by a general denial.

Richard Groene, driver of defendant Lindell's truck, which was an International two-ton truck, with dual wheels, licensed for full capacity, testified, in substance, as follows: He left West Point, Nebraska, about 6:30 p. m., collected some nine head of cattle, loaded them and came into Fremont on highway No. 8 from the north, and took U. S. highway No. 30 down to a place known as the Farris filling station, arriving there at 10:30 p. m., and remaining for about ten minutes; then proceeded east on No. 30 to Bell street, which is the new paving south of Fremont, 20 feet in width and apparently level for some distance. Groene then proceeded on his way south on Bell street. The dimmer lights on his truck were on, and he could see approximately 20 to 30 feet ahead.

Joe Sebek, driver of a truck, testified, in substance, that he and Joe R. Vesely arrived at the Farris filling station just as defendant Groene was leaving, and that they subsequently followed his truck within a range of 100 to 250

feet. The speed of both trucks was from 20 to 22 miles an hour. The Groene truck was proceeding on its right side of the highway and at all times remained on the right side. A Ford truck, driven by Martin Suhr, in the employ of a nursery company, was proceeding north on Bell street on his right side of the road. Sebek testified that he could see the lights of the Ford truck a block or two away before the accident occurred, and that, just as it was passing Groene's truck, "he (Suhr) just turned right under it;" "went in under his (Groene's) truck and come out and went behind" the Groene truck, and stopped on the west side of the highway between the Groene truck and the Sebek truck; that Suhr "had his arm pretty near gone;" that Suhr said "his arm was gone;" that his arm was not hanging out of the door of the Ford truck, and the window of the Ford truck was open; the left front tire was blown out at the time of the accident, and the lights on the Groene truck, both front and rear, were on; that the Groene truck at no time swayed in the road.

The witness Vesely, who was riding on the right side of Sebek, testified, in substance, that the Ford truck hit the Groene truck and he heard the tire blow out; saw the "sparks fly from the pavement;" that after striking the Groene truck the Ford truck came to the right side of the road in front of the Sebek truck. Witness did not see the Ford truck until it was about 60 feet distant therefrom, and stated that the Groene truck remained on its side of the road at all times. On cross-examination both Sebek and Vesely testified that they saw the lights of the Ford truck turn sharply to the left into the Groene truck. They made a statement to plaintiff's counsel, which is substantially the story told by them at the trial, with the exception that Sebek denied that the following was a part of the statement which he signed: All of a sudden the small truck hit into the International truck "right at the front corner of the rack;" "I didn't notice the lights on the International before or after the accident." There also appears in the statement referred to the following: The

driver of the International truck said: "It came so fast he didn't know how it happened."

Defendant Groene testified further that he first saw the lights of the Ford truck three or four blocks distant; that the Ford truck came down on its own side of the road in a straight line, and he could see it approaching 30 to 40 feet ahead of his truck; that the lights obscured his vision of the road; that the Ford truck seemed to switch right off into the left side of his truck "right under the wheels," "right under the box." He also testified that the Ford truck went over to the east side of the paving 30 or 40 feet ahead of him. There is evidence that both trucks were moved after the accident to permit traffic to pass. There is also evidence of pieces of glass having been swept from the east side of the highway. This glass was obviously from the lamp of the Ford truck. The evidence further discloses that immediately after the accident an ambulance arrived; Martin Suhr was taken to the operating room of a hospital in Fremont, where there were present Doctor Fasser, Paul K. Peterson, and his wife, Edith, a trained nurse, who managed the hospital.

The physical facts show that the rack of the Groene truck was about 7 feet, 9 inches, in width, the exact measurements not disclosed by the record; that the truck was approximately 13 feet in length; that the body of the truck extended beyond the cab on each side. The distance from the bottom of the rack to the ground is not disclosed. The front of the rack apparently was not struck by the Ford truck, but on the second stanchion, about the width of two boards up, appeared a chipped place. There is a dispute as to whether there were any marks on the first stanchion of the truck. There is some evidence that a piece had been gouged out of the first stanchion on the left side of the truck. There were pieces of flesh and clothing caught on the rack, back about two-thirds of the way from the front, and a little piece of skin and cloth had fallen to the floor of the rack. There were marks on the side of the rack, underneath the rack, and on the out-

side of the wheels. The back part of the International truck was lower than the front part. The Ford truck showed the left fender smashed, the rear-vision mirror bent back in towards the cab, the left front light broken, the metal water trough above the door was bent flat against the body of the truck, and the body was dented, both in front and behind, above the door. The rear left fender of the truck was dented, the door was closed, and the window on the left side was down.

Appellants contend that the physical facts demonstrate that the Ford truck turned into the defendants' truck; while appellee contends that the driver of defendants' truck was on the wrong side of the highway; that the front of the body of defendants' truck was higher than the rear and went over the left front fender of the Ford truck; that the front corner of defendants' truck rack hit the upper hinge of the cab door of the Ford truck; that the front side of defendants' truck hit the side of the Ford truck, thus drawing the front of that truck slightly to the left; that its left wheels went on by and under the edge of defendants' truck; in other words, the trucks side-swiped.

Appellants contend that the court erred in not sustaining defendants' motion for a directed verdict at the close of the testimony, citing *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514, wherein this court held: "If the evidence essential to a recovery by plaintiff is clearly disproved by the physical facts and conditions, the trial court should direct a verdict against him." *Dodds v. Omaha & C. B. Street R. Co.,* 104 Neb. 692, 178 N. W. 258, and *Sippel v. Missouri P. R. Co.,* 102 Neb. 597, 168 N. W. 356, holding to like effect are cited.

Appellants cite *Bentley v. Hoagland,* 94 Neb. 442, 143 N. W. 465, wherein this court held: "Where the verdict of a jury is clearly against the weight and reasonableness of the evidence, it will be set aside and a new trial granted." They also cite *Calnon v. Fidelity Phenix Fire Ins. Co.,* 114 Neb. 53, 205 N. W. 942, holding to like effect.

From the physical facts in this case, the jury could determine either that the Ford truck struck defendants' truck, or that defendants' truck and the Ford truck sideswiped.

Appellants cite *Anderson v. Altschuler*, 125 Neb. 853, 252 N. W. 310, wherein we held: "Where, in an action for damages, the evidence discloses certain physical facts which stand undisputed, and where the facts in evidence show beyond reasonable dispute that plaintiff's negligence was more than slight as compared with the negligence of defendant, and to such extent that no reasonable mind can believe that such contributory negligence on the part of the party injured was slight and the negligence, if any, of the defendant gross in comparison therewith, in such a case the jury should be instructed to find for the defendant."

The physical facts in the instant case do not meet the rule as announced in the above case, for the reason that the physical facts do not disclose or show beyond reasonable dispute that Martin Suhr's negligence was more than slight as compared with the negligence of defendant Groene. The defendants' witnesses, Sebek and Vesely, saw the Ford truck approaching, testified to its striking the Groene truck, but predicated their testimony on seeing the lights of the Ford truck suddenly veer to the left. The accident occurred in the nighttime. Defendant Groene's testimony that his vision was obscured immediately before the accident, and his statement to Sebek that "he could not do anything but let him hit him, said it came so fast he didn't know how it happened," and the fact that the Ford truck was traveling at the rate of 15 miles an hour, would leave the question as to the degree of negligence in dispute.

The appellants further contend that the court erred in not submitting to the jury the issue of contributory negligence on the part of Martin Suhr in driving with his arm out of the truck window. There is no evidence in the record that would warrant the trial court in giving such an instruction.

"It is proper practice for court to refuse to submit to jury defense not supported by evidence." *Sterns v. Hellerich*, 130 Neb. 251, 264 N. W. 677; followed in *Kovar v. Beckius, ante*, p. 487, 275 N. W. 670.

Appellants criticize instruction No. 6, given by the trial court, wherein the court used the word "cautious," together with the word "prudent," in defining negligence. "Cautious" is synonymous with "prudent." It may have been superfluous in the instruction, but its use was not error.

Instruction No. 8 is also criticized for the reason that it left the impression with the jury that they could consider any and all acts of negligence on the part of Groene at the scene of the accident. It is contended that the instruction throws the whole matter of negligence open to wild conjecture, and in the use of the words, "in any wise negligent," the jury could speculate without limit on the negligence of Groene, if any. In reading, in connection with instruction No. 8, instruction No. 9 on proximate cause, wherein the court did limit the negligence of Groene, if any, to the propositions of negligence as set out in instruction No. 1, and in reading instruction No. 1, which is also criticized, we conclude that instruction No. 1 sets out specifically the acts of negligence, if any, of which Groene would be guilty, and eliminates, for lack of evidence, from the jury's consideration several acts of negligence pleaded in the petition.

"Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient." *Clausen v. Johnson*, 124 Neb. 280, 246 N. W. 458; followed in *Kovar v. Beckius, supra.*

Appellants contend that certain statements made by Martin Suhr after the accident were improperly admitted and were not part of the *res gestæ*. In this connection it would be well to ascertain the physical condition of Suhr immediately after the accident. His left arm was practically torn off; he was suffering from loss of blood and shock and was cold. All of his muscles and soft parts of his left

arm were torn in the region of the elbow, and his arm from the elbow down was attached to the upper arm simply by a few shreds of muscle. The bones above the elbow were crushed in small pieces, and the skin was torn from the arm up above the shoulder. He had a cut about three inches long on his forehead and another cut about two inches long on his chin. He was given a hypodermic of morphine to ease his pain. There was clothing ground into his torn arm, and he was given glucose of normal salt under his skin as a stimulant.

Doctor Fasser testified that he asked Martin Suhr: "Slim, what happened to you?" and that, in response to this question, "He said that he had been struck by an automobile on the wrong side." This statement was made about 10:45 p. m. Paul K. Peterson understood the statement as follows: "He said it was over the black line in the center of the road. * * * Q. What did he say in reference to the black line? A. All that I could remember was that he looked up and saw this car. It was on his side of the road over the black line over on his side of the road." Edith Peterson, who was present at the time the statement was made, recalled it as follows: "He said, 'I was hit, crowded off by a car on the wrong side of the road.' "

"To bring acts and declarations within the doctrine of *res gestæ,* they must be connected with, and grow out of, the act or transaction which is the subject-matter of inquiry so as to form one continuous transaction, and must, in some way, illustrate, elucidate, qualify, or characterize the act, and, in a legal sense, be a part of it." 10 R. C. L. 977, sec. 160.

"A statement to be admissible as a part of the *res gestæ* must have been spontaneous and impulsive, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation." *Tongue v. Perrigo,* 130 Neb. 564, 265 N. W. 737.

"The consensus of the authorities seems to be that a declaration to be a part of the *res gestæ* need not be coincident in point of time with the main fact proved. It is

enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is then a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue taken together form a continuous transaction, then the declaration is admissible." *Missouri P. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913.

"Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts." 3 Wigmore, Evidence (2d ed.) 738, sec. 1747.

" 'The trial court must be permitted to exercise its discretion, very largely, in determining whether the declarations were made under such circumstances as to permit the inference that they were genuine expressions, and the jury must be left to determine whether or not such inference shall be drawn.' *Hewitt v. Eisenbart*, 36 Neb. 794." *Ridenour v. Lewis*, 121 Neb. 823, 238 N. W. 745.

Considering the evidence relative to the condition of Martin Suhr immediately after the accident and the short period of time elapsing before the statement was made by him, as hereinbefore set out, we believe that the court properly admitted such evidence as part of the *res gestæ*.

A short time subsequent to the making of the foregoing statement by Martin Suhr he made a statement to Earl Conrad, his employer and owner of the Ford truck damaged in the accident. Conrad testified as follows: "Q. Now you may state what Martin Suhr said there in your presence. A. I just spoke to him and said, 'You had a pretty bad accident;' and he said, 'Yes; but Conrad it wasn't my

fault. They were clear over on my side and I couldn't help it.'" This statement was admitted in evidence as part of the *res gestæ*.

Obviously, the statement made by Martin Suhr to his employer, whose property had been damaged while he, Suhr, was driving, from its very nature, indicates that it was a statement made to his employer as to how the accident occurred and his reason why he was not to blame. We believe that this statement made by Martin Suhr to Earl Conrad was improperly admitted in evidence, and that its admission was prejudicial to defendants. There were also admitted in evidence certain statements made by Martin Suhr to different persons during the period he was in the hospital; his arm having been amputated at noon of the second day, and he having died on the third day, or approximately 36 hours after he had been taken to the hospital. These statements are as follows: "I will never live through this or get over this;" "I will never live through this, never;" and to Edith Peterson, who was present in his room almost hourly, he made such statements as "I will not live through this; I will never get over this and this is the end of me," saying that he was "going to die." Such statements of the declarant relating to his physical condition and his settled belief that he would not recover are not admissible in evidence as a part of the *res gestæ* and constitute merely an opinion of the declarant.

The statements, as hereinbefore set out, develop only one thing: That the patient believed he would not get well, do not relate to the accident or its cause, and are not spontaneous but reflect what the patient believed in his mind as to his condition. We believe such statements were inadmissible and prejudicial.

For the reasons given, the judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED.

CARTER, J., dissenting.

I am unable to agree with the holding of the majority opinion that the statement made in response to the inquiry by Dr. Fasser is admissible as a part of the *res gestæ*.

The record discloses that the accident happened between 10:30 and 11 o'clock p. m., and that it was 15 or 20 minutes before Mr. Suhr was removed from the scene of the accident. Upon his arrival at the hospital, in the words of one of the witnesses, "We worked with him for awhile getting him warmed up and sort of over his first shock" before the statement was made. It is apparent that at least 30 minutes had elapsed, and probably more, before Dr. Fasser made his inquiry. The evidence is not disputed that deceased was conscious from the time of the accident until the purported *res gestæ* statement was made. He talked with some of the witnesses immediately following the collision but made no statements bearing upon the cause of the accident at that time. Under this statement of the facts, the testimony offered in evidence is not a part of the *res gestæ*. It is merely a self-serving declaration that is not admissible in evidence for any purpose.

In order for a declaration to be admissible as a part of the *res gestæ*, it must be a spontaneous utterance, made contemporaneously with the facts in controversy and explanatory of such facts. A mere narrative of a past occurrence is not a part of the *res gestæ*. In the case at bar, the declaration was no part of the transaction. The accident had occurred more than 30 minutes before the declaration was made. Ample time had been afforded the declarant to formulate his thoughts and to engage in the natural tendency of a person to exculpate himself. The general rule is that the declarations of the party to his physician or to other persons as to the cause of the injury are not admissible when not made at the time of the injury. 3 Jones, Commentaries on Evidence (2d ed.) sec. 1217.

Another noted text-writer states the rule as follows: "The utterance must have been *before there has been time*

to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. * * * It is to be observed that the statements *need not be strictly contemporaneous* with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated." 3 Wigmore, Evidence, sec. 1750 (b).

In commenting on the same point, another text-writer states: "So if in one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision are confined within the few moments that it occupies. * * * It is the power of perception unmodified by recollection that is appealed to; not of recollection modifying perception. Whenever recollection comes in—whenever there is an opportunity for reflection and explanations—then statements cease to be part of the *res gestæ.*" 1 Wharton, Law of Evidence (3d ed.) secs. 258, 259.

In *Chicago & A. R. Co. v. Industrial Board,* 274 Ill. 336, 113 N. E. 629, the court said: "Declarations by an injured person to his attending physician are admissible in evidence when they relate to the part of his body injured, his suffering, symptoms and the like, but not if they relate to the cause of the injury; and this rule is even more rigorously enforced as applied to lay witnesses."

In *Chicago Packing Co. v. Industrial Board,* 282 Ill. 497, 118 N. E. 727, the court said: "Where no one witnesses an accident resulting in an employee's death, the testimony of an interne at the hospital to which the injured employee was taken, as to what the employee told him about the accident, is not admissible."

In *Roosa v. Boston Loan Co.,* 132 Mass. 439, the court said: "While a witness, not an expert, can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both

past and present. In both cases these declarations are admitted from necessity, because in this way only can the bodily condition of the party, who is the subject of the injury, and who seeks to obtain damages, be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury, which is the principal subject-matter of inquiry, and which may be proved by other evidence. No case has been called to our attention, and we are not aware of any case, where such evidence has been admitted."

In *Fordyce v. McCants*, 51 Ark. 509, 11 S. W. 694, a physician was permitted to testify that, after driving 13 miles to attend the deceased who had been injured in a railroad accident, deceased stated to him that he had been thrown heavily across the corner of a seat and had thus received an injury from which the witness found him suffering. The court held that such declarations were not part of the *res gestæ*.

In *Illinois Central R. Co. v. Sutton*, 42 Ill. 438, the court used the following language: "But to permit a party to prove what he himself stated to his physician, not in regard to the character and manifestations of his malady, but in reference to its specific cause, when that is one of the issues before the jury, would be carrying an acknowledged departure from the ordinary rules of evidence, having its origin in necessity, to a most dangerous extent."

In *Mayes v. State*, 64 Miss. 329, 1 So. 733, the rule is stated in the following language: "It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated, nor that it was made under such circumstances as to compel the conviction of its truth; the true inquiry, according to all the authorities, is whether the declaration is a verbal act, illustrating, explaining, or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not."

In *Simon v. Dixie Greyhound Lines*, 176 So. (Miss.) 160, a case very similar to the one at bar, the witness was in bed when he heard the crash of the collision. He immediately dressed and hurried to the scene of the accident. He assisted in carrying the injured man up the embankment onto the road and the witness offered to testify that the injured man said, "How come me here?" and next said, "The lights blinded me, I couldn't see, I tried to stop and couldn't." He further testified that the injured man stated that he thought the bus was coming, and that he turned gradually to the right until he got on the bank and then could not stop. The court held that the statements by the injured man *at the scene of the accident* constituted a mere history or narrative of a completed past occurrence, and were therefore not admissible as a part of the *res gestæ*.

In *Zohner v. Sierra Nevada Life & Casualty Co.*, 114 Cal. App. 85, 299 Pac. 749, the evidence showed without conflict that the deceased was unconscious for something in excess of five minutes after the accident. The court said: "It is claimed that the trial court erred in admitting a certain declaration of the deceased made after regaining consciousness to the effect that he turned out to avoid striking another car. This testimony was inadmissible (citing cases)."

