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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1937,
AND JANUARY TERM, 1938

VOLUME CXXXIII

HENRY P. STODDART
OFFICIAL REPORTER

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1938

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By Henry P. Stoddart, Reporter of the Supreme Court,

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

CHARLES A. GOSS, Chief Justice
WILLIAM B. ROSE, Associate Justice
EDWARD E. GOOD, Associate Justice*
GEORGE A. EBERLY, Associate Justice
L. B. DAY, Associate Justice
BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice†

HENRY P. STODDART.....Reporter
GEORGE H. TURNER.....Clerk
ELBERT M. WHITE.....Deputy Clerk
RICHARD C. HUNTER.....Attorney General
BARLOW NYE.....Administrative Assistant
FRANCIS V. ROBINSON.....Assistant Attorney General
EDWIN VAIL.....Assistant Attorney General
GEORGE W. AYRES.....Assistant Attorney General
BERT L. OVERCASH.....Assistant Attorney General
CLINTON J. CAMPBELL.....Assistant Attorney General
ROBERT D. FLORY.....Assistant Attorney General

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*August 4, 1937, Associate Justice Edward E. Good died.
†August 9, 1937, Associate Justice Frederick W. Messmore was appointed.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Wilmer W. Wilson	Neb. City
Third	Lancaster.	Jefferson H. Broady Ellwood B. Chappell John L. Polk Frederick E. Shepherd	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas and Washington.	William A. Day Francis M. Dineen James M. Fitzgerald Charles Leslie Herbert Rhoades John A. Rine Willis G. Sears Arthur C. Thomsen John W. Yeager	Omaha Omaha Omaha Omaha Tekamah Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings Harry D. Landis	David City Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner Frederick L. Spear	Columbus Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Robert M. Proudfit	Friend
Eighth	Cedar, Dakota, Dixon and Thurston.	Mark J. Ryan	Pender
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Charles H. Stewart Adolph E. Wenke	Norfolk Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Lewis H. Blackledge Frank J. Munday	Hastings Red Cloud
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Edwin P. Clements Ernest G. Kroger	Ord Grand Island
Twelfth	Buffalo, Custer, Logan and Sherman.	Bruno O. Hostetler	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	Isaac J. Nisley J. Leonard Tewell	North Platte Sidney
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Robert R. Dickson	O'Neill
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	George W. Irwin	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

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Admitted since the Publication of Vol. 132

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IN MEMORIAM

EDWARD E. GOOD

At the session of the Supreme Court of the State of Nebraska, October 18, 1937, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable George A. Eberly, Honorable L. B. Day, Honorable Bayard H. Paine, Honorable Edward F. Carter, and Honorable Frederick W. Messmore, Associate Justices, and Honorable Ernest G. Kroger, District Judge, the following proceedings were had:

Honorable Charles H. Slama.

May it Please the Court:

Edward E. Good was born at Bloomfield, Iowa, on May 13, 1862. He was reared, educated and grew to manhood there. He studied law at the State University of Iowa, from which institution he graduated in June of 1885. He was married to Orpha J. Gillilan at Central City, Iowa, on July 8, 1885, and shortly thereafter they moved to Wahoo, he forming a partnership with B. F. Good, which continued until the latter's election as Judge of the Fifth Judicial District. He then formed a partnership with myself which continued some years until I was elected County Judge of Saunders County, when he formed a partnership with George W. Simpson and was associated with him until his election as Judge of the Fifth Judicial District. Later he was elected Supreme Justice, which position he occupied until his death on August 4, 1937.

Our chairman departed from the conventional and divided these services into subjects, and assigned to me the subject, Edward E. Good, the Practitioner.

The tradition of Diogenes walking with a lighted lantern in midday in Athens saying he was looking for a man naturally provokes a smile. But Diogenes was too profound and serious a seeker after truth and wisdom to play the ridiculous. What that rigid philosopher meant was that he was seeking a man who regarded life's matters intrin-

sically, in the nature of the case, in the grain, and who shaped his life and life's conduct accordingly. Had Diogenes lived in this generation his quest would have ended upon meeting Edward E. Good.

It was my great privilege to be associated with him in the practice of law at Wahoo. We were partners in the early part of the century until I was elected County Judge. Shortly after that he was elected District Judge, and later Supreme Justice. I am glad to say that in this I had a very active part.

For many years we were next door neighbors until his removal to Lincoln to enter upon his duties as Justice of this Court. As his law partner I had and have first-hand knowledge of how he analyzed and prepared his cases, and of his ability and strength as the practitioner.

He was worthy, both personally and professionally, of the fine traditions and spirit of our honorable profession. He was an able trial lawyer, a princely soldier at the bar, and a powerful, yet fair and upright opponent, and true to every phase of ethics. Intellectually I will say, measuring my words as I say them, that he was profound. He had a thoroughly disciplined mind. He was a broad-based lawyer. By this I mean that he understood the philosophy of the law, comprehended its purpose, appreciated its deepness.

He was a constant and careful student. He not only understood legal principles, but he also understood humanity and human nature. He caught the significance of every incident, however trivial, that arose in his cases. Having a deep knowledge of law, understanding life, knowing human nature, possessing ability to analyze with usually unfailing accuracy, and having an affable adroit manner, he was fully prepared to be and was a talented, successful and honorable practitioner.

In his law work he not only saw the big things, but also saw the little things in relation to the big things. He studied them with much care. He was studious and clear headed. He struck at the marrow of the issues and incidents involved in the cases that he handled. He was unob-

trusive. His unobtrusiveness, his fine poise, his companionableness were based upon a profound intuition of justice. With an ingenuous, but not over-awing, estimate of his own merits he generously responded to those of others, and there was a frankness and splendid tact in this trial work that stamped him the true, astute practitioner.

Being associated with him as law partner and neighbor I knew him to be gracious in his temperament and demeanor. He was endowed with a strong mind and character, and it seems a pity that he was taken out of your midst and away from this sphere of activities.

Honorable Harry L. Norval.

May it Please the Court:

We pause to pay respect to the memory of a sincere friend, an outstanding citizen and a distinguished jurist. In the prime of life, in November, 1911, Judge Edward E. Good was elected as a Judge of the Fifth Judicial District of Nebraska, comprising the Counties of Butler, Hamilton, Polk, Saunders, Seward and York. He assumed the duties of that office in January, 1912, which position he continuously held until elected as a member of the Supreme Court of Nebraska, in the fall of 1922.

It was an accomplishment not acquired by all, that he continued to grow in the affection of his fellow men, not only with his intimate associates, but with his more casual acquaintances, even with those who did not personally know him, but who observed the administration of justice dispensed at his hands.

It is always a satisfaction for any lawyer to appear before a court knowing that regardless of what the outcome of a trial may be, it represents an honest and uninfluenced decision. As a trial judge, he administered justice without fear, favoritism, and with the utmost impartiality. Personal friendship, political association, or political expediency did not enter his thoughts or influence his judicial actions. In the trial of a case, he proceeded with caution;

assumed a patient and fatherly attitude towards the young and inexperienced lawyer; was tolerant with the wrongdoer, and afforded every person accused of crime a fair and impartial trial within the full meaning of that constitutional right. He was modest and soft spoken, yet always retained supreme command in the trial of a case. He possessed the faculty of eliminating nonessentials, and with clearness and precision arrived at the real issues in controversy. When life and liberty hung in the balance, bias and prejudice never affected his judgment.

We who knew him best will remember him longest. His demise is a distinct loss. The influence of his life, the wholesomeness of his character, the result of his labors and official acts stand as a monument and guide, and serve as a stabilizing influence for the future.

Honorable John W. Delehant.

May it Please the Court:

With the permission of your honors, it is my privilege, briefly to testify to the sincere pride of the bar of Nebraska in the qualities of legal scholarship and intellectual integrity that are reflected in the distinguished career of Edward E. Good, first as a Supreme Court Commissioner in 1907 and 1909 and later as a justice of this court from January, 1923, until his death in August, 1937.

A mature understanding of the history and principles of jurisprudence is an indispensable qualification for meritorious service as a judge. It should be demanded of all who aspire to the judicial office, both by our profession and by the citizens of our nation and its every state. He should be branded as utterly presumptuous, who, lacking this initial talent, nevertheless seeks to be elevated to the bench, which must inevitably suffer a loss of prestige in his service.

No citizen of our state, lawyer or layman, ever entertained the remotest doubt respecting the equipment for this test of Justice Good. There was nothing informal or

casual about his preparation for the bar. He received his legal education in the school of law of the University of Iowa, in a generation when the bar of Iowa was nationally known for the excellence of its leading members. And nothing so surely as an eminent bar will foster thoroughness and accuracy in legal education, and a high standard of professional service.

His career as a practicing attorney of our state is here recalled to us by one who knew it most intimately. It is merely mentioned at this moment as a foundation for the legal excellence of his judicial career. For the due appreciation from experience, of the task and mission of the advocate, is an invaluable resource to any judge.

The opinions of this court that came from his pen exhibit both the accuracy of his basic legal training and the maturity of his examination into the law of each instant case. They are brief and concise, and thus reflect the careful and accurate thinker; but he was never betrayed into the error of constituting brevity an end in itself. Where detailed elucidation was indicated, he realized that, after all, it is better to employ many words than to neglect a necessary thought.

The law, with him, was not a fetish, to be venerated without regard to equity. Yet he was a respectful guardian of the established law and was persuaded that it is society's surest instrument for the administration of justice. With the academic reformer he admitted that the refinements of legal principles have no value for their own sake; but this disciple of the law as a science was not betrayed into the too prevalent judicial practice of belaboring what our modern legal illiterates are pleased to call "technicalities." He realized that, with a few possible exceptions, these abused technicalities are the safeguards, with which enlightened society, in consequence of centuries of experience, has surrounded the impartial dispensation of justice, between the state and its citizens, between man and man. He appraised them as the very instruments of justice, not of its negation. His ultimate quest was for the equitable judgment, but in his progress to that end he employed the

acknowledged forms and principles of established law. His application of the law was the law's own vindication.

In offering our tribute to his intellectual integrity, may we emphasize two acknowledged facts.

First, let it be recognized that, in praising a Justice, living or dead, for his spiritual courage, we of the Bar do not consider that we are marking him as an exceptional exemplar of that virtue. We know—and it is our solemn duty to proclaim this truth—that the history of our American judiciary is a record of exalted courage, rarely, indeed, sullied by an example of timidity or ignoble ambition. Upon this integrity, upon its maintenance and universal acknowledgment, above all else, rests the hope for the preservation of our social and political structure. If the great American experiment be destined ultimately to fail, failure will come only after our people have abandoned their confidence in the independence and integrity of their judiciary.

Secondly, let us assure the bench, and remind our fellow citizens, that the consistent integrity of our courts is the object of the jealous pride of our profession. It is from our number that the membership of the judiciary is selected; and we are its acknowledged officers in the discharge of its exalted duties. Rightly, therefore, we regard the maintenance of the historic standard of judicial integrity with pride, its rare neglect as a betrayal of our calling.

And so, this morning, of him in whose honor we are convened, we shall say simply that he discerned rightly and maintained faithfully the traditional judicial obligation of intellectual integrity and moral courage; for though not precisely identical, these two qualities can never be divorced. He reckoned intellectual rectitude an obvious and simple duty; not a badge of distinction.

His associates in judicial service have testified both publicly and privately to the disinterested objectivity with which he approached the study of the cases entrusted to his judgment. Their praise of his character was not less generous while he still lived, than it has been in response to the charitable impulse of death. Each of them heartily wel-

comed his elevation to the bench, and, likewise, experienced the loss of a potent moral and intellectual aid when his service closed.

His judicial character was manifested to the attorneys practicing in his court in his opinions as a Judge. The reasonable limitations upon this session forbid quotation from them, or their general analysis; so, also, do the restraints of propriety, for this is no occasion for the presentation of a legal brief.

We know, however, and unanimously affirm, that his opinions consistently reflect the conclusions of a mind and soul that were devoted to one consideration alone—the just decision of each case in the light of the established law.

No base reflection upon personal interest or political expediency controlled his judgment; and upon those rare occasions in his long public career when the consideration of personal consequence might have perplexed a less courageous soul, his recorded opinions disclose no intimation that in his deliberation the shadow of his own fortune ever even remotely obscured the clarity of his judicial vision.

In his every official act, he proposed as his guide the ideal of the intelligent and courageous Judge. He was never unmindful of deserving distress. Still, he never allowed the personal necessities of a litigant to deflect his judgment from the course prescribed by the law. He was an accurate interpreter of the law, a faithful servant of his own enlightened conscience.

Therefore, in this service, we, who here speak in the name and behalf of the Nebraska Bar, offer this inadequate testimonial, as a token of our reverence for him we have long known and loved. Let it be repeated that we speak with unfeigned pride in his service; in its exaltation of the profession to which our lives are dedicated; in its contribution to the science of jurisprudence; and, above all, in its constant devotion to this, our country, in which we have always proudly affirmed that justice is administered in accordance with the rule of law rather than at the caprice of men.

Honorable Charles H. Sloan.

May it Please the Court:

The analytic topical allocation by the committee chairman seems quite appropriate. Without it our deliverance would be overlapping, lack poise. At first glance it seemed difficult. There appeared to be a challenge of the abtruse and metaphysical, rather than the concrete and material, to reflect the permanent products of this Master Mind now receiving our honors. I remember a saying of Charles Buxton: "How easy are these difficult things to do." The character and merit of the subject overshadows felicity of speech or facility of pen.

The several topics discussed are truth-revealing. Couched in language combining purity, propriety and precision of diction demonstrates the depth and breadth of Judge Good's exalted character and soundly based, strongly built, well rounded and superbly balanced career. The poise or balance of the pound or pennyweight scale is often the test of defeat or triumph of business ventures.

The lever and weight with its knife-edge scale are considered dependable, compared with the delicate, adjustable coil spring which by varying degrees of heat, amount of use and wear, affects the accuracy of the most carefully constructed scale coil. The ebb and flow of tides and the courses of the heavenly bodies are held and driven by that same gravity which controls a just balance. So there is wrought into the lives of men who serve faithfully their fellow men. "With what measure they mete," it is measured unto them, and is revealed unto their fellow men.

After all, burnished brass cannot long supplant the king of metals, even though the first may glitter in the sun, and the second dishonored lie buried in the "Dark and Bloody Ground." Few men, in passing, leave reputations greatly different from the actual characters they have lived under the collective and composite vision of their fellow men.

If he has held a just balance, which is the Lord's delight, in all he does, regardless of rank or condition, wealth or

poverty, power or weakness, then is developed within him that which men call poise which in the crown of time can no more be hidden than the city on the hill.

It has its imitator in pose which is poise with its eye knocked out. It is like hypocrisy compared to virtue. LaRochefoucauld said: "Hypocrisy is the homage that vice pays to virtue." The pretender pose may deceive the unwary if he tarries not too long. He stands to lose a precarious reputation. Once lost, it is lost forever.

Poise does not rest in great stature, physical strength, or general pulchritude. The athlete with swift feet, strong biceps, heavy bone, and tensile sinew, may have cowering vision and slinking habit. A diminutive form with crippled limb and delicate body may be the one in a multitude to whom all will bow. He may stand undaunted in the presence of power. In poverty he can face great wealth. And like the eagle of the Nile whose glance flashes back the noonday sun, he can meet undaunted his adversary's frown. If in study well directed and prudently used there is added industry and its practical use well applied; if difficulties and embarrassment add to his courage and zeal; if he obeys Sinai's resonant commands; if he follow the milder mandates of the Master from the Mount of Beatitudes; if knowing man's weakness sees also his strength and gives in judgment, wage, deference, respect and honor all that should be in the credit column of right, he will have that superb quality called poise, known to the public, though perhaps unknown to him.

It contains the eternal elements of strength, balance and virtue, which all the uncoordinated qualities of fear, vanity, error, hypocrisy, indulgence and crime cannot long successfully imitate.

An experienced physician at bedside in battle with the last enemy, when soothing specific has been shelved and voluble charlatan has departed, rising to the emergency and responsibility of the crisis, is observed by those concerned to be in stern mood, precise movement of hand, and balanced evolution of mind inspiring confidence and awe, that is medical poise.

The general of an army with Washington the type beset by powerful enemies, hardships, suffering, desertion and betrayals, with many apparent defeats, yet doing that which crystallized in future the 150 year miracle of democratic government, that was historic, heroic poise.

So it is with kingdoms. The first and last monarchs of united Israel had not this quality through which may be held what they have nor increase. The first posed in majestic mien in stature above the multitude. He was courageous in battle, yet the proud position he occupied was never filled by him. The fourth environed by radical academicians on the crucial day of succession met an angry, tax-ridden people. The answer to his appeal by experienced counselors was rejected. The advice of the sophistic experimenters was adopted in the following fateful language: "My father chastized you with whips. I will chastize you with scorpions." So Israel was divided.

David and Solomon in reigns of brilliant national establishment and glorious construction made the chosen people and favored kingdom the leading nation of the world. Erring men they were, it was true; but they left each a nation filling a large section of the world's history, featuring the most widely read metre and wisdom of the ages. Neither posed. Each had poise which has been handed down the ages.

Judge Good was a deep reader, but never a slave to exclusive statutory, common or civil law. He studied the lawyer, advocate, and judge's first and most dependable law book. In it the harsh invective of Jeremiah, the eloquence of Isaiah, the imperative law of Moses, the wisdom of Solomon, and the metric music and song from earth's most renowned royal singer, all appealed to him.

Of all the Psalms the 23d was favored. He saw in it the poetic autobiography of the singer's youth. He often quoted and sometimes recited it to close friends. It was made the theme of Rev. Cutler's masterly address at the Judge's church home in the city of Wahoo before all that was mortal of him was consigned by his relatives, neighbors,

and friends, gathering in great concourse, to earth, all-giving, all-receiving.

I submit a modest, unambitious paraphrase dedicated to our friend's memory:

"It is written in the sacred word,
My shepherd is the Lord.
No matter where I go,
Of want I'll never know.
After feasting on the best,
I shall lay me down to rest.

"He leads me by the river,
Where flow bright currents ever,
Clear, crystalline and still,
Where I may drink my fill.
Gives me sleep, more and more
Till my soul he doth restore.

"Righteous paths he hath me take
For his hallowed namesake.
Though I walk down death's valley,
Like slave driven to the galley,
No evil do I fear,
For I know my master's near.

"I fear no dread or terror
From the threatening host of error.
I know I am quite safe,
Through His mighty rod and staff.

"In presence of my deadly foe,
Whether I be high or low,
He prepares for me a feast,
Whether I be great or least.

"He my head with oil annointeth.
My crowning He appointeth.
That I in grace may grow,
My cup doth overflow.

"Surely grace, good and mercy
Shall ever be with me.
I'll dwell in the Lord's mansion
Through all eternity."

Dependable balance and wholesome poise fit, actuate and adorn the truly great in all the noble of earth, selected by their fellow men for stations of trust, responsibility or honor. However, to many they seem most appropriately placed in the exalted tribunals where human rights are determined and human wrongs are denounced. When decisions are made affecting not only for today or this generation, but for the long centuries to come, nowhere is more pertinently addressed the inquiry, "Is the position merely occupied or is it filled," than to the judiciary.

Were we to further develop the restricting scope of my theme, resort might be had to the opinions written by Judge Good which in word, phrase, sentence and paragraph reflect his style of expression, his arrangement of material, his human sympathies, and above all his devotion to the law in its relation to the being, doing, and aspiration of men of the Republic whose strength, independence, and perpetuity are of first concern. To go farther we might say: "For his judicial poise read his opinions in thirty-five volumes of Nebraska Reports."

Speaking before this learned, upright and Honorable Court from which a unit has been removed and fitting replacement made, let me say of this tribunal that in the large and numerous affairs of Nebraska life it is final arbiter of human rights and property privileges. Its general jurisdiction is more important to our people than the supreme and sublime tribunal at Washington which though of limited jurisdiction stands, in honor and respect, the first in the world.

Pardon an allusion to this bench when fifty years ago my active professional interest in it began. Cobb, Maxwell and Reese were its personnel. Its personnel changed by election, constitutional increase and death has maintained a reputation for probity, courage, uprightness, and justice well worthy the array of exalted membership of which Judge Good was an outstanding type.

In the Sacred Book no character except the Nazarene appeals to men for human anchorage and courage as does Daniel. In dramatic literature, not Caesar nor the melan-

choly Dane surpasses Portia. And who has America produced under whose shadow John Marshall must stand?

The quality of these in fidelity and zeal should inspire and animate all Americans. All lawyers may not attain the Bench. All citizens cannot find membership at the Bar. But in their own way and sphere they can support our Constitutions and obey our statutes. In their communities they should, with or without station, hold the balance and preserve the poise of peace.

In Revelations 6, 5, the inspired evangelist dramatically introduced four horses with symbolic mounts. One wore a crown, on conquest bent. Then one for slaughter with a sword. The third, with balance in hand. Had the evangelist not named the fourth, history would have told his name was Death. With all of these the one to suggest peace, hope, stability, and humanity was the rider with the balance. A conquering crown seldom leads in the world's history the way to ultimate peace. The encrimsoned sword rarely carves the way to human happiness. The balance, measuring the products of vineyard and field against the needs of man, in the hands of powerful men, imbued with eternal justice, may stay the conquering crown and the slaughtering sword; to the end that the pale horse may not be mounted or in terror and destruction ridden.

May a divine and directing Providence place in the hands of those in authority that balance, and in their personalities that crisis meeting emergency and solving poise exemplified in him for whom we here render the last professional and official honors.

Honorable E. A. Coufal.

May it Please the Court:

Dean Wigmore has stated that "a long time ago" he attempted the analysis and classification of legal ideas, with appropriate terminology, with a view to formulating a realistic analysis of legal concepts which would correspond to that of the applied sciences of medicine and engineering.

If the work of Wigmore, since undertaken by others, had found its way into practical use, instead of residence "in an old suit case," Justice Good would have been one of its ardent disciples. He was orthodox in his attitude toward jurisprudence and solicitous that its concepts be crystallized into exact formulæ.

This adherence to orthodoxy in the law is significant of the meaning of the life of the Justice. He was a Platonist in his ethical and political philosophy. He desired and eagerly sought the light of wisdom, and deemed the attainment of a high proficiency a prerequisite to the assumption of the exacting requirements of a position of presumed infallibility. He took the long and difficult road, loyal to the conviction that only by that way he could attain competence. Not only did he acquire the ability the position demanded, but he proceeded to achieve the purpose of a worthy ambition in an honorable method. He eschewed the implements of the political opportunist, the temptation to play tricks with doctrine, the cunning subterfuge, and the adroit maneuver. In one of his campaigns, when he and his associates on the district bench were standing for reelection, he stressed the worthiness of and his esteem for his colaborer. When the suggestion was made that in a particular community his generous attitude would not help his colleague and would injure his own cause, his answer came in the earnest repetition of the same generous commendation.

Justice Good's life revealed the union of ability, the fruit of application, and simplicity, which was tempered by emotions steady, deep and perpetual. He and Mrs. Good stood in the relationship of parents to six orphaned children, reared in their home; but in conversations on many topics over a period of a quarter of a century, not once did he mention the experience as an accomplishment. There was an intense projection of these splendid endowments and cultural attainments, contained within himself, which we call the dignity of his bearing. It was an attribute of these eminent qualities of which he seemed to be oblivious, and which fitted as a garment fashioned to the form. In

his presence the humble were at ease, those in distress sensed a bond of sympathy, and the sophisticated felt a sincere respect for him. As he purchased his transportation to Rochester, where he was to receive the last verdict, he was able to state as if in retrospect that rarely had he been approached off the bench by a partisan and importuned to discuss a pending action.

After we have composed our recollections of all that he said and all that he did, there remains, adorning the chambers of precious memory, much to be said of him that has not been adequately revealed. Even the artist cannot spread upon canvas or printed page the nobility of his good life.

Honorable Paul F. Good.

May it Please the Court:

It is perhaps appropriate at this time to recall some of the services done by Judge Edward E. Good in the development of the jurisprudence of the State of Nebraska and to express some of the indebtedness which the State of Nebraska owes to him.

The value of Judge Good's contribution is a matter peculiarly within the knowledge of the bar and the bench and it is fitting that in these memorial exercises some expression should be made of the feeling of the bar in this connection.

In the nature of our legal system, relying as we do upon precedent, the work of Judge Good and its value will be more and more apparent as time goes on and as his opinions are cited and applied to new circumstances and new controversies. His thoughts and methods of expression are weaving themselves into our legal thinking and becoming a part of the fund of knowledge used daily by the bar and by the courts throughout the state.

His service with this court began in 1907 and for a two-year period he served this court as commissioner. His opinions are found in Volumes 78 to 85 of the Nebraska

Reports. Thereafter during his 11 years of service on the district bench he was, after the adoption of our 1920 Constitution, called upon from time to time to sit with the Supreme Court. His service then as Judge of the Supreme Court began in 1923 and lasted until the time of his death, a period of over 14 years. His opinions as Judge appear in the published volumes of the Nebraska Supreme Court Reports from Volumes 109 to 133.

It would be impossible within the limits of an ordinary paper to make any detailed discussion of these opinions or even to attempt to analyze what they have meant. Even to pick some of his opinions at random for analysis or discussion would be doing an injustice. Perhaps we cannot know at present which will be considered by future generations of lawyers and judges to be most important and most influential.

One may, however, make some general observations as to the qualities which these opinions have in common with each other. In the first place they demonstrate the rare combination of legal learning and practical application to the affairs of mankind. Twenty-five years of experience as an advocate and counselor entered directly into Judge Good's decisions and opinions. He never lost touch with those human affairs which are the stuff and substance of all legal controversies. When applying legal principles he never lost sight of the fact that the law was created for human needs and that human beings must first be considered. At the same time his firm grasp of legal principles enabled him to look beyond the immediate case and to consider the effect of a mistaken application of the law upon the relations of mankind in general. He knew the principle that "hard cases make bad law" and carefully avoided application of wrong principles in order to alleviate some particular hardship.

Outstanding in his opinions is the careful analysis of the nature of the case, the nature of the relief sought, and the facts with which the court had to deal. Always fair and just, his conclusions on the facts reflected the situation as an impartial arbiter saw them. In many cases this

must have been a tedious and difficult task. The members of the bar do not always analyze the records with sufficient care so that a court may perform this task with the minimum of effort to which it is entitled. Judge Good sustained sometimes an unduly heavy burden cheerfully and with firm regard for right and justice.

Following the maxim that out of the facts grows the law, Judge Good's opinions go on then clearly and succinctly to apply the established legal principles to the controversy. The opinions are models of sound legal reasoning, proceeding by logical steps to conclusions which are harmonious with previously decided cases and at the same time just and fair in the particular controversy.

I cannot end this contribution to Judge Good's Memorial without some personal words of appreciation. It happens that from my earliest memories I knew and admired Judge Good. I was privileged to be closely acquainted with him in his family relationships as well as professionally. It is necessarily an inspiration to a younger lawyer to maintain as I was privileged to do these personal contacts throughout all the years. As a good companion, a wise mentor and as a personal friend, Judge Good was unexcelled. These are things that death cannot take away from us although for a time death ends the privilege of direct contact.

The members of the bar of Nebraska are the richer that Judge Good was one of the members of our Court and this likewise is something that death cannot remove. Judge Good has left a living monument for himself not only in the memory of his friends but in the printed pages which will be used and reused by the bar and the courts as long as the common law prevails in Nebraska.

Judge George A. Eberly.

Thrice in the present term has this Court been called upon to pay a tribute to the memory of those who once were members of this body and participated in its labors.

Truly these recurring events speak in no uncertain voices, and, amid the glories of this Autumn, challenge our attention to the solemn facts that,

"Leaves have their time to fall,
And flowers to wither at the north wind's breath,
And stars to set—but all
Thou hast all seasons for thine own, Oh Death."

"Passing away" is written on the world and all the world contains.

I first met Judge Good as a colleague on this Bench. With passing years I learned to know the man, and to judge him as I observed his work.

The ancient Greek philosopher has said, "Four things belong to a Judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

Judge Good possessed them all. In the study of cases no labor was too great to enable him to possess the facts and properly apply the law. He never sought public acclaim. We, his colleagues of the Bench and Bar, learned to know him as a faithful servant of the law. The law indeed was his master, which as a Judge he served with an allegiance that knew no friends and remembered no enemies.

Then too, we learned to know him as a man among men, a Christian gentleman, as he lived from day to day, as he dealt with the problems of life and the world, as he quietly and without ostentation cared for and assisted the helpless and friendless.

Truly, in heart and deed, he ever responded with rare fidelity to the poet's admonition—

"Do noble things, not dream of them all day long;
And so make life, death, and that vast forever,
one grand sweet song."

Charles A. Goss, Chief Justice.

Judge Good's place on this court would be hard for any one to fill. It had become so habitual to go to him when in need of help that I find myself preparing to do so before I realize that he is no longer here. He possessed so large a share of the world's wisdom, was so familiar with the legal principles involved in matters arising here, was so fine in his manner towards those seeking legal aid, and so helpful in suggestions as to how to work out difficult questions, that it was the most natural thing in the world to seek his advice.

He was a large man and gave to casual observers the appearance of being phlegmatic. Yet it seems to me that I have never known a man on any court who was more alert mentally than he. Lawyers who argued cases here soon learned that fact. He was a good listener. Before they got far into the argument of a case, if they were not developing it as the exigencies of their time demanded, he would ask a question or questions that struck at the very heart of their case.

His opinions were orderly. They were concise and clear. He stated the facts and the law in such a way that the opinion would be understood not only by a lawyer but by any intelligent layman.

For years it has been my privilege to secure the tickets at the football games for a little group of which he was one and to sit with him in the Stadium. Only in this realm did he appear to lack in any degree that judicial poise that characterized him as a lawyer, as a trial judge and as a reviewing judge. His loyalty to the home team caused him to be unduly depressed when we were losing and to be greatly elated when we were winning. In this respect he harked back to boyhood. He preserved the qualities of youth.

In the drives we took together, in his office, in his home and wherever you found him, he was a good companion. We shall miss him here more than our words have power to indicate. But the judicial history that he helped to make shall live on.

Judge Good was a good citizen, a loyal friend, a kind man. He had unfailing charity for the weaknesses of those less strong than himself. He never gossiped. He was a Christian gentleman.

"His life was gentle; and the elements
So mix'd in him that Nature might stand up
And say to all the world,
'This was a man.'"

The memorial will be entered on the records of the court and published in the current volume of the Nebraska Reports.

The Saunders County Bar Association, Wahoo, offered the following tribute:

We appreciate the opportunity extended to the Saunders County Bar Association, Wahoo, to pay tribute to the memory of our friend and neighbor, Judge Edward E. Good. His name has been carried on our roster for several years, at his personal request.

About three years ago, at one of our meetings when he was a speaker on our program, he said that he was always glad to come to Wahoo and mingle with his friends; that it was here he began his life work, and when the time came for him to lay down the cares of this life, it was here he wished to be buried.

After finishing his college preparation, it was in Wahoo that he and his boyhood friend and college mate, Honorable Benjamin F. Good, first opened their office under the name of Good & Good, Attorneys, ready to engage in the practice of their chosen profession. They were both young men, anxious to succeed, and merited the success which followed their efforts. This partnership continued until his associate, Benjamin F. Good, was elected Judge of this Judicial District.

He served eleven years as Judge of the Fifth Judicial District, from which he was elevated to membership in our Supreme Court, which position he held at the time of his death, serving over fourteen years. He had a great

capacity for friendship and his friends were coextensive with his acquaintance. This is illustrated by the fact that, when he was first a candidate for the office of Associate Justice of the Supreme Court, his plurality was the largest in the history of Saunders County, and by the fact that he was reelected twice without opposition, both being evidence of his ability as a Judge, and the esteem in which he was held by the public.

It was to a modest four-room cottage in Wahoo that he brought his bride, formerly Miss Orpha J. Gillilan, to begin their happy married life which extended over a period of more than fifty-two years. This cottage later was supplanted by a more sumptuous modern home.

He had no children of his own, but he and his life mate took into their home children of relatives who needed care and protection, to whom he gave the devotion he would have given had they been his own.

He associated himself early with the First Congregational Church in Wahoo. He believed that being a member of a church meant more than having his name on the roll, and acted accordingly. He not only aided the church financially, but acted as an officer, and as a teacher of the Men's Class in Sunday School for many years. He made his influence count for good in the community.

Judge Good was a good friend, a good neighbor, a good father, a good lawyer with a keen insight of the principles of law and their application to the cases before him, and was a competent and faithful official. He will be missed by his family, by his associates on the bench, by the members of our Association, and by his legion of other friends.

In reverence, we pay tribute.

B. E. HENDRICKS, Chairman
J. H. BARRY
A. Z. DONATO
Committee

IN MEMORIAM

FRANCIS S. HOWELL

At the session of the Supreme Court of the State of Nebraska, October 4, 1937, there being present Honorable Charles A. Goss, Chief Justice, Honorable William B. Rose, Honorable George A. Eberly, Honorable L. B. Day, Honorable Bayard H. Paine, Honorable Edward F. Carter, and Honorable Frederick W. Messmore, Associate Justices, the following proceedings were had:

May it Please Your Honors:

The committee appointed to present resolutions in memory of the Honorable Francis Singleton Howell, who, after an illustrious career at the bench and bar covering a period of fifty-three years, died at his home in Omaha, Nebraska, on the 28th day of June, 1937, respectfully submit the following:

Resolved, that in the death of Francis Singleton Howell the state of Nebraska has lost a patriotic and public spirited citizen and the profession of the law an able, upright, learned and conscientious member.

Resolved, that Judge Howell was a man of high character and of signal legal and judicial attainments. As a member of the bar, as United States District Attorney for Nebraska, as Judge of this Court, and in other offices of trust and responsibility held by him during a long and busy life, he contributed in substantial measure to the development and progress of our commonwealth.

Resolved, that we point with pride to his career as a lawyer, as an official and as a judge. He discharged his official duties fairly, impartially and fearlessly and rendered his state and country lasting and valuable services.

Resolved, that we tender to his family and relatives our sincere sympathy in their affliction, yet suggest the consolation and comfort which should spring from the contemplation of a long, useful and honorable career.

Resolved, that these resolutions be spread upon the records of this Court and that exemplified copies thereof be furnished to the members of the family of the deceased.

BENJAMIN S. BAKER
CLARK O'HANLON
F. D. WILLIAMS
W. A. SCHALL
GEORGE M. TUNISON

Honorable George M. Tunison.

May it Please the Court:

With your permission I would briefly supplement the resolutions submitted for your consideration. First let me commend the Court for providing this appropriate occasion. Aside from evidence of affection and respect for the departed, such observance is wise. We learn from the contemplation of a long and active life in any line of human endeavor. Recently in the capital city of our nation I admired the new hall of National Archives, extending from Pennsylvania avenue to Constitution avenue. Over the portals of that magnificent edifice is inscribed: "Study the Past. The Past is Prologue."

It was my good fortune to commence the practice of law in Judge Howell's office, at Omaha, 28 years ago. Passing time brought changes, but in the later years of his life we were again associated, and it was from our office that he retired from active practice in 1936. For the privilege of this association with one who was a scholarly gentleman, who was one of the first lawyers of Nebraska and who was, clear to the bottom of his rugged yet kind heart, a man, I will be ever grateful.

His achievements as a lawyer are written in the judicial records of his state and nation and in the reported cases

wherein he participated as counsel or judge. Yet back of those records, not apparent to the superficial observer, are the days, and in some instances years, of careful and painstaking preparation. Among his outstanding characteristics were zeal for his client's interest and solicitude to prepare to properly present his client's cause. His industry was notable and was a major reason for the eminence he attained in his profession. Holy Writ tells us: "Seest thou a man diligent in his business? he shall stand before kings."

During the long years of Frank Howell's practice, there was never a stain on his professional honor and integrity. Always a vigorous advocate, he was respected by his fellow lawyers and the courts. I never knew of an attempt by him to deceive a court, either in the essential facts of his case, or in the principles of law applicable to its solution. He fought with honest weapons and won or lost nobly.

His philosophy of life accented the importance and responsibility of the individual. He believed, with Daniel Webster, that the best and highest individual destiny could be attained through Justice, under Law. He believed, in those words peculiarly appropriate this very day, that:

"Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name, and fame, and character, with that which is and must be as durable as the frame of human society."

Judge Howell detested sham and pretense. He abhorred injustice and tyranny and was happiest when championing the cause of the weak and oppressed. Always he was considerate and kind to young lawyers.

Now that indomitable will is conquered; that sturdy heart is at rest. No longer will we hear his happy chuckle or glimpse the friendly twinkle in his keen blue eyes. We miss

him. We regret his passing. Yet we realize that, in the eternal procession of the ages, each of us holds here but a fleeting term. Soon our strength is exhausted and we pass from the scene. In that long perspective of time it may truthfully be said of our departed friend: "He served well his day and generation."

Honorable Benjamin S. Baker.

May it Please the Court:

May the Court indulge me for a moment to supplement the appropriate resolutions of your committee in the memorial exercises of the late Judge Frank S. Howell.

I had a close personal acquaintance with Judge Howell for more than forty years; I knew him as a citizen, a lawyer and public official. One year of his official life he graced this Honorable Court as a member.

He was always congenial, gracious, loyal and trustworthy; he loved his fellow man, and loved his country to devotion.

His life was an open book; there was no hyprocrisy in his thoughts or actions; he was what he was, without guile or deception.

He was the architect and builder of his accomplishments, true to his clients and just to their contenders.

His outstanding virtues were so illuminating that his faults, if he had any, faded into obscurity.

I write upon the tomb of Judge Howell this epitaph: *"Here rests the remains of Judge Frank S. Howell, a learned and brilliant lawyer, an honest man, a good citizen, mourned by all; a loss to his profession and a loss to society."*

Honorable Clark O'Hanlon.

May it Please the Court:

It is fitting and proper that we, who are yet living, should set aside from our daily vocations a sufficient time to do or

say something in commemoration of the lives, energies, labors, attainments, accomplishments and abilities of those who for many years gave from their labors and ability much in the way of advancement in our profession.

I deem it a great privilege, as well as an honor, to be permitted to say a few words respecting the life, labor and service of one of our profession, who by his untiring efforts, his zeal for knowledge, and his power of advancement, was timely rewarded by his being elevated to the honorable position as an Associate Justice of this Court,—Honorable Francis S. Howell, who recently departed this life, at Omaha, Nebraska.

My first acquaintance with Justice Howell was early in the year 1894, while I was yet young in the practice of law, at the time when he came to Blair with his wife and family and established himself in an office for the practice of law. I soon recognized in him a lawyer of extraordinary and unusual ability; he was young, amiable, courteous, upright, learned in his profession, with a boundless amount of energy, untiring in his efforts and research in matters of law. He prepared his cases with a thoroughness seldom seen among the older members of the profession, and he soon took a high rank at the Bar.

He was forceful in his argument and presentation of his case; had a pleasing appearance before the Court or the Jury, and was an efficient and painstaking trial lawyer. He was always prepared for the task of trying his cases, and throughout the trial he left nothing undone in the interests of his clients. During his years of practice at Blair I never heard of a single instance wherein a client complained that he had lacked in ability, integrity, honesty, or effort in their behalf. If their case was lost it was due to no fault or failure on his part. Had I been a litigant myself, I know of no man to whom I would rather have entrusted my case.

Knowledge of his ability, integrity and consequent success in the profession, spread with his growing years and practice, and he soon moved to Omaha, Nebraska, where his ability and energies would have a wider field for effort. Soon after locating in Omaha he was selected as United

States District Attorney for the District of Nebraska, in which office he served with marked distinction, ability and with much honor and credit to the office and himself.

While in Omaha he was associated in the practice of law with honorable and brilliant associates, and it may be well said that he fulfilled his part with credit to himself and to his coworkers and associates.

In the later years of his life he was elevated to the position of an Associate Justice of this Honorable Court. The extent and nature of his services here are written on the pages of your records, and the Nebraska Reports of this Court. It is not necessary for me to enlarge thereon, and suffice to say that he here discharged his duties with dignity, honesty and ability.

He has now gone to his reward: Let us hope, and I know, that this reward is one which he so well merited for his services rendered here on earth; that on his appearance before that Great Supreme Judge, before whom we must all sooner or later appear, it was then and there said to him —"Well done thou good and faithful Servant."

Honorable W. A. Schall.

May it Please the Court:

To have been associated with Frank Howell, even for a brief period of time, must be, to any one who regards private virtues and personal accomplishments, a source of peculiar pride; and it is with that feeling of pride that on this occasion I recall my association with him, which terminated by his appointment to this Honorable Court.

Based on that association, I feel that I have the necessary knowledge of his character and ability to speak on this occasion.

By birth, by education, by profession, and, better than all, by practice and by principles, Frank Howell was always a gentleman. He was possessed of a spirit that disdained dishonor of every kind; a heart that knew no guile; a character beyond suspicion.

I speak before this Bench, to which he was an ornament,

and in the presence of the Bar, with whose members his manhood was familiar, and I say of him with confidence, whether you consider him as a man or as a lawyer, there never was a man less capable of exciting enmity towards himself, or giving offense to others. In the flush of victory he was always magnanimous, in defeat always graceful. He deserved and received the respect and regard of associates and antagonists alike.

In the administration of the law of our land, the part that Frank Howell took during his lifetime will stand forever as an inspiration to others.

As an advocate, both in conflicts of civil and political life, he was bold, decisive and effective. His clear and logical intellect, his experience in practical affairs, and knowledge of human nature, his high character as a man, made him a formidable opponent in any legal contest.

Work was the cardinal interest of his life. I know of no other man whose life was more thoroughly dedicated to the highest conception of the duty of a lawyer,—duty to his clients and to his friends and to his country.

He espoused no cause halfheartedly. His delight was a jury trial. He cross-examined with consummate ability. He spoke eloquently and forcibly, and was acknowledged by the Bar as a great jury lawyer. He prepared his cases with infinite care, marshalling his facts, planning their presentation with every caution. He briefed in advance every question of law that could possibly arise, often saying that cases were won, not in the courtroom, but in the office.

His attitude toward the Court was always one of candor, helpfulness and deference. His effort was always to aid, never to mislead.

He was intensely patriotic. He possessed an almost religious reverence for the fundamental principles of our system of Government. No man gave more unstintingly of his time and money during the World War in furthering the activities carried on in this State to assist the Nation in its time of need, and the honor he cherished most was the fact that he had sacrificed his first born, a son he dearly loved, on the altar of his country.

Many men have lived longer, none have lived a fuller life than Frank Howell, and when he came to its end crowded as it was with action and achievement, he died as he had lived, a true Christian gentleman.

Honorable F. D. Williams.

May it Please the Court:

Judge Francis Singleton Howell was born in Milton County, Georgia, July 17, 1863, on a plantation. His parents were Singleton Gideon and Agnes (Owsley) Howell. He was of revolutionary ancestry and of Welsh lineage on his father's line, and English lineage on his mother's line. His father was born in Gwinett County, Georgia, and his mother was born in Danville, Kentucky. The deceased was a second cousin of Clark Howell, owner and editor of the Atlantic Constitution, the leading daily newspaper of the South.

He was one of five sons and six daughters, all of whom are deceased, except his sister Dora Bantley, of the state of Florida.

Judge Howell was reared on his father's plantation, and attended public schools at Atlanta, Georgia. He also finished a college course in Emory College, Oxford, Georgia, in 1882.

Judge Howell was married January 9, 1887, to Miss Clara A. Jones of Norcross, Georgia. Four children were born to this union: Guy R. Howell; Eunice S. Pollard; Frances L. McSweeny; George Howell.

The son, Guy R. Howell, was a soldier of the World War, was overseas one year, and died in a military hospital in Hoboken, New Jersey, from influenza, in April, 1919. The other children are all living.

Judge Howell was affiliated with the Masonic Order, Elks, and other organizations, and was a strong partisan, and had traveled much in the South. He came to Nebraska and located at North Loup, in 1883, where he studied law and was admitted to practice law at Ord, Nebraska, in 1884.

He moved from North Loup, Nebraska, to Albion, Ne-

braska, in 1889, where he practiced law, and was a member of the firm of Howell & Pratt, and later Howell & Spear.

In 1895 he moved to Blair, Nebraska, where he was in the active practice of law, alone, until 1900, when he moved to Omaha and became a member of the firm of Jefferis & Howell, to be succeeded by Jefferis, Howell & Shotwell, and this firm succeeded by Jefferis, Howell & Tunison. On January 1, 1910, President Taft appointed him United States Attorney for Nebraska, which place he occupied until 1915.

In 1916, Ed P. Smith, W. A. Schall and Judge Howell, all of Omaha, formed a partnership under the firm name of Smith, Schall & Howell, and this relationship continued until January, 1928.

Judge Howell became a member of this court on the 29th day of December, 1927, and retired on the 4th day of January, 1929.

In 1929, he became a member of the firm of Howell, Tunison & Joyner, which relationship continued until 1935, when he retired from active practice, and in which retirement he lived until his death on the 28th day of June, 1937, in his home at Omaha.

The above outline is a brief sketch of the more important features of Judge Howell's life in Nebraska.

Judge Howell was a natural lawyer. He studied the law; he lived in the law; he knew the science of law, and he loved the law.

Nature had done much for him. Fine physique, good voice, fine carriage, fertile brain, an attractive personality.

During the years he lived at Albion, he became well and widely known as one of the most brilliant and successful lawyers in that section of the State. There were few important cases in the county but what he was retained on one side of the controversy.

An instance happened in the District Court while he was at Albion, in the trial of an important case, illustrating his readiness and fearlessness. During the trial the presiding Judge remarked: "Take that witness away. Don't let him lie any more." Mr. Howell sprang to his feet and addressed the Court: "Hold, your Honor," and then turned to the

jury and said: "Gentlemen of the Jury, before this case is submitted to you, the Court will instruct you that you are the sole Judges of the evidence." He was then but twenty-seven years of age.

He went back to Albion in 1922, as special prosecutor in the homicide case of State v. Hill and Maxwell, assigned for trial from Merrick County to Boone County, as head counsel of a party of four lawyers for the state. Opposing were four lawyers for the defense, headed by the late Judge Albert, of Columbus, and W. A. Prince, of Grand Island, very able and distinguished lawyers. The case was begun May 16, 1922, and closed May 26, 1922. Judge Howell had reached the height of his physical and mental powers, and he conducted almost the entire case for the State. During the trial, interesting and exceedingly important questions arose, but Judge Howell was the master debater in that forum. His argument to the jury was masterful. The defendants were acquitted, but Judge Howell, in losing, had made a magnificent record.

He loved the courtroom, where he reveled in the clash of wits, and its ever changing scenes.

In any gathering he was a leading participant. In his intercourse with other members of the Bar, he had the highest sense of professional conduct and his word once given was sacred:

"How long a man shall live,
Is not for him to know,
How well a man shall live,
Is all his own to show."

To his clients he gave the best of service and prepared his cases well.

He was diligent in business and kept his house well in order. He was careful in his finances, had a beautiful country home with about thirty acres of an orange grove just a few miles from Palmetto, Florida, and there hoped to live in retirement, but later decided to continue his home in Omaha, the city he loved so well.

He had ample producing investments for his needs and he left a very good competence for his son and daughters.

As a member of this Court, his able, learned opinions are a part of its most satisfactory records.

At the time of his death, he was one of the ablest and most distinguished members of the Nebraska Bar.

Charles A. Goss, Chief Justice.

The careers of Judge Howell and myself touched at several points. When I first knew him he was practicing law at Blair. Later he moved to Omaha, where we were members of the same Bar for many years. He succeeded me as United States Attorney for the District of Nebraska in 1910 and then later followed me to this Court. Without repeating, I may safely say that the resolutions and remarks about him have in no way exaggerated his ability and qualifications. He did his work on this Court with his usual ability and brilliancy. It is well known that he greatly enjoyed the work here after so many years of advocacy at the Bar.

The memorial will be spread upon the records of this Court and printed in the current issue of the Nebraska Reports.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1937

ALEX PLOTKIN ET AL., APPELLANTS, V. CHECKER CAB COMPANY, APPELLEE.

274 N. W. 198

FILED JUNE 18, 1937. No. 30001.

1. **Automobiles.** Ordinarily, a vehicle which enters an intersection and is on the right of the other vehicle has the right of way. Comp. St. Supp. 1935, sec. 39-1148.
2. **Negligence:** DIRECTION OF VERDICT. "Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning the negligence or lack of negligence of the respective parties, it is error to sustain a motion for an instructed verdict." *Boomer v. Lancaster County*, 115 Neb. 295, 212 N. W. 613.

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

Leon & White and *Gordon Diesing*, for appellants.

Johnsen, Gross & Crawford, contra.

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

GOSS, C. J.

Plaintiffs appealed because, at the conclusion of evidence on their behalf, the court instructed a verdict for defendant and dismissed the petition.

Plaintiffs asked for damages to their grocery truck, which was injured in a collision with defendant's cab in the intersection of Twenty-second and Pierce streets in Omaha, about 6:30 p. m. December 8, 1934. Plaintiffs' truck was being driven north and defendant's cab was being driven east and down a sloping street. Both had their lights on. The streets were slippery.

Edward Britton, driver of plaintiffs' truck, testified that he approached the intersection at 15 miles an hour, honked his horn when about 40 feet away and slowed down five or ten miles an hour; he saw defendant's cab about 100 feet west of the intersection; when he was nearly through the intersection and the rear of the truck was still in the center thereof, defendant's cab struck the rear left fender and wheel of the truck and swung it in a northeasterly direction so that it crashed against a pole on the northeast corner of the intersection. The evidence showed that the greater amount of damage was done to the right side of the truck when it crashed with the pole but indicates the collision was between the front end of the cab and the rear left of the truck.

There was testimony that the cab followed the general direction of the truck and when the cars came to rest was headed in approximately the same general direction of the truck and behind it. It may be that this relative location of the truck and car caused the trial judge, in sustaining the motion for a directed verdict, to say: "In my opinion the physical facts in this case bar a recovery and show that the collision could not have occurred as the testimony states. I will sustain the motion."

We have read the entire record and are unable to agree that the physical facts bar a recovery or that the evidence before the jury shows as a matter of law that plaintiffs did not furnish sufficient evidence to support a verdict in their favor if the jury had been permitted to pass upon the evidence and had reached such a verdict.

There was testimony of Britton, the driver, corroborated by Kennedy, his helper, who was with him, that plaintiffs'

truck entered the intersection first. Ordinarily, a vehicle which enters an intersection first and is on the right of the other vehicle has the right of way: "When two motor 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 exceptions are not applicable here.) Comp. St. Supp. 1935, sec. 39-1148. So it was a question of fact, to be settled by a jury, whether the cab struck plaintiffs' truck in such a manner and at such a place in the intersection as to indicate actionable negligence.

There were four acts of negligence pleaded as against defendant: (1) Negligent and unlawful speed; (2) that the driver of the car did not have it under control; (3) that the driver of the cab did not maintain a proper lookout; and (4) that the driver of the cab was driving it to the left of the center of the highway. The testimony which we have so briefly abstracted would be sufficient to support a verdict indicating negligence in one or both of charges numbered 2 and 3 above listed. The physical facts that the truck ran over to the right and that much of its damage was done to its right side, and that the cab was over in that proximity and headed in the same general direction, are not physical facts from which it may be inferred that defendant must be freed from liability as a matter of law. And that is apparently the basis of the court's judgment in directing a verdict for defendant. "Where from the facts and circumstances proved reasonable minds might draw different conclusions concerning the negligence or lack of negligence of the respective parties, it is error to sustain a motion for an instructed verdict." *Boomer v. Lancaster County,* 115 Neb. 295, 212 N. W. 613. See *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16.

We are of the opinion that the trial court erred in directing a verdict for defendant. The judgment is reversed and the cause remanded for a new trial.

REVERSED.

BEVERLY ELIZABETH THOMAS ROTZIN, APPELLANT, V. A. R. MILLER ET AL., APPELLEES.
274 N. W. 190

FILED JUNE 18, 1937. No. 29976.

1. **Trusts:** ACCOUNTABILITY OF TRUSTEE. "In a court of equity the accountability of a trustee for the safe-keeping and investment of trust money is not measured by his own conceptions of duty, where they conflict with fundamental principles of justice essential to the protection of trust property and of the estate of deceased persons." *Baird v. Lane*, 115 Neb. 413, 213 N. W. 512.
2. ———: ———. "It is the duty of a trustee accepting money for the purpose of safe-keeping and investment to account for the investments and income, to report his fiduciary transactions to the beneficiary, and to surrender the trust funds in his hands upon the termination of the trust relation." *Baird v. Lane*, 115 Neb. 413, 213 N. W. 512.
3. ———. "The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust." *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N. W. 44.
4. **Principal and Agent.** "When an agent voluntarily admits receipt of his principal's property or money, the burden of showing that he made proper disposition of it rests upon the agent." *In re Estate of Boschulte*, 130 Neb. 284, 264 N. W. 881.
5. ———. "Where a trustee or agent deals with his trust in the name of another, or by means of an agency, corporate or otherwise, which he himself controls, he will be deemed in legal effect to have transacted such business as in his individual name, and as in his proper person." *In re Estate of Boschulte*, 130 Neb. 284, 264 N. W. 881.
6. ———. "'Unless otherwise agreed, an agent receiving or holding things on behalf of his principal is subject to a duty to the principal not to receive or deal with them so they will appear to be his own, and not so to mingle them with his own things as to destroy their identity.' Restatement, Agency, 900, sec. 398." *In re Estate of Boschulte*, 130 Neb. 284, 264 N. W. 881.
7. ———. "Unless the circumstances indicate otherwise, it is inferred that an agent employed to act for the principal is to act in the principal's name, and is to have title to anything obtained for the principal vested in the principal's name." *In re Estate of Boschulte*, 130 Neb. 284, 264 N. W. 881.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed, with directions.*

Lower & Sheehan, for appellant.

Reeder & Reeder, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY, PAINE and CARTER, JJ., and BLACKLEDGE, District Judge.

ROSE, J.

This is a suit in equity by Mrs. Beverly Elizabeth Thomas Rotzin, plaintiff, to require A. R. Miller, William H. Thomas and Thomas D. Thomas, defendants, to account to her for a trust fund of $5,000 which her grandfather, David Thomas, willed to her in their care as trustees during her minority. Defendants admitted receipt of the trust fund, pleaded faithful execution of the trust and a willingness to turn over to plaintiff alleged trust property in their hands, including a deed for land and some diversified securities in small amounts. Upon a trial of the cause, the district court found the issues in favor of defendants, charged plaintiff with an overdraft of $146.55, with $50 for services in excess of other claims for compensation, with $200 for attorneys' fees for defending the suit, made the sum of the three charges, or $396.55, a lien on the trust property and entered a decree in favor of defendants. Plaintiff appealed.

There is no pertinent evidence in dispute. What equity requires of the trustees in view of the material facts established is the question presented by the appeal.

David Thomas, grandfather of plaintiff and father of the defendants Thomas, died January 31, 1928, leaving a will bequeathing in the third paragraph to each of five grandchildren $5,000, plaintiff, a minor, being one of them. These bequests of testator were subject to the following conditions:

"All who may be minors shall have their said $5,000 held in trust by my executors together with accumulations thereto until they shall reach their majority."

The will appointed William H. Thomas and Thomas D.

Thomas, sons of testator, and his friend A. R. Miller, executors, and contained also the following provisions:

"I hereby authorize and empower the trustees hereunder to do any and all things necessary in the furtherance of their duties in court or otherwise in protecting the interests in their hands and I hereby authorize and empower my executors hereinafter named to sell, bargain, grant and convey any or all property of my estate and convert the same into cash in order to meet the bequests and conditions of this will, without order of the court."

The will was duly probated and the probate court directed the executors to set apart to themselves as trustees for the infant grandchildren $25,000 to be held by such trustees under the terms and conditions of the third paragraph of the will. October 25, 1929, defendants received for plaintiff $5,000 from the estate of testator and gave in writing a receipt therefor. Plaintiff was 14 years of age when her trust money fell into the hands of defendants. She married Walter Rotzin August 12, 1933, and then reached her majority. Comp. St. 1929, sec. 38-101. She received from time to time in small amounts $1,250, but never received the corpus of the trust, though the tenure of the trustees under the will was until she reached her majority, a period long since expired. Testator, by the terms of his will, imposed on the trustees named by him to administer the trust after his death the strict accountability of fiduciaries. A bond was required for the faithful performance of duties. In addition, the will itself reminded the trustees of the ties of blood and friendship, for it names two sons and a friend, the latter with a long experience in banking and in administering trust estates. Before this litigation ensued, an attorney for plaintiff importuned defendants in a courteous manner to settle this controversy according to recognized standards of equity and justice. They declined to do so and stood on their own standards of accountability and on what they had done. When required to account in a court of equity, they offered to deed to plaintiff a quarter-section of land in Antelope

county as a credit of $4,000, to assign to her 30 diversified securities, and to surrender the remainder as shown by their own accounts which they introduced in evidence.

This land was not a part of testator's real estate and proved to be a poor investment. When it was encumbered by a 4,000-dollar mortgage defendants bought the lien in the name of a corporation called "Miller Allied Securities Company," trustee, before they qualified as trustees. Mortgagors made default in payment of their debt and later deeded the land, subject to the mortgage, to the Miller Allied Securities Company, trustee, but not naming the beneficiary. The title never stood in the name of plaintiff nor in the name of defendants as trustees for her. The title papers were in possession of the corporation named as grantee but were not earmarked as evidencing plaintiff's ownership. The grantee named in the deed is not plaintiff's trustee. Plaintiff had no connection with the transaction or with the corporation. The $5,000 and accumulations that belonged to plaintiff were to be held by defendants, as trustees, until she reached her majority, not by the grantee in the deed. Personal duties and responsibilities of sons and friend as trustees were what the will, the order of the probate court and equity required. They did not deal with the title in their own names as trustees or in the name of plaintiff as beneficiary. The deed to the corporation was not recorded. Plaintiff is not required to know at her peril that the corporation can convey the title or that mortgagors did not sell the land to an innocent purchaser after they disposed of their interests. If defendants can effectively direct the corporation to do as they wish, they nevertheless kept the title in such a condition as to enable them to sell the land at a profit, if possible, and unload it on plaintiff, if of little or no value. Some of the other property listed in their account as belonging to the trust estate is in a similar situation. Defendants are in no better situation than that of trustees who mingle trust funds with their own. The rules of equity that determine the accountability of defendants on the undisputed facts

of this case have been stated in definite terms as follows:

"In a court of equity the accountability of a trustee for the safe-keeping and investment of trust money is not measured by his own conceptions of duty, where they conflict with fundamental principles of justice essential to the protection of trust property and of the estate of deceased persons.

"It is the duty of a trustee accepting money for the purpose of safe-keeping and investment to account for the investments and income, to report his fiduciary transactions to the beneficiary, and to surrender the trust funds in his hands upon the termination of the trust relation." *Baird v. Lane*, 115 Neb. 413, 213 N. W. 512.

"The violation by a trustee of a duty laid upon it by law, whether wilful and fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust." *Masonic Bldg. Corporation v. Carlsen*, 128 Neb. 108, 258 N. W. 44.

"When an agent voluntarily admits receipt of his principal's property or money, the burden of showing that he made proper disposition of it rests upon the agent.

"Where a trustee or agent deals with his trust in the name of another, or by means of an agency, corporate or otherwise, which he himself controls, he will be deemed in legal effect to have transacted such business as in his individual name, and as in his proper person.

" 'Unless otherwise agreed, an agent receiving or holding things on behalf of his principal is subject to a duty to the principal not to receive or deal with them so they will appear to be his own, and not so to mingle them with his own things as to destroy their identity.' Restatement, Agency, 900, sec. 398.

"Unless the circumstances indicate otherwise, it is inferred that an agent employed to act for the principal is to act in the principal's name, and is to have title to anything obtained for the principal vested in the principal's name." *In re Estate of Boschulte*, 130 Neb. 284, 264 N. W. 881.

According to these wholesome rules of equity, defendants did not perform their duties as trustees, or transact the business of the trust in the manner provided by law, or keep proper accounts, or hold the corpus of the trust in the name of the beneficiary or in their own names as trustees for the beneficiary, or fully inform her of their fiduciary transactions or turn over to her the trust property within a reasonable time after she reached her majority. By breach of trust and neglect of duty, they brought on plaintiff the burdens of litigation. Consequently, they are not entitled to compensation for services or to expenses or to costs or to fees of attorneys for defending the suit. *Baird v. Lane,* 115 Neb. 413, 213 N. W. 512. Plaintiff is entitled to a judgment against defendants for $5,000 with interest thereon at the legal rate from October 25, 1929, less payments received by her, and to costs in both courts. The judgment below is reversed and the cause remanded to the district court, with directions to enter judgment on the record as it stands in conformity with the conclusions herein stated.

REVERSED.

DUARD STAGEMEYER V. STATE OF NEBRASKA.

273 N. W. 824

FILED JUNE 18, 1937. No. 29953.

1. **Criminal Law:** CONFESSIONS. "A statement of facts claimed by the prosecution to be equivalent to a confession of guilt will not be considered unless it is first shown to have been voluntarily made and without inducement." *Chency v. State,* 101 Neb. 461, 163 N. W. 804.
2. ———: ———. "After the prosecution has introduced preliminary evidence as to the voluntary character of the confession the accused may, before the confession is received in evidence or read or stated to the jury, introduce evidence to show that the confession is involuntary, and for this purpose may show all of the circumstances under which the confession was made. In this respect defendant may cross-examine the witnesses who testified for the prosecution, defendant may take the stand and testify as a witness for himself, and defendant may call other

witnesses to testify on this question. The prosecution may introduce evidence to rebut defendant's evidence as to voluntary character of confession." Underhill, Criminal Evidence (4th ed.) pp. 557-559.

3. *Tramp v. State*, 104 Neb. 222, 176 N. W. 543, adhered to.
4. **Criminal Law**: CONFESSIONS. Where the state offers in evidence a purported confession of an accused, and an issue of the use of the "third degree" in obtaining the same is clearly raised on behalf of accused, not only should all surrounding facts and circumstances be fully investigated, but defendant may produce, as bearing upon the voluntariness of the confession, evidence of the condition of his body at the time of and immediately after the making of the alleged confession, as well as the statements of himself which have a bearing on, and tend to disclose the circumstances under which, the alleged confession was made.
5. ———. An error which prevents proper consideration by the jury of the controlling question upon which a case must turn is substantial, and not technical, and may not be disregarded by an appellate court.
6. ———: CONFESSIONS. "Wherever the writings or words of such party (charged jointly with the commission of a criminal offense) amount to an admission merely of his own guilt, and cannot be deemed acts done in furtherance of the common design, they can be received in evidence only against the party making or uttering them." *Zediker v. State*, 114 Neb. 292, 207 N. W. 168.
7. ———: EVIDENCE OF INDEPENDENT OFFENSES. "It is a general rule that, on the trial of one accused of crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions." *Abbott v. State*, 113 Neb. 524, 206 N. W. 153.
8. ———: CONFESSIONS. "The general rule is, that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question. While the fact that such statement may include another offense as well as that charged does not prevent the confession being received and going to the jury with proper instructions when there can be no separation of the relevant from the irrelevant parts, when the relevant parts can be separated from the irrelevant this must be done and that part, only, of the confession admitted which is material to the issues on trial." *People v. Spencer*, 264 Ill. 124, 106 N. E. 219.

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

Perry, Van Pelt & Marti, J. F. Fults and *J. P. O'Gara,* for plaintiff in error.

Richard C. Hunter, Attorney General, and *Edwin Vail, contra.*

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

EBERLY, J.

The defendant, who is plaintiff in error here, was found guilty of the charge that he, in conjunction with Fred Stombaugh and Vick Hargis, in Furnas county, Nebraska, on February 2, 1935, did wilfully, maliciously and forcibly break and enter into a store building owned by the Farmers Co-operative Oil Company, a corporation, with intent to steal goods and chattels of value of the said corporation, then in said store building, and did unlawfully steal and carry away property of the value of $70 without consent of the owner thereof. The defendant was tried separately by the district court. At the conclusion of the trial, the jury returned a verdict finding him guilty as charged. From the order of the trial court overruling his motion for a new trial, defendant prosecutes error.

The evidence in the record discloses that the Farmers Co-operative Filling Station in Holbrook, Furnas county, Nebraska, was, on the night of February 2, 1935, feloniously entered by burglars, and about $70 in cash stolen therefrom. The sole evidence connecting the defendant therewith consists of certain confessions, which included a confession purporting to have been made by William E. Brown, and on April 3, 1936, reduced to writing by the county attorney of Furnas county, and signed by Brown, identified in the record as exhibit 2; a confession purporting to have been made by Fred Stombaugh, and on April 4, 1936, reduced to writing by the county attorney of Furnas county, and signed by Stombaugh, identified in the record as exhibit

3; and also a confession purporting to have been made by the defendant, and on April 4, 1936, reduced to writing by the county attorney of Furnas county, and signed by defendant Stagemeyer, identified in the record as exhibit 4. Defendant made due objection to the introduction of all evidence on the subject of confessions as each item was offered, and, further, excepted to the ruling of the district court admitting the same in evidence, "without the defendant having an opportunity to show the fact that these (confessions) were obtained by threats and by promises, and after the defendant had been told they would give him the 'third degree' the same as they had Stombaugh; and after he had been struck by one of the officers in whose custody he was; this, the defendant objects to and insists upon his constitutional rights to present his evidence before they (the three written confessions) are received in evidence." This exception and request was denied by the trial court, and the prosecuting attorney was directed to "proceed," and he thereupon read to the jury exhibits 2, 3, and 4.

In this discussion, for convenience, the officers engaged in this transaction, though their names appear in the bill of exceptions, will be referred to as the sheriff, the deputy sheriff, the deputy state sheriff, the railroad detective, and the county attorney.

The evidence offered by the state prior to the rulings of the trial court admitting the confessions in evidence is, in substance, that in the afternoon of April 3, 1936, the deputy state sheriff and a railroad detective were in Beaver City. William E. Brown had been arrested, and that afternoon a typewritten confession embracing twenty-one questions and answers was signed by him, which is witnessed by the county attorney, the deputy state sheriff, and the railroad detective. From the state's evidence alone we glean that no complaint as to defendant was then filed, and no warrant was issued for his arrest, but the county attorney orally directed the sheriff to arrest the defendant and four others. This direction was immediately complied

with. The sheriff and his deputy proceeded to Holbrook. The defendant was there arrested at his home, and, late in the afternoon of the same day, with the others, was placed in the county jail at Beaver City. The sheriff then called up the railroad detective at McCook by telephone, advised him of the arrest, and soon thereafter the deputy state sheriff called up the sheriff by telephone from McCook and advised that officer that he and the railroad detective were coming to Beaver City immediately. These two officers arrived at Beaver City about 12:30 a. m. on April 4, 1936. The sheriff and his deputy awaited their arrival at his office, which the record indicates is in the building where the county jail is situated. The testimony of the officers is that on their arrival the sheriff went out and brought back the county attorney, and while the sheriff was away his deputy brought Stombaugh alone from the jail into the sheriff's office. The evidence of the officers is that when the county attorney arrived Stombaugh was permitted to read Brown's confession (exhibit 2), and, without any solicitation, threats, or inducement, he at once agreed to confess; that the county attorney thereupon typed a statement which Stombaugh then freely and voluntarily signed, wholly uninfluenced by threats, violence, or inducements of any kind. This statement is exhibit 3 and contains 159 words. Thereafter, the preliminary proof of the state is that Duard Stagemeyer, defendant, was brought into the office, and these officers swear that Brown's confession (exhibit 2) was given to him to read, followed by the production of the Stombaugh confession (exhibit 3) for his inspection, and he (defendant) in turn, without any protestation of innocence, immediately admitted his guilt and announced his willingness to execute a like confession. The county attorney thereupon propounded a few questions to him, and then typed the same, which, as exhibit 4, the officers present swear was immediately, freely and voluntarily signed by defendant. The sheriff testifies that neither at the time of his arrest at his home on April 3, nor during his journey to the county jail, nor previous to his being

brought to the office, had Stagemeyer been informed of the charges pending against him. All officers present testify that his act in signing the confession was perfectly voluntary; that no threats were made or directed against him; that no violence was applied to his person; that no promises of any kind were made to him; and that it was done by him freely and without protest. Defendant's confession is a typewritten document, containing 231 words, which occupies less than a page of the bill of exceptions. It admits participation in the burglary charged in the information filed herein, and also participation in the commission of four additional burglaries occurring in January, 1936.

Upon the completion of the introduction of this evidence, the state rested, and the defendant was permitted, for the first time, to present his proof. The testimony on part of the defense is not only contradictory of, but wholly irreconcilable with, the evidence of the state. The defendant swears that, about five or six hours after his arrest and incarceration in the Furnas county jail, he was taken from the jail and conducted to the sheriff's office by the deputy sheriff, who was with the sheriff when he was arrested at his home. This occurred between 1 and 2 o'clock in the early morning. When he arrived at the sheriff's office, in addition to himself and his conductor, there were then present the sheriff, the deputy state sheriff, the railroad detective, the county attorney, and Fred Stombaugh. All were standing up except Stombaugh, who was seated in a chair. Defendant described Stombaugh's condition as he then observed it, in the following words: "His mouth was bleeding; his nose was bleeding; it looked like he had been crying; his eyes were blood-shot;" and there was blood "down on the front of his shirt." Defendant was transported with Stombaugh in the automobile when the party was brought to the jail a few hours before, and knew his condition when he was taken to the sheriff's office about 1 o'clock a. m., and when Stombaugh left the jail only a few moments before, and knew that at these times Stombaugh's nose and lip were not bleeding, and he had no blood

on his shirt. The first thing that was said to defendant after he entered the office was by the railroad detective, who pointed to a chair and told him to sit down. Bill Brown's statement was then brought up and the railroad detective said to defendant, "Are you guilty of that?" The defendant answered, "No." The detective repeated the question, "Are you sure you ain't guilty of that?" The defendant repeated his answer, "No." Then the detective said, "You know you are; you just as well plead guilty; it will be easier." And defendant further testifies that the detective then told him, if he did not plead guilty, "They'd give me the 'third degree.'" At this time the county attorney spoke up, saying to the defendant that he had just as well plead guilty, it would be easier on him. The defendant then replied to the county attorney's statement, "I wasn't guilty." Thereupon the county attorney said, "Just as well give him the 'third degree.'" The detective then directed defendant to get around the table and occupy the chair where Stombaugh was sitting. (At this point Stombaugh was removed from the office and taken back to the jail.) The defendant's narrative continues, viz.: The county attorney told defendant that they had beaten Freddy Stombaugh up and "They'd do the same to me if I didn't plead guilty to them confessions." Further, that all present except defendant were armed with pistols, which were displayed while they were seeking to compel the making of a confession by the defendant. When they had defendant read Bill Brown's statement, defendant told the officers that he "wasn't guilty of it." And when Freddy Stombaugh's statement was shown defendant, he again protested he was not guilty. The railroad detective told defendant three or four times they would beat him until he did sign the proposed confession. Finally, the railroad detective hit the defendant a number of times under the arms in the short ribs. The county attorney said "They would make it easier on me if I'd sign it (the confession);" that "They'd see I got out quick if I signed it and plead guilty;" that "They'd make arrangements about that and

fix this parole." After this had happened, according to the defense, the written confession was typed and signed by defendant, who testifies, with reference thereto, "I would have signed anything to keep them from threatening me and beating me."

The following constitutes further testimony of the defendant:

"Q. Would you have signed the statement if it had not been for these threats and promises that I have called your attention to? A. No. Q. In this statement are these words: 'I have read the foregoing statement and the same is true in every respect and is freely and voluntarily given without any threat or promise.' Was that statement, or any part of it, true? A. No. Q. Had promises been made to you? A. Yes. Q. Were those statements, or any of those statements, true, above that clause? A. No. Q. Had you been guilty of any of those offenses? A. No."

The following is the sole cross-examination on this subject: "Q. And this is your signature on exhibit No. 4? A. Yes. Q. And you signed that? A. Yes. Q. And you now wish to state to the jury—you answered to Judge Perry's question, that there wasn't any of this true? A. I said it wasn't. Q. You said there wasn't any of this true? A. Yes. Q. That you didn't have anything to do with any of these things that are contained in that statement you signed? A. No. Q. Not a thing? A. No."

At a time which does not clearly appear in the record, the defendant asked the sheriff to see an attorney. The trial court, it is thought, mistakenly excluded the most, if not all, of the evidence sought to be elicited on this subject. However, the following is a part of the bill of exceptions: "Q. What attorney did you ask to see? A. John Fults. Q. When was the first time you saw John Fults? A. Tuesday afternoon."

According to the bill of exceptions, the record discloses that this trial was commenced on Wednesday, May 27, 1936. Reading the words "Tuesday afternoon" in connection with the context, the conclusion is that the defendant

was kept in the county jail of Furnas county from April 3, 1936, to May 26, 1936, without benefit of counsel, and without being permitted to see an attorney.

It would unduly extend this opinion to abstract the evidence of all the witnesses who testified on behalf of the defendant. It may be said, however, that Fred Stombaugh, who on the night of April 3/4, 1936, was taken from the jail to the sheriff's office immediately preceding the defendant, and whose signed "confession" was made that night purporting to implicate defendant in conjunction with Stombaugh in the commission of the burglary charged, in open court testified repudiating his alleged confession, stating that it was untrue; that he had not done the things mentioned therein; that it was obtained by the railroad detective beating him up that night in the sheriff's office, and threatening to continue the beating until he made the confession; that this beating caused his physical appearance testified to by defendant as viewed by him on his entrance into the sheriff's office. As an additional ground of his fear for his physical safety at the time his signature to this confession was obtained, the following question was propounded by defendant's attorney: "Q. You have testified, Fred, that you were in fear of Carter (the deputy sheriff) because of the beating he gave you before; now, I ask you to tell the extent of that beating—how he beat you?" Objection thereto on behalf of the state was thereupon sustained, and the following offer of proof was made: "Offer to prove by the witness on the stand that about six weeks before April 3, 1936, in the sheriff's office in the courthouse in Beaver City, Nebraska, when the county attorney was present, the deputy, Carter, was present, Berg, the railroad detective, was present, that the deputy, Carter, slugged him in the face, loosened four of his teeth, broke the bridge of his nose, caused him to vomit, caused him to have nervous indigestion for at least three or four weeks from which he hadn't fully recovered on April 3, 1936; and that Carter, when he approached him in a threatening manner, that witness has just testified, said he'd repeat

what he had given to him on the other occasion if he didn't tell the truth." This offer of proof the trial court denied.

As to the result of the beating that occurred in the early morning of April 4 in the office of the sheriff, in the presence of those already mentioned, Stombaugh testified: "Q. You remember that Duard Stagemeyer was brought into the sheriff's office there before you left? A. Yes. Q. What, if you know, was the condition of your face, your lips, your nose and your shirt at that time? A. My lips at that time was cut and bleeding; there was a knot on the side of my head when Mr. Stagemeyer came in. Q. How many of your teeth were loose at that time? A. All of them along the front side. Q. Who had hit you and knocked your teeth loose? A. Matt Berg. Q. How many times had Matt Berg hit you in the mouth? A. Twelve or fifteen times. Q. How many times did he hit you in the ribs? A. Oh, twelve or fifteen times altogether. Q. What, if you know, was your physical condition at the time Stagemeyer was brought into the room where you were? A. Well, I was weak from being pounded."

The fact that Fred Stombaugh was beaten up while in the sheriff's office, just before the defendant was brought in, is corroborated by Glenn Massey, Harold Dodd, and Dean Hargis. They saw Stombaugh's appearance when he was taken to the office; they also saw him when he got back, all beaten up. They heard noises emanating from the sheriff's office where Stombaugh was detained, while he was gone; they talked to him when he returned and knew his then condition.

It fairly appears that the business of securing these two confessions, one of 159 words, the other of but 231 words, occupied more than three hours in time.

We have long been committed to the view that, "In a criminal trial a confession of guilt alleged to have been made by the defendant is not competent in evidence, unless first shown to have been voluntarily made," and also, that "An involuntary statement or confession is not competent against the defendant for any purpose." *Jones v. State*, 97 Neb. 151, 149 N. W. 327.

So, also, "A statement of facts claimed by the prosecution to be equivalent to a confession of guilt will not be considered unless it is first shown to have been voluntarily made and without inducement." *Cheney v. State,* 101 Neb. 461, 163 N. W. 804. See, also, *Morcumb v. State,* 125 Neb. 42, 248 N. W. 807.

In the instant case the record is not one where the trial court, on a proper foundation being laid, admits proof of a confession made by the accused which is subsequently challenged by the defendant, but rather one where the accused makes a timely application, before the proof of the purported confession is admitted and read or stated to the jury, for permission to controvert the evidence or testimony constituting the foundation upon which the state predicates its offer of proof. This question was before this court in the case of *Tramp v. State,* 104 Neb. 222, 176 N. W. 543. In that case the trial court, as in the instant case, overruled the objection of the accused and his offer of proof tending to establish the involuntary character of the confession thus offered in evidence. Under the facts in the *Tramp* case, we held: "It was an abuse of discretion for the trial court to allow the jury to receive this evidence without first giving the defendant opportunity to prove under what conditions and circumstances the statement was obtained. It was the duty of the trial judge to pass upon the sufficiency of the foundation. The only theory on which such a statement is permissible of being introduced is where given voluntarily, without fear of punishment, or hope of reward, and free from violence and any possible bodily harm." The controlling principle of practice involved in *Tramp v. State, supra,* finds ample support in the authorities, and has never been expressly repudiated in this jurisdiction.

In 2 Wigmore, Evidence (2d ed.) pp. 216-219, it is stated: "The admissibility of the confession, as affected by the foregoing rules, is a *question for the judge,* on elementary principles defining the functions of judge and jury. * * * In determining admissibility: (1) The *judge must*

hear the defendant's evidence (including evidence from cross-examination of the prosecution's witnesses) upon the issue of voluntariness."

On this question of trial practice, Underhill, Criminal Evidence (4th ed.) pp. 557-559, says, in part: "After the prosecution has introduced preliminary evidence as to the voluntary character of the confession the accused may, before the confession is received in evidence or read or stated to the jury, introduce evidence to show that the confession is involuntary, and for this purpose may show all of the circumstances under which the confession was made. In this respect defendant may cross-examine the witnesses who testified for the prosecution, defendant may take the stand and testify as a witness for himself, and defendant may call other witnesses to testify on this question. The prosecution may introduce evidence to rebut defendant's evidence as to voluntary character of confession. If the jury was not present when the evidence as to voluntary character was received, the defendant may, after the confession is received, introduce evidence as to voluntary character of confession as bearing upon the weight and credibility of the confession."

It will be noted that the rule as stated is quite consistent with the underlying principle upon which *Tramp v. State, supra,* is based, and that, in support of the rule announced as to defendant's right of cross-examination, *Willis v. State,* 43 Neb. 102, 61 N. W. 254, is cited. See, also, *Burns v. State,* 226 Ala. 117, 145 So. 436; *Lockett v. State,* 218 Ala. 40, 117 So. 457; *Hardin v. State,* 66 Ark. 53, 48 S. W. 904; *People v. Fowler,* 178 Cal. 657, 174 Pac. 892; *People v. Reed,* 68 Cal. App. 19, 228 Pac. 361; *People v. Eli,* 131 Cal. App. 482, 21 Pac. (2d) 654; *People v. Klyczek,* 307 Ill. 150, 138 N. E. 275; *People v. Sweeney,* 304 Ill. 502, 136 N. E. 687; *Zuckerman v. People,* 213 Ill. 114, 72 N. E. 741; *Commonwealth v. Jokinen,* 257 Mass. 429, 154 N. E. 189; *State v. Condit,* 307 Mo. 393, 270 S. W. 286; *State v. Behiter,* 55 Nev. 236, 29 Pac. (2d) 1000; *State v. Ascarate,* 21 N. M. 191, 153 Pac. 1036; *People v. Rogers,* 192 N. Y.