In the last two cited cases, if the declarations made had been spontaneous and explanatory of the accident, I would not agree with the result. They appear to be merely a recital of a past event; they are nothing more than self-serving declarations that are not admissible even if a part of the *res gestæ* in point of time.

In *Hill v. Aetna Life Ins. Co.*, 150 N. Car. 1, 63 S. E. 124, the court said: "The defendant proved by a witness that just after a passenger train running twenty-five to thirty miles an hour had passed, he saw the deceased struggling and falling along beside the train; that witness ran there as quickly as he could, rolled the man over on his face and commenced to talk to him. The court properly excluded any evidence as to what the injured man stated as to how he had sustained the injury. Though the time which had

elapsed was brief, the conversation was not a part of the *res gestæ. It was not exclamatory but narrative,* and therefore hearsay and incompetent. * * * The evidence offered of declarations made a few minutes still later by the deceased as to the manner in which he had been injured were, of course, incompetent. The fact that the plaintiff had repeated one of these statements made to himself did not make it competent. It was merely hearsay still." (Italics ours.)

Some of the cases in this court supporting my contention are: *Missouri P. R. Co. v. Baier,* 37 Neb. 235, 55 N. W. 913; *Union P. R. Co. v. Elliott,* 54 Neb. 299, 74 N. W. 627; *City of Lexington v. Fleharty,* 74 Neb. 626, 104 N. W. 1056; *Roh v. Opocensky,* 126 Neb. 518, 253 N. W. 680; *Milton v. City of Gordon,* 129 Neb. 888, 263 N. W. 208; *Tongue v. Perrigo,* 130 Neb. 564, 265 N. W. 737.

The decision most frequently relied upon to sustain the admission of the declarations of an injured person as to the cause of an injury that has resulted in his death is *Insurance Co. v. Mosley,* 8 Wall. (U. S.) 397, 19 L. Ed. 437, in which declarations of the deceased that he had fallen downstairs, made to his son immediately after the occurrence, and to his wife as soon as he came back upstairs, were admitted in evidence as part of the *res gestæ.* While this case has been severely criticized, I would not feel obliged to voice objection if the rule therein stated were applied to the suit at bar. The declarations in the *Mosley* case were spontaneous and immediate and justification exists for the statement that they were so close in point of time that they should be considered as a part of the whole transaction. This is not so in the case before us.

I submit that the declarations in the instant case were not a part of the accident nor did they follow immediately upon the happening of the accident. They were narrative in form and consisted merely of a recital of a past transaction that had terminated more than 30 minutes before; the opportunity for reflection and self-exculpation was present and the declarations were in no sense spontaneous,

they having been elicited by the inquiries of the physician, and were not voluntary declarations in the sense required by the *res gestæ* rule. In my judgment, the decision of the majority is an unjustifiable departure from the rules announced by this court and the courts of other jurisdictions. It must ever be borne in mind that "what the law distrusts is not after speech, but after thought."

MARY ALICE GOSNELL, APPELLEE, V. LELA B. MONTGOMERY ET AL., APPELLANTS.
277 N. W. 429

FILED JANUARY 27, 1938. No. 30113.

1. **Automobiles: GROSS NEGLIGENCE.** Evidence examined and *held* not sufficient as a matter of law to sustain a finding of gross negligence on the part of the driver of an automobile resulting in personal injuries to a guest.
2. ———: ———. When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed state of facts had, the question of whether or not such facts will support a finding of the existence of gross negligence is a question of law.

APPEAL from the district court for Merrick county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions to dismiss.*

Harold A. Prince and *Walter R. Raecke,* for appellants.

Beghtol, Foe & Rankin and *Edward J. Patterson, contra.*

Heard before GOSS, C. J., ROSE, EBERLY, DAY, CARTER and MESSMORE, JJ., and TEWELL, District Judge.

TEWELL, District Judge.

This action was begun by the plaintiff, Mary Alice Gosnell, a minor, by a next friend, to recover damages arising from personal injuries received by the plaintiff when an automobile in which she was riding overturned. Lela B. Montgomery, a defendant, was the driver of the automobile. John W. Machamer, the only other defendant,

is the father of the defendant Montgomery, and was the owner of the automobile at the time of the accident involved. From a verdict and judgment against both defendants in favor of plaintiff, both defendants appeal.

The only question presented by the defendants in oral argument to this court, and the only one we deem necessary of determination, is that of whether or not the evidence is sufficient to support a finding of the jury to the effect that the defendant Montgomery was guilty of gross negligence proximately causing plaintiff's injuries. Chapter 105, Laws 1931, now section 39-1129, Comp. St. Supp. 1937, provides in part as follows:

"The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of said motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or operator in the operation of such motor vehicle."

That the defendant Montgomery was not in any manner intoxicated and that the plaintiff was not riding for hire are both conceded. To determine whether or not the defendant Montgomery can be said as a matter of law not to be shown to have been guilty of gross negligence, within the meaning of the above quoted statute, necessitates a careful analysis of the facts shown by the evidence.

On May 3, 1934, the defendant Montgomery, her daughter Martha, and one Lois Coolidge drove a Chandler automobile from Central City, Nebraska, to Lincoln, Nebraska. In doing so, they drove across a point on the highway where such highway intersects a railroad. This point is upon state highway No. 66, and is located about 23 miles east of Central City, Nebraska. Nothing in the evidence shows that anything occurred in crossing this railroad crossing on the ride to Lincoln that called the attention of defendant Montgomery to any roughness in the highway at such crossing. It is not shown that defendant Montgomery ever drove or rode over this crossing prior to this

trip. Two days later, on May 5, the defendant Montgomery and her daughter Martha and said Lois Coolidge, accompanied by the plaintiff, left Lincoln about 7:30 a. m. for the purpose of driving back to Central City. The plaintiff accompanied the party at the invitation of defendant Montgomery for the purpose of a visit with her friend Martha. All of the parties in the automobile knew that Lois Coolidge desired to reach Central City by 9 o'clock a. m. in order that she might report at that hour for work at her employment. On this trip home the defendant Montgomery drove the car, Martha rode with her in the front seat, and that plaintiff and Lois Coolidge rode in the rear seat. The highway at the point of the railroad crossing above mentioned runs from east to west. The railroad crosses the highway from the south to the north side in such manner as to run slightly to the northeast from the southwest but not quite forming a right angle with the highway. The day was clear and the roadbed dry. Other than the automobile involved, no traffic was on the highway. This railroad crossing is located in a broad depression in the surrounding terrain, so as to cause a car on the highway and approaching the crossing from the east to descend down a long slight incline. The bottom of this incline is several rods west of the railroad crossing. From this bottom the highway bed ascends a long slight incline toward the west. A sign-post several feet high warning of the existence of the crossing was located on the south side of the highway some distance east of the crossing. The top of this sign could be seen from any point on the highway that is within a distance of at least several hundred yards from and east of the crossing. The point in the highway that is crossed by the railroad is plainly visible from any point on the highway that is within a distance of at least several hundred feet from and east of such point. A photograph taken several months after the accident involved discloses that the east rail of the railroad crosses the highway with the top of the rail about even or a little lower than the roadbed, and

that the top of the west rail thereof in places is perhaps an inch above the roadbed. The highway was a straight graveled state highway apparently about 24 feet in width. Its width at the crossing and for at least several hundred feet either way from the crossing was approximately constant. A ridge of gravel several inches in depth extended along the north edge of the highway roadbed. Aside from showing that the top of the west rail was slightly above the roadbed, the evidence does not disclose that the crossing was other than a smooth, level crossing on the date of the accident involved. When the car in which plaintiff was riding was nearly upon the crossing, Martha said, "Be careful, mother, this is a bad crossing." Immediately upon this remark being made defendant Montgomery applied the foot brakes of the car. No other deduction can be made from the evidence than that the brakes were applied either when the rear wheels of the car were on the crossing or when the rear wheels had crossed the west rail. Upon the application of the brakes the car swerved to the north until its front wheels struck the ridge of gravel along the north edge of the highway, then swerved to the south edge of the roadbed, and then again swerved to the north and across the roadbed and went over the north embankment of the roadbed through a wire fence and into a field. It came to rest in an upright position facing east in this field. All tires were still inflated. The brakes were not locked. The plaintiff was injured in such accident. The opinion evidence as to the speed of the car at the crossing places the speed at all the way from 40 to 60 miles an hour. The evidence affirmatively shows that the brakes on the car were in good working order and fails to disclose any part of the car to have been out of normal condition. At the time of the trial of this cause in November, 1936, a road sign, other than the white colored sign above mentioned, existed near the south edge of the highway roadbed some distance east of the crossing. This sign, yellow in color, displayed the letters "R. R." and, beneath these letters, the words, "Twelve Miles, State

Law." We find nothing in the evidence to show that such sign was in existence at the time of the accident. Inasmuch as appellee assumes in her brief that such sign did exist at the time of the accident, we assume, for the purpose of this opinion, that such a sign existed at the time of the accident at the place it did at the time of the trial. On the trip home prior to the accident, Lois Coolidge had urged the driver to hurry. All of the occupants of the car testified that they had not deemed the speed or manner of driving unusual or dangerous at any time prior to the accident, and that no warning was given by any one aside from that by Martha heretofore quoted.

The appellee insists that the facts of this case do not bring it within that class of cases in which the defendant is suddenly faced with an emergency, and that, even if it were such a case, the defendant Montgomery is not aided by such rule when her own wrong or failure to use due care brought her to such an emergency. To support such contention the plaintiff cites the following authorities: *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677; 1 Blashfield, Cyclopedia of Automobile Law and Practice, sec. 669. We concede the correctness of the rule of law to which reference is made by this contention, but find it not determinative of the question here involved. In this case defendant Montgomery may have been guilty of some negligence in her approach to the crossing, even though she had crossed it two days before without noticing any condition making speed across it dangerous. She may have made an improper choice of courses to pursue, or even have been guilty of negligence in the application of the brakes, when warned by Martha of the crossing being "bad." The question involved is that of whether or not all of her acts that proximately caused the injury to plaintiff constituted gross negligence. If guilty of negligence less than gross in approaching and in arriving at the crossing, and if also the application of the brakes under all circumstances shown constituted gross negligence, which we deny, then we concede that she could not escape lia-

bility for such gross negligence upon a claim that the brakes were applied in an emergency and that their application proved to be an improper choice of courses to pursue. This court has defined gross negligence as used in the above quoted statute as being negligence of a very high degree that includes but does not necessarily extend to wanton, wilful or intentional disregard of the guest's safety. *Sterns v. Hellerich, supra; Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823; *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96. It may be that a reasonable mind might say that defendant Montgomery was guilty of some negligence either in the speed with which she approached the crossing, or in the application of the brakes, or in both manners, or in other manners. We have no occasion to decide. We do declare that, under the circumstances shown in the evidence, she may not as a matter of law be found to have been guilty of gross negligence. It must be kept in mind that the roadbed at the crossing was plainly visible to her at all times after she crossed a point on the highway at least several hundred feet east of such crossing, and that there was nothing in the appearance of the crossing, or in her experience of having crossed it two days before, that would ordinarily give rise to a feeling of unsafety in a driver of ordinary and common prudence. The crossing is not shown actually to have been dangerous even when crossed at high speed. When evidence is resolved most favorably toward the existence of gross negligence, and thus a fixed set of facts had, the question of whether or not such facts will support a finding of the existence of such gross negligence is a question of law. *Thurston v. Carrigan,* 127 Neb. 625, 256 N. W. 39; *Heesacker v. Bosted,* 131 Neb. 42, 267 N. W. 177; *Clarke v. Weatherly,* 131 Neb. 816, 270 N. W. 316; *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689; *Lemon v. Hoffmark,* 132 Neb. 421, 272 N. W. 214. Plaintiff cites and relies upon the following cases: *Morris v. Erskine, supra; Gilbert v. Bryant, supra; Swengil v. Martin,* 125 Neb. 745, 252 N. W. 207; *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794; *Sterns v.*

Hellerich, supra; Hendren v. Hill, 131 Neb. 163, 267 N. W. 340. In the case of *Morris v. Erskine,* warning by the guest in time to have avoided the injury, a race with a motor cycle, and a visible obstacle in the road ahead are all present. In the case of *Gilbert v. Bryant,* warning and request to reduce speed, and an unknown road, prior swerving of the car back and forth across the road, and the facing of traffic between sundown and dark at a high rate of speed were present. In the case of *Swengil v. Martin,* high speed, a visible curve ahead in the road, timely warning by the guest, and an obstacle ahead to be avoided were all present. In the case of *Rogers v. Brown,* darkness, excessive speed in view of the traffic, passing other cars in an intersection into which cars were coming from all directions, and a visible obstacle ahead which the defendant completely failed to see were all present. In *Sterns v. Hellerich,* darkness, excessive speed, timely warning, curves in the road, a hill, and a narrow bridge ahead all entered into the acts of negligence charged and proved. In the case of *Hendren v. Hill,* darkness, high speed and an obstruction in the road ahead, which defendant either did not see when he should have seen it, or which he recklessly failed to avoid, are disclosed by the evidence. To declare the evidence in this case sufficient to support a finding of gross negligence would be to thwart the intent of the legislature in the passage of the act above quoted.

This case was twice tried in the trial court. From the nature of the facts involved it plainly appears that no reliable, competent and material evidence other than that already produced can be produced upon another trial. The judgment of the trial court is therefore reversed and this cause remanded, with instructions that it be dismissed with prejudice to a future action, and that costs be taxed to the plaintiff.

REVERSED, WITH DIRECTIONS TO DISMISS.

CARL HOLTZ, APPELLANT, V. PAULINE PLUMER, APPELLEE.
277 N. W. 589

FILED FEBRUARY 11, 1938. No. 30181.

1. Trial. Instructions to a jury must be considered as a whole, and if, when so considered, they properly state the applicable law, it is sufficient.
2. Appeal. Rulings of the trial court as to instructions given and as to instructions refused *held* to be without prejudicial error.
3. ———. Rulings of the trial court on admission and rejection of testimony examined, analyzed, and *held* to be free from prejudicial error.

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

Leon & White, Frank A. Anderson and *A. W. Storms,* for appellant.

Wilber S. Aten and *Stephens, Thornell & Millhone, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and YEAGER, District Judge.

GOSS, C. J.

Plaintiff appeals from a judgment for defendant based on a verdict of the jury.

The action was by a father to recover damages on account of the death of his five-year old daughter, alleged to have been struck by defendant's car while operated by her (1) at a reckless rate of speed and in excess of 50 miles an hour; (2) at a rate of speed greater than was reasonable having due regard for the traffic and conditions of the road, and in violation of the laws of Iowa and the speed and traffic ordinances of Council Bluffs (both of which were specifically set out); (3) that defendant did not have her car under proper control, and failed to turn it immediately before the collision, to avoid the same, which defendant knew or in the exercise of reasonable care should have known and could have done; (4) that defendant did not keep a proper lookout ahead for the purpose of observing the condition of the highway in

reference to individuals thereon; (5) and that defendant, in the exercise of ordinary care, could have seen the position of the child in the street before the collision, so as to have avoided the collision, but negligently failed to do so. This constitutes a fair summary of the allegations of the amended petition as to the acts of negligence. They were stated by the court in the first paragraph of the court's instructions.

Plaintiff claims the district court erred in instruction No. 3, which set out what plaintiff must prove in order to recover: (1) That defendant operated the automobile so as to strike the child; (2) "that said defendant upon that occasion was negligent in the driving and operation of her automobile in the particulars claimed by plaintiff and stated to you in instruction No. 1, or some of them, and by such negligence caused the injuries which resulted in the death of the child;" and (3) that plaintiff has suffered damage. Plaintiff argues that, in subdivision 2 above, where the court said "some of them" he should have said "some *one* of them," and that the expression as used by the court led the jury to believe that it was necessary for plaintiff to prove more than one of the acts of negligence before he could recover. Defendant argues that if the judge had used the words "some one of them" the jury would understand it to preclude them from finding negligence in two particulars charged.

Webster's New International Dictionary Unabridged (2d ed.) gives the word "any" as a synonym for "some." From the subject-matter and context that appears to be the sense in which the court used it. It evidently was intended by the court to mean the same as "one or more" of the acts of negligence charged in the petition and set out in the instructions. When the jury were instructed that it was necessary, before a verdict could be reached, for plaintiff to prove that defendant was negligent "in the particulars claimed by plaintiff * * * or some of them," we think it would be understood by the jury to mean that, if they found her negligent in all or in one of the particu-

lars, then plaintiff should be given a verdict. We are of the opinion this instruction did not mislead the jury.

Plaintiff complains of instruction No. 4 given by the court. In that instruction the court recited the Iowa statutes as to the right of a father to recover resulting damages on account of the injury of a child, the Iowa statute as to speed and the Council Bluffs ordinance as to speed, and stated to the jury that a violation was not conclusive evidence of negligence, but should be considered, in connection with other facts and circumstances proved at the trial, in determining whether defendant was negligent upon the occasion in question. Plaintiff requested eight instructions, but none of them referred to this particular subject. While the instruction might have been amplified as to the effect of failure to observe the statutes and ordinance, it was not in the circumstances prejudicial to the plaintiff, and, in the absence of a more particular request from plaintiff, must be approved.

Instruction No. 6 is characterized by plaintiff as erroneous in part. The instruction stated that, if the child was exposed to injury and defendant saw her position or by the exercise of reasonable care could have seen her danger and failed to use reasonable and ordinary care under the circumstances to prevent colliding with the child, then plaintiff may recover. That phase of the instruction plaintiff approves. Then the instruction says: "The defendant contends that she was keeping a lookout and did not see the child or have opportunity to see her before the injury. If you find this to be true, then defendant would not have been negligent in that particular, and if the collision and consequent injury to the child was not to any extent caused or brought about by any negligence or want of ordinary care of the defendant, then the defendant would not be liable in this case."

It is a well-known rule that instructions must be considered as a whole, and if, when so considered, they properly state the applicable law, it is sufficient. *Vithen v. Jensen,* 128 Neb. 188, 258 N. W. 267; *Reinhardt v.*

Menssen, 132 Neb. 207, 271 N. W. 442. Where, as here, the criticized instruction itself shows that the proposition criticized is covered within its confines, the rule is tested and exemplified within narrow limits. The instruction itself, considered as a whole, answers the criticism.