331, 85 N. E. 135; *Kosienski v. State,* 24 Ohio App. 225, 157 N. E. 301; *Berry v. State,* 4 Okla. Cr. 202, 111 Pac. 676.

When a confession is offered by the state in a criminal case, it is within the right of counsel for the prisoner, before it is admitted, to cross-examine the witnesses who propose to testify to it as to the circumstances surrounding the making of it, and the defense may also call at the same time independent witnesses and examine them, going thoroughly into the whole matter, as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all these facts before it, is to pass upon its admission. *State v. Hill,* 65 N. J. Law, 626, 47 Atl. 814.

In this connection the question also arises as to what consideration should be given to the failure or refusal or delay of the officers of Furnas county to accord the defendant his right to assistance of counsel until the day previous to the commencement of his present trial. Owing to the undue restriction exercised by the trial court in the admission of evidence on this subject, the record before us may not completely reflect the facts, and proper explanations by the authorities may yet be made. But, on the basis of what we have, without thought of what may be supplied in the future, the inference supported by the present record is that, from April 4, 1936, to May 26, 1936, fifty-one days, it was impossible for the defendant to secure the assistance of counsel. The effect of the lapse of such an interval of time would in due course of nature tend to remove all trace of violence applied to defendant, or to Stombaugh, if such violence had actually been applied. On the other hand, had counsel been employed by the defense in this case immediately, the result of a prompt physical examination of these parties (including their clothing), made by competent persons, would have in effect preserved evidence of a situation which on the determination of the question of the voluntariness of the confessions would probably have been controlling.

Sections 7, 11, and 12, art. I of our Constitution, provide for and define the rights of the accused in all criminal prosecutions. Without an extended discussion of these paragraphs, it may be said that the right of the accused to counsel and due preparation for his trial cannot be gainsaid.

In *Kleinschmidt v. State,* 116 Neb. 577, 218 N. W. 384, this court approved the following: "In speaking of the federal Constitution Justice Day, in *Weeks v. United States,* 232 U. S. 383, 392, says: 'This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws.' And in speaking of the tendency to execute the criminal laws by violating the Constitution in order to 'obtain conviction,' says that such 'should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.' "

Obviously, the accused in this case, in the event of a second trial thereof, should be accorded the right of showing the exact method followed by the authorities in his incarceration in the county jail of Furnas county during the fifty-one day period referred to. The extent to which his right to consult counsel during that period was delayed or denied, if at all, is certainly proper to be shown. And, if it appear that during said period he has been, in effect, unlawfully held incommunicado by those in whose custody he was, and as a necessary result important evidence has been practically suppressed, this fact will merit due and careful consideration in connection with all other surrounding circumstances in the determination of the competency of the confessions offered in evidence in this case.

A careful examination of all the proof adduced by the state at this trial is convincing that it contains not a scintilla of evidence that tends to connect the defendant with the crime charged, save and except the "confessions"

of Brown, Stombaugh, and the defendant, the written statements of which were prepared by the county attorney and subscribed by the parties named, and received in evidence as exhibits 2, 3, and 4. It is equally evident that, unaided by the "confessions," the proof is wholly insufficient to sustain the conviction. Also, it affirmatively appears that all of the persons so confessing appeared at the trial as sworn witnesses, and each repudiated his confession, and denied the truth of the statements therein contained. In addition, the defendant voluntarily took the witness-stand and clearly and unequivocally testified, not only as to his innocence of the crime charged, but to facts which, if accepted as the truth, fairly establish that the confessions introduced in evidence, as having been made by himself and by Stombaugh, were obtained as a result of the use of the "third degree" being applied to those from whom such confessions were obtained. His cross-examination by the representative of the state in no degree discredited the statements so made by him. Under these circumstances, every fact tending to throw any light upon the truth or falsity of the confessions should have been received for the preliminary consideration of the trial judge, and also for submission to the trial jury. *Shellenberger v. State,* 97 Neb. 498, 150 N. W. 643.

All courts are in agreement that the use of the "third degree" applied by police officers to persons in their custody can never be tolerated, and that confessions obtained thereby are necessarily invalidated because of the nature of the means employed to obtain them.

It appears that when an attempt is made to introduce in evidence a confession purporting to have been made by the defendant in a criminal case, and this issue of the use of the "third degree" is clearly raised, the consensus of opinion of the courts that have passed upon the matter uniformly sustains the conclusion that, not only should all the surrounding facts and circumstances be fully investigated, but that the defendant may produce, as bearing upon the voluntariness of the confession, evidence of phy-

sicians and others as to the condition of his body immediately after the alleged confession, *as well as the statements of himself,* which have a bearing on the circumstances under which the alleged confession was made. *People v. Alex,* 260 N. Y. 425, 183 N. E. 906; *State v. Nagle,* 326 Mo. 661, 32 S. W. (2d) 596; *People v. Weiner,* 248 N. Y. 118, 161 N. E. 441; *People v. Barbato,* 254 N. Y. 170, 172 N. E. 458; *Garrett v. State,* 52 Tex. Cr. Rep. 255, 106 S. W. 389. See, also, *Ridenour v. Lewis,* 121 Neb. 823, 238 N. W. 745.

In the instant case, it is thought that the trial court erred in excluding statements of witness Stombaugh, made by him immediately on his return to the jail in the early morning of April 4, 1936, and while engaged in removing blood from his face, as to the cause of his injuries and the treatment that had just been accorded him.

In *People v. Alex, supra,* the highest court of review of the state of New York reversed a conviction where the trial court refused to receive in evidence, under the circumstances detailed in the opinion, statements of the prisoner, made 36 hours after the confession had been signed, as to treatment received by him causing him to sign the same, accompanied by an offer to show the marks thereof appearing on his body.

In connection with this *Alex* case, the rule was also announced: "An error which prevents proper consideration by the jury of the only question relied upon by the defendant is substantial, not technical, and we have no right to disregard it though we may approve of the verdict."

In the instant case, however, this court expresses no opinion as to the merits of the defense, or as to the guilt of the party being tried.

The last question presented by this record, necessary for consideration, is as to the admissibility of exhibits 2, 3, and 4, considered as entireties. Each instrument is complete within itself. There is no express reference contained in any one to the others. Exhibits 2 and 3 are subscribed respectively by William E. Brown and Fred Stombaugh only. The narration of facts contained in each of these

statements was not given under the sanction of an oath, nor detailed by the maker thereof in open court before the jury in the presence of the defendant. Not only was this defendant deprived of confrontation, but, in effect, he was denied his right of cross-examination. Exhibit 3 does not carry any evidential force because made by one jointly charged with the defendant with the commission of a burglary on February 2, 1935. Both exhibits 2 and 3 purport to have been subscribed in April, 1936. They relate to a criminal transaction which at the time the statements were made had been fully completed in the past. The contents of the statements necessarily negative the inference that, when made, they were in furtherance of a common criminal purpose then in progress.

"Wherever the writings or words of such party (charged jointly with the commission of a criminal offense) amount to an admission merely of his own guilt, and cannot be deemed acts done in furtherance of the common design, they can be received in evidence only against the party making or uttering them." *Zediker v. State,* 114 Neb. 292, 207 N. W. 168. See, also, *Nebraska State Bank v. Citizens State Bank,* 122 Neb. 522, 240 N. W. 575; *Priest v. State,* 10 Neb. 393, 6 N. W. 468.

Therefore, these statements, both made by the subscribers thereof in the absence of the defendant, have no evidential force against him, save that which by his own words or acts he voluntarily gives them. Uncoerced, he must have admitted the truth of each of them, and in fact have made them his own. *Grammer v. State,* 103 Neb. 325, 172 N. W. 41. This must have been accomplished in harmony with the principles laid down by this court in *O'Hearn v. State,* 79 Neb. 513, 113 N. W. 130. These statements may only be received in evidence subject to identical limitations as to competency imposed by law on defendant's own confession, and should be wholly disregarded if the triers of fact, from a consideration of all the evidence, fail to find that they were voluntarily made by the defendant or voluntarily assented to or adopted by him. *Ringer v. State,* 114 Neb. 404, 207 N. W. 928.

But, an examination of exhibits 2 and 4 discloses that they were inadmissible in evidence as entireties for additional reasons.

Exhibit 2 is made up of 21 questions and answers thereto, all admittedly propounded to one William E. Brown, answered by him, and reduced to writing in the absence of the defendant, wholly without defendant's knowledge, and at a time when and place where he was not represented. The first question and answer in exhibit 2 establishes the burglary by Brown of the J. C. Henry Hardware Store on the night of March 31, 1936. The defendant was not in any manner connected with this crime. In interrogatories 2 to 19 and answers thereto, Brown states that there had been a number of other burglaries and thefts in Holbrook during the past two years; recalls that the lumber yard, the depot, and elevator in Holbrook were broken into in the fore part of January, 1936, and, in addition, the Conoco Filling Station was broken into. The methods employed in committing the crimes are described, and the property stolen is listed. Brown states that he was asociated with Vick Hargis and the defendant Stagemeyer in the commission of each of these crimes so described by him. In the nineteenth question and answer Brown says Dean Hargis told him that he, Dean Hargis, and Massey stole the Denman car on January 12, 1936. The defendant is not charged with participating in this crime.

Questions 20 and 21 and answers thereto of exhibit 2 are as follows: "Q. Do you know who robbed the Farmers Co-Op Filling Station in February, 1935? A. Fred Stombaugh, Vick Hargis and Duard Stagemeyer, all told me that they did the job and that they got seventy some dollars out of the station. Q. What if any other crimes do you recall having taken part in in Holbrook? A. Vick Hargis and myself broke into Lentz Filling Station during the first part of December and got some cigarettes, chewing gum, spark plugs, gas tank lids and tire patching."

Exhibit 4 purports to be a confession of the defendant, and signed by him, and is the document the execution of

which he claims was wholly involuntary on his part. It details particulars as to the crime charged in the information filed herein, of defendant's participation therein, and, as a separate paragraph thereof, the following appears:

"In January, 1936, Bill Brown, Vick Hargis and myself broke into the C. B. & Q. depot, the Perry Lumber Company office, the Ranking Elevator, and the Conoco Filling Station, all in Holbrook, Furnas county, Nebraska. I got a quart of oil out of the Conoco Filling Station."

Thus, it appears that in Brown's confession only question 20 and the answer thereto constitute the part that directly relates to the charge upon which defendant was convicted. The other questions and answers are separate and distinct, unconnected with, and in no manner relate to, the crime charged in the information filed in this case. The same observation is true with reference to the separate paragraph in defendant's own "confession," quoted above. But these matters do not pertain to the offense here being presented, and their admission in evidence, even though through the instrumentality of confession, is a violation of the principles announced in *Commonwealth v. Campbell,* 155 Mass. 537, 30 N. E. 72.

It is well said that where the evidence of the other crime relates to another and entirely different transaction, and in no way tends to prove the fact in issue, it is not admissible, even though it tends to prove that the defendant was bad enough to commit a robbery. *People v. Jones,* 31 Cal. 565. In this case the facts were such that the questions of particular intent or motive were not presented by the evidence. We have nothing comparable to the situations presented in *Clark v. State,* 102 Neb. 728, 169 N. W. 271, *Rice v. State,* 120 Neb. 641, 234 N. W. 566, *Knights v. State,* 58 Neb. 225, 78 N. W. 508, or *Foreman v. State,* 126 Neb. 619, 253 N. W. 898, which are cited by the attorneys for the state. In the instant case the "other crimes" occurred almost a year subsequent to the one here charged, and no connection whatever is shown.

"It is a general rule that, on the trial of one accused of

crime, proof of distinct and independent offenses, even of a similar nature, is inadmissible. To this rule there are exceptions; but, in order to make evidence of other independent offenses admissible, it must appear that the evidence offered falls within one of the recognized exceptions." *Abbott v. State,* 113 Neb. 524, 206 N. W. 153. See, also, *Fricke v. State,* 112 Neb. 767, 201 N. W. 667; *Scott v. State,* 121 Neb. 232, 236 N. W. 608; *Morgan v. State,* 56 Neb. 696, 77 N. W. 64; *Davis v. State,* 54 Neb. 177, 74 N. W. 599; *Smith v. State,* 17 Neb. 358, 22 N. W. 780; *Cowan v. State,* 22 Neb. 519, 35 N. W. 405; *Berghoff v. State,* 25 Neb. 213, 41 N. W. 136.

It is clear that the evidence as to additional independent offenses introduced in this case is not within any recognized exception. The fact that this evidence in the instant case is presented in the form of "confessions" does not alter the rule.

"The general rule is, that a statement in the nature of an admission or confession, in order to be admissible, must relate to the offense in question. While the fact that such statement may include another offense as well as that charged does not prevent the confession being received and going to the jury with proper instructions when there can be no separation of the relevant from the irrelevant parts, when the relevant parts can be separated from the irrelevant this must be done and that part, only, of the confession admitted which is material to the issues on trial." *People v. Spencer,* 264 Ill. 124, 106 N. E. 219. See, also, *Commonwealth v. Wilson,* 186 Pa. St. 1, 40 Atl. 283; 1 Greenleaf, Evidence (16th ed.) 351, sec. 218; 2 Wharton, Criminal Evidence (10th ed.) 1416, sec. 688; 1 Elliott, Evidence, 420, sec. 292; 3 Encyclopedia of Evidence, 324.

This rule precludes the reception in evidence, even though proper foundation for admission of the confessions be established by the state, of the separate paragraph of defendant's confession hereinbefore quoted, and also all of the confession purporting to be signed by William E. Brown, save and except the twentieth question and answer thereto.

For the reasons herein set forth, the district court erred. Therefore, the judgment and sentence of that court is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

KANSAS CITY LIFE INSURANCE COMPANY, APPELLEE, V. CHARLES NEVERVE ET AL., APPELLEES: COSMOPOLITAN OLD LINE LIFE INSURANCE COMPANY, APPELLANT.
274 N. W. 390

FILED JUNE 18, 1937. No. 29914.

1. **Principal and Agent.** "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal." *Harrison Nat. Bank v. Austin,* 65 Neb. 632, 91 N. W. 540.
2. **Estoppel.** Where one of two parties to a transaction must suffer loss through the misconduct of a third person, the burden will be allowed to fall where equity and justice require.
3. **Mortgages.** Money paid to a loan broker to purchase notes secured by a first mortgage where subsisting liens must be paid is not such an unequivocal payment of a first mortgage as will discharge the secured debt.

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

Robert G. Simmons, for appellant.

Kennedy, Holland, De Lacy & Svoboda, E. H. Evans, Urban Simon, Cordeal, Colfer & Russell and *M. M. Maupin, contra.*

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

DAY, J.

This suit had its inception as one to foreclose a real

estate mortgage brought by the Kansas City Life Insurance Company against the Neverves, owners and mortgagors of the real estate. The Cowles-White Lumber Company brought a separate suit to foreclose a mechanic's lien on the same real estate, and numerous others filed cross-petitions seeking foreclosure of mechanics' liens. These suits were consolidated, and all parties tried their issues in one trial. In addition to these parties, the Cosmopolitan Old Line Life Insurance Company filed a cross-petition, the object of which was the foreclosure of a mortgage on the same land and to have it adjudicated a lien prior to all others. Briefly, the court found that the Kansas City Life Insurance Company was entitled to a foreclosure of its mortgage as a first lien; that the various mechanics' liens were next in priority; and that the mortgage of the Cosmopolitan Old Line Life Insurance Company was null and void. The appeal to this court is prosecuted by the Cosmopolitan Old Line Life Insurance Company. The issue presented by this appeal is the determination of the rights of the Kansas City company under its mortgage and the Cosmopolitan company under its two mortgages on the same property. Neither the mechanics' lienors nor the owners of the fee are complaining here about the judgment of the trial court.

The factual situation is not as complicated as it would appear. The two brothers, Charles and Grotsie Neverve, own a tract of land consisting of about 960 acres as tenants in common which they mortgaged to the Federal Trust Company on the 26th of February, 1929, to secure their notes of the principal sum of $14,000. The Federal Trust Company sold these notes and assigned the security to the Kansas City company on May 25, 1929, and the assignment of the mortgage was recorded soon thereafter. It is not questioned that the Kansas City company secured a first lien on the land as security.

The defendants Neverve were unable to make the payments of principal, interest, and taxes promptly as stipulated in the contract. They had not paid the taxes for 1929

and subsequent years, and these were paid by the Kansas City company. The Neverves made payments to the company upon occasion. There are, however, two substantial credits on the account, one in 1931, and the other in 1933, as the result of the payment by a fire insurance company of losses resulting from the burning of two of the houses upon the land. The fire insurance was payable to the mortgagee.

But it fairly appears from the record that the Kansas City company was not satisfied with this mortgage as an investment and that as early as April 3, 1931, complained about its delinquency and, on September 16 of the same year, suggested that the Neverves refinance their loan and pay their existing mortgage. There is a series of letters between the Kansas City company and the Federal Trust Company concerning this loan, with the former continually complaining about the manner in which the payments were made. The Federal Trust Company continued to service this loan until April 24, 1933.

The Federal Trust Company, as suggested by the Kansas City company, attempted to refinance this loan as early as August, 1932. From this effort to refinance arises the dispute in this case. The Neverves wished to divide this land among themselves and executed deeds to each other to accomplish this purpose. They each made application to the Federal Trust Company for a loan on their respective tracts, the total of which they hoped would be sufficient to pay all liens against the land. They executed notes and mortgages for this amount to the Federal Trust Company who in turn sold the notes and the mortgage security to the Cosmopolitan company. The Cosmopolitan company paid the Federal Trust Company for the notes and mortgage. The Cosmopolitan company was to have a first mortgage on the land, and it required the payment of all existing liens. At the time of the transaction it was thought that the sum was sufficient to pay the mortgage and all the mechanics' liens against the land. The abstract had not been extended and delivered to the Cosmopolitan company

showing that it held a first lien. In fact, the new deal was not considered completed. The Federal Trust Company realized this and placed the money in a trust fund account in the bank and proceeded to complete the deal. The transaction was never completed, and the Federal Trust Company was never able to furnish the Cosmopolitan company with an abstract of title and a first lien upon the property. It became apparent that the amount of the new loan was insufficient to pay the old mortgage and the mechanics' liens against the property. It therefore became the duty of the Federal Trust Company under its contractual relation with the Cosmopolitan company to return the money paid for the purchase of the new security. Not only did the contractual relation impose this duty fairly interpreted, but the parties by a long course of action so interpreted it. During a considerable period of time, according to an officer of the Federal Trust Company, numerous transactions had been handled in exactly this manner. The Cosmopolitan company expected it in this case. The Federal Trust Company deposited the money received from the Cosmopolitan company in a special account. It was not to be remitted to the Kansas City company until such a time as the property had been cleared of liens and the new mortgage became a first lien in favor of the Cosmopolitan company. It never became such a lien. It could not become such a lien, because it was expected that the money realized from the sale of such security would pay and discharge all other liens. When the amount of all the liens was ascertained, it was found to exceed the amount produced by the new loan. Under the contract as construed by the parties, the Cosmopolitan company could not acquire a first lien and was entitled to a refund of its money by the Federal Trust Company.

In the meantime, the Federal Trust Company became financially involved and used the money for another purpose than the payment of the first mortgage of the Kansas City company and other liens. The cause of this controversy was due to the fact that the Federal Trust Company

at the time it was adjudged insolvent did not have this money in its accounts.

It is the contention of the Cosmopolitan Old Line Life Insurance Company that when the Neverves gave a new mortgage to the Federal Trust Company, which was sold to it and the purchase price paid, it constituted payment to the Kansas City Life Insurance Company. This argument is grounded upon the proposition that the Federal Trust Company was the agent of the Kansas City company. The contract and the course of dealing between the two are said to evidence the nature of the relation between the two corporations.

The mortgage of the Kansas City company was originally given to the Federal Trust Company by the Neverves. It was then sold to the insurance company. The mortgage and note contained provisions that "both principal and interest payable at the office of Federal Trust Company in Lincoln, Nebr." This arrangement was never changed or varied until April 24, 1933, some time after the occurrences which are material to this suit. The Federal Trust Company serviced the loan and acted as agent for the Kansas City company. The appellant insists that we conclude that the circumstances related was a payment of the money due on the notes and that the mortgage became void which the Kansas City company seeks to foreclose. Numerous cases are cited in support of the old, well-established rule in this jurisdiction, announced in *Harrison Nat. Bank v. Austin,* 65 Neb. 632, 91 N. W. 540: "Where one has placed his agent for the investment of money in notes and mortgages in such a situation that persons of ordinary prudence, acquainted with business usages, would be justified in regarding such agent as having full authority with reference to the extension, collection, etc., of such notes and mortgages, payment to such agent will be deemed payment to the principal."

But the rule is scarcely applicable to this case, for the reason that the Cosmopolitan company did not intend to pay this mortgage except for the purpose of making its

mortgage a first lien. In the application for the new loan which was sold to the Cosmopolitan, the Neverves designated the Federal Trust Company as their agent for the purpose of refinancing. The Federal Trust Company was, it seems, in many respects the agent of all parties involved. There is only one possible distinction in the facts between the Cosmopolitan company and the Kansas City company. The former did not part with coupon notes until they were paid, while the latter sometimes sent the notes to the Federal Trust Company for collection. But they had not sent the principal coupon notes in the instant case to them for collection.

There is another well-established rule applicable to the facts presented here that, where one of two parties to a transaction must suffer loss through the misconduct of a third person, the burden will be allowed to fall where equity and justice require. *Omaha Elevator Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 566, 178 N. W. 211; *Knopf v. Perkins*, 127 Neb. 366, 255 N. W. 30.

Either the Cosmopolitan company or the Kansas City company must suffer as a result of the misconduct of the Federal Trust Company which was in reality a loan broker in this case. The Cosmopolitan Old Line Life Insurance Company sought to buy a loan from it just as the Kansas City company had a few years before. The service to be rendered was almost identical. The condition of the purchase was that the abstract be extended to date and show the mortgage as a first lien. It was not an unequivocal payment of the old mortgage. The money was entrusted to the Federal Trust Company on condition that it could secure a first mortgage. It never could in this case. Money paid to a loan broker to purchase notes secured by a first mortgage where subsisting liens must be paid is not such an unequivocal payment of a first mortgage as will discharge the secured debt.

The Cosmopolitan Old Line Life Insurance Company did not rely upon the Federal Trust Company as agent for the Kansas City Life Insurance Company but depended upon

the Federal Trust Company to perform the necessary acts to clear the title so that its mortgage would be a first lien. During that period it was not intended that the Kansas City company would be paid the amount due on its mortgage. The purchase of the mortgage by the Cosmopolitan company was a conditional one dependent upon a condition that was never realized. The Federal Trust Company was as much the agent of the Cosmopolitan company as it was of the Kansas City company. It is beside the issue to quibble over terms; justice and equity require that the Kansas City Life Insurance Company should not lose its security because a conditional refinancing plan did not materialize, and thus benefit the Cosmopolitan Old Line Life Insurance Company who made possible the loss by its action.

AFFIRMED.

PLATTSMOUTH STATE BANK, APPELLEE, V. JOHN BAUER & COMPANY ET AL., APPELLANTS: LOUISA BAUER, INTERVENER, APPELLANT.

274 N. W. 204

FILED JUNE 18, 1937. No. 30038.

1. **Husband and Wife.** Under the provisions of sections 42-202 and 42-203, Comp. St. 1929, a married woman may enter into a business partnership with another as a part of her own trade or business.
2. ———. If a married woman enters into a partnership, she becomes liable as a partner and is bound by its debts, whether contracted by herself or another member of the firm.
3. **Corporations.** Unless prohibited by statute, a corporation may, by a by-law, create or reserve a lien on its stock as against a stockholder for an indebtedness due from such stockholder, but such lien will be effective only as to such persons as have knowledge of the by-law, such as directors, stockholders and transferees having or being chargeable with notice.
4. ———. A purchaser of stock without actual notice of a by-law creating or reserving a lien upon it, and to whom constructive notice cannot be imputed, is not bound by its provisions.

APPEAL from the district court for Cass county: DANIEL W. LIVINGSTON, JUDGE. *Affirmed in part and reversed in part, with directions.*

Hotz & Hotz, for appellants.

A. L. Tidd, contra.

Heard before ROSE, DAY, PAINE and CARTER, JJ., and HASTINGS, MUNDAY and RINE, District Judges.

CARTER, J.

This is an action on two promissory notes signed by John Bauer & Company, a partnership consisting of John Bauer and Emma Bauer Egenberger. The defendant Emma Bauer Egenberger pleaded that she was a married woman and that as such her separate estate was not liable for the debts of the partnership. The trial court found against Emma Bauer Egenberger and entered judgment against her for the full amount of the notes. From the overruling of her motion for a new trial, Emma Bauer Egenberger appeals.

The record further discloses that Louisa Bauer, mother of Emma Bauer Egenberger, intervened in the action and claimed ownership of eight shares of stock in the plaintiff bank by purchase from Emma Bauer Egenberger. The bank claimed a prior lien on the stock by virtue of a by-law of the banking corporation giving the bank a lien on the stock of any stockholder who was indebted to the bank. The trial court found against Louisa Bauer and adjudged the bank to be entitled to a lien on the stock for the amount owing by Emma Bauer Egenberger. From the overruling of her motion for a new trial, Louisa Bauer appeals.

The evidence shows that from 1902 until 1919 John Bauer, defendant herein, and his father, John Bauer, Sr., had engaged in a partnership business under the name of John Bauer & Son. It further shows that in 1919 John Bauer, Sr., died and that Emma Bauer Egenberger, his daughter, succeeded to his interest in the business, the partnership continuing under the name of John Bauer & Company. At the date of the death of John Bauer, Sr., the

partnership was indebted to plaintiff bank in the amount of $5,000 or $6,000. On December 29, 1930, the indebtedness was renewed by giving the notes sued upon, signed "John Bauer & Co. by John Bauer. (Signed) John Bauer." Emma Bauer Egenberger admits that she was a member of the partnership on the date the notes in suit were signed and continued as such partner until she withdrew from the partnership on November 1, 1932. It is the contention of Emma Bauer Egenberger that she did not sign the notes or authorize her partner to bind her separate estate for their payment. The evidence clearly shows that after November 1, 1932, there was nothing left of the partnership except debts. The question to be determined is whether, under these circumstances, Emma Bauer Egenberger is liable on the notes.

The statutes applicable to this case are: "A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." Comp. St. 1929, sec. 42-202. "Any married woman may carry on trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used and invested by her in her own name." Comp. St. 1929, sec. 42-203.

It is apparent from the foregoing statutory provisions that a married woman may carry on a business in her own name. In so doing she may appoint agents who may make contracts for her and in her name. We fail to see any reason why these statutes should be interpreted as restrictive of her rights to enter a firm as a partner and thus bind her separate property for such firm's undertakings, as partners in a firm are the agents of each other, in the transaction of partnership affairs and it is conferring no more power upon the partner to bind the sole and separate

property of a married woman than such married woman would have the right to contract for through any other agency. In *Vail v. Winterstein,* 94 Mich. 230, 53 N. W. 932, the court said: "We think the great weight of authority under statutes quite similar to our own is that married women, while incompetent to enter into partnership engagements with their husbands, are free to enter into partnership relations with third parties, and bind their separate properties as fully and to the same extent as they might do through any other agency where they carry on business upon their sole and separate accounts." See, also, *Hoaglin v. Henderson & Co.,* 119 Ia. 720, 94 N. W. 247.

The reason for the rule is well stated by a text-writer as follows: "If the legislature has conferred upon the married woman the full, complete, and free power to carry on a separate trade or business, that seems to carry with it, by necessary implication of law, the right to conduct such business upon the same principles, the same system, in the same manner, to the same extent, and at her own option, as fully and freely as any other person, and to say that she cannot form a partnership, would be to deny her a valuable right in business relations, which is allowed to other persons. It will not do to say, that she is a sole trader with all the power in relation to her trade and business, that she would have if a *feme sole,* unless she has the liberty to exercise an unrestricted option as to the mode of carrying on such business, provided there be no fraud perpetrated on others. It has been insisted by some that if she forms a partnership she becomes, by that relation, liable as a partner, and is bound by the debts, either contracted by herself or another member of the firm, and this would often subject her property to the debts and liabilities of another person. But I can see no good reason consistent with the full power as a sale (sole) trader, why she should not enter into a partnership in business, if she thinks her separate interests would be promoted thereby." Harris, Contracts Married Women, 420, sec. 511. See, also, 1 Bates, Partnership, sec. 136.

We necessarily conclude that, when Emma Bauer Egenberger became a member of the partnership, she was engaged in her own trade and business. It would naturally follow that the obligations of the partnership upon which she was personally liable were made with reference to her separate trade and business. The trial court therefore did not err in entering judgment against her on the notes sued upon.

The record shows that Louisa Bauer filed a petition in intervention claiming that she was the owner of eight shares of stock in the Plattsmouth State Bank by purchase from her daughter, Emma Bauer Egenberger, upon which the bank was given a lien by the trial court to secure the payment of its judgment against Emma Bauer Egenberger. It appears that on October 2, 1922, Emma Bauer Egenberger purchased the stock from John F. Gorder, another stockholder, and took an assignment in her own name. It further appears that in 1931 Emma Bauer Egenberger owed the bank $750 on a note upon which the stock was pledged as collateral security. Being unable to pay the note, she sold the stock to Louisa Bauer for $780 which she used to pay off the note she owed the bank. The officers of the bank knew that the note was paid with funds obtained from Louisa Bauer. Thereafter the stock was presented at the bank for transfer to Louisa Bauer upon the books of the corporation. The officers of the bank refused to make the transfer for the reason that the by-laws of the bank prevented a transfer of stock of the bank by a stockholder who was indebted to the bank and have since claimed a lien upon the stock for the payment of the partnership indebtedness owing by Emma Bauer Egenberger.

The part of the by-law in question that is material to this case is as follows: "This bank shall have a lien on the stock of each and every stockholder who is indebted to this bank for said indebtedness and for any and all indebtedness hereafter incurred and that no certificate of capital stock of this bank shall be transferable on the books of this

bank until the indebtedness of the holder of such certificate of stock has been fully satisfied, and paid."

There is no provision of statute in this state creating a lien upon this stock. Neither do the articles of incorporation of the Plattsmouth State Bank provide for one. The stock certificate itself gives no notice of any such lien. The claim of the bank is necessarily based upon the provisions of the by-law alone.

An authoritative text-writer states the applicable rule as follows: "In the absence of statutory prohibition a lien may be created or reserved by by-law but binds only such persons as have actual notice or are charged with notice of the by-laws, such as stockholders, directors and transferees having or being chargeable with notice; transferees without actual notice and to whom constructive notice cannot be imputed and who take the legal title to the shares are not bound." 8 Fletcher, Cyclopedia Corporations, sec. 4207.

In *Braden v. Sullivan County Bank,* 251 S. W. (Mo. App.) 754, the court in a like case said:

"It is clear that the only ground upon which defendant claims a lien upon the stock is by virtue of the by-law passed long before Muncy became obligated in any way to the bank. Nothing was ever thereafter done to create the lien claimed. * * *

"So that this prior by-law cannot *ipso facto* create a lien upon said stock which is good against the world. Under this statute, the bank had no right to make a loan to Muncy, or to accept him as security on the coal company's notes, on the faith or strength of the by-law. And, without regard to what it might or might not have subsequently done under the by-law 'to prevent loss upon a debt previously contracted in good faith' (on which we make no intimation), it is certain that it did nothing to create a lien nor even to assert one until after whatever rights plaintiff obtained had attached. Indeed, it does not appear that in the bank's suit on its notes any attempt was therein made to assert such lien or to subject the notes to it. Unless authorized so to do by law, a corporation cannot in its by-

laws impose restrictions upon the transfer of its stock, and as there is no law conferring such power on banks, the by-law relied upon is powerless to prevent a transfer. * * * Whatever force or validity the by-law may have had as a contractual obligation solely as between the bank and Muncy where no rights of a third party are involved, it certainly could have no effect upon the rights of a transferee of said stock who obtained same without notice thereof."

In the case at bar, the record does not show that Louisa Bauer had any actual knowledge of this by-law. Neither is it such a case that constructive notice may be imputed. In the instant case, Louisa Bauer not only parted with $780 to obtain the stock, but the bank received the money in payment of the note for which the stock was then pledged as collateral. It would be a harsh rule that would permit the bank to accept the purchase money advanced by a third party to extinguish the debt for which the stock was pledged and then permit the bank to retain the stock as security on some other indebtedness and leave the innocent third party empty-handed. It is not contended by the bank that there was any fraud perpetrated or that there was not a sufficient consideration to sustain the transfer. The by-law in question is nothing more than a contractual relation between the corporation and its stockholders and totally ineffective for any purpose upon the rights of a third person who purchases without notice.

We conclude that the trial court erred in granting the bank a lien on this stock, and that part of the judgment is reversed and the cause is remanded, with instructions to enter a judgment in accordance with the prayer of intervener's petition in intervention.

AFFIRMED IN PART AND REVERSED IN PART.

UNITED STATES NATIONAL BANK OF OMAHA, APPELLANT, V. SETH H. SIMONDS, ADMINISTRATOR, APPELLEE.

274 N. W. 187

FILED JUNE 18, 1937. No. 30018.

1. **Homestead.** Where a husband and wife reside upon a homestead selected from the separate property of the husband, and the wife dies, and the husband continues to reside thereon until his death, the homestead character of the land continues in the surviving husband although he may have no children or dependents residing with him.
2. ———. Where a husband is the fee owner of land from which a homestead has been selected, and his wife predeceases him, and he continues to reside thereon to the time of his death, it vests on his death in his heirs and devisees, and is not subject to the payment of any debt or liability contracted by or existing against him previous to or at the time of his death, except such as exists or had been created under the provisions of the homestead law.

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

Wills & Wills and *Morsman & Maxwell,* for appellant.

A. B. Wallace, contra.

Heard before ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and HASTINGS and RINE, District Judges.

HASTINGS, District Judge.

Vernon H. Simonds died seised in fee simple of 320 acres of land situated in Boyd county, Nebraska. Seth H. Simonds, as administrator with will annexed of his estate, filed his petition in the district court for Boyd county for a license to sell so much of said 320 acres of land as was not the homestead of the deceased to pay the debts of said estate. The United States National Bank of Omaha, appellant herein, as a creditor of said estate, filed objections to the setting off of any part of said land as a homestead.

The land involved is designated in said cause as Tracts Nos. 1 and 2. License to sell Tract No. 2 was granted. Tract No. 1 was found to be the homestead of the decedent at the time of his death, and of less value than $2,000, and

not subject to be sold to pay his debts. License to sell was denied. Appeal is prosecuted from said finding and judgment by the United States National Bank.

The particular question presented for review on this appeal is whether Tract No. 1, consisting of 160 acres, is exempt from sale as homestead property.

The record discloses that about the year 1895 Vernon H. Simonds, a married man with four children, purchased Tract No. 1. From that time on he and his wife resided thereon as their homestead until the death of Mrs. Simonds about September 17, 1927. At the time of her death Mrs. Simonds left surviving her husband and her sons, Seth H., Merle C., Harry R., and Glen W. Simonds, issue of her marriage with decedent. Before the death of Mrs. Simonds all of the children had left the family home and established homes of their own, except Harry. The decedent never remarried, but continued to reside upon the premises until his death, and during said time Harry and his wife resided with him. After the death of his wife decedent had no dependents living with him. The evidence sustains the finding of the trial judge that the land claimed as a homestead was of less value than $2,000. The claim allowed in favor of appellant arose on indebtedness incurred by deceased after the death of his wife.

It is the contention of counsel for appellant that the deceased, not being the head of a family, as defined by section 40-115, Comp. St. 1929, had no homestead interest in the land involved at the time he became indebted to appellant, and that it descended to his heirs and devisees subject to his debts incurred after the death of his wife. We have held:

"A debtor who has acquired a homestead does not lose his right to the exemption, where he continues to occupy the property as a home, though, by reason of death and the removal of his family, he has no one living with him." *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088. See, also, *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555; *Galligher v. Smiley*, 28 Neb. 189, 44 N. W. 187.

Again, in *Dougherty v. White*, 112 Neb. 675, 200 N. W. 884, it is held:

"The homestead character of the family home, title to which is in the husband, is not divested because the wife obtains a divorce and, with the children, removes from the home, while the divorced husband alone continues to occupy the property as a homestead."

Under the rule announced in the foregoing cases, where the husband and wife reside upon a homestead selected from the separate property of the husband, and the wife dies, and the husband continues to reside thereon until his death, the homestead character of the land continues in the surviving husband, although he may have no children or other dependents residing with him.

It is provided by section 40-117, Comp. St. 1929:

"If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

In construing that section in *Lewis v. McAdams*, 130 Neb. 62, 263 N. W. 480, we said:

"It was clearly the intention of the legislature in enacting the homestead law to protect the home of the survivor during his or her lifetime. The homestead interest of the surviving spouse in the homestead of the deceased title-owning spouse is a life estate only. Under the statute, the remainder descends by will or by inheritance free from the debts of the deceased title-owning spouse and the debts of the surviving spouse that were contracted prior to the death of the title-owning spouse." See, also, *First Nat. Bank of Greenwood v. Reece*, 64 Neb. 292, 89 N. W. 804;

Durland v. Seiler, 27 Neb. 33, 42 N. W. 741; *Cooley v. Jansen*, 54 Neb. 33, 74 N. W. 391.

It is argued by counsel that the homestead in this case would have descended to his heirs freed from the payment of any debt or liability contracted or existing at the time of the wife's death if she survived him, but since she predeceased him, and he not being the head of a family thereafter, that it became liable for the payment of debts subsequently incurred by the husband, and on his death descended to his heirs and devisees charged with such debts.

In *Dougherty v. White, supra*, in construing that statute we held:

"If a divorced husband dies possessed of a homestead, which was selected from his separate property, it vests on his death in his heirs or devisees, and is not subject to the payment of any debt or liability contracted by or existing against him previous to or at the time of his death, except such as exists or has been created under the provisions of the homestead law."

In the opinion in that case Judge Good said:

"It would be a strange rule that where the husband died, leaving a wife surviving, she could take the property for her lifetime, and then his heirs would take it, absolutely free from debt, and because he left no spouse surviving, they would be cut off from any right to the homestead. Such is not the intention of the statute."

We hold that where the homestead has been selected from the separate property of the husband, and his wife predeceases him, and he continues to reside on the homestead to the time of his death, it vests on his death in his heirs and devisees, and is not subject to the payment of any debt or liability contracted by or existing against him previous to or at the time of his death, except such as exists or has been created under the provisions of the homestead law.

Counsel for appellant urges that *Palmer v. Sawyer, supra*, and *Dougherty v. White, supra*, should be overruled in so far as the rule announced in each of said decisions is contrary to his contention herein. This we are not disposed to

do, as the rule announced in those cases is in accord with the liberal construction this court has always given the homestead law.

Those cases are not in conflict with the decision in the case of *Lewis v. McAdams, supra,* as claimed by counsel. The surviving wife in that case was not the fee owner of the land selected as a homestead, and only took a life estate in the remainder devised to her by his will free of his or her indebtedness existing at the time. Neither is said decision in conflict with the conclusion reached in this case.

It follows from what has been said that the judgment appealed from is right and is

AFFIRMED.

JAY J. SHAMBAUGH ET AL., APPELLEES, V. BUFFALO COUNTY ET AL., APPELLANTS.
274 N. W. 207

FILED JUNE 22, 1937. No. 30004.

Counties and County Officers: DETERMINATION OF POPULATION: COMPENSATION OF OFFICERS. A board of county supervisors, in determining the population of the county as a basis for statutory salaries, is a quasi judicial body with limited jurisdiction and its record must affirmatively show the jurisdictional facts essential to the exercise of its power, including notice to county officers whose salaries may be thus reduced and an opportunity for them to be heard on the issue of fact, and a decision purporting reduction of such salaries without these requisites is void as to them.

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

H. L. Blackledge and *J. C. Tye,* for appellants.

N. P. McDonald, contra.

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

ROSE, J.

In this proceeding the following resolution adopted by the board of supervisors, or county board, of Buffalo county July 15, 1931, is challenged as void by county officers Jay J. Shambaugh, treasurer, William F. Flake, sheriff, Lydia A. Finke, register of deeds, Francis W. Lowry, county clerk, and Guy N. Henninger, clerk of the district court, plaintiffs:

"The county board having considered the question of the population and number of inhabitants of Buffalo county, and considering the last government census, and other evidence, finds that the inhabitants and population is under 25,000, and that the same is 24,318 as shown by the last government census; therefore,

"Be it resolved by the chairman and county board of supervisors of Buffalo county, Nebraska, that said board finds the present population of said county to be 24,318 and that county officials and their deputies be paid from this date as provided by law on above basis of population of said county."

Plaintiffs assail the resolution as void on the grounds that it was adopted at a secret meeting without notice to them or an opportunity to be heard; that its purport is to reduce their salaries during their term of office in violation of the state Constitution (art. III, sec. 19); that its effect is to deprive them of property without due process of law, contrary to the state and federal Constitutions.

The plaintiffs named were elected for a four-year term at the general election in November, 1930, and were inducted into office in January, 1931. The population had been previously estimated by the county board to be in excess of 25,000, thus determining the statutory salaries which plaintiffs first received to be as follows: Treasurer, $3,000; sheriff, $2,000; register of deeds, $2,000; county clerk, $2,800; clerk of the district court, $3,000. The effect of the resolution adopted July 15, 1931, determining the population to be 24,318, if valid, was to reduce the salaries during the term of office for which plaintiffs were elected, as fol-

lows: Treasurer, $2,000; sheriff, $1,800; register of deeds, $1,500; county clerk, $2,000; clerk of the district court, $2,500.

The resolution was reviewed by the district court and held void for lack of the county board's jurisdiction to adopt it. Buffalo county and its supervisors, defendants, appealed to the supreme court, contending that the county supervisors had jurisdiction to ascertain and determine the population of the county and that plaintiffs are bound by the decision, citing *Buffalo County v. Bowker*, 111 Neb. 762, 197 N. W. 620, wherein the law is stated as follows:

"In the absence of a statutory provision for determining the population of a county, a board of county commissioners, in order to enable it to classify the officers governed by section 2369, Comp. St. 1922, and thus arrive at the amount of their compensation, may ascertain and determine by any competent means the number of inhabitants of the county. Where such determination has been so made by the county board, *held*, that it is binding upon parties affected thereby until set aside or vacated by some forum of competent jurisdiction in a proceeding brought for that purpose."

Plaintiffs also rely on the case cited, in connection with the resolution itself, to show want of notice essential to the exercise of jurisdiction. The *Bowker* case is authority for the following propositions: The county board in determining the number of inhabitants in the county acts quasi judicially. What was determinable was a question of fact upon competent evidence. A census enumeration was competent, but not conclusive, and any other competent evidence was admissible. The decision was open to the direct attack made in the present instance. *Buffalo County v. Bowker*, 111 Neb. 762, 197 N. W. 620.

In a public tribunal exercising power to estimate population for the purpose of determining statutory salaries, the law requires notice to officers vitally and pecuniarily affected by the decision. The law did not create a secret forum to determine the number of inhabitants as a basis of statutory compensation for public officers without notice

to them or an opportunity to be heard. For anything appearing in the record, plaintiffs may have been ready, able and willing to prove conclusively that numbers sufficient to increase the population far beyond 25,000 became residents of Buffalo county after the census was taken and before the resolution was adopted, thus showing the fact to be contrary to the recital therein. The county board is not a court of general jurisdiction. It is an inferior tribunal with limited authority and its record must affirmatively disclose the jurisdictional facts essential to the exercise of the power that it assumes. The law on this subject has been repeatedly announced as shown by the following rulings:

"The judgments, in this instance, are those of an inferior court without the legal presumptions in its favor, and every fact essential to jurisdiction, ought to appear affirmatively of record." *Howell v. Gilt Edge Mfg. Co.*, 32 Neb. 627, 49 N. W. 704.

"The doctrine of presumptions in favor of the regularity of the proceedings of courts of general jurisdiction does not apply to courts of inferior and limited jurisdiction, but as to such courts, the facts necessary to give jurisdiction must fairly appear from the record." *Muller v. Plue,* 45 Neb. 701, 64 N. W. 232.

"The records of inferior courts must affirmatively show that such courts have acted within the scope of their authority.

"Jurisdictional facts will not be presumed in order to sustain the judgments of inferior courts." *Kuker v. Beindorff,* 63 Neb. 91, 88 N. W. 190.

These rulings were approved in *Gloor v. Torczon,* 108 Neb. 402, 187 N. W. 887.

The county board acted judicially in an attempt to ascertain a fact which vitally affected the rights and interests of plaintiffs. The resolution is the entire public record of the action of the county board. It does not disclose personal notice of any kind to any one or published notice in any form of a private or public meeting or that plaintiffs

were heard or had an opportunity to be heard. It does not indicate that any officer whose compensation was at stake voluntarily appeared. The names of supervisors present do not appear.

The secret action of the county board, if valid, necessarily imposed financial losses on the county officers named as plaintiffs. They were therefore unlawfully deprived of notice of a hearing essential to the jurisdiction of the county board of supervisors. It follows that the resolution is void as to them and that the district court properly so held. Having reached this conclusion, the discussion of other questions argued is unnecessary.

AFFIRMED.

EVERETTE L. CHRISTENSEN ET AL., APPELLANTS, V. ADOLPHINE LUEHRS ET AL., APPELLEES.
273 N. W. 839

FILED JUNE 22, 1937. No. 29999.

1. **Easements.** Where owner of a lot divides it into two equal parts and erects a residence on each thereof, each residence fronting on the adjacent street, leaving a 14-foot space between the houses, and so arranged that such space may be used as a common driveway for delivery of fuel and other merchandise to the rear parts of such residences; and causes a bridge-like structure to be constructed so as to permit vehicles to pass over the street curb into the 14-foot space, and later causes the curb in front of such space to be cut, to better facilitate driving of vehicles from the street into such space, and such space is actually used for a driveway; and then owner conveys one house and half-lot and acquiesces in the construction by his grantee of a garage on the conveyed part of the lot, so that access to it can be had only by use of driveway over the space between the two houses, there is an implied grant or dedication of an easement for a driveway over such space.
2. ———. Where owner of two adjoining residence properties, erected on a lot, sells one of them, the purchaser takes the part so sold with all the benefits and burdens which appear, at the time of the sale, to belong to it as between it and the land which the vendor retains.

3. ———: ESTOPPEL. 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 to such way, and such estoppel extends to their grantees, who take with notice of the driveway, although it was not expressly reserved.
4. ———. Where the owner of a lot, divided into two parts, each of which is quasi dominant and quasi servient to the other, aliens the two portions to different persons, the respective alienees will take the portions granted to them burdened or benefited, as the case may be, by those rights in such easement which the previous owner had the right to and did attach to them.
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 and convenient for such driveway.

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

Fred H. Richards, Jr., for appellants.

Courtright, Sidner, Lee & Gunderson, contra.

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

GOOD, J.

Plaintiffs brought this action in equity to quiet title to an alleged easement in a joint driveway located partly on the realty of defendants, and in part on realty of plaintiffs; to require defendants to remove from such driveway obstructions placed thereon, and to enjoin them from further obstructing the driveway or interfering with plaintiffs' use thereof. Defendants denied the existence of any easement or that there was a joint driveway. Trial to the court resulted in a decree for plaintiffs, but plaintiffs were not awarded all of the strip over which they claim an easement. Plaintiffs have appealed, and defendants have filed a cross-appeal.

Lot 6, in block 90, Barnard's Addition to the city of Fremont, is approximately 70 feet in width from north to

south and abuts on the east side of Clarkson street in the city of Fremont. In 1913 Charles E. West became the owner of lot 6. Some time thereafter he erected two houses on said lot of like dimensions. One of these houses was located four feet from the north line of lot 6, and the other four feet from the south line thereof. There was a space of approximately 14 feet in width between the two houses. Both houses were serviced by one grease trap, which was constructed on the 14-foot strip. The evidence tends to show that the 14-foot space, or a part thereof, was used for a driveway, for the delivery to the two properties of fuel and other articles. Clarkson street was paved after the construction of the houses, but there was no cut in the curb for an entrance to this driveway. West, who owned both properties, procured or constructed a movable bridge-like approach for the use of vehicles to pass over the curb into the 14-foot space between the buildings. Later, while Mr. West was still the owner of the properties, he caused an opening to be cut in the curb in front of the 14-foot space. There is evidence that he was asked why he did not cut the curb at the time it was put in, and that he answered he was not at home at the time or he would have had a cut left for the driveway.

In 1922 West sold the north half of lot 6 to one Lillie. Up to this time there had been no garage erected on either of the properties. In 1926 Mr. Lillie erected a garage in the rear of his residence and quite close to the south line of his half lot. Mr. West was present at the time and knew that the only way Mr. Lillie could gain access to his garage would be over the space between the two buildings. At this time one Patton was a tenant of West in the south property. There is evidence that she asked Mr. West to build a garage on the south property for her use, and requested that it be built on the north line of the south property, so that the Lillie garage and the garage she desired built could use one wall between them, which would be on the line between the two properties. Mr. West did not erect a garage on the south property. Later he de-

parted this life, and his executor sold and conveyed the south property to Mrs. Patton. The evidence tends to show that Mrs. Patton used this driveway in washing her automobile, and that the driveway was used in delivering fuel to her. Later, Mrs. Patton sold the south property to the defendants Luehrs, and Lillie sold the north property to the plaintiffs. The evidence tends to show that Mrs. Luehrs was aware that the 14-foot strip was used as a driveway. She knew this when she purchased the property. She knew the driveway had been used by the tenants and owners of the north property to gain access to the garage and for other purposes.

We think it fairly inferable from the evidence that when West constructed the two houses, leaving a 14-foot space between them, it was contemplated by him that the space should be used as a driveway for the convenience of both properties. This is made evident by the fact that the strip was so used as a driveway; that West, while he was still the owner of both properties, constructed a bridge-like approach over the curb for the use of vehicles, and that later on he caused a cut to be made in the curb in front of this space, showing unmistakably that he intended the 14-foot strip, or a part thereof, to be used as a driveway.

The record does not disclose that there was any formal dedication of a driveway over this 14-foot strip, or that there was any reservation made in any of the deeds or conveyances mentioned herein. However, we do not think that fact is controlling. The principle applicable to and which will control the decision in this case will be found in the following authorities.

"Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or advantage of a continuous and apparent nature, and sells the one in favor of which such continuous and apparent quasi easement exists, such easement being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication. The use is continued in the grantee by oper-

ation of law, whether the creation of the quasi easement was by the act of the owner himself or by a tenant acting under his authority." 19 C. J. 914. And in the same volume, at page 915, it is said: "If the owner of an estate, part of which is quasi dominant and part quasi servient, aliens the two portions to different persons, the respective alienees will take the portions granted to them burdened or benefited, as the case may be, by those rights in the nature of apparent and continuous easements which the previous owner had the right to attach to them." Some authorities hold, however, that an easement will not pass by implication except in cases of strict necessity, while others hold that an easement by implied grant can only arise in case of necessity. The weight of authority and better view sustain the rule that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made, and that it should not be absolutely necessary for the enjoyment of the estate granted. See 19 C. J. 919.

The applicable principle is stated in *Fremont, E. & M. V. R. Co. v. Gayton,* 67 Neb. 263, 93 N. W. 163, wherein it is held: "Where an owner of land by any artificial arrangements effects an advantage for one portion as against another, upon severance of the ownership the grantees of the two portions take them respectively charged with the easement and entitled to the benefit openly and visibly attaching at the time of the severance."

In *Znamanacek v. Jelinek,* 69 Neb. 110, 95 N. W. 28, this principle is announced:

"Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the tract which the vendor retains.

"Where the owner of two adjoining tracts of land constructs a dam of a permanent character across a stream on one tract, which causes the water to overflow a portion of

the other tract; upon a sale of such other tract to one having knowledge of the existence of such dam and its character, in the absence of evidence of a contrary intent, there arises an implied contract that the mutual benefits and servitudes, as regards such dam, shall remain *in statu quo*."

Among the cases from other courts recognizing the principle here involved are *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111; *Teachout v. Duffus*, 141 Ia. 466, 119 N. W. 983; *Oliver v. Wilhite*, 227 Mo. App. 538, 55 S. W. (2d) 491; *Forde v. Libby*, 22 Wyo. 464, 143 Pac. 1190; *Wright v. Barlow*, 169 Okla. 472, 37 Pac. (2d) 958. In the latter case it was held: "Where owners of adjoining lots orally agreed upon a private way between their lots and constructed their improvements with relation thereto, each was estopped from disputing the other's right to such way, and that estoppel extended to their grantees, who took with notice of the way, although it was not expressly reserved."

In the instant case, West constructed his properties with a view to the use of the intervening space between the buildings for a drive. It was so used. When he sold the north half to Lillie, Lillie had a right to and did assume an implied grant or dedication of the strip, or so much thereof as was reasonably necessary for a drive. With that end in view, he constructed his garage in the rear of his residence where it could be used only by his passing over the strip as a driveway. West acquiesced and consented therein. Lillie went to considerable expense in thus constructing his garage, which would be useless to him or his grantee except by the use of the strip as a drive. When the plaintiffs purchased from Lillie they knew that the strip was used as a drive and that the garage would be useless to them except by the use of the strip for a drive. Mrs. Patton, the grantee of the south property from the executor of West, likewise knew of the use and necessity for the strip as a drive when she purchased, and so did her grantees, the defendants in this action. We have no hesitation in holding that an easement exists over the strip in question by implied grant or dedication.

The remaining question is the extent and width of the easement. Naturally, it would be so much thereof as is reasonably necessary for a convenient and comfortable enjoyment of the plaintiffs' property. The trial court granted an easement to the extent of a strip one foot wide along the north side of defendants' lot. We think this is insufficient for plaintiffs' convenient and comfortable enjoyment of their property. While it might be possible, by the use of extraordinary care, for plaintiffs to get into and out of their garage, by permitting an easement of only a one-foot strip of defendants' land, it is insufficient for a fair, reasonable and convenient use. We think that not less than three feet should be allowed off the north side of defendants' lot.

The cross-appeal relates only to the question as to whether or not plaintiffs are entitled to an easement over any part of defendants' lot. Since this question has been determined, no further consideration need be given the cross-appeal.

The judgment of the district court is modified so as to permit the plaintiffs to use, as a part of the drive, a strip off the north side of defendants' land three feet in width, extending from the west line of the lot a distance of 65.8 feet. As thus modified, the decree of the district court is affirmed.

AFFIRMED AS MODIFIED.

BEN R. GRIFFIN ET AL., APPELLANTS, V. THOMAS GASS ET AL., APPELLEES.

274 N. W. 193

FILED JUNE 22, 1937. No. 29942.

1. **Intoxicating Liquors.** The Nebraska liquor control commission is empowered, under the provisions of the Nebraska liquor control act, 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.
2. **Constitutional Law.** Ordinarily, the unconstitutionality of a

statute on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against.

3. **Pleading:** DEMURRER. A general demurrer admits the truth of all material facts well pleaded, but does not admit the conclusions of law. So, also, as a general rule, only the pleading demurred to may be considered in passing on the demurrer. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. Neither can the court consider extrinsic facts admitted by the parties or by counsel, nor the conclusions of the pleader, except when they are supported by, and necessarily result from, ultimate facts stated in the pleading.
4. ———. "The ultimate or issuable facts to be established should be alleged in a pleading." *Markey v. School District*, 58 Neb. 479, 78 N. W. 932.
5. ———. Plaintiffs' petition examined, and *held* that the allegations therein contained are insufficient to constitute a cause of action.

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

John P. Jensen, for appellants.

William H. Wright, Attorney General, Robert D. Flory and *Guy N. Henninger, contra.*

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

EBERLY, J.

This is a suit in equity to enjoin the enforcement of "Regulation No. 15" which was, on March 25, 1936, promulgated by the Nebraska liquor control commission, in the following form:

"It is hereby ordered by the Nebraska liquor control commission that, effective May 1, 1936, all places licensed for the sale of beer outside the corporate limits of cities or villages shall observe the same opening and closing hours on week days as provided by city or village ordinance in the nearest city or village, for the regulation of similar

licensees within said city or village; provided, however, that if the city or village nearest such licensee does not permit the sale of beer, then the closing hours provided by ordinance in the nearest city or village which does permit the sale of beer within the city or village limits shall be observed."

Plaintiffs' petition alleges that they, Ben R. Griffin and R. O. Thrasher, are, respectively, the owners and operators of a business known as the "1733 Nite Club," and a business known as the "Kearney Club;" that they are retailers of beer without the corporate limits of cities and villages, for consumption on the premises, under and by virtue of the terms and provisions of section 53-326, Comp. St. Supp. 1935; that Ben R. Griffin lawfully secured a retailer's license on May 1, 1936, for the sale of beer, regardless of alcoholic content, only, without the corporate limits of cities and villages, for consumption on the premises where the 1733 Nite Club is situated; and that on March 30, 1936, the plaintiff R. O. Thrasher secured an identical license to carry on the retailing of beer on the premises where that business under the name and style of the Kearney Club has, since the issuance of such license, been lawfully carried on. It is also set forth in the petition that the nearest city or village to the places of business of plaintiffs is the city of Kearney, Nebraska, whose ordinance in terms prohibits the sale, barter, or exchange of beer within such city between the hours of 11 o'clock p. m. and 6 o'clock a. m.; that the Nebraska liquor control commission, in the enforcement of Regulation No. 15, by and through one Melvin Mueller and George W. Sear, the latter being sheriff of Buffalo county, acting pursuant to the directions of such commission and the provisions of Regulation No. 15 referred to, is unlawfully depriving plaintiffs of the right to sell beer at retail under their licenses after 11 o'clock p. m. and before 6 o'clock a. m.

The validity of such Regulation No. 15 is challenged for the following reasons, in substance: (1) As being void and contravening the provisions of section 1, art. II of the Con-

stitution of Nebraska; (2) as being in violation of section 18, art. III of the Constitution of Nebraska, as being local or special law, and not operating alike on all members of a class; (3) as void, because dependent upon the action of municipalities, which may from time to time be changed or amended; (4) as void, because it amounts to an unconstitutional delegation of the power of the legislature and of the Nebraska liquor control commission to the municipality whose ordinances purport to control the subject in issue herein; (5) as void, because depriving plaintiffs of their property without due process of law under section 3, art. I of the Constitution of Nebraska; and (6) as void, because operating as a denial of plaintiffs' equal rights under section 1, art. I of the Constitution of Nebraska.

To this petition a general demurrer was filed, which the trial court sustained, and plaintiffs electing to plead no further, their action was dismissed. From this order plaintiffs appeal.

Preliminary to a discussion of the contentions presented by the record on this appeal, it will be noted that, primarily, injunctive relief is here sought to protect a retail liquor business carried on by plaintiffs under the name and style of the Kearney Club, and a similar business carried on under the name and style of the 1733 Nite Club. The proper use and application of the term "club," in connection with the liquor business in this state, is determined by subsection (18) of sec. 2, ch. 116, Laws 1935 (Comp. St. Supp. 1935, sec. 53-302). The allegations of plaintiffs' petition fully disclose that the nature of the business as carried on by them is not within the statutory definition referred to. In this litigation it appears that we are not dealing with "clubs" in the sense of that term as employed in sections 35, 36, 40, and 45 of our liquor act (Comp. St. Supp. 1935, secs. 53-335, 53-336, 53-340, 53-345). Whether the retail operations as at present organized and carried on are within the inhibitions of section 93 of the legislation referred to (Comp. St. Supp. 1935, sec. 53-393) is a question not raised in this proceeding, and will not be determined.

Therefore, the rights of plaintiffs will be determined on the basis that they are individual licensees under subsection F, sec. 26 of the liquor act (Comp. St. Supp. 1935, sec. 53-326) and all consideration of other features of the business as carried on by them is excluded from consideration.

Two contentions are advanced by appellants, the first being that the provisions of the Nebraska liquor control act were wholly ineffective to confer upon the Nebraska liquor control commission power to regulate the hours of opening and closing on secular days of duly licensed retailers of beer outside of the corporate limits of any city or village. In connection with this question, section 27 of the liquor act (Comp. St. Supp. 1935, sec. 53-327) provides in part:

"A license shall be purely a personal privilege * * * and shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated."

As applied to the present situation, it appears that "The right to engage in the sale of intoxicating liquors is not one of the privileges or immunities of citizens of the United States which the states are thereby forbidden to abridge, nor can such restrictive statutes be said to deprive persons of liberty or property without due process of law, nor, if not entirely arbitrary in their discrimination between persons, do they deprive any one of the equal protection of the laws." 33 C. J. 508.

So, also, "A license for the sale of liquor is not a contract between the state or municipality granting it and the person to whom it is issued, in any such sense as to be within the protection of constitutional guaranties. It gives no vested rights, such as cannot be abridged or abrogated by the legislative authority in the interests of the public, nor is it in itself property or a right of property, in the ordinary meaning of those terms." 33 C. J. 532. See, also, *Dinuzzo v. State*, 85 Neb. 351, 123 N. W. 309.

We also announced the principle in *State v. Howard*, 96

Neb. 278, 147 N. W. 689, viz.: "Authority to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations, is not an exclusively legislative power. Such authority is administrative in its nature, and its use by administrative officers is essential to the complete exercise of the powers of all the departments."

The foregoing declaration is in line with the more general rule, which appears to be: "But while the legislature may not delegate power to make law, it may vest a large measure of discretionary authority in officers charged with the administration of the laws, as, for example, laws enacted in pursuance of the police power for the protection of the health and safety of the people, or laws for the examination of persons applying for admission to a profession. Obviously, the conferring of administrative powers to enforce a statute is not a delegation of legislative authority. * * * Especially may the legislature authorize an administrative officer or body to make rules and regulations relating to the administration or enforcement of the law." 12 C. J. 844. See, also, 2 Lewis' Sutherland, Statutory Construction (2d ed.) 942, sec. 507.

The text of the liquor act certainly evidences the legislative intent to authorize the adoption of regulations by the Nebraska liquor control commission. Among provisions relating to this subject are:

Section 4 (Comp. St. Supp. 1935, sec. 53-304): "The power to regulate all phases of the control of the manufacture, distribution, sale and traffic in alcoholic liquors, except as specifically delegated in this act, is hereby vested exclusively in the commission."

Section 46 (b) (Comp. St. Supp. 1935, sec. 53-346): "The commission may license the sale of beer at retail to applicants who reside in any county outside the corporate limits of any city or village therein. Such retail licenses shall be issued, renewed, rejected or revoked by the commission upon such notice and hearing and subject to such

other rules and regulations as the commission by its own orders shall from time to time fix."

Section 58 (Comp. St. Supp. 1935, sec. 53-358): "The commission may make such reasonable rules and regulations as may be deemed necessary for the administration of the duties vested in it by the provisions of this act."

Section 97 (Comp. St. Supp. 1935, sec. 53-397): "This act shall be liberally construed, to the end that the health, safety and welfare of the people of the state of Nebraska shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors."

"The power to regulate, it has been said, carries full power over the thing subject to regulation; and that, in the absence of restrictive words, the power must be regarded as plenary over the entire subject. The power to regulate may include the power to confine a business with reference to place, or time; * * * to prescribe reasonable rules, regulations and conditions upon which a business may be conducted or permitted, (and) to enforce them." 53 C. J. 1175.

In the instant case, the power to regulate must be exercised in conformity with all the provisions of the Nebraska liquor control act, and in harmony with its spirit and expressed legislative intent. So construed, we find in section 53-337, Comp. St. Supp. 1935, no restrictions on the right of the commission, 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.

The second proposition advanced by appellants is that the regulations of the Nebraska liquor control commission, due to the manner of the determination of the permissive hours for the sale of beer outside of cities and villages, are unreasonable and discriminatory.

Two principles must be borne in mind, in the consideration of the question presented, viz.:

(1) "The unconstitutionality of a statute on the ground that it denies equal rights and privileges by discriminating between persons or classes of persons may not be raised by one not belonging to the class alleged to be discriminated against. This has been held in numerous cases, and the rule applies to all cases affecting civil rights of every kind and also to cases in which property rights only are affected." 12 C. J. 768. By analogy a similar rule would be equally controlling where a regulation prescribed by competent authority is likewise attacked as discriminatory.

(2) The second determinative principle here is the fact that the case is presented for review upon the correctness of the order of the trial court sustaining a general demurrer to plaintiffs' petition. Under these circumstances, the following principles are clearly binding upon the trial court, as well as on this court of review, viz.: "As a general rule, only the pleading demurred to may be considered in passing on the demurrer. The court must assume that the facts are as alleged, and cannot assume the existence of any facts not alleged, nor find facts in aid of the pleading, nor hear evidence on the questions involved, nor consider what evidence may be introduced at the trial." 6 Standard Ency. of Procedure, 981.

Courts cannot consider extrinsic facts admitted by the parties or counsel, nor an agreed statement of facts, nor can matters within the personal knowledge of the court be considered. 6 Standard Ency. of Procedure, 984, 985. See, also, *Bresee v. Preston,* 91 Neb. 174, 135 N. W. 544; *City Savings Bank v. Carlon,* 87 Neb. 266, 127 N. W. 161.

So, also, we are committed to the doctrine that a general demurrer admits the truth of all material facts well pleaded, but does not admit the conclusions of law. *Bresee v. Preston,* 91 Neb. 174, 135 N. W. 544; *American Water-Works Co. v. State,* 46 Neb. 194, 64 N. W. 711; *State v. Ramsey,* 50 Neb. 166, 69 N. W. 758; *Dobney v. Chicago & N. W. R. Co.,* 120 Neb. 824, 235 N. W. 585; *U. S. Theatre Supply Co. v. Creal,* 122 Neb. 743, 241 N. W. 529; *Thurston County v. Farley,* 128 Neb. 756, 260 N. W. 397.

"A demurrer admits allegations only of fact. It does not admit conclusions of the pleader, except when they are supported by, and necessarily result from, the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader as to the effect of the facts, nor allegations of what will happen in the future, nor arguments." 6 Standard Ency. of Procedure, 949. See, also, *Thurston County v. Farley,* 128 Neb. 756, 260 N. W. 397; *Moriarty v. Cochran,* 75 Neb. 835, 106 N. W. 1011; *State v. Porter,* 69 Neb. 203, 95 N. W. 769; *Markey v. School District,* 58 Neb. 479, 78 N. W. 932.

"The ultimate or issuable facts to be established should be alleged in a pleading." *Markey v. School District, supra.*

It was contended by appellants in their argument at the bar of this court that, the hours during which the sale of beer without the limits of municipalities was permitted being fixed by the city or village ordinance of the municipality situated nearest to such place of sale, the diverse provisions of the various ordinances applicable and determinative would result in the regulations being unreasonable and discriminatory.

The ultimate or issuable facts alleged in the petition in this case have already been summarized. It contains no allegation of the existence of terms of any city or village ordinance pertaining to the sale of beer, save and except Ordinance No. 784 of the city of Kearney, Nebraska. However, the date of the adoption and approval of such ordinance is not alleged.

As we have already seen, in the consideration of the present record, we cannot assume the existence of facts not alleged; and, in addition, courts of appeal will not as a general rule take judicial notice of municipal ordinances. *Foley v. State,* 42 Neb. 233, 60 N. W. 574. It follows that for the purpose of this case Ordinance No. 784 is the only one now for consideration. It also appears that this petition contains no allegations of the existence or location of any "retailers of beer without corporate limits," save and

except the plaintiffs herein. Considering the foregoing as of the "ultimate facts" of the situation, discrimination against plaintiffs as contended by them, could not exist.

As to the method pursued by the Nebraska liquor control commission in framing and promulgating Regulation No. 15, it seems clear that it is justified, by analogy at least, by the rule applicable to statutory enactments. The commission's intent was clearly evidenced by the employment of suitable words of reference which in effect incorporated the matters referred to and indicated as part of the regulation issued.

"Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. When so adopted, only such portion is in force as relates to the particular subject of the adopting act, and as is applicable and appropriate thereto. Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 787, sec. 405.

However, in *State v. Howard,* 96 Neb. 278, 147 N. W. 689, the matter of the validity of a statute in effect adopting by reference the New York standard form of policy, "as now or may hereafter be constituted," was presented to this court. The enactment, so far as it operated to adopt the New York standard form of policy *as now constituted,* was approved, but "that portion of the section referred to which provides that the New York form shall be used as it 'may be hereafter constituted'" was held invalid. As to the challenge of plaintiffs that Regulation No. 15 is unconstitutional as applied to ordinances pertaining to this subject as subsequently enacted or amended, it may be said that a well-established rule of construction, equally applicable to "regulations," is: "All cases to which a statute cannot constitutionally apply will be excepted by necessary

implication, however absolute and express the provision may be." 2 Lewis' Sutherland, Statutory Construction (2d ed.) 939, sec. 503.

At all events, the constitutionality of Regulation No. 15, as applied to ordinances and amendments thereto made subsequent to the date of its promulgation, is not presented by this record, and may not now be properly determined.

Under the limitations imposed by the present record, and restricted to a disposition of the issues actually presented by it for review, we find that, from plaintiffs' petition, it does not appear that what is here shown to be in effect the adoption by the commission, by reference, of section 3 of Ordinance No. 784 of the city of Kearney, Nebraska (the petition being silent as to the existence of other similar ordinances), as a part of its Regulation No. 15, and its enforcement by defendants, in any manner unlawfully impaired plaintiffs' rights, or damaged their properties or their business.

Therefore, the judgment entered by the district court dismissing this action is correct, and it is

AFFIRMED.

DAY and CARTER, JJ., dissent.

DAVID BLACKER, APPELLEE, V. KITCHEN BROTHERS HOTEL COMPANY ET AL., APPELLEES: BRUNO F. MEYER, APPELLANT.
273 N. W. 836

FILED JUNE 22, 1937. No. 30028.

1. **Costs.** It is the practice in this state to allow the recovery of attorney's fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
2. **Attorney and Client.** Where many persons have a common interest in a trust fund or property, and one of them, for the benefit of all, at his own cost and expense, takes legal action for its preservation or administration, the court of equity in which the suit was brought may order the successful litigant to be reimbursed his costs and expenses, including counsel fees,

from the property of the trust or order those benefited to contribute proportionately toward that expense.

3. ———. But allowances for attorney's fees and expenses in such cases can only be made after the services have been rendered and a determination made that they were of direct and substantial benefit to other members of the class who are alleged to have benefited therefrom.

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

Walter E. Schroeder and *Howard Saxton,* for appellant.

Fradenburg, Webb, Beber, Klutznick & Kelley, Finlayson, Burke & McKie, Leon & White and *Kennedy, Holland, De Lacy & Svoboda, contra.*

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

CARTER, J.

This is an appeal from two orders of the district court for Douglas county allowing V. Huhnke, a bondholder of the Kitchen Brothers Hotel Company, $500 for expenses and $2,500 for attorney's fees for the purpose of prosecuting an appeal to the supreme court in a case in which the rights of all bondholders were involved.

The record discloses that in the early part of 1935 a proposed plan of reorganization of the Kitchen Brothers Hotel Company was filed in the district court for Douglas county. It shows that V. Huhnke appeared as a bondholder and objected to the plan and eventually secured a withdrawal of the plan to the benefit of all bondholders. In December, 1935, a new proposed plan of reorganization was filed for the consideration of the court. V. Huhnke again appeared as a bondholder and objected to the jurisdiction of the court over the subject-matter and over the person of the objector as a bondholder and all other bondholders similarly situated. Many hearings were held on various phases of the matter and the case finally tried. Thereafter the court approved the reorganization plan. The property involved in

this proceeding ranges in value from $750,000 to $1,250,000, as represented and evidenced by the investment in the Paxton Hotel in Omaha and, in fact, belongs to the bondholders. The objector, V. Huhnke, contends that the importance of the matters involved and the desirability of finally adjudicating the rights of all the parties to the action in the court of last resort in this state necessitates that an appeal be taken to the supreme court to secure a final determination. The objector, V. Huhnke, claims to be the only bondholder who has preserved a record in the district court that would properly raise all the issues necessary to such a final determination. The record shows that the legal work and briefing would be intricate and involved and would necessitate much time and study. The objector further alleged that such an appeal would be beneficial to all bondholders involved. The trial court, after a hearing, sustained the contentions of V. Huhnke and made the allowances for costs and attorney's fees hereinbefore set out and directed the Omaha Safe Deposit Company, successor trustee, to pay said amounts to the attorney for the said V. Huhnke. Bruno F. Meyer, a bondholder, filed a motion for a new trial which was overruled. Bruno F. Meyer then perfected his appeal to this court. The question for our determination is whether the trial court properly made the allowances for attorney's fees and expenses.

The order of the court allowing expense money to the attorney for V. Huhnke contained the following language: "That Omaha Safe Deposit Company, successor trustee in the above entitled matter, be and it hereby is authorized and directed to pay forthwith to Fred S. White, attorney for V. Huhnke, objecting bondholder, the sum of $500 to be expended for the preparation of the bill of exceptions, transcript, briefs and the perfection of an appeal to the supreme court of the state of Nebraska, and such other sums, if any, as may be incurred as costs in connection with the perfecting of an appeal to the supreme court of the state of Nebraska." The order allowing attorney's fees to the attorney for V. Huhnke contained the following

language: "That the Omaha Safe Deposit Company, successor trustee in the above entitled matter, be and hereby is authorized and directed to pay forthwith to Fred S. White, attorney for V. Huhnke, objecting bondholder, the sum of $2,500 as attorney's fees for services heretofore rendered in the district court in said above entitled matters and for his services in connection with perfecting the appeal and the preparing of a written brief, for filing in the supreme court of the state of Nebraska, in the above entitled matter." It will be noted that the order allowing expense money is made to cover expenses to be incurred in the future, while the order allowing attorney's fees is made for services rendered as well as for services to be rendered in the future.

The general rule in this state as to the allowance of attorney's fees has been stated by this court as follows: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N. W. 1037; *State v. Sagl*, 119 Neb. 374, 229 N. W. 118. Appellee has cited no statute, nor have we found one, authorizing the allowances made in this case.

The general rule announced in many decisions is that, where the services of a litigant's attorney result in rescuing or preserving a large amount of property or funds, not only for the benefit of the particular litigant, but for the benefit of all others in the same class, and by means of these services the property or funds are conserved for the benefit of all, nothing is plainer than that the cost should be borne by those benefited by it. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Hempstead v. Meadville Theological School*, 286 Pa. St. 493, 134 Atl. 103; *In re Estate of Creighton*, 93 Neb. 90, 139 N. W. 827.

In *Buell v. Kanawha Lumber Corporation*, 201 Fed. 762,

the court stated the rule as follows: "The general equitable principle on which American courts act in allowing counsel fees from a fund in court for distribution is that where one has gone into a court of equity, and, taking the risk of litigation on himself, has created or preserved or protected a fund in which others are entitled to share, such others will be required to contribute their share to the reasonable costs and expenses of the litigation, including reasonable fees to complainant's counsel; but, to warrant such allowance, the fund so created or preserved must be one applicable to the claims of the complainant and those interested with him, and a fund on which others have liens superior to complainant's claim cannot be subjected to such payments to the displacement of such liens."

Where one goes into a court of equity, and takes the risk of litigation on himself, and creates or protects a fund to a share in which others are entitled, those others will not be permitted to lie back and share the results of these successful labors without contributing their due share. But this rule is based on the theory that all in the class benefited should contribute to the expense. Their share of the expense is dependent entirely upon the success of the litigation. It necessarily follows that no liability for attorney's fees and expenses accrues until the litigation has been successfully terminated with actual benefits accruing to others in the class. If the litigant is unsuccessful, no benefit to others in the class accrues and he must undergo the fate of any other unsuccessful litigant; that is, pay the costs and expenses himself. We know of no rule, nor have we found any case, that authorizes the allowance of attorney's fees and expenses in a case such as we have before us, on any basis other than that of benefits accruing as a result of successful litigation.

At the time the allowances were made in the instant case, it had not been determined whether the litigation was beneficial to other bondholders for the reason that there had been no final determination of the matter. We are of the opinion that the trial court could properly allow at-

torney's fees and expenses in connection with services rendered that were beneficial to other members of the class, but that its attempt to allow expenses and attorney's fees for work to be done in the future is without authority of law. Such allowances against others similarly situated being based upon the benefits received by them, there is nothing upon which to base such an allowance until the services have been performed and the resulting benefits, if any, determined.

We necessarily conclude that the trial court erred in allowing attorney's fees and expenses for perfecting an appeal to this court. The trial court could, if the facts warranted, have allowed attorney's fees and expenses for beneficial services already rendered to bondholders similarly situated. We are unable, however, under the state of the record, to determine what amount was allowed for attorney's fees and expenses for services then rendered that were beneficial to all bondholders. For that reason, the orders appealed from will be reversed without prejudice to the right of V. Huhnke to file a claim for any attorney's fees and expenses to which she may be entitled under the holdings of this opinion.

REVERSED.

HANS JENSEN, APPELLANT, V. J. VICTOR ROMIGH ET AL., APPELLEES.

274 N. W. 199

FILED JUNE 22, 1937. No. 29972.

1. **Partnership.** An agreement that H. J. shall become "a limited partner" of the firm of R. and H. upon the payment of a stated amount, and that "this agreement shall run one year from August 1, 1925, and shall terminate August 1, 1926," and by its further terms giving to said H. J. interest on the amount he paid in and a share in the profits, but not stating what his rights are at the end of the year nor giving him any specific interest in the partnership, and not stating the value of the assets of said partnership, is vague and ambiguous and may be explained by other evidence.

2. **Contracts:** CONSTRUCTION. The practical interpretation given a contract by the parties to it while they are engaged in its performance, and before any controversy has arisen concerning it, is one of the best indications of its true intent, and the courts will ordinarily enforce such construction.
3. **Evidence.** When a letter is read in evidence, all other letters on the same subject between the same parties may be given. And when a detached writing is given in evidence, any other writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence. Comp. St. 1929, sec. 20-1215.
4. **Contracts.** When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it.
5. **Limitation of Actions.** Payments by one partner out of partnership funds of a partnership which has become inactive but has not been dissolved tolls the statute of limitations as to both partners.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed.*

Shuman & Overcash, for appellant.

Hoagland, Carr & Hoagland and *J. V. Romigh, contra.*

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

LIGHTNER, District Judge.

In this case the district court directed a verdict against the plaintiff and he appeals. His suit was for $4,500 balance of $5,000 which he claims that he loaned to defendants on July 28, 1925. Defendants admit getting the money, but claim that the transaction by which they got it constituted the plaintiff and the two defendants a limited partnership. The court evidently took the position that exhibit 19, hereinafter set forth, made the parties partners and prevented plaintiff from recovering in an action at law.

Exhibit 19, above referred to, is as follows:

"July 28, 1925.

"This agreement made this 28th day of July, 1925, by and between the partnership of Romigh and Heffner and Hans

Jensen whereby it is agreed that the said Hans Jensen shall become a limited partner of the said firm upon the payment to the said firm of the sum of $5,000 in cash, as follows: $4,200 in cash paid this day; $400 in cash payable August 1, 1925; $400 in cash payable Nov. 27, 1925.

"It is hereby agreed that this agreement shall run one year from August 1, 1925, and shall terminate August 1, 1926, and the terms of this agreement are that the said two partners do agree with Hans Jensen that he shall obtain out of the profits of the partnership business in the sale of automobiles of the said firm the sum of 5% of the said investment each half year at February 1, 1926, and August 1, 1926, being a total of 10% on the money invested for the year, and in addition to the said 10% which is guaranteed to the said Hans Jensen, he shall obtain at the end of the year, or August 1st, an additional sum which shall be such sum as will make one-tenth of the profits of the said firm for the year ending August 1, 1926, up to the amount of 20% of his investment, but no more.