Certain instructions were requested by plaintiff and refused. As to some of these error is claimed. In all of them the record shows that they were marked by the trial court "Refused as sufficiently covered by instructions given." Without going into a detailed discussion of these instructions, we find the court's description of the situation to be correct and that the instructions given by the court were not prejudicially erroneous.

Plaintiff asserts that the court erred in admitting evidence over plaintiff's objections. The only instance cited is with reference to the testimony of Fred Hoeck, a witness for defendant, who testified that he was seated in the front seat of an automobile closely following that of defendant when the child was injured. He was asked if he saw any child on the west side of the street or curbing. "A. I did not. There was no child there; didn't see any. Mr. White (attorney for plaintiff): Move to strike the answer with respect to the statement there was no child there because he didn't see any, for the reason it is a conclusion and not responsive. Overruled. Exception." At first thought it would seem that the objection was good, but on consideration it appears to be a qualification of his answer by a careful witness. He expresses thereby the belief that there was no child visible at the place designated because he did not see any child there. This answer was subject to any cross-examination plaintiff might thereafter make. We fail to see how it could prejudice the jury. It appears from this witness that the first thing he saw indicative of the presence of the child was when he saw something flutter behind the left hind wheel of defendant's car—"thought it was a piece of paper * * * after I got closer I could see it was a child." He was then about 100 feet behind defendant's car.

Ben Montgomery was the only witness who saw the accident. He testified that he was driving north, with two cars preceding him; that he saw a little girl running north along the curb, saw her dart across the street in front of the first car ahead of him, and then saw her flying head first and strike under the left back wheel of the car coming south; this last car was Miss Plumer's car, which was going 15 to 20 miles an hour; her back wheel ran over the child; her car went 15 to 25 feet and did not stop; the first car in front of him did not stop.

Plaintiff also charges that the court erred in admitting testimony of defendant in the following instance. Defendant had testified that, as she drove, she did not see any child in the street in front of her, though she was looking in front. "Q. Could you have seen it if it had been there? Mr. White: Objected to as calling for a conclusion of the witness. Overruled. Exception. A. Yes, sir." A similar situation arose in the case of *Barr v. Post*, 56 Neb. 698, 77 N. W. 123. There the witness was asked if Mr. Van Atta could have been there and the witness could not have seen him. The question was objected to as calling for a conclusion and opinion of the witness. The court overruled the objection and the witness answered, "No, sir; he could not." Counsel complained that by this ruling the court permitted the witness to state her opinion. The court said in the opinion: "We do not think so. We think she stated what she did as a matter of knowledge. She was not asked for her opinion and she did not give it. She simply said Van Atta could not have been present and she not have seen him."

On direct-examination defendant was asked if she told Dr. Kelly at the hospital that there was a bump and the body (of the child) was just in front of the car, if she felt a bump on the front of her car, on the radiator, and if she repeatedly told him she felt a bump on the radiator of her car. She answered that she did not make such statements to Dr. Kelly. On cross-examination she was asked whether she discussed with Dr. Kelly at the hospital how

this accident happened. She answered, "No, I did not. Mr. Stephens (attorney for defendant): Objected to as not cross-examination. Sustained. Exception." There was no motion to strike the answer and it stands in the record and presumably was considered by the jury. The court said, "I have indicated how far you are entitled to go. You can get there in one question." Then the question was asked: "Did you at the time of that conversation at that hospital in substance and effect tell Dr. Kelly that your automobile struck the child? A. No." Then plaintiff's counsel asked the last question of plaintiff shown in the record relating to her conversation with Dr. Kelly: "Q. In substance and effect did you tell Dr. Kelly about your car striking a child at the hospital?" This was objected to as "incompetent and not proper cross-examination," the objection was sustained and no answer appears. The court probably sustained it on the ground that it was repetitious and in that sense not proper cross-examination.

Inasmuch as defendant had categorically denied any conversation with Dr. Kelly at the hospital as to how the accident happened and that her automobile struck the child, and inasmuch as Dr. Kelly testified that she told him she was driving the car and something suddenly struck with a bump in front, that she stopped the car and discovered the child in the street, there was everything plaintiff needed in the evidence to argue to the jury that defendant was impeached and that in the particulars described by Dr. Kelly the accident happened as he related. No other or further cross-examination on the particular points would serve any useful purpose after she had denied as facts what the cross-examiner sought to elicit from her. The effect was to be considered by the jury.

Error is sought to be predicated upon several other rulings of the court on evidence. We have examined them and do not find any of them prejudicially erroneous and omit their discussion in this already too long opinion.

The facts were evidently presented to jury with unusual thoroughness in the evidence. The jury were adequately

instructed on the law. They evidently believed the testimony of defendant and that of Montgomery. The verdict was disappointing to plaintiff. But, under our system, the judgment based on the verdict is conclusive. We cannot say it was wrong. Therefore, it is

AFFIRMED.

JOHN J. EARLY, APPELLANT, V. BELGRADE-HORD COMPANY ET AL., APPELLEES.
277 N. W. 596

FILED FEBRUARY 11, 1938. No. 30163.

1. **Garnishment.** Garnishment in aid of execution is a provisional remedy created by statute directing the procedure to obtain such relief.
2. ———. In a garnishment proceeding in aid of execution, the answer and evidence of garnishee only are admissible in response to the summons in garnishment.
3. ———. A judicial order on a garnishee to turn over money or property in aid of execution can be made only upon an unqualified admission by him of a present indebtedness which the execution debtor would be entitled to but for the garnishment.

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

H. G. Wellensiek, for appellant.

Morsman & Maxwell and *E. J. Patterson, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

ROSE, J.

This is a garnishment proceeding in aid of execution. Upon a hearing in response by the garnishees to the summons, the district court discharged them and plaintiff appealed.

John J. Early, plaintiff, recovered in the district court for Merrick county, April 28, 1936, a judgment for $4,992 against Belgrade-Hord Company, defendant. Execution on the judgment was issued and returned by the sheriff May 4, 1936, *nulla bona.* On behalf of plaintiff an affidavit for

garnishment in aid of execution was filed in the district court June 16, 1936, pursuant to statute. Comp. St. 1929, sec. 20-1056. Affiant stated he had good reasons to believe and did believe that Heber Hord and the Lakeside Ranch Company had property of, and were indebted to, Belgrade-Hord Company, defendant. They were summoned by the sheriff as garnishees June 16, 1936, to answer under oath all questions touching the goods, chattels, rights and credits of defendant in their possession or under their control.

Heber Hord, personally, and as president of Lakeside Ranch Company, was examined under oath. After the hearing the district court found that garnishees had no property of defendant and were not indebted to it. The garnishees were consequently discharged. On appeal plaintiff assigned error in the finding and judgment below.

Garnishment in aid of execution is a provisional remedy created by statute directing the procedure to obtain such relief. Comp. St. 1929, secs. 20-1056 to 20-1061. The answer and evidence of garnishees only may be taken by the court in response to the summons in garnishment. *Orchard & Wilhelm Co. v. North,* 125 Neb. 723, 251 N. W. 895. A judicial order on a garnishee to turn over money or property in aid of execution can be made only upon an unqualified admission by him of a present indebtedness which the execution debtor would be entitled to but for the garnishment. *Clark v. Foxworthy,* 14 Neb. 241, 15 N. W. 342.

In the present instance, the answers and evidence of Hord in testifying for himself and on behalf of Lakeside Ranch Company, of which he was president, did not admit an indebtedness of garnishees to Belgrade-Hord Company, defendant, when the summons in garnishment was served. On the contrary, the true import of his answers and evidence is that there was no such indebtedness. It follows that under the law the judgment discharging the garnishees was the only one that properly could have been rendered on the record.

AFFIRMED.

M. SHONSEY COMPANY, APPELLANT, V. BELGRADE-HORD COMPANY ET AL., APPELLEES.
277 N. W. 597

FILED FEBRUARY 11, 1938. NO. 30164.

Garnishment. "A judicial order on a garnishee to turn over money or property in aid of execution can be made only upon an unqualified admission by him of a present indebtedness which the execution debtor would be entitled to but for the garnishment." *Early v. Belgrade-Hord Co., ante*, p. 884, 277 N. W. 596.

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

H. G. Wellensiek, for appellant.

Morsman & Maxwell and *E. J. Patterson, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and MUNDAY, District Judge.

ROSE, J.

This is a garnishment proceeding in aid of execution. Upon a hearing in response by the garnishees to the summons, the district court discharged them and plaintiff appealed.

The M. Shonsey Company, plaintiff, recovered in the district court for Merrick county, October 15, 1934, a judgment for $2,277.50 against Belgrade-Hord Company, defendant. Execution on the judgment was issued January 9, 1936, and returned by the sheriff *nulla bona*. On behalf of plaintiff an affidavit for garnishment in aid of execution was filed in the district court June 16, 1936, pursuant to statute. Comp. St. 1929, sec. 20-1056. Affiant stated he had good reasons to believe and did believe that Heber Hord and the Lakeside Ranch Company had property of, and were indebted to, Belgrade-Hord Company, defendant. They were summoned by the sheriff as garnishees June 16, 1936, to answer under oath all questions touching the goods, chattels, rights and credits of defendant in their possession or under their control.

Heber Hord, personally, and as president of Lakeside

Ranch Company, was examined under oath. After the hearing the district court found that garnishees had no property of defendant and were not indebted to it. The garnishees were consequently discharged. On appeal plaintiff assigned error in the finding and judgment below.

The issues and facts and the law applicable thereto are the same as in *Early v. Belgrade-Hord Co., ante,* p. 884, 277 N. W. 596, and for reasons stated in the opinion therein, the judgment herein is

AFFIRMED.

ROBERT M. CAMPBELL, APPELLEE, V. KEWANEE FINANCE COMPANY: HARVEY HESS ET AL., APPELLANTS.
277 N. W. 593

FILED FEBRUARY 11, 1938. No. 30175.

1. **Statute of Frauds.** Under our statute of frauds, the contract or some note or memorandum must be signed by the vendor, and the name or the description of the vendee must also appear.
2. ———. An oral contract, partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity.

APPEAL from the district court for Sioux county: EARL L. MEYER, JUDGE. *Reversed.*

F. J. Reed, for appellants.

Mothersead & York, contra.

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

DAY, J.

This is a suit to quiet the title to a tract of Sioux county land, and to obtain other equitable relief. The appellants are Harvey Hess and his wife, Elizabeth Hess, tenants in possession of the farm. They claimed a right or interest in the land other than as tenants. The appellee filed a demurrer to the second amended answer and cross-petition of the defendants, which was sustained by the court. The

appellants elected to stand on their second amended answer and cross-petition and refused to plead further, and the trial court entered judgment on the appellee's petition.

Prior to February, 1927, the appellants were the owners of the real estate herein involved. At that time the land was covered by a real estate mortgage in favor of Union State Bank & Trust Company. This mortgage was in foreclosure, and a decree had been entered. There was in this case a decree for a second lien on said real estate for approximately $4,000. A release of this second lien was secured, and Mr. and Mrs. Hess executed a warranty deed to the premises. At the same time the bank executed a written option to Harvey Hess, giving him a right to repurchase. The appellee is the receiver of the Union State Bank & Trust Company, and has sold the farm to another for $6,000. The mortgage was originally made to the Kewanee Finance Company, and by it transferred to the bank as collateral. Since there is no issue to this assignment, it will not be mentioned again.

The gist of the present controversy is that after the written option an agent of the bank with respect to the land, R. P. Palmer, made a verbal agreement with Harvey Hess. It is alleged that he agreed that the appellants should be given the first chance and opportunity to buy the farm at any such reduced price, and that the appellants should make certain substantial improvements to the premises.

It is provided by the statutes: "Every contract for * * * the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the * * * sale is to be made." Comp. St. 1929, sec. 36-105. This has long been the law of this state, and has often been construed by this court. Under our statute of frauds, the contract or some note or memorandum must be signed by the vendor, and the name or description of the vendee must also appear. *Barkhurst v. Nevins*, 106 Neb. 33, 182 N. W. 563. In every instance the court has held that the contract or some note or memorandum must be in writing. The contents of the

contract or memorandum designated are the names of parties, description of land, price, general terms, and the signature of the vendor. *Gardels v. Kloke*, 36 Neb. 493, 54 N. W. 834.

There follows section 36-106, Comp. St. 1929, which provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of equity to compel the specific performance of agreements in cases of part performance." It is argued here that there is such a part performance that the one option is removed from the operative effect of the statute of frauds. The appellants rely upon the fact that they leased the premises after the execution of the deed, and that, on account of the oral option of repurchase, they kept the premises in repair and the land in a high state of cultivation. Specifically, the answer alleges that, in reliance upon this oral option, they painted the dwelling-house, hauled large amounts of manure from other farms, and, at a great expense for labor and teams, leveled a borrow pit. The appellants also assert in their answer that, in accordance with the oral agreement, they have constructed an underground pipe line to feed yards, a concrete feeding platform, and have reconstructed the electric lighting plant. It is averred that all these improvements are reasonably worth $500. The appellants assert they are ready, willing, and able to exercise their option by purchasing this land for $6,000. The appellants leased the premises until February 28, 1937. The rights the appellants assert are other and different than those of tenants. They arise, if at all, from the alleged oral agreement for an option to purchase. The oral option is not dependent in any way upon the deed the appellants executed to the appellee in 1927. The consideration for that deed was, of course, the debt and a written option for repurchase. This written option has never been exercised, and is not now sought to be enforced. However, the answer and cross-petition alleges a good defense to the suit. If evidence is produced to sustain the truth of the allegations, the appellants have rights in the

property other than those of a tenant. The consideration for the oral option is the expense incurred for the improvements and repairs upon the farm after the agreement was made. If the evidence does not establish part performance, then, certainly, the appellants have no rights in the property. An oral contract partly performed, which the statute of frauds requires to be in writing, will be enforced by a court of equity. *Lucas v. County Recorder of Cass County*, 75 Neb. 351, 106 N. W. 217. It is almost the universal rule that an oral contract partly performed will be enforced by a court of equity, although the statute of frauds requires such a contract to be in writing. For all practical purposes this case is simplified. The issue for the court to decide from the evidence is whether such agreement existed, its terms, and whether the appellants performed the conditions alleged. It is alleged in the answer that these expenditures were made in reliance upon the oral agreement, and were not required of the appellants as tenants. Certain other arguments are advanced which are not essential to the determination of this case. The trial court erred in sustaining a demurrer to the answer.

REVERSED.

PALMER FINDLEY, APPELLEE, V. EMELIA PETERS ET AL., APPELLANTS: FIRST NATIONAL BANK OF SCRIBNER ET AL., APPELLEES.

277 N. W. 595

FILED FEBRUARY 11, 1938. No. 30180.

Mortgages. A moratory stay is properly denied where the evidence indicates that the encumbrance against the land is in excess of its actual market value.

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

Donald S. Krause and *R. B. Hasselquist*, for appellants.

Abbott, Dunlap & Abbott and *Courtright, Sidner, Lee & Gunderson, contra.*

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

DAY, J.

This is a suit to foreclose a mortgage on a tract of Dodge county land. On the 9th of February, 1937, the trial court denied the appellants' motion for a moratorium, and an appeal was taken to this court.

The only question presented here by this case is a question of fact. Does the evidence sustain the trial court in its denial of a moratory stay? The trial court correctly found that the amount of the liens against the land was approximately $30,000. Since the hearing, about $1,100 interest and taxes have accrued. The contention of the appellants is that the property is worth between $30,000 and $36,000. Some of the testimony of the appellants did not justify a finding that the real estate is of more value than the indebtedness. There are 200 acres, and this would mean that the tract was worth from $125 to $175 an acre. Several of the witnesses for the appellants fixed the value at $125 an acre. It is not necessary to mention the testimony of each witness, but much is made of that of the appellant Henry Peters, son of the appellant Emelia Peters, and tenant in possession. He testified that the Federal Land Bank would loan $18,000 on the property, and he concludes the amount is 50 per cent. of the value. If that were competent evidence, there is still nothing to show that the value would be twice the amount of the loan. There is other evidence offered by the appellees that the property is worth much less than the indebtedness. While this is an equity case, triable *de novo* before this court, the finding of the trial judge is supported by the evidence, and this court finds his judgment on the matter persuasive. It is well settled in this jurisdiction that a moratory stay is properly denied where the evidence indicates that the encumbrance against the land is in excess of its actual mar-

ket value. *Clark v. Hass,* 129 Neb. 112, 260 N. W. 792; *Lincoln Nat. Life Ins. Co. v. Richards,* 132 Neb. 282, 271 N. W. 794. See other numerous cases in this jurisdiction.

There is no apparent reason for disturbing the finding of the trial court.

AFFIRMED.

MARIE MILLER, APPELLANT, V. RAYMOND L. CROSSON, SHERIFF, ET AL., APPELLEES.
277 N. W. 796

FILED FEBRUARY 11, 1938. No. 30223.

1. **Appeal.** A verdict based upon conflicting evidence, in the absence of legal error, will not be disturbed unless clearly wrong.
2. ———. A motion for new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court.
3. **New Trial.** Newly discovered evidence, if merely cumulative or impeaching, or which probably would not change the result, does not require a new trial.
4. **Appeal.** Conduct of counsel, suggesting in examination of witness by implication that the testimony was unreliable, is not reversible error.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Edmund P. Nuss and *J. E. Ray, contra.*

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

DAY, J.

This is an action to recover from a sheriff and his bonding company for damages occasioned by the loss alleged incident to an execution issued to him as such officer. This case was previously before this court. *Miller v. Crosson,* 131 Neb. 88, 267 N. W. 145. Those desiring an extended statement of facts are referred to that opinion. It seems sufficient now to state that an execution was

caused to issue to the sheriff under which he levied upon a car. A third party claimed ownership of the car, and the sheriff released it upon demand and evidence of ownership. This case was also heard twice by the district court. The last trial in the district court was to a jury, and the verdict was in favor of the sheriff. There are no errors alleged relative to the submission of the issues involved. There is no merit in the appeal which Miller prosecutes in this court.