"It is further agreed that this agreement may continue at the option of the parties hereto or be extended by mutual agreement of all parties concerned.

"Romigh and Heffner, by J. V. Romigh
"Hans Jensen"

This agreement was later extended by mutual consent for a second year, and the first consideration perhaps relates to the rights of the parties at the end of the second year when by its terms and by the extension agreement the contract terminated.

Plaintiff lays considerable stress upon the unequal position of the plaintiff and the defendants, and preliminary to a discussion of the meaning of exhibit 19, it is proper to mention that the plaintiff was born in 1883 and quit school after reaching the fifth grade. He is of Danish extraction, but was born in Dodge county, Nebraska. Prior to entering defendants' employment in May, 1925, he was a farmer and his job around defendants' garage was washing cars, making minor repairs and running errands. The defend-

ant Romigh, on the other hand, who carried on the business with Mr. Jensen for his firm, was a graduate lawyer of Nebraska and Harvard Universities, had practiced law and was an experienced business man.

Now coming to a consideration of the rights of the parties at the expiration of the time fixed by exhibit 19 and the extension agreement, we find no place where the law fixes the rights of limited partners as between themselves. Section 67-104 and the following sections of chapter 67, Comp. St. 1929, lay down various rules with reference to limited partnerships, but in our judgment these are for the protection of third parties, and in any event they do not set forth the rights of the parties on a termination of such partnerships. Is exhibit 19 open to the construction that on the termination thereof there was to be an accounting and that the plaintiff was to receive some definite share in the property of the partnership? If the total net assets of the partnership on such an accounting turned out to be say $20,000, would he have an interest above his $5,000 therein? Defendants would be the last to so contend. On the other hand, if the total assets turned out to be $10,000, would he simply get one-third thereof? There is nothing in the agreement that so provides. The agreement does not specify the interest of the partners nor how much they had invested in the partnership. The part of the agreement which says that plaintiff "shall become a limited partner of said firm" is, it seems to us, entirely meaningless except in connection with that part of the agreement which says that, in addition to 10 per cent. of his money, he shall receive "an additional sum which shall be such sum as will make one-tenth of the profits of the said firm for the year ending August 1, 1926, up to the amount of 20% of his investment, but no more." It seems to us that a fair construction of this instrument is that plaintiff loaned the partnership $5,000 at 10 per cent.; that up to the time the agreement was terminated he was, in addition to his 10 per cent., entitled to share in the profits of the concern; that upon the termination of his agreement

he was entitled to recover from the firm the $5,000 he had put in; that he was a limited partner only to the extent set forth in the instrument, namely, for one year (later extended to two years) and in the profits as stated in the agreement made during said two years; that after the expiration of the two years defendants simply held his money as borrowers. If this meaning is not given to exhibit 19, it at least must be conceded that its meaning is vague or ambiguous and therefore open to explanation by other evidence. It provides for the termination of the relationship existing between plaintiff and defendants without stating the rights of the parties on such termination and without reciting any facts from which the rights of the parties could be determined. The agreement being silent as to these points, its meaning is ambiguous and the interpretation placed upon it by the parties should govern.

"The practical interpretation given their contracts by the parties to them while they are engaged in the performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and the courts will ordinarily enforce such construction." *Cady v. Travelers Ins. Co.*, 93 Neb. 634, 142 N. W. 107. See *City of Scottsbluff v. Western Public Service Co.*, 127 Neb. 160, 254 N. W. 712; *Petersen v. City of Omaha*, 120 Neb. 219, 231 N. W. 763; *Edwards v. Hastings Distributing Co.*, 107 Neb. 621, 186 N. W. 980.

Plaintiff offered to prove by Mr. Jensen, who was on the witness-stand, "that on the morning of July 28, 1925, at the place of business of the defendants, Romigh and Heffner, in the city of North Platte, Nebraska, the defendant Romigh presented to the plaintiff, Jensen, this exhibit 19, that the plaintiff read it through and then said to Mr. Romigh before it was signed: 'What about paying the five thousand dollars back? It was understood between us that this was to be paid in one year. Does that paper in there show that this money is to be paid back to me in one year?' And that Mr. Romigh then read the part of the agreement which said: 'It is hereby agreed that this agreement shall

run one year from August 1, 1925, and shall terminate August 1, 1926.' Mr. Romigh said to Mr. Jensen: 'When that says that shall terminate August 1, 1926, that means, that we are to pay you back your five thousand dollars on that date.' " This was excluded by the court and was assigned as error.

Mr. Jensen was leaving for California a short time after the end of the first year, that is, about August 5, 1926. Plaintiff offered to prove by Mr. Fred Kugler that "the witness and Hans Jensen were in town together, about ready to start for California, and that he overheard a part of the conversation between the plaintiff, Jensen, and the defendant Romigh, and he heard Mr. Jensen ask Mr. Romigh for his money that he had loaned to him, and that Mr. Romigh said that it was too short notice, that he would have to have a little time in order to get the money to pay him." This proffered evidence was also rejected by the court and error in the ruling is assigned by plaintiff.

In our judgment this evidence should have been admitted, since it bears on the meaning of the contract with regard to a matter about which the contract is silent, or at least uncertain. It is evidence of the construction the parties themselves placed upon this agreement.

The court did admit the letters written by Mr. Romigh and these letters in our judgment were ample to carry the case to the jury on the proposition that the transaction was a loan. Quotations from the letters showing the date of each are here given, to wit:

"Sept. 30, 1926. * * * We finally got the profits figured up for the year and it made a little over 16%, which makes your interest and profit on the $5,000 amount to $804. I am inclosing a check for this amount to you. * * *

"This investment of yours has been pretty good for this year and hope that you will be able to extend it for another year, as the chances are it will do better next year."

"Dec. 8, 1926. * * * I am inclosing check for the first quarter's interest, being $125, and hope that we can again have a better year for next year. * * *

"I accept your proposition in regard to the agreement last year, and will extend it for another year as you agreed in your letter."

"May 16, 1927. * * * I am inclosing check for $250, which makes the interest for six months and pays up to the first of this month."

"Sept. 14, 1927. * * * We went pretty far in the hole this spring and are gradually coming out of it and I think that we will be able to get you some money by December all right, at least $1,000 and maybe more."

"Nov. 21, 1927. * * * I am inclosing our check for $250, which will at least take care of the interest on your investment for the six months following August 1st, and pay this up to Febr. 1st, 1928. * * *

"I am sending you this interest now and hope that I will be able to send you some more money in December, but things will have to improve if we do."

"Dec. 3, 1927. * * * I am inclosing you another check for $250 on account and think I will be able to send you another check of the same amount in the next week or 10 days."

"April 23, 1928. * * * I am inclosing check for $250 as requested and am glad that I can report that things are much better here this spring."

"July 30, 1928. * * * I am sending you check for $225 for interest up to August 1st, as the investment is now down to $4,500."

"February 15, 1929. * * * I am inclosing herewith check for $225 which will pay interest in advance to August 1, 1929."

"August 17, 1929. * * * I inclose check for $225 as your share on minimum basis on the past six months' profits."

"March 13, 1930. * * * I am inclosing check for $50 which is all we can spare now, but next month there ought to be a revival and we can send you some more."

"July 23, 1930. * * * If conditions would get a little better, there might be something left for the partners, but we cannot tell now, as business is so bad that it is hard to sell anything. * * *

"After all the accounts are paid, there may be something left for you, Earl, Charlie and I, but no one can tell now."

It will be noticed from these letters that the first time after the expiration of the two years that Mr. Romigh refers to the transaction as anything but a loan is in the letter of August 17, 1929. In so far as we can see the idea never occurred to defendants prior to that time but that they owed plaintiff the balance of his investment. Plaintiff served notice on defendants to produce the various letters sent to them by Mr. Jensen. They produced only two letters, which were offered by plaintiff but excluded by the court. They should have been admitted. Plaintiff says in his letter of November 19, 1926: "I will loan you the $5,000 for another year on the same term and same kind of contract and you can send me the interest that will be due by the first Dec." In another letter dated November 14, 1927, plaintiff writes: "When you send me the money my address is (followed by his address)."

After laying the proper foundation plaintiff offered to prove the contents of other letters he sent to defendant Romigh referring to the transaction. These are part of the correspondence between plaintiff and defendant Romigh during the time that plaintiff was living in California. In one of these letters plaintiff requested the defendants to pay him $2,000. This is the letter to which defendants' letter of September 14, 1927, is a reply in which he says: "I think we will be able to get you some money by December all right, at least $1,000, and maybe more." Plaintiff should have been permitted to prove the contents of these letters. They throw light on the transaction, would have made the letters written by defendants more understandable, and they are part of the correspondence, part of which had already been admitted. Comp. St. 1929, sec. 20-1215. They can hardly be said to be self-serving since the defendants apparently acquiesced in regarding the transaction a loan which they intended to repay. They show plaintiff's understanding of the agreement.

"When the terms of an agreement have been intended

in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." Comp. St. 1929, sec. 20-1217. See *Davis v. Highway Motor Underwriters,* 120 Neb. 734, 235 N. W. 325; *Flory v. Supreme Tribe of Ben Hur,* 98 Neb. 160, 152 N. W. 295.

Defendants further contend that because the business was carried on by the defendant Romigh the principle announced by the court in *Mayberry v. Willoughby,* 5 Neb. 368, and followed in the later case of *Hall v. Rogers,* 113 Neb. 290, 202 N. W. 908, applies, and that the payment by Romigh does not toll the statute of limitations as to the defendant Heffner. The evidence shows however that the partnership though inactive actually had never been dissolved, that the payments by Romigh were with partnership money in which defendant Heffner had an equal interest with defendant Romigh. The principle announced in the two cases above referred to does not apply in a situation of this kind. 37 C. J. 1167.

Defendants plead that plaintiff assumed the role of a partner after the agreement of July 28, 1925, but the evidence does not support this plea. He continued doing common work exactly as before. One evening after the partners had gone home he wrote a check to make change, but before doing so he called up Mr. Romigh and got his consent and he signed the check "J. V. Romigh by Hans Jensen." There is no other evidence to support the plea that Jensen assumed the role of a partner.

REVERSED AND REMANDED.

VILLAGE OF WINSIDE, APPELLEE, V. WILLIAM H. BRUNE ET AL., APPELLEES: UNION LOAN & SAVINGS ASSOCIATION, APPELLANT.

274 N. W. 212

FILED JUNE 22, 1937. No. 29904.

1. **Mortgages:** PLEADING. "The provision of the Code, that the plaintiff shall state in his petition whether any proceedings had been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties." *Dimick v. Grand Island Banking Co.*, 37 Neb. 394, 55 N. W. 1066.
2. **Municipal Corporations:** TAX SALES: REDEMPTION. Section 3, art. VIII, Constitution of Nebraska, clearly indicates that the right of redemption from all sales of real estate for the nonpayment of taxes or special assessments of any character whatever, made to the county treasurer by the owner, acts only in favor of the real estate and special assessments as are shown by the county treasurer's books to be subject to redemption.
3. ———: TAXATION: SPECIAL ASSESSMENTS. The amount of special assessments under the law of Nebraska is not determined by the assessed valuation of real estate, and neither the county treasurer nor the county assessor has any interest, right or authority to apportion or assess special assessments such as paving taxes.
4. ———: ———: ———. "The only foundation for special assessments rests in the special benefits conferred upon the property assessed, and, therefore, the frontage rule per foot cannot be adopted unless the benefits are equal and uniform." *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734.
5. ———: ———: ———. Section 77-1903, Comp. St. 1929, gives the proper parties the right to redeem, in part, as indicated therein, and the right of the county treasurer to accept the amount due on special assessments of any kind, but such section does not determine the right to a reapportionment of special assessments against a part or parcel of land, but does give the right of redemption after apportionment or reapportionment of special assessments may have been made by the proper taxing authorities.
6. ———: ———: ———. Section 17-432, Comp. St. 1929, grants the power to cities of the second class and villages to grade, pave or repave and levy special assessments against the property specially benefited, proportionate to the benefits, and does not carry the provision granting the power to the taxing

authorities of such city or village to reapportion and reassess special assessments after the same have once 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.

7. ———: ———: ———. Section 17-435, Comp. St. 1929, designates the manner in which special assessments shall be made by the council or board of trustees by taking into account the benefits derived or the injuries sustained in consequence of the improvement, but does not authorize such council or board of trustees to reapportion or reassess special assessments and carries no restriction of any kind restricting such taxing body from assessing the special assessments against more than one lot.

8. ———: ———: ———. The action of the taxing authorities of a village in assessing special assessments, as provided for by law, is conclusive, unless it is affirmatively pleaded and proved that the members of such taxing body making the special assessments proceeded upon an illegal principle or an erroneous rule of law.

9. ———: ———: ———. An equity court, in the absence of a statutory provision, is without power to authorize the proper governing body of a village which had the power to levy special assessments and did so levy such special assessments, as provided for by law, to reapportion and reassess such special assessments, unless it is affirmatively pleaded and proved that the members of such body making the special assessments proceeded upon an illegal principle or an erroneous rule of law.

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

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

H. E. Siman, contra.

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

MESSMORE, District Judge.

This is an appeal from the district court for Wayne county wherein that court sustained a demurrer to the amended answer of appellant.

The petition of appellee village alleges that it purchased

on January 12, 1935, at private tax sale of the county treasurer of Wayne county lots 21, 22, 23 and 24, block 2, original town of Winside; that said property was purchased for all of the taxes delinquent thereon and for which said real estate was subject to sale on said date, together with interest thereon as provided for by law, amounting to the sum of $2,160.64; that said sum represents instalments for paving Nos. 3 to 10, inclusive, in paving district No. 1, in said village, of $70.05 each, with interest as provided by law, and instalments for paving Nos. 1 to 7, inclusive, in paving district No. 2, in said village, of $40.95 each, with interest as provided by law, in the total sum of $1,402.73, and general real estate taxes for the years 1931, 1932 and 1933 which, with interest, amount to the sum of $757.91.

The petition further alleges that the special assessments were properly levied; that William H. Brune, one of the appellees, is the record owner of the title to said real estate; that appellant appears to have some interest in and to the real estate in question; that appellee Ben Saunders, superintendent of banks, in charge of the Citizens State Bank of Winside, has or appears to have some interest in said property by virtue of a mortgage in the sum of $6,000, of record; alleges that whatever right, title or interest appellant or the other named appellees, or any of them, may have or claim to have in said real estate is inferior and subject to the interest of said appellee village arising from said taxes, certificate and tax sale, as aforesaid; prays that an accounting may be had of the amount due it upon its certificate and lien, that the amount due thereunder may be decreed to constitute a first lien against said premises, the lien foreclosed, the equity of redemption and other rights and interests of appellant and other appellees in and to said real estate be barred and foreclosed by this action, that said real estate be sold as upon execution to satisfy the amount found due the village, with interest and attorney's fee. A copy of the county treasurer's certificate of tax sale is attached to and made a part of the petition.

The pertinent parts of appellant's amended answer and cross-petition are that on or about August 8, 1927, appellees William H. Brune and Emma Brune, husband and wife, executed and delivered to appellant their bond in the sum of $6,000, and to secure the payment of said bond said appellees, on said last-mentioned date, made, executed and delivered their mortgage deed, mortgaging and conveying to appellant lots 23 and 24, block 2, original town of Winside, which mortgage was properly filed of record; further alleges that defendants and appellees defaulted under the terms and conditions of said mortgage; that no part of the mortgage debt has been paid; that foreclosure of said mortgage was had and a decree entered in favor of appellant and against said mortgagors for the sum of $4,175.05, which said sum was declared to be a first lien against said lots 23 and 24; that a nine months' stay was taken, which expired, the court later granting a moratory stay, under which the Brunes are now in possession of said lots; that at some time after the original levy and assessment of said special assessments and prior to the purchase of said tax sale certificate by the village said special assessments were apportioned among said lots by the taxing authorities of said village and so appeared on the records of the county treasurer of said Wayne county, but were thereafter canceled at the request of the taxing authorities of said village.

Said answer and cross-petition further alleges the willingness of appellant to redeem said lots 23 and 24 from all taxes legally assessed against them; that appellee village, its officers and agents and the proper taxing authorities were requested by appellant to apportion the taxes that had been levied and assessed against lots 21, 22, 23 and 24 as one tract or parcel of land, so that appellant might pay the special assessments due and delinquent against said lots 23 and 24, the only lots described in the petition of the village and the tax sale certificate in which this appellant had any right, title or interest, but that said village, its officers and agents and the other proper taxing authorities

refused to do so; that appellant is ready, willing and able to pay all taxes, general and special, legally levied and assessed against said lots 23 and 24, but is unable to pay the same, or to make tender of said taxes into court, for the reason that appellant is unable to ascertain from the records of the county treasurer or from the officers and agents of appellee village the amount of said taxes; asks that said village, its officers and agents and the proper taxing authorities be ordered and directed to separately assess and apportion said taxes, and all of them, between lots 21, 22, 23 and 24 so that appellant may be able to redeem said lots 23 and 24 from said tax sale; prays for the same relief, in substance, as set forth in its amended answer and cross-petition.

Appellant and appellee village have virtually agreed upon the following statement of law: A demurrer to a pleading admits only such facts as are well pleaded. This rule, however, does not include conclusions. One allegation of the petition of appellee village is to the effect that no proceeding at law has been had for the recovery of the debt, etc. The amended answer of appellant denies this allegation. In the case of *Dimick v. Grand Island Banking Co.*, 37 Neb. 394, 55 N. W. 1066, this court held: "The provision of the Code, that the plaintiff shall state in his petition whether any proceedings had been had at law for the recovery of the debt, or any part thereof, applies alone to formal mortgages, and not to mortgages or liens arising out of the equities between the parties." The instant case involves the foreclosure of a tax sale certificate and not a formal mortgage, so the decision last above cited makes a further determination of this question unnecessary.

The question to be determined in this appeal is the right of appellant, as mortgagee, to redeem from tax sale the real estate covered by its mortgage, including special assessments, and the duty of the taxing authorities to apportion the taxes so that one with the right to redeem a part of it may redeem such part from the tax sale wherein special assessments are involved, and this appeal involves

only the right to have apportioned and set aside by the proper taxing authorities of said village the special assessments against said lots 23 and 24, as hereinbefore set out, so that appellant may redeem the property upon which it holds its mortgage without being required to pay the special assessments against lots 21 and 22, in which appellant has no right, title or interest.

In support of the contentions raised by it appellant cites section 3, art. VIII, Constitution of Nebraska: "The right of redemption from all sales of real estate for the nonpayment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. Provided, that occupants shall, in all cases, be served with personal notice before the time of redemption expires."

Appellant further cites section 77-2021, Comp. St. 1929, in part, as follows: "Any person claiming an undivided part of any land sold for taxes may redeem the same on paying such proportion of the purchase money, interest and costs and subsequent taxes as he shall claim of the land sold. The owner or occupant of a divided part of any land sold for taxes, or any person having a lien thereon or interest therein, may redeem the same by paying the taxes separately assessed against such divided part, together with interest, costs and subsequent taxes."

It is true that the constitutional provision cited above does give the right to redeem from sales of real estate for taxes, general and special, of any character whatever, but this section clearly indicates that payment made to redeem to the county treasurer by the owner acts only in favor of the real estate and special assessments as shown by the county treasurer's books to be subject to redemption.

It is also true that under section 77-2021, Comp. St. 1929, *supra,* the owner or occupant of a divided part of any land sold for taxes, or any person having a lien thereon or interest therein, may redeem the same by paying the taxes separately assessed against such divided part, together with

interest, costs and subsequent taxes. This section refers to taxes assessed against the part or parcel of land. This section also sets forth the duty of the county assessor, upon demand of the owner or lienholder or upon demand of the county treasurer, to assess said divided part and to certify said assessment to the county treasurer, and thereupon said owner or lienholder of said divided part may redeem said divided part upon payment to the treasurer of such sum so assessed, together with interest thereon, costs and subsequent taxes.

The amounts of special assessments under the law of Nebraska are not determined by the assessed valuation of the real estate, and neither the county treasurer nor the county assessor has any interest, right or authority to apportion or assess special assessments such as paving taxes.

In the case of *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734, this court held: "The only foundation for special assessments rests in the special benefits conferred upon the property assessed, and, therefore, the frontage rule per foot cannot be adopted unless the benefits are equal and uniform."

In furtherance of its contention, appellant cites section 77-1903, Comp. St. 1929, which is, in part, as follows: "The treasurer shall receive taxes on part of any lot, piece or parcel of land charged with taxes, when a particular specification of the part is furnished. * * * The tax may be paid on an undivided share of real estate. In such case the treasurer shall designate on his record upon whose undivided share the tax has been paid. The treasurer shall receive from any taxpayer at any time, the amount due on account of special assessments of any kind." Analyzing this section, it gives the right of redemption to the proper parties to redeem in part as indicated, and the right of the county treasurer to accept the amount due on special assessments of any kind, but the section does not determine the right of reapportionment of a part or parcel of land whereon special assessments may be had. This section gives the right of redemption, of course, after the apportion-

ment or reapportionment, as the case may be, has been made by the proper taxing authorities. The county treasurer accepts the money, gives the proper credit for the payment of taxes, general and special, under this section, but he cannot himself make a division and can only accept that which is certified to him so that the taxes may be paid and redemption had, as provided for in this section.

Appellant further cites the case of *State v. Thomas,* 127 Neb. 891, 257 N. W. 265, wherein this court held: "Taxing statutes as to special assessments are strictly construed in favor of the taxpayer." In the last-cited case this court, in interpreting the section of the statutes providing for the levy of special assessments for paving by cities of the second class and villages and the payment thereof by the property owner, held that such section confers on the owner the option of paying in instalments, but does not prevent the owner from paying balance of assessment at any time by paying the amount thereof and interest to date. The sections of the statute cited by appellant and the rights of the taxpayer thereunder to pay special assessment were passed on in this case.

Appellant cites section 17-432, Comp. St. 1929, in support of its contention, which, in part, is as follows: "The governing body of any city of the second class or village shall have the power to grade, * * * pave, repave, * * * at public cost, or by levy of special assessments on the property specially benefited thereby, proportionate to benefits." This section of the statute designates the powers granted to any city of the second class or village and specifies what the governing body of such city or village shall have the power to do, that is, to grade, pave and repave and levy special assessments against the property specially benefited, proportionate to the benefits. This the governing body of the village of Winside did without objection as to its method and procedure.

Appellant further cites section 17-435, Comp. St. 1929, which is, in part, as follows: "First. Such assessment shall be made by the council or board of trustees at a

special meeting, by a resolution fixing the valuation of such lot assessed, taking into account the benefits derived or injuries sustained in consequence of such contemplated improvements." As stated therein, this section designates the manner in which the assessments shall be made by the council or board of trustees, by taking into account the benefits derived or the injuries sustained in consequence of such improvements. This provision of the statute was obviously followed by the taxing body of the village of Winside. There is nothing in this section authorizing the reapportionment or reassessment of special assessments by the governing body of a city of the second class or village and no restriction of any kind restricting said governing body from assessing the special assessments against the four lots *en masse*. *Morse v. City of Omaha, supra.*

The action of the governing authorities of appellee village in assessing the special assessments as provided for by law would seem to be conclusive, unless the members of such body making the assessments proceeded upon an illegal principle or an erroneous rule of law.

Nowhere in appellant's brief do we find any citations of authorities whereby a court of equity, under its general powers, could be of assistance to appellant and grant the relief it prays for, and to grant the relief contended for by appellant would be tantamount to legislating in favor of appellant. Under the amended answer, as it now stands, and for the reasons stated in this opinion, the ruling of the lower court sustaining the demurrer to appellant's amended answer and cross-petition is

AFFIRMED.

PAINE, J., dissents.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, PLAINTIFF, V. OMAHA MOTION PICTURE EXHIBITORS ASSOCIATION ET AL., DEFENDANTS.
274 N. W. 397

FILED JUNE 26, 1937. No. 30189.

Injunction: NUISANCE. Temporary injunction issued, to enjoin the plan of "bank night" lotteries or gift enterprises.

Original proceeding by the state, on the relation of the attorney general, to enjoin defendants from carrying on a lottery. *Temporary injunction granted.*

Richard C. Hunter, Attorney General, Francis V. Robinson and *James T. English,* for plaintiff.

Wright, Wright & Kennedy, for defendants.

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

PAINE, J.

This is an original action in the supreme court, in which the state of Nebraska, on the relation of the attorney general, as plaintiff, prays that this court will issue a restraining order forthwith, which shall serve as a temporary injunction until a hearing shall be had, at a time to be fixed by this court, for the purpose of restraining and enjoining the defendants, their officers, agents, servants, and employees, from carrying on, promoting, permitting, or allowing within their places of business an illegal lottery, gift enterprise, or scheme of chance, commonly called "bank night," and that upon the final hearing the injunction be made perpetual.

The petition first describes the various corporations and associations and officers and agents conducting various moving picture theaters in the city of Omaha, and alleges that for months past all of the moving picture theaters now operated in the city of Omaha have been conducting a lottery, gift enterprise, or scheme of chance in connection with said theaters, and intend to continue so doing; that

such lottery has been designated as "bank night," and its operation is described in the petition briefly as follows: That a series of registration cards, numbered serially, provide a blank space for the name, address, and telephone number of the registrant; that any person desiring to register fills in the blanks and hands it to an employee of any participating theater; that said cards so filled are filed serially in one card index file, being a record of the individuals who have registered for participation in the weekly drawing; that such blank registration cards are available in the outer lobbies of all participating theaters, and any one can secure a card and fill it in without buying a ticket of admission; that the same serial numbers are printed on small cards, about one inch square, for each of the registration cards, which small cards are placed in a large drum, or receptacle; that Wednesday night of each week is "bank night" at all of the Omaha moving picture theaters.

That a matinee performance is given in all said theaters on Wednesdays, on which afternoon any person who buys a ticket of admission for the matinee prior to 6:00 p. m. may upon request receive a special matinee attendance record, and thereby become eligible to participate in the drawing for that particular night only, whether present at the theater at the time of the drawing or not, and such cards are only provided to those who purchase such admission tickets. Each of said matinee cards has printed upon it: "You are now entitled to participate in tonight's drawing. Should your name be drawn, you will be notified. This card good for tonight's prize only."

On Wednesday evenings, between 8:00 and 9:15 o'clock, during the course of the evening's performance, a large drum or receptacle, containing all of the small one-inch cards, is placed upon the stage of the Orpheum Theater, in full view of the audience, and some disinterested person spins this drum, thereby mixing the cards. The drum is then opened, and one card is drawn therefrom by a blindfolded, disinterested person, usually a child. Reference is

immediately made from this small one-inch card to the registration index, and the name of the registrant whose number has been called is identified, and this winner's name and address are telephoned to every moving picture theater in Omaha, and then announced from each stage. The winner is notified that unless he has signed a matinee card that day he has three minutes in which to make himself known to an agent of some Omaha theater and claim the prize. At some of these theaters this announcement is made simultaneously from the stage and also in the outer lobby and on the street in front of the theater. In other theaters the announcement is made only from the stage inside the theater. If the winner identifies himself within three minutes, or if he has signed a special matinee card that day, the defendants deliver to him the prize money, which consists of a minimum amount of $1,000 cash. If within the three-minute time limit a winner does not appear, and such winner has not signed and filed a special matinee card, no prize is awarded on that Wednesday night, but $500 is added to the $1,000 and the combined sum of $1,500 becomes the prize the following week, and in like manner the prize money is pyramided every week until a winner receives it under these rules, and then the defendants again put up a $1,000 prize for the next ensuing Wednesday night. If the winner whose name is announced is outside of said theater and presents himself within the three-minute limit, he is permitted to enter the theater and claim and receive the prize money without buying an admission ticket.

That on each Wednesday all Omaha theaters display large signs, posters, banners, lighted displays, carrying the words "Bank Night," thereby holding out as a chief inducement for patronage such lottery drawings to be conducted that night; that large signs and small signs are displayed near box office windows, urging prospective patrons to "Register now and be eligible for tonight's drawing." That several of these theaters charge a greater admission price on Wednesday than other days; that the

operation of said "bank night" lottery tremendously increases the patronage of the theaters; that on Wednesdays many matinee tickets are sold to those persons who desire to register, but who do not see, or try to see, the picture that is being shown inside.

It is charged that that part of the scheme which in remote and infrequent cases seems to present the possibility of participating in the drawing and winning the prize without being required to buy an admission ticket is, in truth and in fact, a mere subterfuge, skilfully devised and used by the defendants in an attempt to give their enterprise the outward appearance of a lawful enterprise, whereas in the practical operation of the scheme a vast majority do pay in money for their opportunity to participate, and those who do pay in effect pay for whatever chance, if any, those who do not pay have to win.

That many thousands of dollars have been paid out in prize money, and large sums have thereby been gambled, hazarded and lost by thousands of persons who have been induced by the defendants to participate in said lottery, including minors and others who cannot afford to risk their earnings, and that this tends to demoralize the winners and impoverish the losers, and will, if permitted to continue, result in irreparable losses to legitimate business and to the habits and morals of the people which cannot be compensated in money.

That by the operation of said scheme the defendants are wilfully violating the Constitution and statutes of Nebraska, and are maintaining a public nuisance, which directly affects thousands of citizens of Nebraska, because the same "bank night" scheme is being operated in hundreds of theaters all over the state of Nebraska, and is statewide in its scope, so that individual prosecutions would involve plaintiff in a multiplicity of suits, which would not prevent the lawlessness herein described. That all of such suits would be for the purpose of quieting and establishing the same common rights of plaintiff to proceed by criminal prosecution against operators of the

"bank night" scheme, and all of said suits would have a common set of facts and a single question of law for determination. That plaintiff is without adequate remedy at law; that defendants will continue to violate the law and maintain said public nuisance unless enjoined and restrained from so doing, and that a temporary restraining order and a temporary injunction should be issued against the defendants, their agents, officers, servants, and employees, from carrying on and operating said illegal lottery, gift enterprise, and scheme of chance, and that on a final hearing of this cause said injunction should be made permanent.

This petition is positively verified, and in addition two affidavits are attached thereto. One of these affidavits states that the affiant during a period of three weeks visited all motion picture theaters in Omaha, and that the plan is being used in at least 26 theaters in the city of Omaha; that the winning of such prizes by a few people has caused thousands of people to lose thousands of dollars solely as a result of such lottery, gift enterprise, and scheme of chance.

To this petition and showing, the defendants filed a special appearance, objecting to the original jurisdiction of this court over the subject-matter, setting out that the plaintiff has adequate remedy at law by a legal prosecution for the alleged violation of the criminal statute, and also has an adequate remedy at law by an action for injunction brought in the district court for Douglas county, and the petition fails to show why adequate and complete remedy may not be had by action in the district court for Douglas county, and that the operation of the "bank night" plan is not statewide in its scope, but purely local in character; that the operation of said plan is not harmfully affecting the rights and interests of the people generally throughout the state; that the petition fails to show that a public wrong has been committed, and that judgment by this court in this action will not prevent a multiplicity of suits, and that, for the reasons set forth, the court should not

assume original jurisdiction over the subject-matter of this action. This matter being argued to the court, the special appearance of the defendants was overruled, to which the defendants duly except.

The matter coming on further to be heard upon the motion of the plaintiff for a temporary injunction, such motion was also argued at length to the court, and duly submitted.

We will first examine the Constitution and statutes of Nebraska in reference to lotteries and gift enterprises.

Section 24, art. III of the Constitution, reads as follows: "The legislature shall not authorize any games of chance, lottery, or gift enterprise;" followed by the amendment of 1934 on the pari-mutuel racing plan.

The Nebraska law defines lotteries as follows: "Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands, or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever, shall be fined in any sum not exceeding Five Hundred Dollars." Comp. St. Supp. 1935, sec. 28-962. Then follows the provision exempting pari-mutuel wagering at horse races.

Section 28-965, Comp. St. 1929, provides that gift enterprises are unlawful which include a ticket of admission to any performance where any promise is held out.

In 1850 Mr. Justice Grier, in delivering the opinion in *Phalen v. Commonwealth of Virginia*, 8 How. (U. S.) 163, 12 L. Ed. 1030, said: "The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole com-

munity; it enters into every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

In 5 Pomeroy, Equity Jurisprudence (2d ed.) 4296, sec. 1893, we find this paragraph: "As a public nuisance concerns the public generally, it is the duty of the government to take measures to abate or enjoin it. Hence it follows that the government can obtain an injunction to restrain a public nuisance, without showing any property right in itself. The duty of protecting the property rights of all its citizens is sufficient to warrant issuing the injunction. Therefore, wherever a public nuisance is shown, equity must enjoin it at the suit of the government. 'Every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated is a public nuisance.' "

The plan of a "bank night" lottery is not a new thing before the courts of our country. The defendants cite some 13 cases in each of which they say "bank night" plan has been held to be legal and not a lottery. The plaintiff in his brief sets out a very respectable list of cases where the "bank night" lottery plan has been condemned, and answers the defendants by saying that many decisions cited favorable to "bank night" lotteries are based upon constitutional or statutory provisions much narrower than the provisions in the Nebraska Constitution and laws which make all gift enterprises unlawful.

It will be impossible to set out the holdings of all the cases which we have examined.

In *Central States Theatre Corporation v. Patz,* 11 Fed. Supp. 566, decided in the United States district court for the central division of Iowa, it was said: "Conducting in motion picture theater of advertising scheme called 'bank night' *held* to appeal to cupidity of public and spirit of gambling and speculation, to be unfair and contrary to public safety, and to so closely border on conducting of a lottery as not to entitle theater corporation to injunction to restrain interference with operation of scheme."

In *Commonwealth v. Wall,* 3 N. E. (2d) (Mass.) 28, the holdings can be briefly summarized as follows:

"Essence of 'lottery' is chance for a prize for a 'price,' meaning something of value rather than formal or technical consideration which would support contract. * * *

"Game does not cease to be 'lottery' because some or many of players are admitted to play free, if others continue to pay for their chances. * * *

"In determining whether theatre's bank night constituted lottery, test was whether persons paying for admission were paying in part for chance of prize, and not whether it was possible for persons in lobby or on sidewalk to win without paying for admission to theatre."

In *Affiliated Enterprises v. Gantz,* 86 Fed. (2d) 597, we find an opinion which was released December 3, 1936. It was an appeal from the district court of the United States for the northern district of Oklahoma. Suit was brought by the Affiliated Enterprises against Gantz, doing business as the Star Theater. It was heard in the circuit court of appeals for the tenth circuit, with the opinion by Lewis. The "owner of 'bank night' plan consisting of a system for giving away money prizes by lot in places of entertainment open to public on payment of admission fee held not entitled to restrain use of plan by defendant in his theater for purpose of giving away money prizes by lot or chance, since the plan was too closely akin to a lottery to warrant the protection of equity, notwithstanding that no admission charge was to be exacted as a condition to right to participate in the drawing."

In the very able and exhaustive brief of the defendants, we are cited to many cases which have held that "bank night" was not a lottery. Now, whether this plan is unobjectionable, or, on the other hand, is an evasion of the statute, or an avoidance of it, as claimed, is clearly a question of fact as to how the plan works out in actual operation, and whether in the majority of cases there is an actual payment of money for the chance of winning the prize.

If the allegations of the petition shall be sustained by the evidence, then the plaintiff will be entitled to a permanent injunction, based upon our holdings in the past. *State v. Ak-Sar-Ben Exposition Co.*, 118 Neb. 851, 226 N. W. 705; *Id.*, 121 Neb. 248, 236 N. W. 736, where it was held that a lottery, or any scheme of chance, by whatever name, style, or title, is unlawful; *State v. Heldt*, 115 Neb. 435, 213 N. W. 578; *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, 130 N. W. 295.

In our opinion, it will be proper to grant the state a temporary injunction at this time.

TEMPORARY INJUNCTION GRANTED.

JOHN A. JOHNSON ET AL., APPELLANTS, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT ET AL., APPELLEES.
274 N. W. 386

FILED JUNE 30, 1937. No. 29943.

1. **Pleading.** A defect which appears on the face of the petition should be taken advantage of by demurrer.
2. ———. When a defect of misjoinder of parties appears on the face of the petition, it must be raised by special demurrer.
3. **Eminent Domain.** By failing to make timely objection to five appraisers, plaintiffs waived any right they may have had to an appraisal of their damages by six appraisers.
4. ———. "Chapter 86, Laws 1933, does not authorize public power and irrigation districts to condemn and take private property for public use without just compensation." *State v. Fricke*, 126 Neb. 736, 254 N. W. 409.

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

Dryden, Dryden & Jensen, for appellants.

Beeler, Crosby & Baskins and *E. H. Evans, contra.*

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

GOSS, C. J.

This is an appeal by three joint plaintiffs from a judgment denying their injunction and dismissing their action. Plaintiffs sought to enjoin defendants from taking by condemnation proceedings the right of way across their several lands for purposes of a transmission line.

The petition described the lands owned separately by each plaintiff and alleged that the condemnation proceedings in the county court were unlawful because (A) only five appraisers were called whereas it is alleged that the applicable statute called for six appraisers; (B) that the proceedings asked for the appraisement of plaintiffs' lands for use only for pole structures to be placed thereon for high tension electric wires 20 to 50 feet above the ground and for the destruction of trees only in a direct line the width of the pole structures whereas the easement provided for cutting trees for 75 feet on either side of the right of way; (C) that defendant district's engineer, at the time of making the appraisement, represented to the appraisers that the structures would be composed of poles 60 feet tall with the wires 50 feet above the ground at the poles and 27 feet above the ground between poles, whereas, the wires are 10 feet closer to the ground than as so represented; (D) that under the statute defendant district's liabilities are limited to its profits and no damages hereafter allowed plaintiffs can be recovered unless defendant district shows a profit in its operations; (E) that the easement actually granted calls for construction diagonally across plaintiffs' lands and not along section, half-section, or boundary lines of plaintiffs' property lines, thus causing greater damage than if constructed on boundary lines as required by statute, and is thus contrary to law and to statutes in eminent domain proceedings in such cases; (F) that in the condemnation proceedings the notices served on plaintiffs did not describe their lands, but the property described purported to be in township 18.

Plaintiffs further alleged that they have no adequate remedy at law, that the right of way as granted is con-

trary to statutory law and is being taken without due process of law and for a public purpose without compensation, and that they have no remedy for damages against defendants by reason of the statutory limitation of liability.

By a joint answer defendants alleged a misjoinder of plaintiffs in that the petition shows on its face that each had a separate cause of action upon a separate tract separately owned; that the law provided for five appraisers; that the proceedings correctly described the pole structures that would be placed on the land, condemned the right to destroy any necessary trees across the separate tracts, and for ingress and egress; that all damages were appraised and the amounts of the appraisals have been deposited with the county judge for the use of plaintiffs; and the poles for the transmission line have been placed upon, over and across the lands; defendants admit (as alleged in the petition) that the assets of defendant district will be profits derived from its hydroelectric plant and irrigation, and allege that it will create a reserve fund for the payment of all repairs and expenses of acquiring right of way for its works and cost of operation of its project, and allege that there will be money available to pay any claims or judgments secured against it; allege that the easement runs across plaintiffs' lands and is not required by the statutes in such cases to run upon section or fractional section lines.

Plaintiffs demurred to the answer, but we find no ruling thereon. Later a reply, combining a general denial to the answer and a demurrer thereto, was filed. The demurrer was to certain portions of the answer to the general effect that the answer did not state sufficient facts to constitute a defense to the plaintiffs' cause of action.

In the judgment the court found that five appraisers is the number provided by statute for such condemnation proceedings; that plaintiffs are protected at law for any property taken which was not described in the original proceedings and may recover damages therefor; that the

law under which the Platte Valley Public Power and Irrigation District is organized is constitutional, and that, if damages cannot be collected, their use of the property will cease and plaintiffs may recover the same; and that the statute providing for the building of transmission lines on section, half-section and boundary lines does not apply to these defendants.

If defendants' claim as to misjoinder of plaintiffs is good, that will dispose of the case. So we consider that now. We did not heretofore recite that defendants demurred to the petition. The transcript shows no ruling by the court upon that demurrer. Defendants soon thereafter filed their answer, the terms of which we have recited. The demurrer is a general demurrer and failed to demur specially on the ground of misjoinder of plaintiffs.

Section 20-806, Comp. St. 1929, provides six grounds for demurrer, the fourth of which is: "That there is a defect of parties, plaintiff or defendant." And the sixth of which is: "That the petition does not state facts sufficient to constitute a cause of action." Section 20-807, Comp. St. 1929, is as follows: "The demurrer shall specify distinctly the grounds of objection to the petition. Unless it do so, it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action." Section 20-808, says: "When any of the defects enumerated in section one hundred and seven (20-806) do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." We interpret this to mean that, when the defect of misjoinder of parties appears on the face of the petition, the defect must be raised by a demurrer specially directed to the defect or not at all.

In *Snowden v. Tyler*, 21 Neb. 199, 31 N. W. 661, it is said: "It is objected that the petition is multifarious because the tenants in common are joined in the petition.

This defect, if it is one, appeared on the face of the petition and should have been raised by demurrer, and as it was not, it is waived."

As to whether there should have been six appraisers, instead of five, much is said upon both sides of the argument. The statutes and the arguments are not only confusing, but it seems to us that in the circumstances plaintiffs have rendered it unnecessary for us to decide the exact legal number of appraisers intended by the legislature to appraise the damages in such a case; for plaintiffs had notice of the appointment of five appraisers. That notice was duly served upon them out of the county court. They had ten days' notice of the inspection of the land by the appraisers, had written notice and the names of the appraisers thereon, and Wescott and Johnson were present at such inspection; Buettner was ill. They also had an opportunity to object, but so far as we can see from the record in the county court and from the record in this case, in which plaintiffs Wescott and Johnson testified and Carl A. Buettner testified on behalf of his father, there was no protest and no objection to five appraisers rather than six, until this injunction suit was begun. Defendants make a strong argument that in the exercise of the right of eminent domain they are governed, by reference in the act, by other statutes which provide for five appraisers, but we express no opinion on the merits of that legal argument. For we are able to hold and do hold that, by reason of all the circumstances, the use of five appraisers was at most a mere irregularity, which is not available to plaintiffs in this injunction suit. By failing to make timely objection to five appraisers, plaintiffs waived any right they may have had to an appraisal of their damages by six appraisers.

The fact appeared in the testimony in this case that plaintiffs have appealed from the awards and those appeals have not yet been tried.

It is claimed that defendants went outside of the line and cut trees, in one instance testified to be 90 feet from

the center line of the 14½-foot line condemned for the poles of the power company. In any case in which this is an issuable fact and can be shown, plaintiff has a remedy at law. But, having occurred after the condemnation proceedings, it has no bearing on plaintiffs' right to an injunction in this case. The awards especially excluded "speculative damage or crop damage that cannot be anticipated at this time."

Plaintiffs allege that the law under which the right of way for the power line is sought is unconstitutional as it deprives plaintiffs of their property without due process of law. The law was enacted as Senate File 310, chapter 86, beginning on page 337 of the 1933 Session Laws. It is carried into the compilation of the statutes and becomes a new or additional article 7 of chapter 70. See sections 70-701 to 70-715, Comp. St. Supp. 1933. The point is made in appellants' argument that section 9 of the act, or section 70-709 in the 1933 Comp. St. Supp., following provisions in the title, restricts the funds out of which any district may provide for payment of any liability (and therefore for condemnation money) solely to revenues derived from operation, and therefore, as it cannot derive revenue until it is in operation, it cannot constitutionally pay for private property taken or damaged, as required by the Constitution. The same act was considered by us in 1934 in the case of *State v. Fricke,* 126 Neb. 736, 254 N. W. 409, and it was held constitutional. One syllabus point said: "Chapter 86, Laws 1933, does not authorize public power and irrigation districts to condemn and take private property for public use without just compensation." In the text of the opinion it is further said: "It is further argued that the district has no funds at its command with which to pay for property condemned. That does not render the act unconstitutional. It would be necessary for the district to acquire the funds to pay for property condemned, in the event that it becomes necessary for it to resort to condemnation. This court is not concerned with the difficulties that the district may encounter in obtaining the funds with which

to finance construction of its proposed plant. Since relator and others similarly situated are fully protected in their private property and are assured that it may not be taken from them, except upon payment of just compensation, neither relator nor any one similarly situated has cause to complain." We see no reason to overrule or modify that opinion.

Under the express authority of the case just cited, the district court properly held on this point "that the law under which the Platte Valley Public Power and Irrigation District is organized is constitutional, and that, if damages cannot be collected, their use of the property will cease and plaintiffs may recover the same."

It is claimed by appellants that there was an error in the condemnation proceedings, wherein some of the land was described as in township 18, when the land in fact was in township 8. This was merely a clerical error and it was properly corrected in an order made and filed August 15, 1935, by the county judge before the appraisal was made. The parties had notice of it, knew that the lands condemned were in the right township, and no one was deceived or misled thereby.

The most complicated question to decide is whether, under the right of eminent domain, defendant district, appellee, was required to condemn along boundary lines, or whether, as it did, it was authorized to cross plaintiffs' lands irrespective of following boundary lines. It is conceded by appellees that, in exercising the right of eminent domain across plaintiffs' lands, the right must affirmatively appear in the statutes.

Appellee district is organized under chapter 86, beginning on page 337 of the 1933 Session Laws, now known as chapter 70, article 7, being sections 70-701 to 70-715, Comp. St. Supp. 1933, and the same section numbers in Comp. St. Supp. 1935. Section 70-707 declares: "All power plants and systems and all irrigation works constructed or otherwise acquired, or used, or operated, by any district under the provisions of this act * * * are hereby declared

to be works of internal improvement, and all laws applicable to works of internal improvement, and all provisions of law now applicable to electric light and power corporations, or to irrigation districts, or to privately owned irrigation corporations, as regards the exercise of the power of eminent domain, the use and occupation of state and other public lands and highways, * * * shall be applicable as nearly as may be, and in so far as not in conflict with the provisions of this act, to districts organized under this act. * * * In addition to any other rights and powers hereinabove conferred upon any district organized under the provisions of this act such district shall have and exercise the power of eminent domain for the purposes and after the manner provided for in sections 46-602, 46-603, 46-607, 46-608, 46-617, Compiled Statutes of Nebraska, 1929, or in any one or more of said sections."

Section 46-603, Comp. St. 1929, above referred to, provides: "In case of the refusal of the owner or claimant of any lands through which such ditch, canal or other works are proposed to be made or constructed, to allow the passage thereof, the person, desiring the right of way, may present to the judge of the county in which such lands are situated, a petition describing the lands to be crossed, the size of the ditch, canal or works, the quantity of land which is required to be taken, and setting forth the names of the parties interested in the lands to be crossed, and praying for the appointment of five appraisers, disinterested freeholders of said county, to ascertain the compensation to be made to such owners or parties interested. Upon the filing of said petition, the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations; and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigation ditches, canals and other works provided for in this article."

Section 46-601, Comp. St. 1929, the first section of the

same article of the same act, says: "Canals and other works constructed for irrigation or water power purposes, or both, are hereby declared to be works of internal improvement; and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works." One of the chief "water power purposes" is the production and transmission of electricity.

Section 70-707, Comp. St. Supp. 1933 and 1935, expressly grants to all works of internal improvement the power of eminent domain exercised by "electric light and power corporations," by "irrigation districts" and by "railroad corporations." Defendant district is a work of internal improvement. It was authorized therefore to condemn plaintiffs' lands across the same without following boundary lines because in the laws relating to light and power corporations, to irrigation districts and to railroad corporations, the laws as to them were expressly made applicable to defendant corporation. The most usual and best known of these corporations acquiring right of way is a railroad corporation. The general statute granting the power of eminent domain to a railroad gives it the power to enter upon and condemn "any land."

The judgment of the district court is

AFFIRMED.

T. G. INGHRAM, DOING BUSINESS AS T. G. INGHRAM & SON, APPELLEE, V. UNION STOCK YARDS COMPANY, APPELLANT: RECORD LIVE STOCK COMMISSION COMPANY, APPELLEE.

274 N. W. 185

FILED JUNE 30, 1937. No. 30057.

1. **Replevin.** One who has the right of possession of personal property is entitled to replevy it when possession is refused.
2. **Record** analyzed and judgment affirmed.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Brown, Fitch & West, for appellant.

O'Sullivan & Southard and *William R. Patrick, contra.*

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and SPEAR and KROGER, District Judges.

GOSS, C. J.

This was a replevin action, in which a jury was waived and by stipulation it was tried to the district court without a jury on the same pleadings as filed in the county court. It resulted in a judgment for plaintiff for the immediate possession of the seven head of cattle taken under the writ from defendant Union Stock Yards Company, and a judgment for damages for five cents and for costs, denying that company any award for expenses of caring for the cattle while their possession was withheld, and in a dismissal of the Record Live Stock Commission Company from the case. The Union Stock Yards Company appealed.

Plaintiff, who will be called Inghram, had been in the live stock business at the Union Stock Yards since 1896, with the exception of two years. Under the Packers and Stock Yards Act passed by the congress in 1921, he came under the definition of a "dealer" and the Union Stock Yards Company was, under that act, a "stock yard owner." The act made it the duty of every stock yard to furnish service "without discrimination," to "establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stock yard services" (7 U. S. C. A. ch. 9, sec. 208) and to make and determine reasonable rates and charges. Such printed rules and regulations, established by the stock yards company, containing tariffs and rules, were in evidence, offered by plaintiff and not objected to.

One of the rules in the printed tariff provided that no person should engage in the live stock commission business or the business of dealing in live stock in these yards unless he had provided a bond running direct to the company or was bonded by another who carried proper bond. The bond was not to be less than $10,000. Inghram

furnished such a bond, with a bonding company as surety, for the period of one year from February 2, 1933, assuring the stock yards company on behalf of "T. G. Inghram and traders for whom they clear" that all charges on account of live stock handled would be paid. One of the conditions written in the bond to which it was recited as subject was this: "That the agent hereunder has not within the knowledge of the assured been at any time a defaulter in the payments of amounts due to the assured." For brevity, the bond had provided that Inghram should be called the "agent."

When the bond expired it was sought to be renewed by a short form of continuation certificate issued by the bonding company. But in the meantime Inghram had questioned, and had refused to pay, certain charges made by the stock yards company and the company had sued him in the courts of the United States thereon, and the evidence shows that, while that suit had been settled, yet there was another suit between the parties over another default of plaintiff herein to pay charges said to be levied under the stock yard's tariffs. So, while the stock yards company did not object to the fact that the bond was sought to be renewed by the continuation certificate, it refused to consider this as renewing the bond because of the recital in the bond which we have quoted in the preceding paragraph. It claims that Inghram had defaulted in payment "of amounts due to the assured" and it claims that the bonding company could not be held on such a bond for later defaults in the face of that recital.

So there was no bond of Inghram in force after the original had expired on February 2, 1934, unless we should hold that the "continuation certificate" renewed the former bond and that thus the minds of the parties met, even though it appears that they did not in fact meet on the recognition of the renewal of the bond. We find ourselves unable so to hold. We are of the opinion that Inghram had at least technically defaulted in his duty to pay charges fixed by the tariff and that the stock

yards company was justified in refusing to accept a renewal of his bond containing a statement that he had not so defaulted. If occasion should arise where the bonding company was sued by the stock yards company on such a bond, the bonding company might seek to defend on the ground that it was not liable by reason of this false statement which induced it to issue the bond.

Inghram also claims that he was entitled to delivery of the seven head of cattle because of the so-called "open order" of Record Live Stock Commission Company, from whom he had purchased the cattle on the 12th of February, 1934. This concern was duly registered under the Packers and Stock Yards Act as a "market agency" and was engaged in the business of buying and selling in commerce live stock on a commission basis. It is agreed that it had a bond to the Union Stock Yards Company in full force.

To speed up the weighing and delivery of live stock in large number and often in small lots, it is necessary that changes of title be facilitated at the scales where it usually takes place. From the seller this is usually effected by an oral statement made by one known to the weigher to be duly authorized to the man at the scales, who quickly makes a record of the weights and of the purchaser. The stock is quickly moved and others with their record follow. In this instance the cattle were not to be moved from the yards. After going over the scales they immediately passed to the possession of the stock yards company, which moved them to a holding pen and locked its gate. If the company had been satisfied with the record of title, it would have delivered them to Inghram without the necessity of a replevin action.

Periodically, and usually about the first of every year, the stock yards company prints for the use of commission men on its market a list of many purchasers on the market whose credit is supposed to be good, most of whom have given bonds to the company, as, for instance, Inghram had done early in 1933. At the bottom of the list is a blank which may be filled out and signed by the commission

company, directing the stock yards company to "deliver to any of the above parties all live stock sold or weighed by us till further notice." The commission firm may strike off any of the names on the printed list or it may add any names. Inghram's name was on the list. It was the practice or custom of the stock yards company to recognize and consider that any party on the list was entitled to the possession of any live stock as soon as it had been weighed at the instance of any signer of the open order. The paper is entitled "Open orders for commission firms, packers, shippers and traders." This one was executed by Record Live Stock Commission Co., by A. G. Robinson, December 16, 1933. It had not been revoked and was considered by the Record company in effect when they had in the usual way directed the man at the scales to weigh the cattle and identified Inghram as the purchaser.

These open orders have been referred to rather loosely in the testimony as "letters of credit." They seem to be that only to the extent that they direct the company to deliver to any purchaser named on the list all live stock sold or weighed to them. In other words, the seller appears to take his chances in getting his pay for the stock or for any charges against them, if he has not already received whatever he is entitled to.

After this occurrence Inghram continued to do business on the market, but did not rely on his bond or upon the open order. He obtained from some duly bonded agency a so-called "release order," of which two samples, used by him to clear cattle bought by him after they were weighed, are in the record. These are card forms signed by the commission firm making the sale directing delivery to T. G. Inghram & Son.

All parties were stubborn in their attitudes in the particular case involved. Only those who were legally right ought to be entitled to that expensive privilege.

One who has the right of possession of personal property is entitled to replevy it when possession is refused.

We are unable to see how the stock yards company got any more or better authority to turn over to Inghram the cattle he purchased from others about the same time, which were secured upon release orders, than was obtained here by the open order from Record Live Stock Commission Company, which it refused to honor. Both merely directed delivery. Neither showed any special reason for clearance. The evidence shows that, if the Record company had executed a card such as we have described, the stock yards company would have honored it. Inghram had title to and the right of possession of the cattle. In the circumstances we are of the opinion the stock yards company had no legal right to refuse to deliver the cattle without a further release. We see no violation of the national act, no violation of the tariffs or rules of the stock yards, or any other legal liability that could have arisen out of the compliance with the request. The judgment of the district court is

AFFIRMED.

JESSIE ANDREWS, APPELLANT, V. JOHN CLAPPER, SR., APPELLEE.

274 N. W. 209

FILED JUNE 30, 1937. No. 30022.

1. **Appeal.** In reviewing the discharge of the jury and the entry of a nonsuit at the close of plaintiff's evidence in an action for negligence well pleaded, the appellate court will consider as established every pertinent fact which the admissible evidence adduced proves or tends to prove and give plaintiff the benefit of proper inferences therefrom.
2. **Negligence.** "A plaintiff, who is without fault, may recover for injuries as the proximate result of the negligence of another, regardless of the degree of such negligence." *Serratore v. Miller*, 130 Neb. 908, 267 N. W. 159.
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." *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794.

4. **Automobiles:** OPERATION: PRESUMPTION. The presumption that the driver of an automobile at an intersection of streets, where there are red and green traffic signals, will not violate traffic regulations terminates when the contrary is indicated by affirmative acts of which other motorists are bound to take notice in the exercise of ordinary care.
5. ———: ———. A motorist approaching traffic at an intersection in public streets may rely upon his right of way until he becomes aware of conditions which call for action upon his part, but it then becomes his duty for his own safety, and that of others, to avoid accident if reasonably possible, and violation of this duty may create a liability for resulting damages.
6. ———: NEGLIGENCE: QUESTION FOR JURY. Where evidence in an action for negligence well pleaded is sufficient to sustain a verdict in favor of plaintiff, it is error to discharge the jury and enter a nonsuit.

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

Robert E. McCormack, Bernard R. Stone and *Wear, Boland & Nye*, for appellant.

Gaines, McLaughlin & Gaines and *Paul L. Hoffman, contra.*

Heard before ROSE, GOOD, EBERLY, DAY and CARTER, JJ., and HASTINGS and RINE, District Judges.

ROSE, J.

This is an action to recover $20,000 in damages for personal injuries resulting from alleged negligence of John Clapper, Sr., defendant, in causing a Chevrolet car driven by him to collide with a Ford coach in which Jessie Andrews, plaintiff, was a guest. The collision occurred in Omaha at the intersection of Fifty-seventh street, or "Happy Hollow Boulevard," and Dodge street about 6:30 in the evening of April 2, 1935.

Dodge street runs east and west. The Ford coach in which plaintiff was riding, going west, entered the inter-

section from the east on Dodge street, made a left turn to the south or toward Fifty-seventh street and stopped south of the center of the intersection, where it was struck by the Chevrolet car which, going east, entered the intersection from the west on Dodge street. The acts of negligence imputed to defendant are excessive speed; failure to accord right of way to the driver of the Ford coach, who first arrived at the intersection; no proper control of Chevrolet car; failure to look out for traffic; want of audible signal of approach.

Defendant denied negligence on his part and pleaded that plaintiff's injuries were caused by the negligence of the driver of the Ford coach. The reply was a general denial.

At the close of plaintiff's evidence the trial court, on motion of defendant, discharged the jury and entered a nonsuit for insufficiency of the evidence to prove actionable negligence on the part of defendant. Plaintiff appealed.

The question presented is the sufficiency of the evidence to make in favor of plaintiff a *prima facie* case against defendant for the consideration of the jury. Mrs. Everett Stoll, owner of the car, was driving at the time of the accident. Plaintiff, a guest, was not guilty of any negligence. In reviewing the discharge of the jury and the entry of a nonsuit at the close of plaintiff's evidence in an action for negligence well pleaded, the appellate court will consider as established every pertinent fact which the admissible evidence adduced proves or tends to prove and give plaintiff the benefit of proper inferences therefrom. *Rhoads v. Columbia Fire Underwriters Agency,* 128 Neb. 710, 260 N. W. 174; *Bainter v. Appel,* 124 Neb. 40, 245 N. W. 16; *Kimble v. Roeder,* 115 Neb. 589, 214 N. W. 1.

Other applicable principles of law have been stated as follows:

"A plaintiff, who is without fault, may recover for injuries as the proximate result of the negligence of another, regardless of the degree of such negligence." *Serratore v. Miller,* 130 Neb. 908, 267 N. W. 159.

"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." *Rogers v. Brown,* 129 Neb. 9, 260 N. W. 794. See, also, *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695; *Bosteder v. Duling,* 115 Neb. 557, 213 N. W. 809; *Johnson v. Mallory,* 123 Neb. 706, 243 N. W. 872.

The facts already stated were shown by the evidence. The driver of the Ford coach testified as a witness for plaintiff and among other things said in effect: There were red and green traffic signals at each of the four corners of the intersection. Dodge street is four traffic lanes in width. Driving west in the lane north of the center of Dodge street, she approached Fifty-seventh street at a speed of about 25 miles an hour when the traffic light was green; crossed to the west side of Fifty-seventh street; turned to the left, or south, going about 10 miles an hour; when just turning saw defendant about a quarter of a block away coming from the west at the rate of about 40 miles an hour in the center lane on the south side of Dodge street; signaled her left turn by opening the door on the left or south side of the Ford coach; defendant did not change his course or slacken his speed; observing defendant's approach, brakes of Ford coach were applied and car stopped; from the time she first saw defendant until the impact she went about a car's length or eight or ten feet; when the Ford coach was headed southwest and at rest in the southwest quarter of the intersection the collision occurred; right front of Ford coach was first struck; the next witness knew, her car was standing on the northeast corner of the intersection facing northwest. Testimony of the nature outlined was not destroyed by cross-examination. There is also evidence to the effect that plaintiff was a guest sitting at the right of the driver; that after the crash the right door of the Ford coach was open; that plaintiff was unconscious on the pavement, and severely injured. The evidence is uncon-

tradicted and, for the purpose of testing the order that took the case from the jury, is accepted as expressing the truth on the issue of negligence and resulting damages.

Though the driver of the Ford coach did not give the proper signal by extending her left arm and index finger beyond the left side of her car to indicate a left turn, the omission did not give defendant a license to rush into the intersection at a dangerous speed without regard to the rights and safety of others lawfully there—a busy center of traffic requiring signal lights. Since the driver of the Ford car saw defendant about a quarter of a block away as she was making a left turn, it is a fair inference that he then saw, or should have seen, the turning movement of her car and should have anticipated her purpose. His failure to change his course or to slacken his speed to avoid a collision under the circumstances was evidence of actionable negligence. The law is: "The duty of a motorist at a congested intersection in public streets is commensurate with the danger to himself and others." *Rogers v. Brown*, 129 Neb. 9, 260 N. W. 794. The presumption that the driver of an automobile at street intersections, where there are red and green traffic signals, will not violate traffic regulations terminates when the contrary is indicated by affirmative acts of which other motorists are bound to take notice in the exercise of ordinary care. In a former discussion of this subject it was said:

"One having the right of way may not on that account proceed serenely unconscious of the surrounding circumstances; and if they are such as to forecast in the mind of a reasonably prudent person the probability of a collision should he continue on his way, it would be his duty to waive his right if reasonably necessary to avoid that event. The position of a driver of an automobile having the right of way is akin to that of the farmer who, when his horse ran away, trusted in the Lord until the breeching broke; the former may rely upon his right of way until he becomes aware of conditions which call for action

upon his part; it then becomes his duty for his own safety, and that of others, to avoid accident if reasonably possible." *Thrapp v. Meyers,* 114 Neb. 689, 209 N. W. 238. See, also, *Serratore v. Miller,* 130 Neb. 908, 267 N. W. 159.

If negligence of the driver of the Ford car combined with that of defendant to cause injury to plaintiff, a third person without fault, defendant did not thus escape liability for resulting damages. The issues were for the jury under the evidence and the rules of law stated. For the errors in excusing the jury and in dismissing the action, the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

ESTHER N. BUSHNELL, APPELLANT, V. ADDIE THOMPSON ET AL, APPELLEES.
274 N. W. 453

FILED JUNE 30, 1937. No. 30047.

Dismissal. Failure or refusal of plaintiff to comply with a proper order of the court with respect to amendment of petition may be valid ground for dismissal of the action.

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

Charles A. Fisher and *W. M. Iodence,* for appellant.

Boyd & Metz, contra.

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

GOOD, J.

Plaintiff brought this action in ejectment alleging a legal estate in and right to possession of the following described realty: "A strip of land about 30 rods in width, north and south, and 100 rods in length, east and west, which is situated along the north side, and immediately

adjoining and abutting upon the north side of the section line between sections 1 and 12 in township 28 north of range 50 in said county, which tract comprises a portion of the south half of the southeast quarter and the southeast quarter of the southwest quarter of said section 1."

Defendants Addie Thompson and Eugene E. Thompson in their answer alleged as defenses that the land claimed by plaintiff was not in section 1, but was a part of section 12, and that defendants had been in possession thereof, under claim of ownership, for more than ten years, and pleaded the statute of limitations. Plaintiff's reply was in the nature of a general denial. A trial of the issues resulted in the following verdict: "We, the jury duly impaneled and sworn in the above entitled cause, do find for the defendant Burt Furman. We also find that the plaintiff has a legal estate in and is entitled to the possession of the tract of land described in her petition and also find for the plaintiff as to her claim for damages as against the defendants Addie Thompson and Eugene E. Thompson and assess the amount of her recovery therefor at $288." It may be observed that the court directed a verdict in favor of defendant Furman.

Motions for a new trial were filed by Addie Thompson and Eugene E. Thompson, and later the court sustained these motions, and, realizing that plaintiff's description of the land claimed by her was so indefinite that no one could tell what particular tract of land was claimed, gave leave to plaintiff to amend her petition, to accurately describe the tract of land claimed by her, and ordered that, unless she did so amend her petition within 60 days, the action would be dismissed. After the lapse of more than 60 days, plaintiff not having amended her petition but having stated in open court that she elected to stand upon her petition, the court entered judgment of dismissal. Plaintiff has appealed.

It is apparent that plaintiff has not in her petition described any tract of land with particularity, so that it could be ascertained. The most that may be said for

it is that the south boundary of the tract is the south line of section 1, in township 28, north of range 50 west, but, in truth and in fact, if the range is 50 west, it is not in the county in which trial was had, but would be in Box Butte county, to the east thereof. From other matters in the record and from the formal pleadings, it is evident that plaintiff should have designated the range as 53 west, but, even if the range had been correctly given, only one dimension of the tract claimed by plaintiff was set out. Where it terminates on the east was not disclosed, nor where it terminates on the west, and its northern boundary is somewhat indefinite. It would be impossible for any one to locate, from the description given, any particular tract of land claimed by plaintiff. When this situation was apparent to the court, it very properly advised plaintiff that it would be necessary for her to give an accurate description of the land, possession of which she sought to obtain in the action. Plaintiff was allowed ample time in which to comply with the order of the court. Plaintiff did not comply with the order, but she announced in open court that she would stand on her second amended petition.

The rule is well established that failure or refusal of plaintiff to comply with a proper order of the court may be valid ground for dismissal of the action. Section 20-601, Comp. St. 1929, authorizes dismissal of an action by the court for disobedience by the plaintiff of an order concerning the proceedings in the action.

In *Ferson v. Armour & Co.*, 109 Neb. 648, 192 N. W. 125, it was held: "Judicial power to dismiss an action without prejudice for failure of plaintiffs to comply with rules of pleading and orders relating thereto is recognized by statute."

In *Northport Irrigation District v. Farmers Irrigation District*, 125 Neb. 607, 251 N. W. 174, it was said (p. 611): "The lower court sustained two motions to two different petitions; the plaintiff failed to comply with the order or ruling of the court but avoided setting out the matter

required in each of the petitions and the court was justified in dismissing the case where the plaintiff ignored the previous order of the court," citing *Ferson v. Armour & Co., supra.*

Since the judgment of dismissal was properly made because of plaintiff's refusal to comply with the order of the court, it is unnecessary to consider any other question presented.

The judgment of the district court is right and is

AFFIRMED.

LLOYD R. JOHANSEN, APPELLANT, V. FARMERS MUTUAL HAIL INSURANCE ASSOCIATION OF IOWA, APPELLEE.

274 N. W. 393

FILED JUNE 30, 1937. No. 30081.

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

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

Foster & Yates, for appellant.

Chambers & Holland, contra.

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

EBERLY, J.

This is an action under the Nebraska workmen's compensation law. It appears that on April 30, 1935, plaintiff first filed a petition before the then compensation commissioner, alleging, in substance, that on August 17, 1931, while in the employ of defendant, the wheel of an automobile passed over plaintiff's right foot which caused injuries which resulted in his total disability, for which recovery was sought.

Chapter 57, Laws 1935, was passed with an emergency

clause, and was approved and became in full force and effect on May 25, 1935. There was a hearing had under the provisions of this law of 1935 before one of the judges of the compensation court, and on March 11, 1936, an order was entered dismissing plaintiff's cause of action. Thereafter a rehearing was granted, and said cause was heard before the compensation court sitting *en banc*. That court thereupon reversed the original decision, and on May 15, 1936, entered an award in favor of plaintiff. Thereafter defendant prosecuted an appeal to the district court for Lancaster county, upon the hearing of which an order was made and entered in that court reversing the order and judgment of the compensation court rendered in favor of plaintiff, and dismissing plaintiff's cause of action. From this order, and the order of the district court overruling his motion for a new trial, plaintiff appeals.

As part of its judgment, the district court stated special findings of fact, as follows:

"1. That the plaintiff, Lloyd R. Johansen, sustained an injury on or about the 17th day of August, 1931, which injury resulted in immediate disability.

"2. That since the said accident the said Lloyd R. Johansen has been continuously disabled."

There is no evidence in the record which, in a substantial manner, controverts these conclusions.

The following is a résumé of the testimony in the record:

On August 17, 1931, at about 3 o'clock p. m. of that day, plaintiff was at the Ideal Garage on the corner of Fourteenth and M streets, in Lincoln, Nebraska. He was talking to his brother, Jack Johansen, who was seated in a parked automobile at that place. The conversation ended and Jack "backed out" his automobile to commence his journey. In so doing the left front wheel of Jack's car passed over plaintiff's right foot. This caused the initial injury from which it is claimed plaintiff's troubles originated. Plaintiff at the time "didn't think" he "was badly hurt;" his foot "was kind of numb;" he

"rubbed it and it felt better." In the evening of that day, when he removed his socks, the injured foot "was quite red; * * * there was a couple of skinned places on my foot." On the following day, it began to swell and was red and hurt him when he walked on it. After that his "foot got worse;" and he went to bed, and "when I got up I developed a condition in my knees." The services of Dr. Beshlein, a chiropodist, were engaged "two or three days after the accident." The foot was then "badly swollen and awfully sore and red." Dr. Beshlein continued his treatment "about ten days or two weeks." Plaintiff then consulted Dr. Bowman, a regular physician and surgeon, who continued to treat him until February, 1932. He then developed ulcers of the eyes which were treated by Dr. Elliott. In the meanwhile during the "last of September," 1931, his knees swelled and this condition was treated by Dr. Bowman until February or March, 1932. He then consulted Dr. Kail, an X-ray specialist, who made X-rays of his right foot. In March, 1932, he employed Dr. Olney, a regular physician. At this time the plaintiff described his condition as follows: "The swelling had never left my foot, and I had bursitis in both my knees. * * * They weren't any better. They got just about so bad and stayed that way."

It may be said that after the employment of Dr. Olney, the following physicians, surgeons, diagnosticians, and specialists, in turn, made examinations of plaintiff's condition, and treated him from time to time, up to the time of the filing of these proceedings, viz.: Dr. Marx, physician and surgeon; Dr. Pratt, member of the faculty of the Medical School, University of Nebraska; Dr. J. E. M. Thomson, orthopedist; Dr. Ward, physician and surgeon; Dr. Fritz Teal, orthopedist; Dr. Rasck, Dr. Reinhard, and Dr. E. W. Rowe, physicians who examined him for the insurance carrier; and last of all he employed Dr. Arthur L. Smith, diagnostician.

As to the information he had received from these various doctors, plaintiff testifies that he first went to

Dr. Arthur L. Smith about April, 1935; that his knees were then swollen, red and painful, and that he walked with a cane. His further evidence is, in part: "Q. Up to the time you went to see Dr. Arthur L. Smith in April, 1935, had any physician or surgeon who had examined you or treated you, or any other physician or surgeon, ever told you that the condition of your knees was the result of the accident and injuries you sustained on August 17, 1931? A. No. Q. And up to the time that you went to Dr. Arthur L. Smith, in April, 1935, did you know yourself that the condition of your knees and your disability was the result of the accident and injuries you sustained on August 17, 1931? A. No. Q. Dr. Smith made an examination of you, did he? A. Yes. Q. What did his examination consist of? A. Physical, X-rays and the usual clinical examination, I guess, that he gives. Q. Did he inform you what the producing cause of your disability at that time was? A. He did. * * * Q. Did you become informed at the time that you were examined by Dr. Smith what the nature and character of your disability in your knees was? A. Yes. * * * Q. You may state whether, or not, you had ever been informed by any physician or surgeon subsequent to your accident and injuries on August 17, 1931, up to the time you went to Dr. Smith, that the disability in your knees and the physical condition of your knees was the result of the accident and injuries you sustained on August 17, 1931, while in the employ of the defendant on appeal in this case? A. No. Q. When was the first time that you were informed that the accident and injuries you sustained on August 17, 1931, was the producing cause of the condition to your knees, and which you are now suffering, and which renders you disabled? A. In April, 1935. * * * Q. Are you able to earn a livelihood for yourself? A. No. Q. Have you been since your accident and injuries? A. No. Q. Now, Mr. Johansen, during all of the time from the date of your accident and injuries on August 17, 1931, up to the time you went to see Dr. Arthur L. Smith,

you had been treated by many physicians, had you not? A. Yes. Q. And you may state whether, or not, during all of that time, you were trying to find out the cause of your condition and a cure therefor? A. I was."

Plaintiff also testified, viz.: "Q. You may state whether, or not, you were a strong, able-bodied man prior to the 17th day of August, 1931? A. I was. Q. Were you able to walk prior to that time? A. Yes. Q. Was there anything physically wrong with you prior to August 17, 1931? A. No. Q. Had you ever been treated by any physicians or surgeons for any disease prior to that time? A. No. Q. Did you have arthritis prior to August 17, 1931? A. No."

Plaintiff further testified, viz.: "Q. You were a well man before August 17, 1931; have you ever had a well day since that time? A. No, sir. Q. Has there ever been a day since this alleged accident when you have not been disabled? A. Disabled in some way, my foot, my knees, or something. Q. And since August 17, 1931, you have always known, have you not, that the injury sustained on that day to your right foot was disabling? A. The accident that I sustained disabled me in the foot, yes. Q. Has there been any time since August 17, 1931, that you have been able to walk without some kind of a support? A. No. Q. Now, at the time this disability worked up into your knees, was this foot still sore? A. Yes, sir. * * * Q. Was there any lapse of time between the injury to your foot and the time the disability started in your knees? A. No, sir."

In this case the record does not establish that notice of injury or claim for compensation was filed within six months with the compensation commissioner, or served upon the employer, as required by section 48-133, Comp. St. 1929; nor was a petition filed within one year after the accident, as required by section 48-138, and under the limitations therein provided all claims for compensation under the last-named section were barred. *Duhrkopf v. Bennett*, 108 Neb. 142, 187 N. W. 813. In the *Duhrkopf*

case, in discussing the statutory provisions above referred to, the doctrine applicable thereto was announced, viz.: "Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed." See, also, 2 Schneider, Workmen's Compensation Law (2d ed.) p. 1891.

However, plaintiff seeks to avoid the bar of the statute by the contention that none of the many doctors employed by him, nor any one else, ever informed him that he was suffering from traumatic arthritis, and that he had no knowledge that the accident of August 17, 1931, was connected with his subsequent physical condition, and constituted the causal factor thereof, until he received such information from Dr. Arthur L. Smith in April, 1935.

But Dr. Fritz Teal testifies as a witness for plaintiff, on direct examination, that he first examined the plaintiff on August 28, 1931, and that his diagnosis was that plaintiff was then suffering from acute arthritis of his right foot and ankle. It further appears on cross-examination that Dr. Teal made a report on the physical condition of plaintiff to the Midwest Life Insurance Company on September 14, 1931, and his "diagnosis was arthritis of the right foot, traumatic in origin." It is stipulated in the record that plaintiff made claim under the accident policy with the Midwest Life Insurance Company for disabilities due to the accident of August 17, 1931. It was in connection with this claim that Dr. Teal's diagnosis was made. It also appears stipulated that Dr. Marx, if present, would testify that on or about December 1, 1932, Mr. Johansen, plaintiff, presented himself at the office of Dr. Marx for examination and treatment, on which date Dr. Marx advised him that he was suffering from a proliferating and destructive type of arthritis.

The record also discloses that on April 20, 1932, plaintiff instituted an action against his brother, Jack Johansen,

in the district court for Lancaster county, Nebraska; that, in his petition, signed and personally sworn to by him, filed in that case, he set forth a cause of action for damages for personal injuries received by plaintiff, due to the negligence of Jack Johansen in backing an automobile over the feet of plaintiff on August 17, 1931. The fourth paragraph of this pleading is as follows:

"That on said day and at said time and place the front wheels of said Chevrolet automobile ran onto and over the feet of the plaintiff injuring the bones in his feet causing him great injury and damage; that as the result of the negligence and carelessless of the defendant, the plaintiff was required to remain in bed for a period of four months sustaining constant physical and mental pain and suffering; that plaintiff has been required to employ doctors and surgeons to attend him and to expend money and incur indebtedness for their services in the sum of Five Hundred Dollars ($500); that as a proximate result of the negligence and carelessness of the defendant and the injury to the bones in his feet, the plaintiff's lymphatic system and circulatory system has become involved, and his knee joints have been affected and stiffened, and his eyes have been affected so that the plaintiff has been permanently crippled and lamed and incapacitated for physical labor and will remain a cripple for the rest of his natural life."

What men actually do from time to time, wholly unexplained, may be conclusive as to what knowledge they then possess, even as against protests to the contrary subsequently made.

These statements made in his petition are not satisfactorily explained by plaintiff. It is obvious from all the evidence that the disability of plaintiff was immediate, commencing substantially on the date of the accident, and it was thereafter substantially continuous. From and after the 19th day of April, 1932, it would seem undisputable that plaintiff was chargeable with knowledge that as a proximate result of the accident of August 17, 1931, he had been "permanently crippled and lamed and incapacitated

for physical labor and will remain a cripple for the rest of his natural life."

If it be conceded that plaintiff was ignorant as to the name of the disease from which he suffered, the causal injury, so far as objective symptoms were concerned, was not latent, and it must be admitted that this public record in evidence discloses that he was informed and well knew on April 19, 1932, of the causal connection between the accident of August 17, 1931, and his then condition, more than three years prior to the commencement of the present action, and that he had a compensable injury during all that period of time. *Park v. School District*, 127 Neb. 767, 257 N. W. 219; *Welton v. Swift & Co.*, 125 Neb. 455, 250 N. W. 661.

Therefore, plaintiff's proof is manifestly insufficient to remove the bar of the statute of limitations. This fact necessarily determines the litigation and denies plaintiff any relief in this action. The discussion of the further questions presented by the record is therefore unnecessary and would serve no purpose.

It is apparent that the judgment of the trial court is correct, and it is

AFFIRMED.

EMILY MCCORMACK, APPELLEE, V. THOMAS B. MURRAY, APPELLANT.

274 N. W. 383

FILED JUNE 30, 1937. No. 29991.

1. **Mortgages**: DEFICIENCY JUDGMENT. The trial court, by holding a motion for a deficiency judgment under advisement until a subsequent term of court, did not lose jurisdiction thereof.
2. **Judgment**: COLLATERAL ATTACK. When a trial judge, having jurisdiction of the parties and subject-matter, gives a wrong reason for the judgment he enters, it is not for that reason open to collateral attack.
3. ———: REVIVOR. Repeal of the statute permitting recovery of a deficiency judgment (Comp. St. 1929, sec. 20-2141) does not prevent an action to revive a dormant deficiency judgment.

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

Thomas & Thomas and *Eugene D. O'Sullivan,* for appellant.

John R. McCormack, contra.

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

PAINE, J.

In this case an attack is made upon a revivor of a deficiency judgment, on the ground that the original deficiency judgment was void.

On August 20, 1914, a petition for the foreclosure of a mortgage against the north 33 feet of a certain residence lot in Hanscom Place, Omaha, Nebraska, was filed. On January 11, 1915, the decree was entered, and on December 4, 1915, a motion was filed, setting out that the plaintiff was entitled to a deficiency judgment for the difference between $4,568.88, which was the amount of the original decree, with interest and costs of $54.80, less the amount of $3,700, which was the proceeds of the foreclosure sale.

This matter was taken under advisement until several years and many terms of court had passed, and then on June 17, 1918, the court found it would not be equitable to award the plaintiff a judgment for the full amount of the deficiency claimed, and then adds in such decree these words: "The court finds that the plaintiff Emily McCormack is justly entitled to judgment against defendant Thomas B. Murray for the rental value of the property during the period the same was held by the defendants Murray after default, with interest at the rate of 6% per annum. That the rental value of the premises was thirty dollars ($30) per month and the defendants Murray held possession after default from June 1, 1914, to December 1, 1915. That the amount which plaintiff is justly entitled to recover with interest to date is six hundred twenty-two and 50-100 dollars ($622.50) and the costs."