This court cannot set aside the verdict of the jury in this case. A verdict based upon conflicting evidence, in the absence of legal error, will not be disturbed unless clearly wrong. *Peterson v. Omaha & C. B. Street R. Co.*, 131 Neb. 676, 269 N. W. 510, states an old rule of this jurisdiction, supported by numerous cases. The jury had the entire controversy before them, and the evidence is sufficient to support the verdict. There is no legal error, and this court cannot assert that the verdict is clearly wrong.

A new trial cannot be granted on the grounds of newly discovered evidence unless, among other things, it would probably change the result. The newly discovered evidence in this case is that of two witnesses who make affidavit that one of the witnesses had, upon another occasion, made a statement contradictory to that made at the trial. This witness was a witness for the sheriff. A motion for new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court. *Allender v. Chicago & N. W. R. Co.*, 119 Neb. 559, 230 N. W. 102; *Blaha v. Chicago & N. W. R. Co.*, 119 Neb. 611, 230 N. W. 453.

Again, this court has held that newly discovered evidence, if merely cumulative or impeaching, or which probably would not change the result, does not require a new trial. The evidence relied upon is impeaching of the testimony of one witness. The issue in the trial court was the ownership of the car. It was merely cumulative on that issue. It was not such evidence as would probably change

the result of the trial. The experienced trial judge who heard the case did not abuse his discretion when he refused to grant a new trial.

The alleged misconduct of the attorney for the appellees is not sufficient to grant a new trial. The conduct of the attorney cannot be approved as a model of decorum in the courtroom. However, the conduct of counsel is not comparable to that delineated in *Hall v. Rice*, 117 Neb. 813, 223 N. W. 4, or in *Ashland Land & Live Stock Co. v. May*, 59 Neb. 735, 82 N. W. 10. The counsel for the appellees asked certain witnesses questions which, implicitly at least, suggest they were professional witnesses, and therefore not to be believed. From all the circumstances of the case it is not apparent that the improper and ungentlemanly conduct of counsel had any influence on the jury, or distracted their attention from the real issue. To require a new trial, the misconduct of the attorney must be such as prejudices the substantial rights of a party.

An examination of this case does not disclose any reversible error.

AFFIRMED.

CLARENCE A. CURYEA, APPELLEE, V. CORA FRY ET AL., APPELLANTS.

277 N. W. 598

FILED FEBRUARY 11, 1938. No. 30198.

Mortgages. The defendants in a foreclosure suit are not entitled to set aside confirmation, nor to a moratory stay, where liens discharged by the proceedings exceed the actual value of the mortgaged premises.

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

Hoagland, Carr & Hoagland, for appellants.

Albert S. Johnston and *S. S. Diedrichs, contra.*

Heard before GOSS, C. J., ROSE, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

PAINE, J.

This is an appeal from an order confirming a foreclosure sale and directing a writ of restitution.

This action involves a farm of a trifle over 62 acres in Lincoln county, Nebraska, which land is located about ten miles west of the city of North Platte, just south of the Lincoln Highway. It is a very well-improved farm, all under irrigation, with early priority water rights paid for, which make it very valuable.

In the decree of foreclosure, dated May 24, 1935, the court found that there was due on both the first cause of action on plaintiff's tax sale certificates, and on the second cause of action, being the mortgage given May 3, 1929, the sum of $5,145.12, and that there was also due on the third cause of action $297, each with interest at 10 per cent. Defendants were granted a nine months' stay.

On April 28, 1936, an order of sale was issued to the sheriff, and on June 11, 1936, he made a return, showing he had sold the premises to the plaintiff for $4,000. Objections were filed to the confirmation. On July 10, 1936, the district court ordered that $172, received from the state of Nebraska for borrow dirt used in paving the Lincoln Highway, and paid into court, be accepted, and that the $172 should be applied upon the amount of the plaintiff's decree. On the same date the district court decreed a moratorium until March 1, 1937, upon application of the defendants, the conditions of said moratorium being that the defendants pay one-third of all crops grown thereon as rental.

On March 3, 1937, plaintiff moved that the moratorium heretofore allowed be discontinued, and that the sale be confirmed, and on March 11, 1937, filed a waiver of all claims for deficiency judgment, and on the same day the sale was confirmed and deed ordered. Notice of appeal and bond were given by the defendants.

The defendants set out as grounds why the order of confirmation should be vacated: That there was no finding that a resale would not bring a higher bid; that the

property sold for its fair value; that there was no showing made to entitle the plaintiff to have the order of moratorium vacated; and no showing that the defendants do not have an equity in the property; and that the decree is in conflict with the prior order of the court.

An examination of the order of confirmation discloses that said order sets out that the court has examined the proceedings; that said sale was in all respects conducted in accordance with law; that said premises were sold for their fair value under the terms and conditions of the sale, and that a resale would probably result in no higher bid, the plaintiff having filed a waiver of a claim for deficiency judgment, in accordance with the requirement of the court, as a condition of the confirmation of the sale.

This decree of confirmation appears to comply with all the requirements found in section 20-1531, Comp. St. 1929, including the additional provision inserted in the amendment as set out in Laws 1933, ch. 45. It is stated that the amount of the mortgage liens and costs, with interest to the date of the confirmation, less the $172 received from the state of Nebraska, made a total indebtedness of $6,290.95, and that this did not take into account the real estate taxes for the years 1932 to 1936, or the drainage assessments, which, it was testified by defendant O. F. Fry, were originally $1,500, but which he shows by affidavit amount to a total of $1,264.80, to be paid over a period of 20 years. Mr. Fry admitted that there was gravel in spots in the south side of the land. He claimed that the improvements on the land were worth $4,000 or $5,000.

As to the value of this land, Mr. John P. Roberts, called as a witness by the plaintiff, who had been in the real estate business since 1917, gave its value as $65 an acre, and, under further examination, not to exceed $75 at the time he was testifying. W. H. Jenkins, the chairman of the drainage board and the owner of land in the valley, testified as to the bonded indebtedness of the drainage board.

On the part of the defendants, Ed Briegel, whose land adjoins the defendants' land on the south, testified that in his opinion $75 to $100 would be a good price, the way things were at that time. Mr. Briegel, on direct examination, was asked this question and made the following answer: "Do you know of any loans on, or sales of land being made on the land in that community or neighborhood? A. Well, I know of foreclosures, but no sales, because the drainage that spoils the whole sale. There is no use of talking about selling any land in there as long as the drainage is the way it is; a man that has got any brains at all wouldn't loan you a dime on our land because he would lose the dime."

Theodore Lowe, who was for 12 years county clerk and county assessor, and at present in the real estate business, owned 80 acres lying west of the Fry land, and had listed it for sale at $40 an acre for eight months without getting an offer. He testified that, if this land were entirely free from the drainage taxes, it ought to be worth $100 an acre, which is the price the state of Nebraska paid for the small amount which it used for road purposes.

In our opinion, supported by all the evidence, the defendants had no equity in the property, and in such a case they were not entitled to a further moratorium, the one granted having expired by its terms. *John Hancock Mutual Life Ins. Co. v. Cover*, 132 Neb. 427, 272 N. W. 230; *Security Mutual Life Ins. Co. v. Herpolsheimer Bldg. Co.*, 132 Neb. 149, 271 N. W. 343; *First Trust Co. v. Rathbone*, 132 Neb. 211, 271 N. W. 428. But defendants are given right to redeem at any time before mandate issues herein.

Finding no error in the record, the decree of the district court is

AFFIRMED.

PETE PILLARD, APPELLEE, V. LINCOLN PACKING COMPANY, APPELLANT.
277 N. W. 587

FILED FEBRUARY 11, 1938. No. 30320.

1. **Workmen's Compensation.** If a night watchman is found injured on the premises where it was his duty to be, and suffers an accident while engaged in the work he was employed to perform, *held*, such employee is entitled to compensation for such injuries.
2. ———. Under workmen's compensation law, if an award for permanent total disability is not supported by the evidence, it will be set aside.

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

Hall, Cline & Williams and *Flavel A. Wright*, for appellant.

Sanden & Anderson and *Arthur J. Nevins, contra.*

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

PAINE, J.

The district court entered a life award for permanent and total disability of the plaintiff in a compensation case, and defendant appeals.

The parties in this case are Pete Pillard, plaintiff, and the Lincoln Packing Company, defendant. The plaintiff is now about 71 years of age. He went to work for the packing company about five years ago. He testified that he first cut wood for the smokehouses, nailed boxes, cleaned up after butchering, and did many odd jobs, and in 1936 his work was changed to that of night watchman, which was lighter work. His duties required that he go around at night, take temperatures in the cooler, pick up papers, attend the smokehouse, squirt water on the hams, and he was required to ring bells every hour as a watchman. This is what he continued to do until September 1, 1936, when he had the accident that happened some time before

10 o'clock that night. He claims that he started to go up the back elevator to take the last temperature, and went to the elevator shaft, as he had the right to use the elevator. He was unable to tell exactly what happened, but he reached in his arm and tried to take hold of the chain to pull it, and his right arm was perhaps caught in some way, and he was carried up to the ceiling, although he was not in the elevator, and then was dropped and fell to the floor, where he was found by a truck driver, and was taken to Dr. Wiedman's office, with his arm badly cut, and with other injuries, and in a state of shock, and then was taken in an ambulance to the hospital. This accident was not observed by any person, but plaintiff is entitled to an award.

The defendant claims, in the first place, that the accident could not have taken place in the way the plaintiff described it. Other witnesses testify in the record that the chain, which he says caught him, does not move at any time, but remains perfectly still, and therefore the chain itself could not have carried him. Aside from a bad cut on his right arm, he had a fracture of the tip, or olecranon, of the left elbow, a fracture of one to three ribs, and was otherwise lacerated, bruised, and injured. He was taken to the hospital, and was there for four weeks and then taken home, and he was paid for nine weeks and five days, at the weekly rate of $12.88, making the sum of $125.12, together with hospital and medical service of $446.85, making a total of $571.97, and he signed a receipt on November 19, 1936, for this amount in full of all injuries. The plaintiff did not have his glasses with him, and said he could not, and did not, read this receipt which he signed.

Plaintiff then went back to work for defendant, where he continued until February 27, 1937, at which time he was laid off. He was told that he was too old, and the insurance company would not carry him on compensation any longer.

On March 12, 1937, plaintiff filed his petition in the

Nebraska workmen's compensation court, and the defendant answered, and a hearing was had before Judge Charles E. Jackman, of said court, on April 21, and on June 5 an award was entered, finding that plaintiff's wages had been $19.32 a week, and that he was entitled to receive $12.88 for temporary total disability for a period of 9 5/7 weeks; that plaintiff was entitled also to $12.88 a week for a period of 45 weeks, beginning November 8, 1936, for compensation for a 20 per cent. permanent partial disability for loss of the use of his left arm.

Each party waived trial before the entire compensation court, to which they would have been entitled under section 13, ch. 57, Laws 1935, now section 48-174, Comp. St. Supp. 1937. *City of Lincoln v. Nebraska Workmen's Compensation Court, ante,* p. 225, 274 N. W. 576.

Each party having perfected an appeal to the district court, it was stipulated that the two cases should be consolidated and tried as one case. The trial occurred September 15 and 16. The plaintiff's evidence was given by himself, his wife, and his physician, Dr. Arthur L. Smith; the defendant called some six doctors, and other witnesses. On October 26, 1937, the district judge entered a permanent total disability order, awarding $12.88 a week for 300 weeks and $8.69 a week for the rest of his life, also awarded the sum of $282 for the services of plaintiff's physician.

The defendant sets out 12 errors relied upon for reversal. It is charged that the court acted in excess of its powers, and that the award is grossly and highly excessive; that the court's own findings of fact do not support the award, and defendant states in several different ways that the evidence does not in any way sustain the award made by the court. In the first place, defendant insists that the plaintiff has not maintained the burden of proof that is on him to show that his injuries are the result of the alleged accident.

It is the opinion of this court that, if a night watchman is found badly injured on the premises where it is his duty

to be, and suffers an accident while engaged in the work he was employed to perform, but because of shock is unable to give a coherent account of the accident, which no witness saw, then such employee is entitled to compensation for such injuries.

Defendant has set out in the brief more than ten places where plaintiff's evidence is entirely at variance with all of the other testimony in the case. Defendant charges that plaintiff is very much older than his years indicate; that he has had a large rupture for perhaps 15 years, and the doctors testify that this rupture is the largest rupture they have ever seen.

The plaintiff's physician sets out his injuries as consisting of: (1) The mental changes; (2) the fibrous union of the fractured left olecranon process; (3) the healing of the fractured ribs; (4) traumatic heart injury; (5) angina pectoris; (6) infection of the urinary tract; (7) weakness and nervousness; (8) chronic arthritis.

It is insisted that the high blood pressure, arthritis, and large hernia are none of them due to this accident. Testimony of fellow employees is to the effect that, during the months he worked after the injury, he did the same kind of work that he did before the accident, and did it without any trouble of any kind, because the employees working in a position to have heard his complaints testified that he made none.

There is no serious dispute as to the law involved in this case. Plaintiff relies upon the fact that a finding of the district court in a compensation case will not be set aside on appeal if it is supported by sufficient evidence, as this court held in *City of Fremont v. Lea*, 115 Neb. 565, 213 N. W. 820, and *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316. This requires us to carefully examine the evidence to see whether the award for life made by the trial court is supported by the testimony of witnesses.

In section 48-174, Comp. St. Supp. 1937, it is provided that a judgment or award of the compensation court shall only be set aside upon four grounds. It also provides only

four grounds upon which an award of the district court may be modified or set aside. The third ground is: "That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record;" and (4): "That the findings of fact by the court do not support the order or award."

A careful reading of the evidence in accordance with this law leads us to the conclusion that, while the plaintiff sustained a deep cut on his right forearm, yet he admits that this healed up without any difficulty. The fracture of the olecranon process of the tip of the left elbow has healed, but with a fibrous union, which gives the plaintiff a good, fair use of that arm, sufficient in every way to perform the duties of a watchman practically as well as before the accident. This leaves the fracture, claimed to have been suffered, of three ribs, which plaintiff claims are healing. It must be remembered that Dr. Rowe, an X-ray specialist, testified by deposition that he failed to find the fracture described, but did find an old fracture of the tenth rib, which had fully united.

In opposition to the evidence of the plaintiff and his physician, there is, in addition to the testimony of Dr. Rowe, the testimony of Dr. Arnold, Dr. Wiedman, Dr. Neely, and Dr. Everett Angle to the effect that the plaintiff has completely recovered from all injuries received in the accident of September 1, 1936, with the sole exception of some limitation in the motion of his left arm, which disability of the left arm is estimated by medical experts to be from 15 per cent. to 20 per cent., and *Johnson v. David Cole Creamery Co.*, 109 Neb. 707, 192 N. W. 127, provides a method for computation thereof.

This court has held in many cases that an award of compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence to show a disability arising out of and in the course of employment. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N. W. 655; *Porter v. Brinn-Jensen Co.*, 131 Neb. 611, 269 N. W. 96.

In our opinion, there is no competent evidence to support a finding for a greater allowance than a 20 per cent. permanent partial disability to his left arm, as was found by the judge of the compensation court. As thus modified, the balance of the decree and judgment of the district court are affirmed.

AFFIRMED AS MODIFIED.

A. BELLE FOX ET AL., APPELLEES, V. ARTHUR M. NELSON, APPELLANT.

277 N. W. 795

FILED FEBRUARY 11, 1938. No. 30214.

Mortgages. Inadequacy of price alone is not sufficient reason for refusing to confirm a foreclosure sale, unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud.

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

S. E. Torgeson, for appellant.

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

Heard before GOSS, C. J., EBERLY, DAY, PAINE, CARTER and MESSMORE, JJ., and WILLIAM A. DAY, District Judge.

CARTER, J.

This is an appeal from a judgment of the district court for Kimball county confirming a sale of real estate in a foreclosure suit.

On February 28, 1935, a decree of foreclosure was entered against the property covered by appellees' mortgage in an amount in excess of $3,480. The property consisted of 320 acres of Kimball county land and the improvements thereon. On December 21, 1936, it was sold to appellees for $4,400. The record shows that this was a second sale of the property, although the amount of the first sale is not disclosed.

The evidence as to the value of the property is in con-

flict. C. L. Alden, a real estate man in Kimball, fixed its value at $3,200 to $4,000. W. L. Bates, also engaged in the real estate business, fixes the value at $4,000. Appellees also offered the affidavit of L. R. Eastman, a real estate dealer, that the property was of the value of $4,000.

Appellant offered the evidence of Olaf A. Peterson, a farmer living near the land involved herein, that it was worth $22.50 an acre. Chris Terman, another farmer familiar with the place, estimated its value at $25 an acre. E. R. Hadley, another farmer familiar with the land, estimates its value at $20 to $25 an acre. The appellant testified that the land was worth from $20 to $30 an acre.

Under this evidence, the trial court did not err in confirming the sale of this property. It comes squarely within the announced rule that mere inadequacy of price will not preclude a confirmation of a foreclosure sale, unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud. *Keller v. Boehmer,* 130 Neb. 763, 266 N. W. 577; *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *First Trust Co. v. Airdale Ranch & Cattle Co.,* 131 Neb. 475, 268 N. W. 362; *Lincoln Joint Stock Land Bank v. Fuller,* 132 Neb. 677, 273 N. W. 14.

For the reasons herein stated, the judgment of the district court is affirmed, with leave to the appellant to redeem at any time prior to the issuance of the mandate of this court.

AFFIRMED.

FREMONT JOINT STOCK LAND BANK, APPELLEE, V. FRANK R. SATTERFIELD ET AL., APPELLANTS.
277 N. W. 797

FILED FEBRUARY 11, 1938. No. 30197.

1. **Mortgages: FORECLOSURE: MORATORIUM.** When it appears from the evidence that the amount of the mortgage lien on the land exceeds its value a moratory stay must be denied. *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82.
2. ———: ———: **SALE: CONFIRMATION.** "Mere inadequacy of price will not preclude a confirmation of a foreclosure sale

unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Srajhans v. Mares*, 130 Neb. 924, 267 N. W. 82.