It thus clearly appears from the decree that, for some reason not given by the court, he found it would not be equitable to award the plaintiff the large sum due as a difference between the amount of the original decree less the amount realized at the foreclosure sale, plus interest for those years and costs, but that, without any allegation in any pleading raising this issue or requesting such a judgment, and apparently assuming power to go entirely outside the issues, the court simply rendered a judgment that the house, retained for 18 months, should have been worth a rental of $30 a month, amounting to $540, and added thereto 6 per cent. interest for the period from December 1, 1915, to June 17, 1918, amounting to $82.50, thus rendering a judgment for rental value and interest thereon at 6 per cent., in the total sum of $622.50. The difference between the original judgment with 6 per cent. interest and costs less the amount of $3,700 bid for the property would have amounted to upwards of $1,056, so the judgment entered for what the rental value amounted to was a little over half of the deficiency judgment which the court might have entered.

The judgment so entered is attacked on many grounds: First, that it was void because not entered at the term when the report of sale was made, but entered after several terms of court had intervened.

Appellant also insists that the judgment is absolutely void for the reason that it shows by its terms that it was entered for rental value, which was not mentioned in the pleadings nor in the motion for deficiency judgment.

Next, the appellant claims that the repeal of the deficiency judgment statute in April, 1933 (Laws 1933, ch. 41) destroyed that remedy in all cases except as preserved by section 49-301, Comp. St. 1929; that is, except in pending actions and in causes of action not in suit which accrued prior to the repeal.

The first question which must be decided is whether the court lost jurisdiction of the matter by holding the motion for a deficiency judgment under section 20-2141, Comp.

St. 1929, under advisement from December 4, 1915, the day it was submitted, until June 17, 1918, before entering judgment thereon.

Commissioner Pound said that such a judgment was without objection if rendered at any time during the same term. *Crary v. Buck,* 1 Neb. (Unof.) 596, 95 N. W. 839. This was enlarged in *Sawyer v. Bender,* 4 Neb. (Unof.) 304, 93 N. W. 980, but it was criticized in *Eastern Banking Co. v. Robbins,* 97 Neb. 318, 149 N. W. 779, in which it was said that after a delay of 14 years a court of equity would decline to enter a deficiency judgment, as such delay was inexcusable laches. However, nothing in the opinion indicates that such a question could not be held under advisement until a later term.

We are inclined to the view that, while his action is open to criticism, yet the trial judge, by holding the motion for deficiency judgment under advisement for several terms of court, did not lose jurisdiction thereof.

Was it prejudicial error for the trial court to enter a judgment for the rental value of the property while it was retained by mortgagor, together with interest thereon in the sum of $622.50, rather than to enter a judgment for the correct amount of the deficiency?

The appellant cites *Fidelity Finance Co. v. Westfall,* 127 Neb. 56, 254 N. W. 710, in which it was said: "It has long been the general rule in this jurisdiction that the findings of fact and judgment must conform to and be supported by the pleadings." And in *Bowman v. Cobb,* 128 Neb. 289, 258 N. W. 535, it is said: "Under our system of Code pleading and practice, issues to be tried must be formed by pleadings, and a judgment rendered thereon must respond to the issues raised by the pleadings." Appellant also calls our attention in his oral argument to the cases of *Hobbie v. Zaepffel,* 17 Neb. 536, 23 N. W. 514; *Upton v. Betts,* 59 Neb. 724, 82 N. W. 19; *Solt v. Anderson,* 63 Neb. 734, 89 N. W. 306.

On the other hand, in *Dryden v. Parrotte,* 61 Neb. 339, 85 N. W. 287, our court said: "And it is a universal prin-

ciple—an axiom of the law—that where a court has jurisdiction of both the subject-matter and the parties, power to decide implies authority to decide either way—to reach either a right or a wrong conclusion—and, in conformity therewith, to pronounce a judgment that will be conclusive upon the litigants and those in privity with them, unless reversed, vacated or modified in an appellate or other direct proceeding instituted for that purpose."

No bill of exceptions has been brought to this court, so we do not know what evidence may have been offered in reference to the rights and liabilities of the parties to this suit upon the hearing on the motion for deficiency judgment. In any event, the equities between them were in sharp dispute, and the issues doubtless became confused in the mind of the court during the months he was considering it.

Doubtless, if an appeal had been taken within proper time after the entry of this deficiency judgment on June 17, 1918, it would have been promptly set aside, and the judgment could have been entered for a correct and larger amount, in accordance with the pleadings. However, in our view, the judgment entered was not void, but clearly voidable; but an appeal on that ground was not seasonably taken, and it is too late now to go into that phase of the case.

This brings us to the more difficult question, whether the enactment of chapter 41, Laws 1933, repealing the deficiency judgment law, with emergency clause attached, rendered the judgment entered in this case void.

The title of the repealing act set out its purpose as follows: "To divest courts of the power to enter a deficiency judgment in actions for the foreclosure of real estate mortgages; and to repeal the original sections."

In the case at bar, the foreclosure sale was confirmed November 22, 1915, the motion for a deficiency judgment was submitted December 4, 1915, and on June 17, 1918, the court entered the deficiency judgment.

On April 29, 1921, an execution was issued, another was

issued March 10, 1926, and on March 14, 1928, the last execution was issued, and five years later, March 14, 1933, the deficiency judgment became dormant under section 20-1515, Comp. St. 1929. While the judgment was so dormant, the deficiency judgment statute was repealed on April 26, 1933, and the petition to revive the judgment was filed November 13, 1934, and the next day the conditional order of revivor was entered. On December 17, 1934, an answer by way of plea in bar was filed. On January 23, 1936, the final order of revivor was entered, from which this appeal was taken.

It is insisted by appellant that, being absolutely dormant, it was not in any sense a pending action, under the limitations of section 49-301, Comp. St. 1929, and we are cited to *Scudder v. Sargent,* 15 Neb. 102, 17 N. W. 369, where it is said: "An action cannot properly be said to be pending between the rendition and opening of the judgment."

This question has been considered by this court in several recent cases. In *First Trust Co. v. Glendale Realty Co.,* 125 Neb. 283, 250 N. W. 68, the trial court denied an application for a deficiency judgment. This was reversed by this court, which held that plaintiff was entitled to a deficiency judgment. Chapter 41, Laws 1933, repealing the deficiency judgment statute, was not in force when the final order was entered in the trial court, so it was held that it could not be presented to this court.

In the case of *Arnold v. Hawley,* 128 Neb. 766, 260 N. W. 284, this court said: "Section 20-2141, Comp. St. Supp. 1933, repealing previous statute permitting recovery of deficiency judgment in action for foreclosure of mortgage on realty, does not affect actions then pending."

Again, in the case of *Helfrich v. Baxter,* 128 Neb. 281, 258 N. W. 532, this court said: "Section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, taking away the power of the court to enter deficiency judgments in equity actions, is not applicable to a suit pending at the time it went into effect by virtue of the general saving clause act, section 49-301, Comp. St. 1929."

This general saving clause was discussed in *Stowers v. Stuck,* 131 Neb. 409, 268 N. W. 310, in which it was said: "Plaintiff's action was not pending at the time of the repeal. The amendment went into effect April 26, 1933, and the petition was not filed until September 21, 1933. Under the general saving clause, does the repeal affect 'causes of action not in suit that accrued prior to any such repeal?' " And further, in the same case: "It has been held on principle that the general saving clause preserves the right of action on a claim for a deficiency judgment, though the debt secured by the mortgage was not due when the amending or repealing act was passed."

It is clear, from an examination of these holdings, that in enacting the repeal of the deficiency judgment law the legislature did not intend to wipe out the right of revivor of a former judgment regularly obtained years before. It may be considered as similar in legal effect to that clause in section 49-301, Comp. St. 1929, saying that such repeal shall in no manner affect "causes of action not in suit that accrued prior to any such repeal."

There being found no prejudicial error in the record, the judgment of the trial court is hereby

AFFIRMED.

CARTER, J., dissents.

GENEVIEVE BREEN, APPELLEE, V. GLADYS NUGENT, APPELLANT.

274 N. W. 379

FILED JUNE 30, 1937. No. 30024.

New Trial. The trial court was right in overruling a motion of defendant for a new trial, under section 20-1142, Comp. St. 1929, on the ground of newly discovered evidence, which consisted of facts which the defendant failed and neglected to give to her own attorney.

APPEAL from the district court for Douglas county: ARTHUR C. THOMSEN, JUDGE. *Affirmed.*

Dressler & Neely, Finlayson, Burke & McKie and *Barton H. Kuhns,* for appellant.

McGan & Burbridge, contra.

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and RINE, District Judge.

PAINE, J.

This is a suit for personal injuries received in an automobile accident, and the issue actually tried was the liability of the owner of the car under the guest law of Nebraska. At the close of all the evidence, each side moved for an instructed verdict, and the jury were discharged, and the trial court rendered a judgment for plaintiff for $2,000, and defendant appeals.

On July 15, 1935, plaintiff filed her petition, in which she set out that the defendant was the owner of a Ford V-8 sedan, and on June 23, 1935, plaintiff was riding as a guest and, at the request of the defendant, was driving the car; that when about two miles north of Waterloo, upon a graveled highway, traveling at a speed of about 30 miles an hour, the defendant, without warning, took hold of the steering wheel and carelessly and negligently drove the automobile off the highway and into a bank, and severely injured the plaintiff by causing a severe concussion of the brain, a severe sprain of the sacroiliac joint, a cut four inches long on the top of her head, sprains to the neck, and other bruises and cuts, and since said accident she has been confined to her bed the greater portion of the time, after being confined in the hospital for two weeks; that she has suffered nervous shock and great physical pain; and further sets out that she was an able-bodied woman, 33 years of age, earning $75 a month as a filing clerk, and had an expectancy of 32.36 years.

In this petition the plaintiff charges that the defendant was grossly negligent in the following particulars: In failing to give any warning of an intention to take the steering wheel into her own hands and control and guide

and operate the automobile, and in driving the automobile off of the highway and into the bank adjacent thereto; that the defendant, by the exercise of reasonable care, could have seen, or should have seen, the proximate result of her acts; and, last, it was charged that the defendant was grossly negligent in becoming excited and confused, and taking said steering wheel and control of said car at the time and place.

To this petition the defendant filed an answer, in which she admitted the ownership of the car, and that plaintiff was riding as her guest by invitation on said day, and denied the other allegations of the petition.

On May 8, 1936, the case came on for trial before Honorable Arthur C. Thomsen, district judge, and a jury. In her evidence the plaintiff, in describing just how the accident occurred, said in answer to a question on her direct examination: "Well, there was a truck approaching us and I was driving the car, and naturally I moved over to the right side to give the truck a little room, and as I was driving the car toward the center, Miss Nugent grabbed hold of the wheel and she fell right over me and grabbed the wheel and stepped on my foot, and just at that time I had no control of the car then; I had my hands on the wheel and I was trying to get to the center of the road, and she had grabbed the wheel and her foot was on my foot, and just then the car gave one leap as she stepped on my foot and the car went into the ditch."

At the close of the testimony of the plaintiff's four witnesses, the plaintiff asked leave to amend her petition to include other injuries than those pleaded, which application was denied by the court. The defendant thereupon moved the court to instruct the jury to return a verdict in her favor. The plaintiff thereupon made the same motion, which motions were overruled, and the defendant introduced in her behalf the testimony of three witnesses, the first being Earl J. Donnelly, who testified that he was employed in the auditing department of the Western Union Telegraph Company, and owned a cottage on Todd lake near

Waterloo, and had had some conversation with the plaintiff, Mrs. Breen, about renting her his cottage, and had made an appointment to meet her at the cottage on Sunday afternoon, June 23, and when they arrived the plaintiff and defendant and two other people were in the car, and the defendant, Gladys Nugent, was driving her own car; that after the conversation and discussion of half an hour about renting the cottage, they started back for Omaha. Mr. Donnelly testified that he told them to follow him and he would guide them back to Omaha by a different route, and while driving south on a graveled road, where the gravel was particularly thick, he missed them when he looked up in his mirror, and turned around and drove back, and found them in the ditch on the east side of the road, which would be on the driver's left-hand side; that when he arrived the four people were still in the car, and no one else had arrived; that the plaintiff and defendant were covered with blood; that Mr. McGrath and Mrs. Murphy were lying in the top of the car, the car being completely turned over.

The second witness called by the defendant was Henry Schraeder, who testified that he was working at the Edgewater Dairy Farm, about 20 rods from where the defendant's car went in the ditch. He saw a lot of dirt and dust and immediately started for the place of the accident with a boy, and when he arrived Mr. Donnelly had taken out the two who were on the front seat of the car, and he helped take out the other two, and later he brought Mr. McGrath and the defendant to Omaha.

The defendant thereupon took the witness-stand, and testified that she was a comptometer operator at the Western Union Telegraph Company, and owned the car in question, and had taken the plaintiff, Mrs. Breen, Mr. McGrath, and Mrs. Murphy as her guests out to Todd lake; that when they started to leave Todd lake she suggested that Mrs. Breen drive, as she was tired; that the accident occurred about two miles from Todd lake, before they reached the main highway. When asked to tell what hap-

pened at the time of the accident, her answer was: "The only thing I can say is when we got over there, I thought the car was skidding and grabbed the wheel of the car. * * * It did happen suddenly." On cross-examination she was asked by Mr. McGan whether she was dozing and woke up suddenly. Her answer was: "No; I wouldn't say I was dozing, but I wasn't as wide awake as I am right now."

After the testimony of these three witnesses, the defendant rested, and each party again moved the court for a directed verdict, the grounds of the defendant's motion being that the evidence is insufficient to show that the defendant was grossly negligent within the meaning of the guest statute; that the act of the defendant was performed in an emergency and in a state of excitement and confusion, but that the evidence does not show that such act was the proximate cause of the plaintiff's injuries; and for the further reason that the plaintiff, in accepting the invitation to drive the defendant's car, assumed the risk of the injuries which she sustained.

The court then made this ruling: "Let the record show that the question of both damages and negligence and all questions of fact involved is submitted to the court for his decision on the motion of both parties for a directed verdict." Thereupon the jury were discharged and the case was argued to the court, and the court, at the close of the arguments on May 8, 1936, found for the plaintiff and entered judgment for her in the sum of $2,000 with interest and costs. Thereafter, on May 11, Barton H. Kuhns, attorney for defendant, filed a motion for new trial, and on May 16 said motion was argued and submitted to the court and taken under advisement.

Thereafter, on May 22, the said Barton H. Kuhns filed a motion that he be permitted to withdraw from the case as attorney for the defendant, setting out at length that from the time he was first employed by her on June 27, 1935, up until 5:00 p. m. on May 16, 1936, when the motion for a new trial had been argued and submitted, his client had

led him to believe that the use of intoxicating liquor at the time of the accident by any of the occupants of the car was not in any way involved, but that, after the argument on the motion for a new trial, his client had informed him that she had intentionally withheld a full disclosure of the facts and circumstances surrounding said accident, and "that the element of drinking by the occupants of the said automobile, or some of them, was a material factor and consideration in connection with the accident, and that the accident probably would not have happened had the occupants of the said automobile, or some of them, not been drinking, and that the said Gladys Nugent and the other occupants of the automobile involved in said accident had, subsequent to the happening of said accident and prior to the time when the said Gladys Nugent first discussed the accident with the said Barton H. Kuhns on June 27, 1935, mutually agreed among themselves that they would not say anything about the use of intoxicating liquor during the time immediately preceding said accident by the occupants of the said automobile."

Thereupon, on said May 22, 1936, the court gave Barton H. Kuhns and Alexander McKie, Jr., leave to withdraw their appearance as attorneys for the defendant, and Robert D. Neely entered his appearance as attorney for the defendant, and further argument was continued to a later date.

On June 13, 1936, a supplemental motion for a new trial was filed, which set out for the first time, as a ground for a new trial, newly discovered evidence which the attorney appearing for the defendant could not with reasonable diligence have discovered and produced at the trial, namely, evidence to show that the accident was caused by the use of intoxicating liquor by the plaintiff and other occupants of defendant's car, and on June 23 Robert D. Neely asked leave to take the oral evidence of his client, the defendant Gladys Nugent, and Barton H. Kuhns in support of his motion for a new trial, to which Mr. Burbridge, attorney for the plaintiff, objected for the reason that there has

been no affidavit filed to support what she is going to testify to; that the record clearly shows that she testified at the trial and was in the courtroom, and that anything she might say at this time would be immaterial and incompetent, which objection was overruled.

In this oral evidence of the defendant, upon examination by Mr. Neely in support of the supplemental motion for a new trial, she was asked this question: "When you reported the accident to your insurance company, did you make any mention of intoxicating liquor?" She answered: "Mr. Kuhns said, 'Did you have anything to drink?' And I said, 'We had some beer.' And that is all I said, and that is all he ever said about it."

In addition thereto there was offered, in support of the motion for a new trial, 112 pages of evidence of eight witnesses which had been taken in the trial of the case of Harry McGrath v. Gladys Nugent, being a suit against the same defendant, growing out of the same accident, and on June 29, 1936, the court overruled the motion for a new trial. It thus appears that, while the bill of exceptions discloses that but 90 pages of evidence were taken on the trial of the case in chief before the jury, 137 pages of evidence are shown in the bill of exceptions as having been given in support of the motion for a new trial.

It now becomes our duty to examine, first, the motion for a new trial, which was filed within three days, and set out as grounds therefor: (1) Because the judgment was not sustained by sufficient evidence; (2) because it was contrary to law; (3) because of errors of law occurring at the trial; (4) because the amount of recovery was too large and excessive; and (5) because the evidence was not sufficient to sustain a finding that the defendant was grossly negligent within the provisions of section 39-1129, Comp. St. Supp. 1933 and 1935; next, to examine the supplemental motion for a new trial, filed more than a month after the judgment was entered, setting out the newly discovered evidence material to the case and the many pages of oral evidence of many witnesses taken in support thereof.

Section 20-1142, Comp. St. 1929, covers the subject of new trial, and provides in the seventh paragraph that a new trial may be granted on the ground of "newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial." This question has been before this court on innumerable occasions. In *Van Horn v. Cooper & Cole Bros.*, 88 Neb. 687, 130 N. W. 567, it was said in the opinion that the witnesses did know all before the trial that they knew thereafter, and therefore the evidence was not newly discovered; that it was claimed that they did not advise the attorneys representing the defendant of the facts within their knowledge until after the trial, and Judge Reese says this was either negligence or stupidity; that it is not enough that the evidence should be material and not cumulative, but it must further appear that the applicant for a new trial could not have discovered and produced such evidence at the trial.

In *Buzzello v. Sramek*, 110 Neb. 262, 193 N. W. 743, it was said that the witness was a tenant of the plaintiff, and resided on the same lot with the plaintiff and his family, and the relations between them were cordial, and no sufficient reason was shown for the failure to produce this witness at the trial.

In *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298, a new trial was allowed to enable the defendant to produce the evidence of five eyewitnesses to the accident. All of them were in cars on O street, where they saw the accident, and, driving immediately away, could not be, and were not, discovered to have witnessed the accident until long after the trial, and whose evidence was material in the case. It is there said that new trials on the ground of newly discovered evidence have not been favored by our court. *Smith v. Goodman*, 100 Neb. 284, 159 N. W. 418. That the reason is that the moving party has ample opportunity to carefully prepare his case and secure all of the evidence before the trial, but after the case is lost he is always aroused to diligent activity, and, therefore, a new

trial should only be granted in exceptional cases, to the end that counsel will expend more effort in making the fullest preparation before the trial. It is set out, after an examination of many authorities, that proof should be produced that neither the litigant nor his attorney could have discovered such evidence before the trial by the exercise of due diligence.

In the case at bar, the defendant makes application for a new trial on the ground that she did not disclose to her attorney that some of the parties in the car had been drinking whisky, in addition to the fact that she disclosed that they had been drinking beer. It might well be asked whether, if the defendant withholds some information from her attorney, this gives the court ground for setting aside a judgment secured by the plaintiff in a fair trial, which the defendant now wishes to avoid paying? The defendant is asking that she be given a new trial for her own default in not advising her own attorney as to all the facts, in other words, for her own bad faith.

In our opinion, the motion for a new trial, based on the ground of newly discovered evidence set out herein, was properly overruled by the trial judge. We have carefully examined each of the three errors relied upon for a reversal. There being no prejudicial error in the record, the judgment of the trial court is hereby

AFFIRMED.

PHELPS COUNTY, PLAINTIFF, V. CITY OF HOLDREGE ET AL., DEFENDANTS.

274 N. W. 483

FILED JULY 6, 1937. No. 30100.

Action. The declaratory judgment law is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court having jurisdiction of parties and subject-matter.

Original action for a declaratory judgment. *Action dismissed.*

Wilber S. Aten, for plaintiff.

Frank A. Anderson and *A. W. Storms,* for defendants.

Heard before GOSS, C. J., ROSE, GOOD, DAY, PAINE and CARTER, JJ., and CLEMENTS, District Judge.

ROSE, J.

Phelps county, plaintiff, brought this action in the supreme court and invoked its original jurisdiction for a declaratory judgment on the time to redeem land from a judicial sale for delinquent taxes in the foreclosure of a tax sale certificate under the facts stated in the petition. Other questions are also presented.

The land involved is lot 7 in block 18, second addition to the town which is now the city of Holdrege, Phelps county. There were delinquent general taxes payable to the county and unpaid special assessments due the city for special benefits for public improvements. The defendants are the city of Holdrege, Nebraska Central Building and Loan Association, Lorenzo A. Franzen and Fred A. Jacobson. November 10, 1932, Phelps county, plaintiff, procured in its favor from the county treasurer a tax sale certificate for $530.14 and on November 5, 1935, purchased the delinquent taxes and assessments levied subsequent to the issuance of the tax sale certificate. Delinquencies amounted to $881.10.

March 17, 1936, more than two years after the tax sale certificate was issued, plaintiff sued to foreclose it in the district court for Phelps county. Foreclosure was ordered May 1, 1936, and under the decree the sheriff sold the realty July 13, 1936, to plaintiff for $149.87. The sale was judicially confirmed September 2, 1936. Execution and delivery of a sheriff's deed followed. November 11, 1936, plaintiff sold the lot to defendants Franzen and Jacobson for $550, subject to the 1936 taxes. December 26, 1936, the city of Holdrege, defendant, assessment lienor, and Ne-

braska Central Building and Loan Association, defendant, title holder, separately tendered to the clerk of the district court $149.87, interest and costs, for the purpose of redeeming the premises from the tax foreclosure sale. These tenders were refused by the clerk as having been made after the period for redemption expired.

The facts outlined were pleaded in detail for a declaratory judgment and were assailed by demurrers on the ground, among others, that the petition shows on its face the invalidity of the judgment confirming the judicial sale, because it deprived the parties making the tenders of their constitutional and statutory right of redemption within two years from the foreclosure sale. Const. art. VIII, sec. 3; Comp. St. 1929, sec. 77-2041.

The first question upon which the parties invoke the original jurisdiction of the supreme court for a declaratory judgment may be stated as follows: Are owners and others 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, barred from the right of redemption on confirmation of such judicial sale?—a question twice recently decided in the affirmative in other cases. *Connely v. Hesselberth,* 132 Neb. 886, 273 N. W. 821; *Peterson v. Swanson,* p. 164, *post,* 274 N. W. 482.

This identical question, according to the pleadings herein, was decided in the former independent action in the district court for Phelps county, from which there was no appeal, the parties having been the same as in the present proceeding. It is not now, therefore, a justiciable issue under the act authorizing declaratory judgments. Comp. St. 1929, sec. 20-21,140. The act does not extend beyond the controversies to which it was intended to apply. An examination of precedents in which its purposes have been discussed shows that courts have a reasonable discretion in determining the controversies to which it applies. It was not intended as a substitute for new trial or appeal; or as a method of destroying a proper exercise of power in a

former action; or as authority for a second trial by the same parties on identical issues in different forums; or as justification for an unnecessary decision; or as approval of collateral attacks on former adjudications. These limitations do not prevent liberal interpretation of the act to give effect to its purposes. Courts do not overlook authorized protection of parties to transactions and written instruments or of trustees, officers and others, where they may be subjected to personal liability for errors in the performance of duties without advance interpretation of law, though prompted by honest motives and business rectitude. A capable text-writer on declaratory judgment laws expressed himself as follows:

"The declaratory action is not a substitute for a new trial or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon." Borchard, Declaratory Judgments, 181, citing *Back's Guardian v. Bardo,* 234 Ky. 211, 27 S. W. (2d) 960; *Williams v. Flood,* 124 Kan. 728, 262 Pac. 563.

"The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances." Borchard, Declaratory Judgments, 109.

The following excerpts from court reports indicate the trend of judicial opinion:

"The purpose of the declaratory judgment act was to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated had been properly adjudicated. In other words, it was never intended as a substitute for a new trial, or other steps that the Code requires to be taken in the same action, or for an appeal to this court." *Back's Guardian v. Bardo,* 234 Ky. 211, 27 S. W. (2d) 960.

"Controversies involving the interpretation of statutes may be settled under the declaratory judgment law, but

those controversies must include rights claimed by one of the parties and denied by the other. Here the plaintiff is not claiming any right and the defendant is not denying the plaintiff any right. The controversy is such a one as is likely to arise in the trial of any action. Controversies of that character cannot be determined by this court except on an appeal in the action in which the controversy arises." *Williams v. Flood,* 124 Kan. 728, 262 Pac. 563.

In so far as the supreme court of Nebraska has spoken, it is in harmony with the thus expressed views. *Banning v. Marsh,* 124 Neb. 207, 245 N. W. 775.

There is no controversy over the facts in the present proceeding. The pleadings show that the principal question upon which a ruling is sought herein was formerly determined in actual litigation by the parties hereto in another court having jurisdiction; that there was no appeal from the decision; that other questions presented here were either decided by the district court or were determinable there upon application of aggrieved parties. The pleadings therefore do not raise a justiciable issue under the declaratory judgment law. A dismissal of the proceeding necessarily follows.

DISMISSED.

IMA ELMING JONES, APPELLANT, V. JOHN VENNERBERG ET AL., APPELLEES.
274 N. W. 494

FILED JULY 6, 1937. No. 30039.

1. **Principal and Agent.** The principal may ratify and thereby make valid an unauthorized act of his agent.
2. **Contracts.** Payment of a substantial part of a debt prior to its maturity is a valid consideration for reducing the amount of such debt.
3. **Mortgages: PLEADING.** In foreclosure of formal real estate mortgage, the plaintiff is required to allege that no proceedings at law have been instituted for recovery of the debt, and if such allegation is denied the plaintiff is not entitled to a decree of

foreclosure, unless such allegation is supported by competent evidence.

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

Russell W. Bartels, for appellant.

H. E. Siman and *Leslie W. Ellis, contra.*

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

GOOD, J.

This is an action for foreclosure of a real estate mortgage. In her petition plaintiff alleged, as required by statute, that no proceedings at law had been had for collection of the debt. Defendants denied that there was anything due upon the mortgage, and also denied the allegation that there had been no proceedings at law for collection of the debt. Trial of the issues resulted in a decree for defendants. Plaintiff has appealed.

The record reflects the following facts: March 2, 1925, defendants executed a promissory note for $7,000, due ten years after date, payable to one Frank Elming. This note was secured by the real estate mortgage in question upon defendants' 40-acre farm. In the summer of 1932 Elming, the mortgagee, departed this life intestate, leaving his sister, the plaintiff, as his sole heir at law. At the time of the mortgagee's death, partial payments had been made upon the note aggregating $2,500, leaving $4,500 of the principal unpaid. Plaintiff was appointed administratrix of her brother's estate.

In September, 1932, defendant Vennerberg made application to plaintiff for a reduction in the amount of the promissory note secured by mortgage. He stated that unless some reduction would be made he would not pay anything further on the note, at least until it was due in 1935, and he also indicated his willingness to surrender the farm to the plaintiff unless she would be willing to make some

reduction in the amount of the mortgage debt. It appears that after some parley a tentative agreement was reached that plaintiff would rebate $500 from the note upon condition that defendants would make substantial payments upon the note before maturity. It was agreed that on the following day, September 19, 1932, plaintiff's husband would meet Vennerberg at a bank in Wayne, when the agreement for reduction would be consummated. They met at the bank at the appointed hour, but defendant Vennerberg declined to sign the written agreement which had been prepared by plaintiff's husband. It does appear that plaintiff's husband produced the note at that time and evidently gave it into the possession of the banker, who made a credit of $500 upon the note, and at the same time Vennerberg paid $500 in cash, and another credit in that amount was also made upon the note. Plaintiff was not a witness in this case. Her husband, however, testified that he did not authorize or direct the banker to make the credit on the note. The banker testified that he was so authorized. The evidence on behalf of plaintiff was to the effect that the credit for $500 was to be made provided Vennerberg would pay the whole amount of the unpaid balance of the note on or before the 2d of March, 1933. Vennerberg denied this and said he was only to pay $500 cash at the time, and to make other payments before the note was due, as he was able. It also appears that other payments, aggregating $3,000, were made on the principal of the note long prior to maturity of the note. The final payment of principal was not made until March 8, 1935, six days after maturity of the note.

The evidence as to the 500-dollar reduction in the note is in conflict. Counsel for plaintiff now contend that plaintiff's husband was never authorized to make the credit; that, at the time, the note still belonged to the estate of the mortgagee, and that no credit, representing a reduction in the amount of the note, could have been made without authority from the county court. The evidence shows that the estate of the mortgagee was finally settled December 8,

1932, and the estate of the mortgagee is making no complaint of the credit. Plaintiff, on the 8th of December, 1932, became the sole owner, by assignment from herself as administratrix, of the note and mortgage. Certainly, the plaintiff knew that the indorsement was made upon the note at the time she, as administratrix, assigned it to herself. The record also contains a letter, written by the plaintiff under date of January 14, 1933, when she was the sole owner of the note, in which letter she stated that "in September, 1932, you were given a $500 reduction or credit at that time." The record further discloses a letter under date of February 18, 1933, over the signatures of plaintiff and her husband, and written to the banker at Wayne, in which it was stated: "Credit was given him (Vennerberg) for $500 reduction lopped off." It thus appears beyond question that plaintiff not only knew, when she took the note from the estate of her deceased brother, that the credit of $500 had been made thereon as a reduction in the note, but in the letter she acknowledged this and approved and ratified such credit.

Plaintiff contends that there was no consideration for the credit, and that the debt could not be paid by less than the full amount due on the debt.

In *Asmus v. Longenecker*, 131 Neb. 608, 269 N. W. 117, this court held: " 'A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' Bouvier's Law Dictionary, p. 613."

In 13 C. J. 357, it is said: "The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. * * * This rule does not apply, however, * * * where part payment is made before the debt is due, or at another place, or in a different medium than that required by the contract." And in 13 C. J. 319, it is said: "Payment of interest in advance or before it is due is a valuable consideration. So also is the making of a payment on a promissory note before it is legally demandable." We think the

record clearly shows that there was ample consideration for the credit of $500.

Plaintiff's allegation that no proceedings at law had been had for collection of the debt secured by the mortgage was denied by defendants. Plaintiff offered no proof. This court has repeatedly held: "In an action to foreclose a real estate mortgage, when the allegations of the petition are denied, the burden is on plaintiff to make *prima facie* proof that no action at law has been instituted for the recovery of the debt." *Beebe v. Bahr*, 84 Neb. 191, 120 N. W. 1021. See, also, *Lyons v. Allen*, 88 Neb. 41, 128 N. W. 652; *Great Western Commission Co. v. Schmeeckle*, 99 Neb. 672, 157 N. W. 612; *Reed v. Good*, 114 Neb. 777, 209 N. W. 619; *Young v. Thompson*, 114 Neb. 804, 210 N. W. 407. The lack of proof in this respect is sufficient to defeat a recovery by plaintiff in this action.

The record appears to be free from error. Judgment AFFIRMED.

CHESTER E. HILL, APPELLANT, V. HINKY-DINKY STORES COMPANY, APPELLEE.

274 N. W. 455

FILED JULY 6, 1937. No. 30070.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: ACTION: LIMITATION. By the terms of section 48-138, Comp. St. 1929, where no petition for determination of compensation for injuries under the workmen's compensation act has been filed by either party, but compensation actually has been paid, in the absence of legal disabilities or latent injuries, the limitation provided by said section shall take effect at the expiration of one year from and after the time of making the last payment of compensation.
2. ———: WAIVER. Record examined, and evidence contained therein *held* insufficient to sustain waiver or estoppel as claimed by plaintiff against the defendant.

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

Burbank & Burbank, for appellant.

Kennedy, Holland, De Lacy & Svoboda and *Edwin Cassem, contra.*

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

EBERLY, J.

This is an action for compensation under our workmen's compensation law as last amended by chapter 57, Laws 1935. This amendment of 1935 became in force and effect on May 25, 1935.

It is alleged by the claimant that on December 23, 1931, he was an employee of the Hinky-Dinky Stores Company, the defendant, and in the course of his duties he slipped and fell while descending a stairway in the building in which he was employed; that as a result of said fall plaintiff sustained personal injuries, which the petition specifically describe, and which are of such a nature as to entitle him to the benefits of the Nebraska workmen's compensation law; that as a result of the accident and injury plaintiff was temporarily totally disabled from and after the occurrence thereof up to and including the 27th day of February, 1935, a period of 169 weeks, when, it appears, disability ceased.

It appears that, before any action was instituted by plaintiff to secure a determination of the compensation to which he might be entitled, a settlement was made on March 26, 1932, between the claim agent and adjuster for the New Amsterdam Casualty Company and Chester E. Hill, plaintiff. By its terms Hill was allowed compensation in the sum of $174 (at the rate of $12 a week), which was on that day paid to him. In addition, the payment of "hospital and medical services" in the sum of $155.55, was provided for. Hill then executed "Final Report and Settlement Receipt" which was witnessed also by the attorney at law representing Hill, who was present, and who assisted in obtaining the same. This receipt recites on its face that

the amount received is "in full settlement and satisfaction of all claims for compensation under the provisions of the Nebraska workmen's compensation act on account of injuries sustained by me as a result of an accident on or about the 23d day of December, 1931, while in the employ of the Hinky-Dinky Stores." It is executed on a form provided for that purpose by the compensation commissioner, which bears on its face, in large capital letters, the warning, viz.: "Do not sign this receipt unless you intend to end payments of compensation and close the case."

In addition, the physician under whose professional charge the plaintiff had been, under date of March 30, 1932, executed and delivered to the New Amsterdam Casualty Company the "Surgeon's Final Report," which recites the payment of "total expenses for medical aid" in the sum of $152, and that the "patient (was) discharged as cured on March 26, 1932."

This apparently closed the case. However, plaintiff thereafter filed in the Nebraska workmen's compensation court a petition bearing date of January 2, 1936, and sworn to on that day, setting forth the injuries received by him on December 23, 1931, which had been the subject of the settlement of March 26, 1932, and claiming compensation therefor under the terms of the Nebraska workmen's compensation law. As tolling the statute of limitations, the petition alleges "that, within one year after the above-mentioned accident, plaintiff and defendant agreed upon the compensation payable under the Nebraska workmen's compensation law." To this petition, defendant filed a general denial, and a plea of the statute of limitations. From the determination of one of the judges of the compensation court, the defendant prosecuted an appeal to the district court for Douglas county, where, upon a trial *de novo,* judgment was entered for the defendant. Plaintiff appeals to this court.

The statute of limitations appears to be controlling in the instant case. Section 48-138, Comp. St. 1929, provides: "In case of personal injury, all claim for compensation

shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (48-139) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment."

It is to be observed that we have no question of "latent injuries" or "legal disabilities" in the instant case. The injuries sued for are identical with the injuries embraced in the settlement. If the agreement of settlement is valid, there can be no recovery. However, it is conceded that payment of compensation was last made thereunder on the 26th day of March, 1932. If settlement agreement in this case is to be deemed void for failure of parties to strictly conform to the governing statutes, it is of no effect whatever, and, under section 48-138, Comp. St. 1929, payment of compensation having been made, said limitation took effect at the expiration of one year thereafter. *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42.

But appellant contends that the employer waives the statute of limitations, and is estopped from urging it as a defense, where, by his acts and conduct, he induces the employee not to bring an action under the workmen's compensation act within a year after the accident (or date of last payment of compensation). It would seem that plaintiff's pleadings do not embrace this contention. Waiving the matter of pleading, it appears that no fraud is claimed in the evidence as to the agreement of settlement of March 26, 1932, save and except that plaintiff testifies that at the time of the "settlement" the adjuster said, "if I would settle for the amount that I had coming, and would make no further claim against them, that I would get my job back permanently." Further, after this statement, plaintiff completed the settlement and accepted the money. It appears that some years after this incident the Hinky-Dinky

Stores Company gave him temporary employment, but soon discharged him. The insurance adjuster testifies that he was the adjuster for the New Amsterdam Casualty Company, and details the conversation had at the time the negotiations were had with Chester E. Hill about the settlement of his compensation claim. He testifies, with reference to this conversation, as follows: "Q. At that time what conversation, if any, was there concerning the permanent employment of Chester E. Hill, permanent employment by Hinky-Dinky Stores of Chester E. Hill? A. There was no conversation whatsoever, to my knowledge, of any permanent employment of Chester E. Hill. Q. Did you assure Mr. Hill or Mr. Davey, or tell them, or either of them, that if Mr. Hill would execute exhibit 1, you would see that he had permanent employment by the Hinky-Dinky Stores? * * * A. I did not agree to see that Mr. Hill would receive any permanent employment at the Hinky-Dinky Stores. * * * Q. Well, did you tell them anything of that kind? A. I did not."

However, all negotiations for settlement were had between the claim adjuster of the New Amsterdam Casualty Company and plaintiff and his attorney, Mr. Davey. While the Hinky-Dinky Stores Company was a beneficiary of this agreement, it must be conceded that the casualty company was the party ultimately liable to plaintiff. The casualty company assumed this obligation by virtue of its contract of insurance.

Section 48-147, Comp. St. 1929, provides, in part: "No policy of insurance against liability arising under this act shall be issued unless it contains the agreement of the insurer that it will promptly pay to the person entitled to same all benefits conferred by this act, and all instalments of the compensation that may be awarded or agreed upon, and that the obligation shall not be affected by any default of the insured after the injury, or by any default in the giving of any notice required by such policy, or otherwise. Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation en-

forceable in his name. 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."

The first notice of injury in the present case had been turned over to its insurance carrier by the Hinky-Dinky Stores Company on its receipt, and the insurance carrier's claim adjuster remained in sole charge of the matter until the settlement was made. The testimony is that the adjuster conducted these negotiations in behalf of the New Amsterdam Casualty Company, which was the party ultimately liable for the payment for the injuries sustained. The adjuster was not an officer of the Hinky-Dinky Stores Company. He was vested with no powers whatever by the insured beyond that implied by reason of the terms of the insurance policy involved. He had no requirements to meet save and except those which his company's policy enjoined on him. He was vested with no powers to contract for employees for the insured. The plaintiff makes no claim that he advised the Hinky-Dinky Stores Company of the claimed contract of employment alleged to be binding upon it subsequent to the making thereof.

The record is barren of previous authorization conferred by the defendant on the insurance adjuster or his company to make the agreement of future employment under which plaintiff claims, and neither does it disclose that the insured had any knowledge of such claim until approximately at the time of the institution of this suit.

The fundamental principle invoked by the present situation is (even if plaintiff's evidence is to be accepted as true): "No liability attaches to an individual for the acts of one who assumes without authority to act for him in the capacity of an agent, all elements of ratification or estoppel being absent." 3 C. J. S. Agency, sec. 234.

It follows that the evidence of plaintiff is wholly insufficient to establish facts competent to toll the statute of limitations or to support the contention of waiver or estoppel made by plaintiff.

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

AFFIRMED.

IN RE ESTATE OF MOSES L. MONTGOMERY.
HERBERT A. JOHNSON, GUARDIAN, APPELLANT, V. CLARA F. MONTGOMERY, ADMINISTRATRIX, APPELLEE.
274 N. W. 487

FILED JULY 6, 1937. No. 29944.