APPEAL from the district court for Sarpy county: WILLIAM G. KIECK, JUDGE. *Affirmed.*

Nickerson & Nickerson, for appellants.

Fred M. Deweese, Mark Simons and *Good, Good & Kirkpatrick, contra.*

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

MESSMORE, J.

This is an appeal from a judgment and order entered March 22, 1937, by the district court for Sarpy county, terminating a moratorium, and directing the sheriff to make a deed to the purchaser.

The appeal involves 160 acres of farm land. The decree of foreclosure was entered September 11, 1935. A stay was taken by defendants, staying the issuance of order of sale until June 11, 1936; application for moratorium was filed on the same day, and order of sale issued on June 15, 1936. On June 19, 1936, a moratorium order was granted, staying such proceedings until March 1, 1937. Second order of sale was issued January 13, 1937, and on March 2, 1937, the premises were sold to the plaintiff for $15,133.92. A new application for a moratory stay was filed, dated March 3, 1937. Motion to set aside moratory stay and confirm sale was filed March 9, 1937. The record fails to show objection by defendants to the confirmation of sale.

The competent evidence relative to the value of the land introduced by plaintiff below, appellee herein, consisting of two affidavits and two sworn witnesses, fixed said value at between $14,000 and $15,000. The evidence in behalf of defendants below, appellants herein, consisting of four affidavits and one sworn witness, a former tenant who resided on the land for 11 years, fixed the

value of the land at $125 an acre, or $20,000. The property was sold for $15,133.92, being an amount of $1,311.12 less than the amount due the plaintiff. No interest had been paid on the indebtedness since 1933 and no taxes paid since 1931. The only question at issue is the value of the land.

The trial court found that the amount of the mortgage lien exceeded the fair and reasonable value of the real estate, and that the defendants have no equity in the real estate. In this connection, this court has, in many cases, held that when it appears from the evidence that the amount of the mortgage lien on the land exceeds its value, a moratory stay must be denied. *Srajhans v. Mares,* 130 Neb. 924, 267 N. W. 82; *Howarth v. Becker,* 131 Neb. 233, 267 N. W. 444; *First Trust Co. v. Airdale Ranch & Cattle Co.,* 131 Neb. 475, 268 N. W. 362; *State Life Ins. Co. v. Heffner,* 131 Neb. 700, 269 N. W. 629; *First Trust Co. v. Rathbone,* 132 Neb. 211, 271 N. W. 428; *John Hancock Mutual Life Ins. Co. v. Cover,* 132 Neb. 427, 272 N. W. 230; *Equitable Trust Co. v. Groves, ante,* p. 177, 274 N. W. 457.

"Mere inadequacy of price will not preclude a confirmation of a foreclosure sale unless it is so inadequate as to shock the conscience of the court or amount to evidence of fraud." *Srajhans v. Mares, supra; John Hancock Mutual Life Ins. Co. v. Cover, supra.*

AFFIRMED.

PHYSICIANS CASUALTY ASSOCIATION OF AMERICA, APPELLEE, V. RUTH A. BROWNFIELD: NOEL COVER, APPELLANT.
277 N. W. 599

FILED FEBRUARY 11, 1938. No. 30196.

Judicial Sales. 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.

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

Squires, Johnson & Johnson, for appellant.

Frank H. Woodland and *Schaper & Runyan, contra.*

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

DAY, District Judge.

This is an appeal from an order of the district court for Custer county, Nebraska, confirming the sale of real estate in a foreclosure suit, consisting of 240 acres.

On February 4, 1935, a decree of foreclosure was entered against the property covered by the appellee's mortgage, in the amount of $7,802.53, and an eleven months' stay was granted by agreement of the parties in open court. Before the stay expired, in November, 1935, the appellant claims to have purchased the mortgaged premises, and on the 26th day of December, 1935, filed a motion for a moratorium, and on March 30, 1936, the court entered an order overruling the plaintiff's objection to granting a moratorium and sustained the application for moratorium made by the appellant. On January 15, 1936, an order of sale was issued, and the return of the sheriff discloses that he sold the premises to the plaintiff and appellee for $8,753.85 on February 24, 1936. On February 18, 1937, the appellee filed objections to an extension of the moratorium and a motion to confirm sale, and on March 4, 1937, an order was entered confirming the sale theretofore had. The amount due the plaintiff as of August 1, 1937, is $9,988.85, which sum has increased by this time by reason of interest charges.

The only grounds given by the appellant in his brief for this appeal is that the premises foreclosed sold for so much less than their value "as to constitute a fraud upon the said defendant and appellant and deprive him of his said property described herein, without due process of law." The evidence of appellant in support of his objections to the confirmation of sale is confined to the testimony of the appellant himself that the premises are worth $12,000; the testimony of Carl E. Faught that the property

is worth between $9,500 and $10,000; the testimony of Bert A. Wyman that the value of this place, together with the improvements, was around $10,000; and the affidavit of J. G. Osborn that the land including buildings is worth at least $9,500; and the affidavit of Andy Anderson that the premises are worth $10,000. None of his witnesses places the value over $10,000, except the appellant himself, who puts the figure at $12,000. This court has held repeatedly: "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, 165 N. W. 139; *Lindberg v. Tolle,* 121 Neb. 25, 235 N. W. 670; *Lemere v. White,* 122 Neb. 676, 241 N. W. 105.

The appellant has not made a showing that any different result would or could be obtained by a resale. Obviously, if a new sale were ordered, the appellee would bid up to the then amount of the indebtedness, a sum considerably in excess of $10,000, and neither the appellant nor the former owners of this farm would get any benefit out of such a bid.

There is no precedent for reversing the order of the court in confirming this sale, and the appellant has not ventured to cite a case in support of his argument. The evidence fails to show any inadequacy of price, or such an inadequacy as would indicate fraud or mistake. Under the evidence, the trial court did not err in confirming the sale of this property, and it comes squarely within the rule announced: "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."

For reasons herein stated, the judgment of the district court is affirmed, with leave for the appellant to redeem at any time prior to the issuance of the mandate of this court.

AFFIRMED.

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Constitutional Law. SEE STATUTES.

1. Generally, unconstitutionality of a statute on the ground that it denies equal rights and privileges by discriminating between persons or classes may not be raised by one not belonging to the class alleged to be discriminated against. *Griffin v. Gass* 56
2. The supreme court must construe a statute in harmony with the Constitution, if possible. *Hinman v. Temple* 268
3. The proper administration of justice is the main business of a court, and whatever obstructs or embarrasses such business must naturally be under the court's control. *In re Integration of Nebraska State Bar Ass'n* 283
4. The practice of law is so intimately connected and bound up with exercise of judicial power in adminis-

tration of justice that the right to define and regulate it belongs to the judicial department of government. *In re Integration of Nebraska State Bar Ass'n* 283
5. The Nebraska Constitution does not expressly vest power to define and regulate practice of law in any of the three departments of government. *In re Integration of Nebraska State Bar Ass'n* 283
6. In absence of an express constitutional grant to any of the three departments of government to define and regulate practice of law, power must, when occasion demands, be exercised by the department to which it naturally belongs. *In re Integration of Nebraska State Bar Ass'n* 283
7. The term "inherent power of the judiciary" means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court. *In re Integration of Nebraska State Bar Ass'n* 283
8. The legislature cannot limit the general jurisdiction conferred on district courts by the Constitution. *State, ex rel. Wright, v. Barney* 676
9. The judicial department must protect its jurisdiction at the boundaries of power fixed by the Constitution. *State, ex rel. Wright, v. Barney* 676
10. Delinquent tax law *held* constitutional. *Tukey v. Douglas County* 732
11. Statute remitting penalties for nonpayment of taxes *held* a legal exercise of sovereign power of state to enforce collection of taxes. *Tukey v. Douglas County* 732
12. Penalties for nonpayment of taxes are punitive in their nature and their remission by the legislature is an act of grace to which the question of uniformity has no application. *Tukey v. Douglas County* 732

Contempt.

Complainant *held* guilty of contempt for failure to answer questions propounded to him as witness before a notary. *Ehlers v. State* 241

Contracts.

1. The practical interpretation given a contract by the parties thereto while engaged in its performance is a good indication of their intent, and courts will ordinarily enforce such construction. *Jensen v. Romigh* 71
2. Payment of a substantial part of a debt prior to its maturity is a valid consideration for reducing amount of debt. *Jones v. Vennerberg* 143
3. Where a contractual relation exists by virtue of a written contract expressed in unambiguous language,

the court will not look further to construe it. *Farmers Educational and Cooperative Union v. Farmers Educational and Cooperative State Union* 397
4. Where a contract is ambiguous, the court may consider its construction by the parties to ascertain its true meaning. *Farmers Educational and Cooperative Union v. Farmers Educational and Cooperative State Union* 397
5. Where parties have a contractual relation by reason of a number of documents, which as a whole are ambiguous, the relation will be determined by the acts of parties interpretative of such a contract. *Farmers Educational and Cooperative Union v. Farmers Educational and Cooperative State Union* 397
6. Every law affecting a contract becomes a part thereof, whether the contract is between individuals or between individuals and the government. *Scotts Bluff County v. State* 508
7. *Nudum pactum* is a voluntary promise, without any other consideration than good-will or natural affection, and such a promise is unenforceable. *Grimes v. Baker* 517
8. Reciprocal promises as basis of a valid agreement must ordinarily be obligatory upon the parties, so that each may have an action thereon. *Grimes v. Baker* 517

Corporations.

1. Unless prohibited by statute, a corporation may, by by-law, create or reserve a lien on its stock as against a stockholder for indebtedness due from such stockholder, but such lien will be effective only as to such persons as have knowledge of the by-law. *Plattsmouth State Bank v. Bauer & Co* 35
2. A purchaser of stock without actual notice of a by-law creating or reserving a lien on it, and to whom constructive notice cannot be imputed, is not bound by the by-law. *Plattsmouth State Bank v. Bauer & Co.* 35
3. Evidence *held* to require appointment of receiver for corporation. *Fisher v. National Mtg. Loan Co* 280
4. Payment of fees of attorneys of stockholder approved. *Fisher v. National Mtg. Loan Co* 280
5. A corporate permit to transact business issued by the secretary of state will not bind the court as *res judicata* in a suit to enjoin the corporation from using its corporate name. *Personal Finance Co. v. Personal Loan Service* 373
6. An agreement by seller to repurchase stock at option

of buyer, if supported by a good consideration, is enforceable as a contract of indemnity. *Grimes v. Baker* 517

Costs.

Attorneys' fees and expenses are allowed only where provided for by statute, or where uniform course of procedure has been to allow recovery thereof. *Blacker v. Kitchen Bros. Hotel Co* 66

Counties and County Officers.

1. A board of county supervisors in determining population as a basis for statutory salaries is a quasi judicial body, and its record must affirmatively show essential jurisdictional facts, including notice to officers affected by the decision. *Shambaugh v. Buffalo County* 46
2. Counties with a population of 9,000 or less are limited to authority to levy a maximum of 4 mills for ordinary county purposes. *Megan v. Boyd County* 539

Courts.

1. On appeal from county court to district court, a school teacher, discharged without cause, could recover the entire unpaid salary, though a smaller amount only may have been recoverable before expiration of the school term, when the cause was tried in the county court. *Walter v. School District* 672
2. On appeal from a municipal court to district court, petition may be amended by adding additional party plaintiff. *Packer v. Snyder, Malone, Coffman Co* 756

Creditors' Suit.

Under a bill to reach equitable assets of a debtor on which execution at law cannot be levied, the creditor must allege and show that he has exhausted his remedy at law, but under a bill in aid of an execution at law it is sufficient to show that the creditor's claim has been reduced to judgment and docketed in the county where the land lies which he seeks to subject to the payment of his claim. *Riggs v. Hroch* 260

Criminal Law.

1. A statement of facts claimed to be equivalent to a confession of guilt will not be considered, unless first shown to have been voluntarily made and without inducement. *Stagemeyer v. State* 9
2. Where the prosecution has introduced preliminary evi- accused may, before the confession is received in evidence as to the voluntary character of a confession,

dence, show that it was involuntary, and may cross-examine the prosecution's witnesses, take the stand himself and call other witnesses, and rebutting testimony may be introduced. *Stagemeyer v. State* 9
3. Accused should have opportunity to show the circumstances under which an alleged confession was made. *Stagemeyer v. State* 9
4. An error preventing the jury from properly considering the controlling question in the case may not be disregarded by an appellate court. *Stagemeyer v. State* 9
5. Where writings or words of a codefendant amount to admission merely of his own guilt, and cannot be deemed in furtherance of a common design, they are admissible only against the party making or uttering them. *Stagemeyer v. State* 9
6. Generally, proof of distinct offenses is inadmissible. *Stagemeyer v. State* 9
7. Generally, a statement in the nature of a confession is not admissible, unless it relates to the offense charged, but such a statement including another offense may go to the jury with proper instructions, where relevant parts cannot be separated from irrelevant parts. *Stagemeyer v. State* 9
8. Circumstances sufficient to sustain conviction for felony must be such as to prove defendant's guilt beyond a reasonable doubt and exclude every other rational hypothesis. *Robino v. State* 391
9. A reviewing court may not analyze the evidence to determine the degree of guilt, since that would be tantamount to deciding an issue within the exclusive province of the jury. *Quijas v. State* 410
10. Objection to juror, raised for first time in second motion for new trial, such motion containing no showing of newly discovered evidence, could not be considered on appeal. *Young v. State* 644
11. Nonexpert witnesses may testify as to a person's sanity after stating facts supporting their conclusion. *Harmer v. State* 652
12. Application for appointment of counsel to assist in prosecution of a felony is addressed to the discretion of the court. *Jackson v. State* 786
13. Remarks of prosecutor in argument which do not unduly influence the jury do not constitute misconduct. *Jackson v. State* 786
14. Testimony of witness at preliminary hearing *held* admissible on subsequent trial for same offense when

personal attendance of witness at trial cannot be had. *Jackson v. State* 786
15. Whether the prosecution has sufficiently established the unavailability of a witness as foundation for admission of testimony given at preliminary hearing is within discretion of the court. *Jackson v. State* 786
16. All instructions given should be considered in determining whether a particular instruction is prejudicial. *Harrison v. State* 794
17. In a criminal prosecution, the court in giving instructions may describe the offense in the language of the statute. *Harrison v. State* 794

Damages.
1. Judgment of $7,450 for personal injuries and damage to automobile *held* not excessive. *Anderson v. Byrd* 483
2. Verdict of $5,000 for breaking the jaw bone of a taxicab passenger *held* not excessive. *Fielding v. Publix Cars, Inc.* 818

Death.
In action for damages from sale of poisoned bran and death, administratrix *held* entitled to recover in one action for loss of live stock, loss of business, and for pain and suffering endured by decedent in his lifetime, where such action was started by decedent during his lifetime, and for damages for benefit of herself and children resulting from his death. *Rasmussen v. Benson* 449

Deeds.
Evidence *held* to sustain findings as to terms of contract of sale of land, but not as to amount paid on contract. *Crosby v. Crosby* 264

Depositions.
Complainant *held* lawfully ordered to answer questions propounded to him as witness. *Ehlers v. State* 241

Descent and Distribution.
1. A legal debt due an estate from an heir is not forgiven because it is not set out in a will as an advancement. *Stanton v. Stanton* 563
2. A lawful debt due from a son to his father's estate should be deducted from the son's distributive share of the estate to the exclusion of the son's creditors. *Stanton v. Stanton* 563

Dismissal.

Failure or refusal of plaintiff to comply with order of court with respect to amendment of petition may be ground for dismissal of the action. *Bushnell v. Thompson* 115

Drains.

1. A drainage district is a public corporation and a branch of government over which the legislature has plenary control. *Mooney v. Drainage District*..... 197
2. Legislature may curtail or abrogate powers previously granted to a drainage district, provided in so doing it does not impair the obligation of contract nor interfere with vested rights. *Mooney v. Drainage District*.... 197

Easements.

1. Respective grantees of portions of lot *held* to have an implied grant of an easement for a driveway over a space of ground between the two properties. *Christensen v. Luehrs*..... 50
2. Where the owner sells one of two adjoining residences erected on a lot, the purchaser takes the part sold with all the benefits and burdens appearing at time of sale to belong to it as between it and the land retained. *Christensen v. Luehrs*..... 50
3. Where owners of adjoining properties use a strip of land along their boundary line between their properties as a common driveway and construct improvements with relation thereto, each is estopped from disputing the other's right to such way, and such estoppel extends to their grantees taking with notice of the driveway, although the right was not expressly reserved. *Christensen v. Luehrs*..... 50
4. Where the owner aliens to two different persons two portions of a lot, each of which is quasi dominant and quasi servient to the other, such alienees take the portions granted to them burdened or benefited by those rights in such easement which the owner attached to them. *Christensen v. Luehrs*..... 50
5. The extent of an easement by implied grant or dedication for a driveway is so much of a strip of ground as is reasonably necessary for convenient enjoyment of property served thereby. *Christensen v. Luehrs*..... 50
6. Where adjoining owners entered into an oral agreement for a party driveway with its center on the lot line and used it in common for seven years, an irrevocable easement was created. *Brown v. Story*..... 535

Elections.

1. The right to contest an election is a special statutory proceeding, and conditions for its exercise must be strictly followed. *Landgren v. Hamilton* 668
2. The filing of a cost bond within 20 days after votes are canvassed as required by statute is necessary to give the court jurisdiction in an election contest. *Landgren v. Hamilton* 668
3. A bond limiting liability of sureties for costs of an election contest to $200 was void. *Landgren v. Hamilton* 668
4. Jurisdictional defects may be raised at any time before trial of an election contest. *Landgren v. Hamilton* 668

Eminent Domain.

1. Landowners failing to object to appraisal by five appraisers waived right to appraisal by six appraisers. *Johnson v. Platte Valley Public Power and Irrigation District* 97
2. Chapter 86, Laws 1933, does not authorize public power and irrigation districts to condemn and take private property for public use without just compensation. *Johnson v. Platte Valley Public Power and Irrigation District* 97
3. Evidence *held* inadmissible as departure from theory set out in petition. *Casford v. City of McCook* 191
4. The power of eminent domain does not include corporate authority to take away the right of an individual to acquire, hold, and use property and the right to just compensation when it is condemned or damaged for public use. *McGinley v. Platte Valley Public Power and Irrigation District* 420
5. In a proceeding to condemn riparian land, consequential damages to other land in the same tract are not limited to governmental sections including land actually taken, where depreciation in value of the remainder extends beyond those sections. *McGinley v. Platte Valley Public Power and Irrigation District* 420
6. In condemnation proceedings, dual or speculative or excessive damages are not recoverable for consequential depreciation in value of land not taken, though it is severed from entire tract of owner. *McGinley v. Platte Valley Public Power and Irrigation District* 420
7. The measure of damages for condemned land is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land

before and after taking. *McGinley v. Platte Valley Public Power and Irrigation District* 420
8. Where pasture lands, forming principal acreage of a cattle ranch partly taken for public use, will make the same contribution in value to remainder of ranch as they previously contributed to the whole, they should not be considered in determining damage to portion of ranch not taken. *McGinley v. Platte Valley Public Power and Irrigation District* 420
9. A city is liable to an owner of abutting realty for damages caused by changing grade of a street. *Quivey v. City of Mitchell* 727
10. The measure of damages for injury to abutting property by changing grade of the street by the city is depreciation in value caused by construction and permanent maintenance of the grade. *Quivey v. City of Mitchell* 727
11. Special benefits deductible from damages to realty by reason of a public improvement are such as specially benefit the particular property damaged, aside from benefits to property generally in the neighborhood. *Quivey v. City of Mitchell* 727

Equity.
1. A court of equity which has acquired jurisdiction of a cause for any purpose may retain it and determine all matters put in issue by the pleadings. *Leis v. Beckmark* 467
2. Where a court of equity acquires jurisdiction for an accounting between tenants in common of crops on pleas of both parties to an oral contract, all issues raised by the pleadings may be determined, regardless of distinctions between equity and law. *Leis v. Beckmark* 467

Estoppel. SEE EASEMENTS, 3.
1. Where one of two parties to a transaction must suffer loss through misconduct of a third person, the burden will fall where equity and justice require. *Kansas City Life Ins. Co. v. Neverve* 29
2. Where defendants' pleadings and evidence established facts constituting an estoppel against them, the court may decree such estoppel, notwithstanding plaintiffs have not pleaded same. *Safford v. Flynn* 213
3. Where a party pleads and relies on an estoppel, he has the burden to establish facts on which the estoppel is based. *Wright v. Loup River Public Power District* 715

4. The doctrine of estoppel *in pais* is applicable to municipal corporations. *Village of Deshler v. Southern Nebraska Power Co.* 778

Evidence.

1. When a letter is read in evidence, all other letters on the same subject between the same parties are admissible. *Jensen v. Romigh* 71
2. A nonexpert witness may give his opinion concerning the mental condition of a person with whom he had an extended and intimate acquaintance by giving facts and circumstances upon which the opinion is based. *Bankers Life Ins. Co. v. Aron* 187
3. Evidence of an offer to compromise is inadmissible against the person making it. *Myers v. McMaken* 524
4. A party who affirmatively pleads a fact assumes the burden of proving such fact. *Cohen v. Swanson Petroleum Co.* 581
5. The admission of secondary evidence relating to a lost instrument is dependent upon proving the existence of such instrument and a diligent search therefor, when such instrument is the basis of plaintiff's action. *Cohen v. Swanson Petroleum Co.* 581
6. Evidence *held* insufficient to prove alleged lost contract constituting the basis of plaintiff's action. *Cohen v. Swanson Petroleum Co.* 581
7. A written agreement settling all pending matters between an agent and an insurance company cannot be varied by an oral agreement. *Theno v. National Assurance Corporation* 618
8. The parol evidence rule is a rule of substantive law, which declares that certain kinds of facts are legally ineffective, and forbids proof thereof. *Theno v. National Assurance Corporation* 618
9. Any one with knowledge of time and distance is competent to give an estimate of the speed of an automobile. *Bergendahl v. Rabeler* 699
10. Where witnesses had no reasonable time or opportunity to formulate a basis for an opinion as to the speed of an automobile, their testimony was insufficient to sustain a finding of excessive speed. *Bergendahl v. Rabeler* 699
11. Hypothetical questions propounded to an expert are sufficient if so framed as to fairly reflect facts proved by the witnesses. *Prince v. Pathfinder Life Ins. Co.* 705
12. Where the evidence is conflicting as to a material matter, a hypothetical question may assume the exist-

ence of such matter, it being for the jury to determine whether the hypothesis is warranted. *Prince v. Pathfinder Life Ins. Co.* ... 705
13. A hypothetical question concerning attorney's fees *held* proper. *Prince v. Pathfinder Life Ins. Co.* ... 705
14. Secondary evidence may be admissible to supply that part of a legislative record which is lost or destroyed, to show that certain steps were taken on which the record is silent, but where the record is intact, secondary evidence is inadmissible to fill out its omissions. *Village of Deshler v. Southern Nebraska Power Co.* ... 778
15. The admission or exclusion of statements as part of the *res gestæ* rests largely in the discretion of the trial court. *Suhr v. Lindell* ... 856
16. Statement of an injured person that he was going to die *held* not admissible as part of the *res gestæ*, such statement constituting a mere conclusion of the declarant. *Suhr v. Lindell* ... 856
17. A statement to be admissible as a part of the *res gestæ* must have been spontaneous, and made at a time and under such circumstances as to induce the belief that it was not the result of reflection and premeditation. *Suhr v. Lindell* ... 856
18. Statements made by an injured person shortly after he had been in an automobile accident relative to the cause of injury were admissible as part of the *res gestæ*. *Suhr v. Lindell* ... 856
19. Statements made subsequent to an injury, in explanation of an accident, *held* not admissible as part of the *res gestæ*. *Suhr v. Lindell* ... 856

Executors and Administrators.

1. A contingent claim against an estate is one on which liability depends on some future event which may or may not happen. *In re Estate of Montgomery* ... 153
2. A claim against a deceased surety's estate on the bond of a guardian whose account had not been allowed and settled by the probate court when time expired for filing claims is a contingent claim. *In re Estate of Montgomery* ... 153
3. Limitation on time of filing of a contingent claim is governed by sections 30-701 to 30-705, Comp. St. 1929. *In re Estate of Montgomery* ... 153
4. A proceeding in probate court to settle an estate is a proceeding *in rem*, and every person interested therein is a party, whether or not he is named as such. *Nilson v. Tekamah Investment Co.* ... 180

5. A decedent's estate is not liable to an attorney for services rendered a legatee under decedent's will in a contest thereof. *In re Estate of Alexander* 218
6. A claim against the estate of a decedent, required by statute to be presented to the county court within stipulated time, is such a claim as existed against decedent at time of his death. *In re Estate of Gifford* 331
7. Administrator pleading to merits of claim without raising question of jurisdiction for failure to give notice of pendency of claim waived such failure to give notice. *In re Estate of Gifford* 331
8. A judgment against an executor, providing that the judgment creditor out of account recovered should pay stipulated sums to subcontractors and others, did not require the judgment creditor to make such payments as a condition precedent to payment of judgment by estate. *In re Estate of Gifford* 331
9. Retainer is the right to have the debt of a legatee or distributee charged to him in the adjustment of his legacy or distributive share of an estate. *Stanton v. Stanton* 563

Fixtures.

Where removal of fixtures will not materially injure premises, the seller thereof retaining title thereto may assert his rights as against a prior mortgagee of the realty. *Omaha Loan & Bldg. Ass'n v. Bigelow* 275

Fraud.

1. Actionable fraud may not be predicated on expression of opinion of value honestly made under circumstances that do not give another the right to rely thereon. *Leichner v. First Trust Co* 170
2. In an action for fraud, the burden of alleging and proving the existence of elements thereof is on plaintiff. *Leichner v. First Trust Co* 170
3. In an action for fraud, the existence of fiduciary relationship or status of unequal footing does not shift the burden of proving alleged fraud, but may justify finding of fraud, and thus place the burden of going forward with evidence on the party charged with fraud. *Leichner v. First Trust Co* 170
4. Fraud may be predicated on the making of a promise with an existing fraudulent intent not to perform, but such intent cannot be inferred from the mere fact of nonperformance. *Leichner v. First Trust Co* 170

5. Fraud is never presumed, but must be proved by the person alleging it. *Saffer v. Saffer* 528
Fritsche v. Turner 633

Fraudulent Conveyances.

1. In a suit to set aside a transfer which is presumptively fraudulent, the burden is on defendant to prove a good faith transfer for a consideration. *Safford v. Flynn* 213
2. Conveyances between close relatives are presumptively fraudulent as to an existing creditor, and in litigation between the creditor and parties to the conveyance over its alleged invalidity, the burden is on such parties to establish the good faith of the transaction. *Riggs v. Hroch* 260
3. Fraudulent intent may be established by proof of facts from which such inference may reasonably be drawn. *Riggs v. Hroch* 260
4. The question of fraudulent intent is to be considered at time of conveyance, and with reference to the alleged fraudulent conveyance. *Butke v. Nachschoen* 366
5. Intent to make a mortgage to defraud creditors may be established by proof of facts from which such inference may reasonably be drawn. *Luikart v. Detweiler* 614
6. A fraudulent conveyance is a conveyance, the object or effect of which is to defraud another, or a conveyance made with intent to avoid some duty or debt due by or incumbent upon the person making the transfer. *Butke v. Nachschoen* 366
7. A conveyance from husband to wife was presumptively fraudulent as to an existing creditor, and in a suit by creditor to set aside the conveyance, husband and wife had the burden of establishing the good faith of the transaction. *Butke v. Nachschoen* 366
8. Conveyance from husband to wife *held* made in good faith for adequate consideration. *Butke v. Nachschoen* 366
9. Deed executed and accepted in good faith for an adequate consideration without intent to defraud was not fraudulent as to creditor. *Luikart v. Lehmkuhl* 602
10. The contingent liability of a stockho'der of a state bank makes depositors "existing creditors" entitled to attack a voluntary conveyance. *Luikart v. Detweiler* 614
11. In a suit to cancel a mortgage allegedly executed to defraud creditors, the question of intent is one of fact. *Luikart v. Detweiler* 614

Garnishment.

1. Garnishment in aid of execution is a provisional remedy

created by statute directing the procedure to obtain such relief. *Early v. Belgrade-Hord Co.* ... 884
2. Only the answer and evidence of garnishee are admissible in response to summons in garnishment. *Early v. Belgrade-Hord Co.* ... 884
3. A judicial order on a garnishee to turn over money or property in aid of execution can be made only on an unqualified admission by garnishee of a present indebtedness which the execution debtor would be entitled to but for the garnishment. *Early v. Belgrade-Hord Co.* ... 884
Shonsey Co. v. Belgrade-Hord Co. ... 886

Guardian and Ward.

No action can be maintained on a guardian's bond until the amount due thereon is ascertained by the county court. *In re Estate of Montgomery* ... 153

Highways.

1. An offer of dedication of a highway need not be accepted by public authorities, but it may be accepted by the public itself by its entering upon and use of the land. *City of McCook v. Red Willow County* ... 380
2. Evidence *held* insufficient to establish a public highway by dedication. *City of McCook v. Red Willow County* ... 380
3. To constitute implied dedication of land for a public highway, there must be an intent to appropriate the land for public use, although intent may be expressed in the owner's visible conduct and open acts, and if the acts would lead ordinarily prudent men to infer an unequivocal intent to dedicate, the owner cannot, after acceptance by the public, recall the appropriation. *City of McCook v. Red Willow County* ... 380
4. County boards are required to see that laws relating to public roads are enforced. *Wright v. Loup River Public Power District* ... 715
5. A public road cannot be vacated without consent of a majority of rural voters living within two miles of the road. *Wright v. Loup River Public Power District* ... 715

Homestead.

1. Where husband and wife reside on a homestead selected from the husband's separate property, the husband continuing to reside thereon after the wife's death has a homestead interest therein although no children or dependents reside with him. *United States Nat. Bank v. Simonds* ... 42

2. Where a husband after his wife's death continued to reside on the homestead selected from his land, the homestead on his death vested in his heirs and devisees, and was not subject to any debt of husband not created under the homestead law. *United States Nat. Bank v. Simonds* 42
3. Evidence *held* insufficient to sustain finding that homestead of defendants was not worth encumbrances and homestead exemptions. *Safford v. Flynn* 213

Homicide.

1. Malice is an essential element of both first and second degree murder. *Quijas v. State* 410
2. Where the jury are to determine the grade of homicide, depending upon the question of malice, an instruction presuming malice is erroneous. *Quijas v. State* 410
3. In prosecution for murder, where witnesses to shooting of deceased were eyewitnesses, an instruction presuming malice was erroneous. *Quijas v. State* 410
4. In prosecution for first degree murder, where the evidence and circumstances of the crime are such that different conclusions may properly be drawn therefrom as to the degree, the trial court is without error in submitting the different degrees to the jury. *Jackson v. State* 786

Husband and Wife.

1. Under statute, a married woman may enter into a business partnership with another as a part of her own trade or business. *Plattsmouth State Bank v. Bauer & Co.* 35
2. A married woman who enters into a partnership becomes liable as a partner and is bound by partnership debts. *Plattsmouth State Bank v. Bauer & Co* 35

Indictment and Information.

An information charging the crime of first degree murder includes murder in the second degree and manslaughter. *Jackson v. State* 786

Injunction.

1. Petition to enjoin enforcement of liquor control commission's regulation *held* not to state a cause of action. *Griffin v. Gass* 56
2. Petition to enjoin theaters from conducting "bank night" lotteries *held* sufficient. *State, ex rel. Hunter, v. Omaha Motion Picture Exhibitors Ass'n* 89
3. A writ of mandatory injunction is an executory order

directing the performance of a preexisting duty. *Mooney v. Drainage District* 197

Insurance.

1. Evidence *held* to show that decedent was of sound mind at time of making change of beneficiary of life policy. *Bankers Life Ins. Co. v. Aron* 187
2. The person alleging that insured was of unsound mind at time of change of beneficiary has the burden to establish such fact. *Bankers Life Ins. Co. v. Aron* 187
3. Evidence *held* to sustain judgment for insured on lightning policy. *Grasso v. Glens Falls Ins. Co* 221
4. The term "total disability" in an accident policy means such inability as renders insured unable to perform substantial and material acts necessary to prosecution of his occupation in the usual manner. *Reinsch v. Travelers Ins. Co* 249
5. Evidence *held* to justify judgment in favor of insured on ground of total disability, and that his refusal to submit to a surgical operation did not defeat his claim for benefit. *Reinsch v. Travelers Ins. Co* 249
6. A health and accident insurance company may limit its liability in any reasonable manner and may exempt itself from liability for diseases of organs not common to both sexes. *Hamilton v. Mutual Benefit Health & Accident Ass'n* 464
7. Terms used in an insurance policy are to be taken in their plain and popular sense. *Hamilton v. Mutual Benefit Health & Accident Ass'n* 464
8. A health insurance policy exempting diseases of organs which are not common to both sexes does not cover gonorrhea, which first attacked and chiefly affected insured's genital organs. *Hamilton v. Mutual Benefit Health & Accident Ass'n* 464
9. Under a group policy requiring five years' service as a prerequisite to recovery of permanent and total disability, employee who had received temporary disability payments for fifty-three weeks after having been employed for more than four years prior thereto had completed five years of service required for permanent and total disability benefits. *Hemmer v. Metropolitan Life Ins. Co* 470
10. Attorney's fee of $2,500 where judgment recovered was $1,407.70 *held* grossly excessive. *Hemmer v. Metropolitan Life Ins. Co* 470
11. The statute providing that hail insurance associations shall deposit 50 per cent. of premiums in a loss fund

to be used solely for payment of losses constitutes a controlling element in all hail insurance contracts. *State, ex rel. Sorensen, v. Lincoln Hail Ins. Co.* 496
12. Where insurance department's special agents had been directed by order of court to administer a hail insurance company as a going concern, the agents were required to conduct its affairs in the usual way. *State, ex rel. Sorensen, v. Lincoln Hail Ins. Co.* 496
13. Special agents of insurance department *held* liable for diversion of funds designated for payment of losses. *State, ex rel. Sorensen, v. Lincoln Hail Ins. Co.* 496
14. Court's denial of defaulting special agents' claims for compensation approved. *State, ex rel. Sorensen, v. Lincoln Hail Ins. Co.* 496
15. One suing for death benefits under an accident policy limiting recovery to injuries sustained by the burning of any dwelling-house in which insured shall be at beginning of fire must prove that the injuries resulted from burning of the building itself. *White v. Washington Nat. Ins. Co.* 805
16. In an action for death benefits resulting from injuries from burning of a dwelling-house, proof thereof may be established by circumstantial evidence. *White v. Washington Nat. Ins. Co.* 805
17. In an action for death benefits resulting from injuries from burning of a dwelling-house, whether the injuries were sustained by reason of the burning of the dwelling-house or otherwise is for the jury. *White v. Washington Nat. Ins. Co.* 805

Intoxicating Liquors.

The state liquor control commission has power by reasonable regulations to determine the permissible hours for the sale of beer, regardless of alcoholic content, on secular days outside the corporate limits of cities and villages. *Griffin v. Gass* 56

Judgment.

1. A judgment is not open to collateral attack because the court gives a wrong reason therefor. *McCormack v. Murray* 125
2. Repeal of statute permitting recovery of a deficiency judgment will not preclude revivor of a dormant deficiency judgment. *McCormack v. Murray* 125
3. A suit in equity to obtain a new trial will not lie where there is an adequate remedy at law. *Lindstrom v. Nilsson* 184
4. To be entitled to equitable relief from a judgment,

complainant must not have neglected to pursue his statutory remedy. *Lindstrom v. Nilsson* 184
5. A judgment on the merits conclusively settles as between parties and privies any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of the action. *In re Estate of Gifford* 331
6. Where the question of jurisdiction was adjudicated in an action, the question could not be litigated in a subsequent action between the parties. *In re Estate of Gifford* 331
7. A judgment in another case finding a fact now in issue is ordinarily not admissible. *Harmer v. State* 652

Judicial Sales.

A judicial sale of realty will not be set aside on account of mere inadequacy of price, unless the inadequacy is so gross as to make it appear that it was the result of fraud or mistake. *Physicians Casualty Ass'n v. Brownfield* 906

Jury.

1. Failure to challenge a juror for cause as to his competency, and to examine him or other witnesses in support of the challenge, is a waiver, though the fact of incompetency is not known to the party until after verdict. *Young v. State* 644
2. A case should not be submitted to a jury where no question for the jury is involved. *Smith v. Epstein Realty Co.* 842

Landlord and Tenant.

1. The validity of a lease is not affected by a provision that rental should be fixed at a percentage of income received by the tenant from a garage business carried on in the premises. *Van Avery v. Platte Valley Land & Investment Co.* 314
2. The rule of *caveat emptor* applies to leases. *Van Avery v. Platte Valley Land & Investment Co.* 314
3. A lessor is not liable in damages to his lessee for defects which are plainly discernible. *Van Avery v. Platte Valley Land & Investment Co.* 314
4. Generally, invitees of tenant have no greater right against the landlord for personal injuries resulting from alleged defects on the premises than the tenant. *Van Avery v. Platte Valley Land & Investment Co.* 314
5. Generally, the lessor is not liable for injuries caused to lessee or his invitees by any dangerous condition

which existed when the lessee took possession. *Van Avery v. Platte Valley Land & Investment Co.* 314
6. Lessor of premises leased for a public or semipublic purpose, who knows at time of leasing that a dangerous condition exists thereon, is liable for injuries sustained by patrons of lessee resulting from such dangerous condition. *Van Avery v. Platte Valley Land & Investment Co.* 314
7. A lessor's liability for condition of premises leased for a public or semipublic purpose is only coextensive with limits of invitation which may be deemed to be extended to patrons thereof. *Van Avery v. Platte Valley Land & Investment Co.* 314
8. For an invitee to recover for injuries sustained on demised premises, the invitee must show that at time of injury he was using the premises for the purpose contemplated by such invitation. *Van Avery v. Platte Valley Land & Investment Co.* 314
9. An invitee to premises ceases to be an invitee when using part of premises to which the invitation does not extend. *Van Avery v. Platte Valley Land & Investment Co.* 314
10. Contract between lessor and lessee *held* to constitute them tenants in common of crops. *Leis v. Beckmark* 467
11. Although a landlord generally is not bound to keep leased premises in repair in absence of an agreement to do so, he is bound to exercise reasonable care in keeping premises used in connection with demised premises reasonably safe for those having lawful occasion to use them for purpose for which intended. *Smith v. Rizzuto* 655

Licenses.

1. A license fee should not exceed the cost of investigation and supervision, and cannot be used as a means of producing revenue. *State v. Phillips* 209
2. An ordinance clearly within the general powers of a city is presumed to be reasonable, and will not be declared void unless shown to be unreasonable. *State v. Phillips* 209

Life Estates.

Generally, it is the duty of the life tenant to pay taxes. *Saffer v. Saffer* 528

Limitation of Actions.

1. Payments to lender by one partner out of partnership

funds toll the statute of limitations as to both partners. *Jensen v. Romigh* 71
2. New causes of action stated in amended petition *held* barred by statute of limitations. *Streight v. First Trust Co.* 340

Lotteries.

1. A lottery contains the elements of chance, prize and consideration. *State, ex rel. Hunter, v. Fox Beatrice Theatre Corporation* 392
2. "Bank night" at theaters *held* a lottery which should be enjoined. *State, ex rel. Hunter, v. Fox Beatrice Theatre Corporation* 392

Master and Servant.

1. Employee's claim for compensation *held* barred by limitation. *Johansen v. Farmers Mutual Hail Ins. Ass'n*.... 118
2. Where compensation payments have been made by agreement, limitation for filing petition expires one year from date of last payment. *Hill v. Hinky-Dinky Stores Co.* 147
3. Evidence *held* insufficient to sustain waiver or estoppel on part of employer. *Hill v. Hinky-Dinky Stores Co*..... 147
4. The right of either party to a compensation proceeding to refuse to accept the judgment of a single judge and to secure a rehearing by the entire compensation court is paramount to and exclusive of the right of appeal to the district court from such original decision. *City of Lincoln v. Nebraska Workmen's Compensation Court* 225
5. Lack of written notice of injury does not bar compensation proceedings where the employer has notice or knowledge of the injury. *Perkins v. Young*..... 234
6. Children of divorced wife who had remarried *held* not entitled to recover compensation from employer of deceased father. *Palmer v. Hamer*..... 362
7. Compensation is allowable only for personal injuries or for death of an employee by accident arising out of and in course of his employment. *Lang v. Gage County Electric Co.* 388
8. A compensation award for death cannot be based upon possibilities or probabilities, but must be based upon sufficient evidence that employee's death resulted from an accident occurring in the course of his employment. *Klotz v. Swift & Co*..... 400
9. A long period of time intervening between accident

and death weakens presumption that accident caused death. *Klotz v. Swift & Co.* ... 400
10. Evidence *held* insufficient to sustain finding that death resulted from an accident sustained in course of employment. *Klotz v. Swift & Co.* ... 400
11. The compensation act does not authorize an award in case of death from a peril common to all. *Klotz v. Swift & Co.* ... 400
12. An employer attempting to avoid liability for compensation on the ground that employee was wilfully negligent must prove a deliberate act knowingly done, or such conduct as evidences a reckless indifference to his safety. *Hoff v. Edgar* ... 403
13. Death of driver of truck in collision with train *held* compensable as having resulted from an accident arising out of and in course of his employment. *Hoff v. Edgar* ... 403
14. Two minor accidents which did not accelerate the progress of an occupational disease did not authorize recovery under the compensation law. *Svoboda v. Mandler* ... 433
15. Evidence *held* insufficient to sustain claim for compensation. *Skochdopole v. State* ... 440
16. Evidence *held* insufficient to sustain finding that plaintiff suffered an accident arising out of and in course of his employment. *Loehr v. Alamito Dairy Co.* ... 444
17. In compensation case, plaintiff must prove his case by a preponderance of evidence. *Cunningham v. Armour & Co.* ... 598
18. Where evidence in a compensation case is conflicting, a reviewing court will consider the fact that the district court observed the demeanor of witnesses. *Cunningham v. Armour & Co.* ... 598
19. A Code is enforceable under the National Industrial Recovery Act only by a suit in equity to restrain violations and by criminal prosecution, which must be instituted by the United States district attorney. *Carmody v. L. L. Coryell Oil Co.* ... 661
20. A private person, firm or corporation cannot maintain an action for damages for violation of a Code promulgated under the National Industrial Recovery Act. *Carmody v. L. L. Coryell Oil Co.* ... 661
21. "Independent contractor" defined. *Peterson v. Brinn & Jensen Co.* ... 796
22. Petition alleging an oral agreement to pay compensation, not approved by the compensation commissioner

or court, is demurrable. *Duncan v. A. Hospe Co*..... 810
23. An oral agreement to pay compensation, not approved by the compensation commissioner or court, is void and part payment cannot make the agreement enforceable in a common-law action. *Duncan v. A. Hospe Co*..... 810
24. Where appliance designed to protect employees from lead dust and fumes is of standard make and has adequately protected employees for many years, and there is no substantial evidence that it is defective, issue of negligence in not furnishing proper appliance should not be submitted to the jury. *Rzeszotarski v. American Smelting & Refining Co*..... 825
25. Where a smelting p'ant is equipped with safety appliances, an employer who orders an employee to wear a respirator and instructs him of danger of contracting the disease of plumbism will not be liable to employee contracting the disease in course of employment. *Rzeszotarski v. American Smelting & Refining Co*..... 825
26. Safety appliances of smelting company *held* to comply with statutory requirements. *Rzeszotarski v. American Smelting & Refining Co*..... 825
27. A night watchman who suffered an accident while using an elevator while at work was entitled to compensation, notwithstanding he could give no coherent account of the accident. *Pillard v. Lincoln Packing Co*..... 898
28. An award for permanent total disability will be set aside if it is not supported by evidence. *Pillard v. Lincoln Packing Co*..... 898

Mines and Minerals.

1. Evidence *held* insufficient to justify setting aside deed on ground of fraud. *Fritsche v. Turner*..... 633
2. An oil and gas lease providing for termination unless work is commenced by a certain time or a specified rental is paid to renew the lease confers an optional right on lessee, and should be strictly construed in favor of the lessor. *Fritsche v. Turner*..... 633

Mortgages.

1. Money paid to a loan broker to purchase notes secured by first mortgage where subsisting liens must be paid is not such an unequivocal payment of first mortgage as will discharge the secured debt. *Kansas City Life Ins. Co. v. Neverve*..... 29
2. Statute requiring plaintiff to state in his petition whether any proceedings had been had at law for recovery of the debt, or any part thereof, applies alone

to formal mortgages, and not to mortgages or liens arising out of equities between the parties. *Village of Winside v. Brune* 80
3. The trial court by holding motion for deficiency judgment under advisement for several terms of court did not lose jurisdiction thereof. *McCormack v. Murray* 125
4. In a mortgage foreclosure, plaintiff is required to allege that no proceedings at law have been instituted for recovery of the debt, and on denial of such allegation plaintiff is not entitled to a foreclosure decree unless such allegation is supported by competent evidence. *Jones v. Vennerberg* 143
5. Refusal to grant a moratorium in a foreclosure suit will not be disturbed on appeal on a record showing that mortgagor has no equity in mortgaged premises. *Equitable Trust Co. v. Groves* 177
6. A mortgage foreclosure will not be reversed on appeal for inadequacy of price, where fraud, inadequacy of price, or prospect of a higher bid on resale are not shown. *Equitable Trust Co. v. Groves* 177
7. Orders made prior to confirmation of foreclosure sale are not reviewable on appeal from confirmation and subsequent rulings. *Equitable Trust Co. v. Groves* 177
8. A confirmed foreclosure sale of mortgaged realty may be reversed on appeal, where the uncontradicted evidence was that the property was sold for less than half its value. *Filley v. Mancuso* 538
9. Undisputed evidence *held* to show foreclosure sale price of realty so disproportionate to value as to be unconscionable. *Redfield v. Collopy* 546
10. On motion for confirmation of foreclosure sale, a finding that a subsequent sale would not realize a greater amount is sufficient to sustain a decree of confirmation without a further finding that the property was sold for its fair value under circumstances and conditions of the sale. *Erwin v. Brunke* 745
11. A district judge at chambers has jurisdiction to direct issuance of a writ of assistance on confirmation of foreclosure sale. *Erwin v. Brunke* 745
12. Journal entry of decree of confirmation of foreclosure sale *held* sufficient. *Erwin v. Brunke* 745
13. A moratory stay is properly denied where the evidence indicates that the encumbrance against the land is in excess of its actual market value. *Findley v. Peters* 890
14. Defendants in a foreclosure suit are not entitled to set aside confirmation nor to a moratory stay, where

liens exceed value of the mortgaged premises. *Curyea v. Fry* 894
15. Inadequacy of price alone is not ground for refusing to confirm a foreclosure sale, unless the inadequacy is so great as to evidence fraud. *Fox v. Nelson*..... 903
Fremont Joint Stock Land Bank v. Satterfield..... 904
16. A moratory stay will be denied where the mortgage lien exceeds value of land. *Fremont Joint Stock Land Bank v. Satterfield*..... 904

Municipal Corporations.

1. Under statute, cities of second class and villages may grade, pave, or repave and levy special assessments against property specially benefited, and taxing authorities cannot reapportion and reassess special assessments after they have been legally assessed, and where no objection has been made to the method and procedure adopted by the taxing body in levying such special assessments. *Village of Winside v. Brune*..... 80
2. Section 17-435, Comp. St. 1929, designates the manner in which special assessments shall be made, but does not authorize reapportionment or reassessment of special assessments and does not restrict the taxing body from assessing special assessments against more than one lot. *Village of Winside v. Brune*..... 80
3. Action of the taxing authorities of a village in assessing special assessments is conclusive, unless members of taxing body making the special assessments proceeded upon an illegal principle or erroneous rule of law. *Village of Winside v. Brune*..... 80
4. An equity court, in absence of statutory provision, cannot authorize governing body of village which properly levied special assessments to reapportion and reassess such special assessments, unless members of such body making the special assessments proceeded upon an illegal principle or erroneous rule of law. *Village of Winside v. Brune*..... 80
5. Neither the county treasurer nor the county assessor has authority to apportion or assess special assessments such as paving taxes. *Village of Winside v. Brune*..... 80
6. The only foundation for special assessments rests in the special benefits conferred upon the property assessed; hence, the frontage rule per foot cannot be adopted unless the benefits are equal and uniform. *Village of Winside v. Brune*..... 80
7. The statute gives proper parties the right to redeem

in part, and authorizes the county treasurer to accept amount due on special assessments, but does not determine the right to reapportionment of special assessments against part of land, but gives right of redemption after apportionment or reapportionment of special assessments. *Village of Winside v. Brune* 80

8. The business of house moving affects public health and safety and is a proper subject of regulation and license by a municipality under the police power. *State v. Phillips* 209
9. If the primary purpose of an improvement is to benefit a locality, it is local, but if the primary purpose and effect of an improvement is to benefit the public generally, it is general, though it may incidentally benefit property in the particular locality. *Hinman v. Temple* 268
10. The construction of a viaduct over a railroad right of way *held* to be an improvement for the benefit of the general public. *Hinman v. Temple* 268
11. A highway which a city has power to pave and pay for from special assessment under statute is a public highway within the corporate limits of the city as distinguished from a street. *City of McCook v. Red Willow County* 380
12. Road leading from city to county fair ground *held* not a pub ic highway which city was authorized to pave, and special assessment levied therefor was void. *City of McCook v. Red Willow County* 380
13. Where special assessment by city against county property to pay cost of paving road on county property was void, county's knowledge of the improvement did not estop it from avoiding liability. *City of McCook v. Red Willow County* 380
14. A city's obligation to create a fund for payment of warrants issued in payment of special improvements is not met by levying a special assessment on property benefited and providing that the special assessment when paid is to be placed in a special fund for payment of such warrants. *Miller v. City of Scottsbluff* 547
15. Where a city failed to collect special assessments levied for special improvements, warrants issued in payment thereof became general obligations of the city. *Miller v. City of Scottsbluff* 547
16. A home rule city using the commission form of government in connection with its appointive officers could

not properly elect a tax commissioner by vote of the people. *Eppley Hotels Co. v. City of Lincoln* 550
17. A city may put into its home rule charter any provisions for its government that it deems proper, so long as they are not contrary to the Constitution or to any general statute. *Eppley Hotels Co. v. City of Lincoln* 550
18. The purpose of the constitutional provision authorizing home rule charters for cities is to render them independent of state legislation on subjects of strictly municipal concern, and in such matters general laws applicable to cities yield to the charter. *Eppley Hotels Co. v. City of Lincoln* 550
19. Whether a law relates to municipal or state affairs depends on the contents of the act. *Eppley Hotels Co. v. City of Lincoln* 550
20. Cities adopting home rule charters may levy for purely municipal purposes in excess of limitation fixed by general statute. *Eppley Hotels Co. v. City of Lincoln* 550
21. Where minutes of a village board show that an ordinance was adopted, but the record does not disclose whether the ordinance was read as required by statute, it will be presumed that the ordinance was read. *Village of Deshler v. Southern Nebraska Power Co* 778
22. The statutory provision that ordinances shall contain no subject which shall not be clearly expressed in their titles is mandatory. *Village of Deshler v. Southern Nebraska Power Co* 778
23. Where an ordinance is published in pamphlet form by public authority with other ordinances of a municipality, the municipality cannot question its validity on the ground that it was not legally adopted. *Village of Deshler v. Southern Nebraska Power Co* 778

Negligence.

1. Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning negligence or lack of negligence, it is error to direct a verdict. *Plotkin v. Checker Cab Co* 1
2. A plaintiff without fault may recover for injuries proximately resulting from negligence of another, regardless of the degree of such negligence. *Andrews v. Clapper* 110
3. Where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damages, though one

of them alone might not have caused the injury. *Andrews v. Clapper* 110
Bergendahl v. Rabeler 699
4. Contributory negligence is an affirmative defense and the party pleading it must establish it by preponderance of evidence. *Carlson v. Roberts* 166
5. Where reasonable men might draw different conclusions from evidence, negligence is a question for the jury. *Hardung v. Sheldon* 427
6. Proximate cause is that cause which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the accident could not have happened. *Anderson v. Byrd* 483
7. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Anderson v. Byrd* 483
8. The cause of an injury is that which actually produces it, while the occasion is that which produces an opportunity for the causal agencies to act. *Anderson v. Byrd* 483
9. Though question of proximate cause is ordinarily for the jury, where only one inference can be drawn from the evidence, the court should declare whether a given act or series of acts is the proximate cause of injury. *Bergendahl v. Rabeler* 699
10. The duty of an owner of a building extends no further than to use reasonable care in keeping the building safe for persons rightfully entering it or passing by it. *Smith v. Epstein Realty Co.* 842
11. Defendants *held* not liable for injuries to plaintiff sustained in fall down a stairway. *Smith v. Epstein Realty Co.* 842
12. Where two trucks collide and physical facts do not show, beyond reasonable dispute, that negligence of one driver is more than slight compared with negligence of the other driver, the degree of negligence of both drivers is question for the jury. *Suhr v. Lindell* 856

New Trial.

1. Overruling of motion for new trial on the ground of newly discovered evidence *held* proper where client neglected to disclose all the facts to her attorney. *Breen v. Nugent* 131
2. Motion for new trial on ground of newly discovered

evidence is within discretion of court. *American National Red Cross v. Young* 558
3. Newly discovered evidence which, if believed by the jury, might cause them to arrive at a different verdict will warrant a new trial. *Miller v. Olander* 762
4. Newly discovered evidence, if merely cumulative or impeaching, or if probably would not change the result, does not require a new trial. *Miller v. Crosson* 892

Parties.

Where impleaded defendants were not necessary parties, demurrer of such impleaded defendants was properly sustained. *McDonald v. Masonic Temple Craft* 589

Partition.

1. Agreement providing that plaintiff was to become a limited partner in defendants' firm *held* so vague that interpretation placed upon it by the parties should govern. *Jensen v. Romigh* 71
2. A petition praying for partition of an heir's undivided interest in an estate, which alleged that statutory bond had been given for payment of all debts, allowances, and expenses, was sufficient to state a cause of action, notwithstanding that a decree of heirship or a decree of distribution had not been previously entered. *Hamsher v. Fisher* 854

Physicians and Surgeons. SEE ASSOCIATIONS, 2, 3.

Pleading.

1. Generally, only the pleading demurred to may be considered in passing on the demurrer, and the court must assume that the facts are as alleged, and cannot assume existence of facts not alleged, nor find facts in aid of pleading, nor consider what evidence may be introduced at the trial. *Griffin v. Gass* 56
2. On demurrer, the court cannot consider extrinsic facts admitted by parties or counsel, nor conclusions of pleader, except when they are supported by and necessarily result from ultimate facts pleaded. *Griffin v. Gass* 56
3. The ultimate or issuable facts to be established should be alleged in a pleading. *Griffin v. Gass* 56
4. A defect appearing on face of petition should be taken advantage of by demurrer. *Johnson v. Platte Valley Public Power and Irrigation District* 97
5. Defect of misjoinder of parties appearing on face of

petition must be raised by special demurrer. *Johnson v. Platte Valley Public Power and Irrigation District*.... 97
6. To be admissible, evidence offered must sustain allegations in pleadings. *Casford v. City of McCook*..... 191
7. An amendment to a pleading to state a party's correct name to conform to the evidence may be by order of court. *Perkins v. Young*..... 234
8. A party who answers over after an adverse ruling on motion or demurrer, and goes to trial on the merits of an issue he has elected to join, waives the error, if any, in such ruling. *State, ex rel. Wright, v. Barney* 676
9. A district court, on appeal from municipal court, may permit pleadings to be amended to correspond to proof, or to supply any deficiency or omission in allegations, when substantial justice will be promoted thereby. *Packer v. Snyder, Malone, Coffman Co*..... 756
10. Facts alleged in a petition to which defendant in answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial. *Fielding v. Publix Cars, Inc.* 818

Poisons.

One handling or disposing of a substance containing poison is required to use a high degree of care to protect other persons and other property from being injured thereby. *Rasmussen v. Benson*..... 449

Principal and Agent. SEE AUTOMOBILES, 18.

1. An agent admitting receipt of his principal's money has the burden of showing that he made proper disposition thereof. *Rotzin v. Miller*..... 4
2. A trustee dealing with his trust in another's name, or by an agency within his control, will be deemed to have acted in his own right. *Rotzin v. Miller*..... 4
3. An agent must not deal with his principal's property as if his own, nor mingle it with his own. *Rotzin v. Miller* 4
4. It is inferred that an agent will act in the principal's name, and have title to the principal's property vested in the principal's name. *Rotzin v. Miller*..... 4
5. Where one has placed his agent for investment of money in notes and mortgages in such situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to extention and collection of such notes and mortgages, payment

to agent will be deemed payment to principal. *Kansas City Life Ins. Co. v. Neverve* 29
6. Principal may ratify unauthorized act of agent. *Jones v. Vennerberg* 143
7. Evidence established that remainderman, as agent of the life tenant, had duty to pay taxes. *Saffer v. Saffer* 528
8. Agency may be implied from words and conduct of parties and circumstances of particular case, evidencing an intention to create the relationship. *Saffer v. Saffer* 528
9. One professing to contract as agent is personally liable if, unknown to the other party, his purported principal is fictitious. *Maixner v. Travelers Ins. Co.* 574
10. One seeking to recover from a principal for an unauthorized act of an agent must establish that the principal obtained knowledge of such act before it had changed its position. *Maixner v. Travelers Ins. Co.* 574
11. If a principal received that to which it was entitled, regardless of an unauthorized act, and if it cannot make restitution without loss of that which it is entitled to keep, ratification of such unauthorized act does not result from failure to return benefits received. *Maixner v. Travelers Ins. Co.* 574

Prohibition.

1. "Prohibition" involves not only the definition of a substantive right, but constitutes also an essential common-law remedy. *State, ex rel. Wright, v. Barney* 676
2. Enactment and repeal of statutory provisions relating to the writ of certiorari have not affected prohibition as an available remedy. *State, ex rel. Wright, v. Barney* 676
3. Prohibition is an extraordinary writ issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from exceeding its legitimate powers in a matter of which it has jurisdiction. *State, ex rel. Wright, v. Barney* 676
4. The district courts in proper cases have power to grant a writ of prohibition. *State, ex rel. Wright, v. Barney* 676

Railroads.

1. Generally, a railroad right of way adjacent to tracks, when not part of railroad transportation facilities devoted or necessary to public use, is private property,

and carrier may lease it for private purposes to one or more persons and deny a like privilege to others. *Johnson v. Union P. R. Co.* 243

2. The state railway commission is without power to prevent a railroad company from leasing portions of its private right of way to one or more persons for private lumber yards, and denying the same privilege to others, where the demised premises are not railroad transportation facilities devoted or necessary to public use. *Johnson v. Union P. R. Co.* 243

Receivers.

An order for sale of assets of a trust is one within the court's discretion, and a receiver, having no interest in the sale, cannot appeal therefrom. *State, ex rel. Sorensen, v. Lincoln Hail Ins. Co.* 496

Replevin.

1. One who has right of possession of personal property is entitled to replevy it when possession is refused. *Inghram v. Union Stock Yards Co.* 105
2. Where a writ of replevin is quashed, the court loses jurisdiction of the action. *Tiedtke v. Whalen* 301

Sales.

In an action for goods sold and delivered, where purchase and receipt of the goods are denied, the burden is on plaintiff to prove such sale. *Stevens v. Fall* 610

States.

1. The law under which an agent created to contract for the state acts is as much a part of the contract as if it were formally embodied therein. *Scotts Bluff County v. State* 508
2. Statutes which qualify or limit a grant of authority to contract for the state are mandatory, and contracts not conforming thereto do not bind the state. *Scotts Bluff County v. State* 508
3. Where statute provides an exclusive remedy against the state and the forum, one branch of the legislature cannot extend jurisdiction to another forum. *Scotts Bluff County v. State* 508
4. Claims against the state must first be presented to the auditor of public accounts, with right of appeal from his decision to the courts. *Scotts Bluff County v. State* 508

Statute of Frauds. SEE EASEMENTS, 6.

1. Under statute of frauds, the contract or some note

or memorandum must be signed by vendor and the name or description of vendee must also appear. *Campbell v. Kewanee Finance Co.* ... 887
2. An oral contract partly performed will be enforced in equity, although statute of frauds requires it to be in writing. *Campbell v. Kewanee Finance Co.* ... 887

Statutes. SEE CONSTITUTIONAL LAW.
1. Special provisions in a statute control general provisions. *In re Estate of Montgomery* ... 153
2. An act complete in itself may change or modify provisions of existing statutes without controverting the constitutional provision relating to amendments. *Hinman v. Temple* ... 268
3. All statutes *in pari materia* must be construed as if they were one enactment, and, if possible, effect given to every provision. *Scotts Bluff County v. State* ... 508
4. The basic rule of statutory construction is to ascertain and give effect to intention of the legislature as expressed in the statute. *Megan v. Boyd County* ... 539
5. In construing statutes, the court will ascertain and give effect to legislative intent, if possible. *Megan v. Boyd County* ... 539
6. Generally, an exception in a statute will be held to apply to the clause or sentence immediately preceding it, but if consideration of all statutes bearing on the subject indicates a different legislative intent, such intent will prevail over a construction based on rules of syntax. *Megan v. Boyd County* ... 539
7. Where the legislative intent and purpose of a law are obvious, such intent and purpose should not be defeated merely because not declared in the most accurate language. *Douglas County v. Village of Ralston* ... 834

Taxation.
1. An owner may redeem from sales of realty for nonpayment of taxes or special assessments only such realty as is shown by the county treasurer's books to be subject to redemption. *Village of Winside v. Brune* ... 80
2. Persons interested in realty sold under decree foreclosing valid tax sale certificate, where foreclosure was commenced more than two years subsequent to issuance of tax sale certificate, are barred from right of redemption on confirmation of sale. *Peterson v. Swanson* ... 164
3. When statute under which land is sold for taxes directs an act to be done, such as recording of tax deed, the

statute must be strictly complied with. *Saffer v. Saffer* 528
4. Payment of taxes by and receipt of assignment of tax certificate in remainderman's name *held* to operate to pay the taxes and not to create a lien. *Saffer v. Saffer* 528
5. Ownership and exclusive use of property determine whether or not it is entitled to exemption from taxation. *McDonald v. Masonic Temple Craft* 589
6. Temporary interruption in use due to rebuilding or remodeling does not change character of property for taxation purposes. *McDonald v. Masonic Temple Craft* 589
7. Where part of building is exempt from taxation and remainder is taxable and assessment is based on value of the whole, owner's remedy is to go before the board of equalization and have the overvaluation abated. *McDonald v. Masonic Temple Craft* 589
8. Where part of a property is exempt and assessment is of the whole, tax levied on such assessment is not void. *McDonald v. Masonic Temple Craft* 589
9. To avoid interest charge on taxes due, where assessment is excessive, owner must tender amount of taxes actually due and owing and keep his tender good. *McDonald v. Masonic Temple Craft* 589
10. Owner of tax sale certificate issued prior to 1933 was entitled to interest at 12 per cent. per annum on amount due at time of decree, and decree drew interest at same rate. *McDonald v. Masonic Temple Craft* 589
11. Where part of building is exempt and remainder is taxable, amount of assessment is to be arrived at by valuing that portion of building which is taxable in its relation to entire property, and entire property is then assessed in amount so determined and tax is a lien on entire property. *McDonald v. Masonic Temple Craft* 589
12. A purchaser of realty for delinquent taxes is subrogated to rights of the public against the realty for taxes, but cannot acquire any greater rights than the public had. *McDonald v. Masonic Temple Craft* 589
13. Courts will not disturb assessments for taxation unless they are clearly shown to transgress reasonable limits. *Chicago, St. P., M. & O. R. Co. v. State Board of Equalization and Assessment* 640
14. There are no infallible rules for ascertainment of the actual value of railroad property for taxation. *Chicago, St. P., M. & O. R. Co. v. State Board of Equalization and Assessment* 640

15. Impositions made by legislative authority for failure to pay taxes when due, whether designated as interest, penalties or costs, are in fact penalties. *Tukey v. Douglas County* 732
16. A tax is not a debt, and hence does not bear interest, in absence of statute. *Tukey v. Douglas County* 732
17. Penalties for nonpayment of taxes being statutory, the legislature may waive or remit them. *Tukey v. Douglas County* 732
18. The legislature may remit penalties on unsold delinquent taxes. *Tukey v. Douglas County* 732
19. Where interested parties file waiver of right to redeem from foreclosure sale of tax lien during two-year redemption period, the court may proceed at once to confirm sale. *Douglas County v. Village of Ralston* 834
20. Where county attorney fails to move for confirmation of tax sale after waiver by interested parties of right to redeem within two years, the purchaser may move for confirmation thereof. *Douglas County v. Village of Ralston* 834
21. A purchaser at sheriff's sale pursuant to decree of foreclosure of a tax lien must pay all taxes becoming due or delinquent during pendency of suit or after sale, as a condition precedent to confirmation of sale. *Douglas County v. Village of Ralston* 834

Trade-Names.

1. Unfair competition means conduct in any trade or business whereby one party, in a deceptive manner, transacts his business with the public so as to leave the impression it is dealing with another. *Personal Finance Co. v. Personal Loan Service* 373
2. To justify enjoining use of a trade-name as unfair competition, it must appear that ordinary persons dealing with ordinary caution are likely to be misled. *Personal Finance Co. v. Personal Loan Service* 373
3. Descriptive terms or generic words are not ordinarily susceptible of exclusive appropriation. *Personal Finance Co. v. Personal Loan Service* 373
4. Where one intending to avail himse'f of another's reputation is enabled by use of descriptive words to transact his business as that of his rival, so that prospective customers are likely to be misled thereby, such use of words becomes unlawful. *Personal Finance Co. v. Personal Loan Service* 373
5. To enjoin use of trade-name, plaintiff is not required

to prove that deception actually occurred, but only a calculation on defendant's part to deceive and a reasonable likelihood that deception will result therefrom. *Personal Finance Co. v. Personal Loan Service* 373

Trial. SEE APPEAL. CRIMINAL LAW.

1. It is the duty of courts to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not. *Carlson v. Roberts* 166
2. Where contributory negligence was an issue, failure of the court to give a requested instruction that the burden of proof was upon defendant to prove such issue, or to give one of similar import, was reversible error. *Carlson v. Roberts* 166
3. Court may correct clerical errors or formal matters in verdict, and eliminate illegal allowance of interest. *Swygert v. Platte Valley Public Power and Irrigation District* 194
4. Harmless error in instructions *held* not to require reversal. *Rasmussen v. Benson* 449
5. Where the evidence did not disclose negligence on part of plaintiff, the trial court properly refused to submit to jury defense of contributory negligence. *Rasmussen v. Benson* 449
6. Instructions must be considered as a whole. *Hemmer v. Metropolitan Life Ins. Co* 470
   Kovar v. Beckius 487
   Fielding v. Publix Cars, Inc. 818
   Suhr v. Lindell 856
   Holtz v. Plumer 878
7. Refusal to submit to jury defense not supported by evidence *held* proper. *Kovar v. Beckius* 487
8. In a law action, the court should not direct a verdict where the evidence on an issue of fact is conflicting. *Stevens v. Fall* 610
9. Admission of testimony in violation of the parol evidence rule does not preclude the court from disregarding such testimony and directing a verdict. *Theno v. National Assurance Corporation* 618
10. Where evidence in a law action is conflicting, the decision of fact is for the jury. *Prince v. Pathfinder Life Ins. Co* 705
11. It is not error to withdraw issue of contributory negligence from jury where there is no evidence to support it. *Stephenson v. De Luxe Parts Co* 749
12. Where the evidence is insufficient to sustain verdict

for plaintiff, the trial court may give a peremptory instruction for defendant. *Rzeszotarski v. American Smelting & Refining Co.* 825
13. A court should refuse to submit to a jury a defense not supported by evidence. *Suhr v. Lindell* 856

Trusts.

1. Accountability of a trustee must accord with principles of justice. *Rotzin v. Miller* 4
2. A trustee of money for safe-keeping and investment must account for investments and income, report transactions to the beneficiary, and surrender the trust funds on termination of the trust. *Rotzin v. Miller* 4
3. A trustee's violation of duty placed on him by law is a breach of trust. *Rotzin v. Miller* 4
4. In action by bondholder against trust company, evidence *held* insufficient to sustain finding that trustee was guilty of fraud. *Streight v. First Trust Co.* 340
5. Where trustee failed to notify bondholder of facts of which she was entitled to be advised, the bondholder, in absence of fraud of trust company, could not recover damages for negligence of trust company without showing that negligence caused the damages. *Streight v. First Trust Co.* 340
6. A testamentary trust once created is not affected by the settlor's death before notice of trust to trustee, or acceptance by him. *Smith v. Rizzuto* 655
7. Failure of testamentary trustee to give statutory bond was not a bar to vesting of title to trust property in trustee upon testator's death, but amounted only to a declination of the trust at end of 20-day period within which to give bond. *Smith v. Rizzuto* 655
8. A trustee is subject to personal liability to third persons for torts committed in administration of the trust to the same extent as if he held the trust property free of trust. *Smith v. Rizzuto* 655
9. Where personal liability of trustee to third persons was incurred in proper administration of the trust and the trustee was not personally at fault, he is entitled to indemnity out of the trust estate. *Smith v. Rizzuto* 655
10. Where trustee's personal liability to third persons arises from the mere fact that fee title to property is in him, where he is without fault, his liability is limited to the extent to which the trust estate is sufficient to indemnify him. *Smith v. Rizzuto* 655

11. A remedial statute relating to trusts may be retrospective. *In re Estate of Greenamyre* 693

Waters.

1. Evidence *held* to sustain finding that riparian owners were entitled to portion of island by adverse possession. *Davis v. Mohr* 478
2. Where state department of roads and irrigation had granted water rights for irrigation and power and all litigable issues had been determined by the supreme court on appeal, unnecessary new parties subsequently appearing in the proceeding were bound by the record as they found it, including former adjudications. *Osterman v. Central Nebraska Public Power and Irrigation District* 606
3. Public power districts, in appropriation, crossing and use of highways, are governed by the statutes relating to irrigation districts, so far as applicable. *Wright v. Loup River Public Power District* 715
4. A public power district is required to build a bridge over any canal crossing a public highway. *Wright v. Loup River Public Power District* 715

Wills.

1. A testamentary trust devising realty to a trustee in trust to sell and convert it into money conveys the fee simple title thereto to the trustee immediately upon testator's death. *Smith v. Rizzuto* 655
2. Where petition for probate of will alleged that testatrix died leaving a last will and testament and contestant's answer alleged lack of testamentary capacity, contestant was bound by his answer and could not thereafter contend that petition did not allege testamentary capacity. *In re Estate of Wotke* 739
3. The proponent of a will has the burden, both in county court and in district court on appeal, to prove not only execution of the will, but capacity of testator. *In re Estate of Wotke* 739
4. Evidence establishing a *prima facie* case as to testamentary capacity is sufficient in absence of any rebuttal testimony. *In re Estate of Wotke* 739

Witnesses.

1. A communication from client to attorney is not privileged when it is not made to the attorney in his professional capacity. *Ehlers v. State* 241
2. Where attorney is acting as agent for his client, a

communication in connection with such agency is not privileged. *Ehlers v. State* 241
3. Witness *held* competent to testify to a conversation between her mother and grandmother in an action by the administrator of her grandmother's estate against the witness' mother. *Nelson v. Nelson* 458
4. Where plaintiff in action on health policy offers evidence of his physical condition, he thereby waives the privilege conferred by statute prohibiting disclosure of confidential communications to a physician. *Ansnes v. Loyal Protective Ins. Co.* 665