1. **Executors and Administrators:** CONTINGENT CLAIM. A contingent claim against an estate is one where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability.
2. ———: ———. A claim against the estate of a deceased surety on the bond of a guardian whose account had not been allowed and settled by the probate court, when the time expired for filing claims, is such a contingent claim.
3. ———: ———. Such a contingent claim is governed by sections 30-701 to 30-705, Comp. St. 1929, rather than by a general statute.
4. **Statutes.** Special provisions in a statute, which deal with a certain particular subject, control general provisions, and if there is conflict then such special provisions must prevail.
5. **Guardian and Ward.** No action can be maintained upon a guardian's bond until the amount due thereon is ascertained by the county court.

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

Dryden, Dryden & Jensen, for appellant.

Richard Steele, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY, PAINE and CARTER, JJ., and CLEMENTS, District Judge.

PAINE, J.

Herbert A. Johnson, guardian of the estate of Irene Johnson, an incompetent, appeals from an order of the

district court which sustained a judgment of the county court disallowing a claim filed against the estate of the surety of a former guardian of said incompetent.

On February 27, 1934, Herbert A. Johnson, guardian of Irene Johnson, an incompetent, filed a petition in the district court for Knox county against Clara F. Montgomery, administratrix of the estate of Moses L. Montgomery, deceased, setting out that on October 23, 1933, he was appointed guardian of said incompetent's estate by the county court of Knox county, Nebraska, and that the defendant has been administratrix of the estate of Moses L. Montgomery since March 21, 1930. The following allegations are taken from such petition: That Henry A. Johnson was appointed guardian of the estate of the incompetent on March 4, 1918, and acted as such guardian up to the date of his death, July 15, 1930; that upon his appointment he gave a bond in the sum of $4,000, upon which bond A. J. Luneburg and Moses L. Montgomery were sureties, and said bond was approved by the county judge March 8, 1918; that said Henry A. Johnson came into possession of $2,000, which was given to the incompetent by the will of her grandfather, and remained in possession of said funds of the incompetent until his death; that between the time of his death, July 15, 1930, and October 23, 1933, there was no other guardian appointed for the estate of the incompetent, and no one represented said incompetent; that letters of administration were granted on the estate of Henry A. Johnson on March 5, 1931, and the administrator was discharged on February 8, 1933.

It was further alleged that the surety, Moses L. Montgomery, died, and on March 17, 1930, Clara F. Montgomery was appointed administratrix of his estate, and that said estate is now in process of settlement and no order has been entered barring claims against said estate; that proceedings were taken in the county court of Knox county, requiring an accounting of funds delivered to Henry A. Johnson, deceased, as guardian of the incompetent, and by order of the county court Herbert A. Johnson,

present guardian, was directed to file claims for the amounts due to the estate of the incompetent against the estate of Henry A. Johnson, the deceased guardian, and against the estate of the surety, Moses L. Montgomery, deceased, which claims were filed against both estates on October 23, 1933.

It is further alleged in the petition filed in the district court that the claim of the incompetent was a contingent claim, and not capable of being presented in either estate before October 23, 1933, and did not become absolute until an order was entered by the county court asking for an accounting in the estate of the incompetent, and that under section 30-704, Comp. St. 1929, the claim may be presented in any estate within one year after it shall accrue or become absolute, and that said claim became absolute on October 23, 1933, and is entitled to allowance in the estate of Moses L. Montgomery, deceased surety, and petitioner prays that the sum of $4,235 should be allowed as a claim against the estate of Moses L. Montgomery, and that the administratrix should be ordered to pay the same with costs.

To this petition a demurrer was filed by the administratrix, alleging that the court had no jurisdiction of the person of the defendant or the subject of the action; that the plaintiff has not legal capacity to sue; that it appears on the face of the petition that the cause is barred by the statute of limitations; that a period of more than two years had elapsed since the death of Moses L. Montgomery. On May 9, 1934, the demurrer was overruled and defendant given 30 days to answer.

On June 7, 1934, defendant filed answer, alleging that Paul Johnson, grandfather of Irene Johnson, died April 3, 1917, leaving a will, in which Henry A. Johnson, his son, was named executor, which will was admitted to probate and letters testamentary issued to Henry A. Johnson May 17, 1917, and he immediately entered upon the discharge of his trust; that under said will a legacy in the sum of $2,000 was left to Irene Johnson, who was a daughter of a de-

ceased son of said Paul Johnson, which legacy was payable within one year after the death of Paul Johnson; that the estate consisted of real estate in Nebraska and Colorado, together with certain promissory notes; that on February 15, 1918, Henry A. Johnson, legal guardian of Irene Johnson, filed a receipt for $2,000 on behalf of said ward, and filed an inventory in said estate on April 30, 1918, showing that he had received cash from the Paul Johnson estate of $2,000; that on and after said date, April 30, 1918, Henry A. Johnson did not make any report as said guardian, or file any instrument of any kind with reference to said guardianship matter in said court, and died intestate July 15, 1930, and on March 5, 1931, letters of administration were issued upon the estate of Henry A. Johnson to H. Arvid Johnson; that no further proceedings were had in said guardianship matter from April 30, 1918, up to and including October 3, 1933, on which date Herbert A. Johnson, a brother of Irene Johnson, incompetent, filed a petition in the county court of Knox county, setting out that he is a brother and nearest living relative of said incompetent residing in the state of Nebraska; that during the lifetime of the former guardian the county judge then in office failed and neglected to require guardian to file reports or make an accounting, as provided by law; that said guardian has been dead for more than two years, and a claim must be filed at once to preserve the rights of the incompetent.

It was further alleged that one surety has moved out of the jurisdiction of the court, and that the other surety is deceased, and that the incompetent is still in the State Hospital for Feeble Minded at Beatrice, Nebraska, and petitioner prays that he be appointed guardian for said ward. On October 23, 1933, the county judge of Knox county, Nebraska, entered a decree, reciting the facts hereinbefore set out, and finding that the amount due from Henry A. Johnson to the estate of Irene Johnson, incompetent, is $4,034, and directing Herbert A. Johnson, guardian, to file claims in the estate of Henry A. Johnson, deceased, and

in the estate of Moses L. Montgomery, surety on the bond of Henry A. Johnson, for said amount.

On October 23, 1933, Herbert A. Johnson, guardian, filed a petition in the county court of Knox county, setting out that Henry A. Johnson, guardian, received the said $2,000, and failed and neglected to account for it, except the sum of $206.52, which he paid to the State Hospital for Feeble-Minded at Beatrice, and that there is a balance due of $4,034, and prays that the estate of Henry A. Johnson be revived and permission be given to file the claims above.

It is further alleged in the answer that, at the time of the death of Paul Johnson, Henry A. Johnson owed his estate $8,230; that he was a beneficiary of Paul Johnson, and entitled to receive $3,045.45; that in the settlement of the estate Henry A. Johnson did not pay to himself or receive the sum he was entitled to receive, and did not pay to himself as guardian of Irene Johnson, incompetent, the sum of $2,000 which he receipted for, but that said Henry A. Johnson was insolvent, and all persons interested in the estate had full knowledge of his insolvency, and that any claim against his estate is barred by the statute of limitations; that all persons interested in the estate of Irene Johnson, incompetent, had full and complete knowledge of the death of Moses L. Montgomery, surety, and that the time was limited for filing claims against his estate, yet the parties did not file any claim against the estate of said surety until October 23, 1933, a period of more than three years after the time limited for creditors to present their claims, and that the claim of Irene Johnson, incompetent, was barred by the statute of limitations, and the defendant prays that the plaintiff's petition be dismissed and that the defendant recover her costs.

Herbert A. Johnson, as guardian, filed a reply, setting up that Henry A. Johnson, deceased, her guardian, filed a receipt for the $2,000, and that the surety, Moses L. Montgomery, entered into an undertaking guaranteeing the faithful performance of the trust and the repayment of the money due in said estate.

On May 4, 1936, after having heard the evidence and considered the oral arguments made to him on June 3, 1935, the district judge entered a judgment that the claim of Herbert A. Johnson, guardian of Irene Johnson, incompetent, against the estate of Moses L. Montgomery was barred by the general statute of limitations, and also by the statute of nonclaim. A notice to creditors was published, limiting the time to present claims to July 25, 1930, but that this claim was not filed until October 23, 1933, a period of more than three years thereafter.

It was also found by the trial court that the county court could only grant permission to file such a claim for good cause shown, and the evidence in the present case was held by him to be insufficient for that purpose, and that the evidence raised the presumption of lack of diligence and laches, and held that on the showing made the county court was barred and prohibited from opening the commission to file claims of plaintiff, and therefore denied the plaintiff a right to file such claims, and dismissed his petition.

The plaintiff filed motion for a new trial, setting up many errors, among them that the judgment of the trial court was not sustained by the evidence, was contrary to law, that the court erred in holding that the claim of the incompetent's estate was not a contingent claim prior to the finding of the amount due from the guardian in the county court, and that the court erred in denying the right of the incompetent's estate to file the contingent claim in the estate of the surety within one year after the same became absolute, and that the court erred in holding that the incompetent's estate was barred from recovery against the estate of a surety of the former guardian.

It was deemed necessary to make this complete statement of the pleadings and judgment of the trial court.

The bill of exceptions includes files from the county court of Knox county in each of the several estates and guardianship cases involved herein, and many documents are reprinted from these exhibits in the appellee's brief.

The appellee insists that this case is governed by sec-

tions 30-605 and 30-609, Comp. St. 1929. Section 30-605 provides that, if a creditor files his claim within three months after the expiration of the time previously allowed, he may, for *good cause shown,* be allowed three months more. It is argued by appellee that it makes no difference whether it is a general or contingent claim, as they are both governed by this section. Appellee contends that, upon the death of the guardian, a right of action accrues and becomes absolute in the ward, or his representatives, to obtain any funds or property from the estate of the former guardian, and if such steps required are not taken within the time limited by law, in the absence of good cause shown, it is simply the misfortune of the ward. The trial court decided the appellee was right in all these contentions, and entered judgment in his favor.

We will now review the events in the chronological order in which they occurred. Paul Johnson, the grandfather of the incompetent, died April 3, 1917. Henry A. Johnson was the executor of his estate, and in his final report in that estate set out that he had paid to himself, as guardian of the incompetent, the sum of $2,000. Henry A. Johnson, having also been appointed guardian of the incompetent on March 4, 1918, filed an inventory in the guardianship case, showing that he had received said legacy of $2,000 cash from the estate of the incompetent's grandfather.

On March 8, 1918, the guardian filed his bond in the sum of $4,000, which was approved by the county court, and upon which Moses L. Montgomery was one of the sureties. On February 10, 1930, said surety died, and Clara F. Montgomery, his widow, was appointed administratrix of his estate. On July 15, 1930, Henry A. Johnson, guardian of the incompetent, died, and it is agreed that his estate was insolvent. No new guardian was appointed for the incompetent, and no one looked after her interests or estate from July 15, 1930, the date when Henry A. Johnson died, until the appointment of Herbert A. Johnson, her present guardian, who secured from the county court of Knox county an order on October 23, 1933, finding that the

principal and interest due from Henry A. Johnson, deceased guardian, to the estate of the incompetent was $4,235, and directed her new guardian, Herbert A. Johnson, to file claims against the estate of her former guardian and the estate of the surety on his bond. To the filing of this claim against the estate of the surety, Clara F. Montgomery, administratrix, filed objections, alleging that a period of more than two years had expired from the time set for filing claims by the probate court; that the claim had not been filed for more than three years after an order had been made by the court barring all claims not then presented against the estate, also because of the statute of nonclaim and the statute of limitations. The appellee contends that section 30-609, as amended by striking out the words "whether due or to become due" and "whether absolute or contingent," which went into effect August 10, 1933, did not affect the rights of the parties to this action, as Montgomery died February 10, 1930.

We have been unable to find any Nebraska opinion squarely in point on the issues presented for determination.

In the opinion of this court, this claim against the incompetent's guardian and his surety was at the outset but a contingent claim, which has been defined: "A contingent claim against an estate is one where the liability depends upon some future event, which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability." Dame, Probate and Administration (3d ed.) 425.

"A contingent claim does not become absolute, within the meaning of the decedent's act, until it becomes a claim proper to be presented to the county court for final adjudication as a claim against the estate." *Hazlett v. Estate of Blakely,* 70 Neb. 613, 97 N. W. 808. See, also, *Hughes v. Langdon,* 111 Neb. 508, 196 N. W. 915.

In *Hantzch v. Massolt,* 61 Minn. 361, 63 N. W. 1069, it was held: "That a claim against the estate of deceased sureties on the bond of a guardian whose account as such had not been allowed and settled by the probate court,

when the time expired for presenting claims against their respective estates, is such a contingent claim."

"A contingent claim against a decedent's estate is one upon which the liability depends upon some future event, which may or may not happen, and which makes it uncertain whether it will ever be a liability." *In re Estate of Golden,* 120 Neb. 233, 233 N. W. 893.

A contingent claim such as this is governed by sections 30-701 to 30-705, Comp. St. 1929, rather than by the general statute.

"While a special act upon a subject usually modifies a general act on the same subject, still, if a remedy provided by the later act is not incompatible with the remedy provided by the earlier and more general law, both acts may stand." *State v. Cosgrave,* 85 Neb. 187, 122 N. W. 885.

"It is an established rule of construction in this state that special provisions in a statute in regard to a particular subject control general provisions. Generally, where there is a conflict between a general and a special statute applicable to the same subject-matter, the latter must prevail." *Mancuso v. State,* 123 Neb. 204, 242 N. W. 430.

A claim against the estate of a deceased surety on the bond of a guardian is contingent until there has been a settlement of the guardian's accounts.

In *Langdon v. Langdon,* 104 Neb. 619, 178 N. W. 178, it is held: "The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court."

A surety on a guardian's bond is not discharged by the failure to require an accounting against the guardian's estate within the time prescribed by the statute of nonclaim. 28 C. J. 1299; 21 R. C. L. 1039, sec. 84. See, also, 10 Neb. Law Bulletin, 407. Refusal of the guardian to appear in response to a citation to settle his accounts does not prevent the operation of this rule. *Bisbee v. Gleason,* 21 Neb. 534, 32 N. W. 578.

In *Bell v. Walker*, 54 Neb. 222, 74 N. W. 617, it is held that the liability of a surety in a supersedeas bond is not affected by the failure to present a claim against the estate of his principal, for the surety may either pay the debt and be subrogated to the rights of the creditor, or compel the creditor to sue, and if the statute of limitations be permitted to run against the principal the fault is as much that of the surety as of the creditor.

In *Hughes v. Langdon*, 111 Neb. 508, 196 N. W. 915, it is very properly held that the judgment against the surety cannot exceed the penalty in the bond, and the bond in the case at bar was only $4,000, hence no more than that amount can be recovered in any event.

In *Hughes v. Langdon*, 111 Neb. 515, 199 N. W. 832, being the opinion written upon rehearing, it was held that the legal disability which may be considered in an action on the guardian's bond is only that disability which existed at the time of the discharge of the guardian, and that a disability subsequently arising will not operate to extend the time, and in that case the disability which existed at the time of the discharge of the guardian was that of minority, which was removed upon the minor attaining his majority. However, in the case at bar the mental incompetency of Irene Johnson has been absolute, and, therefore, her mental disability was just as effective at the time of the death of Henry A. Johnson, guardian, as it was at the time of his appointment. It was not a disability which subsequently arose, for this incompetent ward has been an inmate of the State Hospital for Feeble-Minded at Beatrice for at least the last 20 years, according to the bill of exceptions.

In the recent case of *Medow v. Riggert*, 132 Neb. 429, 272 N. W. 238, it was held that a guardian of the minor was discharged when she attained her majority on January 1, 1928. Some six years later the county judge found that there was due from her guardian the sum of $4,900, but such guardian had died March 30, 1932, his estate being insolvent. A demurrer was sustained to her petition against

the surety on the guardian's bond, because such action was not brought within four years of the discharge by death of the guardian. However, in this case the minor was not an incompetent confined in a state institution, as in the case at bar, and we find the trial court was in error when he found that this incompetent was required to show good cause for the delay. In the case of the recovery of real estate, section 20-213, Comp. St. 1929, gives an incompetent ten years after disability is removed.

In the bond which Moses L. Montgomery signed as surety, and the county judge approved, it recited that the principal had been appointed guardian of Irene Johnson, an incompetent, and the surety agreed that the guardian would file an inventory within three months and manage all funds which came into his hands for the best interests of the incompetent, and within one year should render an account on oath of the property in his hands (which was not done), and pay over, at the termination of his trust, all the estate due the incompetent to her legal representatives.

Under such a bond, conditioned for the faithful discharge of the trust by a guardian, the surety is in privity with the guardian, and is bound by an order of the probate court in reference to an accounting, although the surety is not a party thereto, for the surety must take notice of such proceedings.

Cases involving similar questions are: *In re Estate of Bolton*, 121 Neb. 737, 238 N. W. 358; *In re Estate of Wilson*, 127 Neb. 106, 254 N. W. 717; *Chappell v. Lancaster County*, 84 Neb. 301, 120 N. W. 1116; *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158.

We find that the contingent claim of the incompetent's estate became absolute on October 23, 1933, being the date of the order of the county court finding the amount due from her former guardian, and under section 30-704, Comp. St. 1929, the plaintiff within one year filed it against the estate of the deceased surety. The judgment of the trial court is reversed, and action is remanded to proceed in accordance with this opinion.

REVERSED.

ALBERT F. PETERSON, APPELLANT, V. ELMER L. SWANSON ET AL., APPELLEES.
274 N. W. 482

FILED JULY 6, 1937. No. 29960.

Taxation: FORECLOSURE OF LIEN: REDEMPTION. "Owners and others 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 the right of redemption on confirmation of such judicial sale." *Connely v. Hesselberth*, 132 Neb. 886, 273 N. W. 821.

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

J. J. Harrington, for appellant.

L. G. Nelson, contra.

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

CLEMENTS, District Judge.

This is an action by the owner of the land involved herein to redeem the same from a judicial sale based upon a decree foreclosing certain tax sale certificates. The cause was tried in the district court upon the pleadings and stipulation of the parties. There is no dispute as to the facts and the parties have stipulated "that the only question involved now in this action is the right of plaintiff to redeem from the sheriff's sale and the confirmation thereof."

The facts as stipulated are as follows: The land consists of a number of tracts. Some of these tracts were on November 7, 1927, sold to one Helen F. McGerr for delinquent taxes and tax sale certificates numbered 6502 and 6503 of that date were issued to her. These certificates were afterwards on the 19th day of October, 1931, assigned by the purchaser to appellee Elmer L. Swanson. Other of said tracts were on said 7th day of November, 1927, sold for delinquent taxes to one Jabe B. Gibson and tax sale certificates numbered 6659 and 6660 of that date

were issued to him. Still other of said tracts were on the 5th day of November, 1928, sold for delinquent taxes to said Jabe B. Gibson and tax sale certificates numbered 6811 and 6823 of that date were issued to him. Tax sale certificates numbered 6659, 6660, 6811 and 6823 were on the 3d day of August, 1932, assigned by the purchaser to appellee Elmer L. Swanson. Neither the purchasers at said sales nor the assignee of said tax sale certificates took any steps to obtain treasurer's tax deeds on said certificates, but on August 9, 1932, Elmer L. Swanson, the then owner of said tax sale certificates, commenced in the district court for Rock county, Nebraska, an action to foreclose said certificates.

On the 17th day of October, 1932, a decree of foreclosure was entered in said action. On the 9th day of January, 1933, said land was sold by the sheriff under said decree to said Elmer L. Swanson. On February 10, 1933, said sale was confirmed by order of court, and on April 21, 1933, sheriff's deed was executed and delivered to the purchaser. On March 6, 1934, this action was brought in the district court for Rock county.

The plaintiff, after pleading the above facts, prayed that he be permitted to redeem from said judicial sale and that the purchaser, upon such redemption, be required to reconvey said land to the plaintiff by sufficient deed of conveyance, and that the title to said land be quieted and confirmed in the plaintiff as against any claim of title or interest by virtue of said tax sale certificates or any proceedings had by reason thereof. This is not the exact words of said prayer, which is long, but it gives the substance thereof.

On the 20th day of April, 1936, the cause was tried before the Honorable Robert R. Dickson, district judge, who denied the prayer of plaintiff's petition and dismissed the action at plaintiff's cost. Plaintiff brings the cause here on appeal.

It will be seen from the foregoing that, as stipulated by the parties, there is but one question to be considered by

this court. Has the plaintiff herein a right to redeem his land from a judicial sale, based on tax sale certificates obtained by reason of a valid administrative sale of land for delinquent taxes, the proceedings which resulted in the judicial sale having been commenced more than two years after the date of the administrative sale? In *Connely v. Hesselberth,* 132 Neb. 886, 273 N. W. 821, we held: "Owners and others 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 the right of redemption on confirmation of such judicial sale." For the reasoning that resulted in this rule, see the opinion in that case.

If this rule is adhered to, it follows that the judgment in the instant case must be affirmed.

AFFIRMED.

CARL A. CARLSON, APPELLANT, V. ALBERT E. ROBERTS, APPELLEE.

274 N. W. 473

FILED JULY 6, 1937. No. 30027.

1. **Negligence.** The burden of proving contributory negligence, an affirmative defense, is upon the party pleading it, and must be established by a preponderance of the evidence.
2. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested to do so or not.
3. ———. Where, under the pleadings and evidence, contributory negligence is an issue, and an instruction is requested by the plaintiff which places the burden of proof upon the defendant to prove such issue, it should be given if not covered by other instructions of the court; and, if refused, it is the duty of the court to prepare and give a proper instruction upon the point covered by the request.
4. **Automobiles.** Under the pleadings and the evidence in this case, *held* that whether plaintiff was guilty of any one or more of the acts of contributory negligence alleged in the answer of defendant was for the jury to determine under proper instructions.

APPEAL from the district court for Otoe county: DANIEL W. LIVINGSTON, JUDGE. *Reversed.*

Lloyd E. Peterson and *Sam C. Zimmerman,* for appellant.

Loren H. Laughlin, contra.

Heard before ROSE, EBERLY, DAY, PAINE and CARTER, JJ., and HASTINGS and RINE, District Judges.

HASTINGS, District Judge.

This action was brought to recover damages for personal injuries sustained to the plaintiff, Carl A. Carlson, as a result of having been struck by an automobile owned and driven by the defendant, Albert E. Roberts, on the evening of October 20, 1935, on U. S. highway No. 6 in the unincorporated village of Emerald. The trial resulted in a verdict and judgment for the defendant, from which plaintiff appeals.

Plaintiff alleges in his petition that the collision and his injuries were caused by certain negligent acts of the defendant in the driving of his automobile against plaintiff while he was walking on the shoulder of the highway.

The answer of the defendant admitted that he struck the plaintiff with his automobile, but without fault or negligence on his part, and that the collision, and alleged injury to plaintiff, was caused by acts of contributory negligence which are set out in detail therein. The alleged acts of contributory negligence were put in issue by the reply of plaintiff.

The record shows that the traveled portion of the highway at or near the point where the collision occurred consists of brick pavement about 16 feet in width, with a flat cement curbing one foot wide on each side, practically level with the shoulders of the highway. The accident complained of occurred about the hour of 6:00 or 6:10 p. m. of said day. At the time of the collision it was dusk and raining or misting to such an extent that visibility was impaired. The evidence of the plaintiff and of the defend-

ant is in conflict as to where in the highway the collision occurred.

It appears from the testimony of the plaintiff that he parked his car in front of a store on the north side of the highway, and that some time thereafter he went to get his car, but was unable to drive it from the place he had left it to the paved part of the highway owing to the muddy and slippery condition of the ground. From there he went to a garage to get help to move it. The garage was located between 600 or 700 feet west of his car, on the south side of highway No. 6, where that highway was intersected by a county graveled highway running north and south. On being assured at the garage that help would be sent to move his car, he started back to his car, and in doing so he walked along the south shoulder of the paved highway about two feet from the south edge of the pavement. After he had proceeded east about 100 or 150 feet, he was struck by defendant's car on his left leg and was thrown up along the fender and back to the front door of the car, and he then fell to the ground. The shoulder of the highway, on which plaintiff was walking at the time of the accident, was partially graveled, but muddy, and the reason plaintiff gave for not walking upon the pavement was that the traffic was heavy thereon.

It appears from the testimony of the defendant that he was driving his car eastward on the highway, about four or five feet north from the south edge of the pavement, at a speed of about 25 miles an hour, with his lights on, and that he first saw plaintiff eight or ten feet ahead of him directly in front of his car, with his back toward him; that he immediately turned his car to the left and applied his brakes; that the right end of the front bumper struck the plaintiff below the knee, and thereupon plaintiff slid back over the right fender and struck the front corner of the door post and he then fell to the ground. Defendant stopped his car about 25 feet from where he first saw plaintiff.

One of the several assignments of error is that the trial

court erred in refusing to give instruction No. 1, requested by plaintiff. The requested instruction is as follows: "Defendant claims contributory negligence on the part of the plaintiff. This is an affirmative defense and in order to avail himself of the same it is necessary for the defendant to prove it by a preponderance of the evidence." The court gave no instruction upon this issue. We have repeatedly held that the burden of proving contributory negligence, an affirmative defense, is upon the party pleading it, and must be established by a preponderance of the evidence. *Rapp v. Sarpy County,* 71 Neb. 382, 98 N. W. 1042; *Vertrees v. Gage County,* 81 Neb. 213, 115 N. W. 863; *Schrage v. Miller,* 123 Neb. 266, 242 N. W. 649; *Cotten v. Stolley,* 124 Neb. 855, 248 N. W. 384; *Pinches v. Village of Dickens,* 127 Neb. 239, 254 N. W. 877.

Counsel for appellee recognizes this rule, but urges that the instruction tendered does not correctly state the law, in that it does not contain the qualification—"unless they find from the plaintiff's own evidence that he was guilty of contributory negligence." There is nothing in plaintiff's evidence that would warrant the adding of that qualification to the instruction. In *Cotten v. Stolley, supra,* we held:

"Pedestrian has right to walk longitudinally in highway, unless forbidden by statute, and is not, as a matter of law, guilty of contributory negligence in so doing.

"Pedestrian lawfully on highway may rely on reasonable care of automobile drivers, and is not negligent, as a matter of law, in failing to anticipate driver's negligence."

Plaintiff, in walking along the shoulder of the highway, had a right to assume that automobile drivers would use the paved part of the highway intended for their use, and was not required to anticipate that a driver would not do so. Furthermore, it was the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not. *Kimball v. Lanning,* 102 Neb. 63, 165 N. W. 890; *Blue Valley State Bank v. Milburn,* 120 Neb. 421, 232 N. W. 777; *Spittler v. Callan,* 127 Neb. 331, 255 N. W. 27; *Wagner v. Watson*

Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373. If, as contended by counsel for defendant, the tendered instruction is defective in form, it was the duty of the court to prepare and give a proper instruction upon the point covered by the request. *Pospisil v. Acton*, 118 Neb. 200, 224 N. W. 11. The instruction tendered, or one of similar import, should have been given, and the failure to do so constituted error.

At the close of the evidence plaintiff made a motion "that the defense of contributory negligence be removed from the jury on the ground that there is no sufficient evidence to substantiate said defense of contributory negligence." The court overruled the motion and that ruling is assigned as error. Error was not committed by the court in its ruling.

Under the pleadings and the evidence, whether plaintiff was guilty of any one or more of the acts of contributory negligence alleged by defendant was for the jury to determine under proper instructions.

The conclusion reached renders unnecessary a consideration of other alleged errors.

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

REVERSED.

JACOB LEICHNER, APPELLANT, V. FIRST TRUST COMPANY OF LINCOLN, APPELLEE.

274 N. W. 475

FILED JULY 6, 1937. No. 29851.

1. **Appeal.** Error in the admission of evidence or in giving or in failing to give instructions to a jury does not constitute prejudicial error requiring a new trial, if the judgment rendered is the only judgment legally justified under the pleadings and the competent evidence introduced.
2. **Fraud.** Actionable fraud may not be predicated on the expression of a mere opinion as to value, honestly made under circumstances that do not give another the right to rely thereon.

3. ———: BURDEN OF PROOF. In an action in which relief is sought on account of fraud, the burden of alleging and proving the existence of all the elements thereof is upon the party seeking such relief.
4. ———: ———. In an action in which relief is sought on account of alleged fraud, the existence of a confidential or fiduciary relationship, or status of unequal footing, when shown, does not shift the position of the burden of proving all elements of the fraud alleged, but nevertheless may be sufficient to allow fraud to be found to have existed when in the absence of such a status it could not be so found, and thus to have the effect of placing the burden of going forward with the evidence upon the party charged with fraud.
5. ———. While a promise that is made with a then existing fraudulent intent on the part of the promisor not to perform the same may, under some circumstances, be sufficient to allow fraud to be predicated thereon, such an evil intent cannot be found to have so existed only from the naked fact of non-performance of such promise.

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

Edward C. Fisher and *George I. Craven,* for appellant.

Hall, Cline & Williams, contra.

Heard before GOSS, C. J., DAY, PAINE and CARTER, JJ., and TEWELL and YEAGER, District Judges.

TEWELL, District Judge.

The plaintiff's petition contains two causes of action. In each cause rescission of an oral contract is sought. Fraudulent representations on the part of the defendant's agent is alleged to have induced the purchase contracts involved. From a verdict and judgment in favor of the defendant in each cause, the plaintiff appeals.

By the contract involved in the first cause, the plaintiff purchased from the defendant, on July 3, 1929, one bond in the principal sum of $1,000, and by the contract involved in the second cause he purchased from the defendant, on July 23, 1929, two bonds in the total principal sum of $1,500. Payment of all bonds involved in both causes

is secured by a deed of trust in which the defendant is named as trustee. This trust deed creates a first lien upon the Nebraskan Hotel and the five lots upon which it stands in Superior, Nebraska. It and the bonds were executed by the Turner Hotel Company, a corporation, for the purpose of securing funds for the erection of the above-mentioned hotel. The bonds secured by this deed of trust are real estate mortgage bonds that are made payable to bearer, the principal sums of which total the sum of $60,000. One Andrew Suffa, assistant secretary of the defendant company, acted as an agent of the defendant in the case of each of the two sales to the plaintiff. The fraudulent representations alleged are that Suffa told the plaintiff, at the time of each purchase, first, that "the bonds are as good as gold," second, that "the security for the payment of the bonds is good," and, third, that "at any time the plaintiff wanted his money back he had simply to bring in said bonds to the company and that the defendant trust company would repurchase the same and give him back his money with interest and without any trouble or difficulty whatsoever." No representations of Suffa other than the three above outlined are alleged to have been fraudulent. In addition to these representations, all other elements of fraud are pleaded. A confidential relationship between Suffa and the plaintiff and an intent existing at the time of each sale not to perform the promise to repurchase are both alleged in each cause. The reasons for recovery being identical in each cause, the two causes are hereinafter discussed as if pleaded in one cause.

The assignments of error set forth in the appellant's brief are twenty in number. Of these, two relate to instructions given by the court to the jury, three to the failure to give the jury instructions requested by the appellant, and the rest to alleged error in the admission of evidence. No complaint is made on account of any exclusion of evidence offered by the appellant. Error in the admission of evidence or in giving or failing to give instructions to a jury cannot constitute prejudicial error requiring a new

trial, if the judgment rendered is the only judgment justified under the pleadings and the competent evidence introduced. *Swindell v. Malone,* 88 Neb. 90, 129 N. W. 180; *Popejoy v. Burr,* 94 Neb. 52, 142 N. W. 524; 4 C. J. 908. Due to the view we take of the pleadings and evidence in this case, a discussion of any one of the errors relied upon by appellant for a reversal of the judgment of the trial court becomes unnecessary.

An examination of the testimony of the plaintiff discloses that at the time he purchased the bonds involved he knew that their payment was secured by a mortgage on a new building in Superior, Nebraska. He had purchased bonds from the defendant at various times from 1917 to 1929. A bond owned by the plaintiff came due and was paid just prior to July 3, 1929. On that date the plaintiff went to the defendant's place of business to deliver the bond that had been paid and to receive the payment. He desired to reinvest this money in other bonds and asked for a mortgage bond bearing 6 per cent. interest. His purchase of bonds on July 23, 1929, arose in a similar manner. He testified that Mr. Suffa, defendant's agent who sold him the bonds, made no statements whatever relative to the nature of the building conveyed by the trust deed, the cost thereof or the value thereof. That the three representations above enumerated were made by Suffa at the time of each sale is shown by the plaintiff's testimony. The evidence discloses that the building was erected in the year 1929 and the fore part of 1930 at a cost of about $100,000. It was opened for the transaction of business April 14, 1930. No evidence shows that the cost was other than reasonable in amount. Circumstances surrounding the erection of the hotel, such as the population of the city of Superior, the location of the hotel, and the number of railroads and highways extending into such city, fails to disclose other than an honest intent in its erection and in the sale of bonds secured by a first mortgage thereon to aid in its erection. Interest upon all bonds seems to have been paid promptly when due up to at least the payment falling due December

1, 1932. Under the circumstances shown in the record, one could not reasonably find that Suffa at the time of the sale of the bonds involved knew that the representations alleged, assuming that any or all of them were made, were false, or that such representations were made as positive statements without knowledge of whether or not they were true. To say that the bonds were as "good as gold" and that the security for their payment was "good" could not reasonably be construed in this case to amount to more than the expression of an opinion relating to value. Actionable fraud may not be predicated upon the expression of a mere opinion as to value honestly made, under circumstances that do not give another the right to rely thereon. *Aetna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, 94 N. W. 129; 26 C. J. 1131; *Albion Milling Co. v. First Nat. Bank of Weeping Water*, 64 Neb. 116, 89 N. W. 638. The evidence does not show that Suffa knew that any of said representations were untrue. He made no statement importing knowledge on his part. For aught that the record shows, he had full knowledge of all facts existing at the time the bonds were sold. The only evidence from which it might be determined that the alleged representations as to value of the bonds were false is the testimony of one witness for the plaintiff to the effect that, in his opinion, the security for the bonds was not worth to exceed $40,000 at the time of the sale of the bonds, and the fact that payment of interest upon the bonds became delinquent about three years after the bonds were purchased by the plaintiff. The record shows a condition in which Suffa would be justified in believing that the bonds were as "good as gold" and that the security therefor was "good" at the time the bonds were sold. The security for the payment of the bonds is very probably still good. The record does not show otherwise. In an action in which relief is sought on account of fraud, the burden of alleging and proving all of the elements thereof is upon the party seeking such relief. *Davidson v. Crosby*, 49 Neb. 60, 68 N. W. 338; 27 C. J. 44.

The plaintiff alleged in his petition, and now claims,

that a confidential relationship between himself and Suffa existed, and that such relationship, when considered with the representations above enumerated and other facts established, entitles the plaintiff to relief from his contracts. It would unnecessarily extend this opinion to detail the facts and circumstances relied upon to establish such a relationship. Suffice it to say that the record does not disclose any greater confidential relationship than commonly arises from a long but not intimate acquaintance. Perhaps unequal business experience and education is shown, but unequal mentality is not shown. No fiduciary relationship is shown. When relief on account of fraud is sought, the burden of proving the existence of any fiduciary or confidential relationship, or of any unequal footing, is upon him who may allege such a status, and the existence of such a status when proved does not change the position of the burden of proving the existence of all elements of fraud. Such a status may be sufficient to cause fraud in a proved transaction to be inferred and thus to place the burden of going forward with the evidence upon the party charged with fraud. *Miles v. Pike Mining Co.*, 124 Wis. 278, 102 N. W. 555; 27 C. J. 46. The phrases "burden of proof" and "burden of going forward with the evidence" should not be confused. 22 C. J. 67. We find no set of circumstances in this case that casts upon the defendant the burden of showing the fairness of the contracts that plaintiff seeks to rescind.

It is contended by the plaintiff that the alleged agreement to repurchase the bonds at the sale price at plaintiff's election, with an intention never to perform, constituted fraud, entitling plaintiff to relief. This contention was embodied in instruction No. 6 requested by the plaintiff. It has been held by some courts that fraudulent representations inducing a sale that is accompanied by a warranty of the truth of such representations are not such as allow fraud to be predicated thereupon. *Williams Transportation Line v. Darius Cole Transportation Co.*, 129 Mich 209, 88 N. W. 473. The reason given for such a rule is that the

buyer is conclusively presumed to have relied upon the warranty, and that his relief must be sought upon his contract. Whether or not the alleged agreement to repurchase would have a like effect in this action as to the other representations alleged we need not decide. That fraud may be predicated under some circumstances of the making of a promise with a then existing intent not to fulfil such promise has been held by this and other courts. *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. n. s. 640, and note; 12 R. C. L. 261, sec. 28; Annotation 91 A. L. R. 1295. Assuming, but not declaring, that the agreement to repurchase involved herein, if made with a then existing intent not to perform, would be a basis on which to predicate fraud, we look for proof of the existence of such an intent. Sufficient circumstances from which the existence of such an intent reasonably may be inferred are not found in the evidence. The evidence is at least as consistent with a nonexistence of such an intent as with the existence thereof. The law does not presume fraud. The defendant company is not shown to have been financially embarrassed. It at all times was able to repurchase. The evidence does not show that the defendant company or any of its agents had any knowledge of any insolvency of the maker of the bonds. For aught that the record shows, the maker is not insolvent and may pay the bonds on demand. No circumstance other than a subsequent refusal to repurchase is shown from which such an intent might be inferred. More than three years elapsed after the sale before demand for repurchase was made. A severe financial depression had occurred during those years. The evidence is not sufficient to warrant the jury in finding such an intent to have existed. *Maguire v. Maguire*, 171 Minn. 492, 214 N. W. 666; *Cuckovich v. Buckovich*, 82 Mont. 1, 264 Pac. 930; Annotation 91 A. L. R. 1306. While statements found in the opinion in *Federal Finance Co. v. Cass*, 120 Neb. 834, 235 N. W. 579, and other cases therein cited, might seem to indicate that such an evil intent could be inferred from the mere fact of nonperformance, an

examination of those opinions will disclose that circumstances existed other than that of nonperformance from which such an intent could be inferred.

The trial court would have been justified in entering judgment for the defendant without the defendant introducing any evidence. The evidence of the defendant did not aid the plaintiff in making the proof necessary to his recovery. Finding no error prejudicial to the rights of the plaintiff, the judgment of the trial court is

AFFIRMED.

EQUITABLE TRUST COMPANY, TRUSTEE, APPELLEE, V. GOLBA D. GROVES, APPELLANT.

274 N. W. 457

FILED JULY 9, 1937. No. 29983.

1. **Appeal.** On appeal, affidavits cannot be considered in the supreme court to show facts not presented to the district court, nor preserved in the bill of exceptions.
2. **Mortgages:** FORECLOSURE: MORATORIUM. On a record showing that mortgagor has no equity in mortgaged premises, the refusal of the district court to grant him a moratorium in a foreclosure suit will not be disturbed on appeal.
3. ———: ———: SALE: CONFIRMATION. A judicial sale under a decree foreclosing a mortgage on realty will not be reversed on appeal for inadequacy of price, where there was no fraud or shocking discrepancy between value and sale price, or prospect of a higher bid in the event of a resale.
4. ———: ———: REVIEW. Orders made prior to confirmation of a judicial sale in a suit to foreclose a mortgage on realty are not reviewable on an appeal limited to confirmation and subsequent rulings.

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

Dryden, Dryden & Jensen, for appellant.

C. J. Thurston, contra.

Heard before ROSE, DAY, PAINE and CARTER, JJ., and HASTINGS, MUNDAY and RINE, District Judges.

ROSE, J.

This was a suit in equity in which the district court for Garden county March 7, 1935, decreed foreclosure of a first mortgage lien amounting to $33,947.91, with interest at the rate of 10 per cent. per annum, on a 4,320-acre ranch in Garden and Grant counties. The amount of a second mortgage lien March 7, 1935, was decreed to be $6,870.85, with interest at the rate of 10 per cent. per annum. Following is a chronology of further proceedings: February 24, 1936, order of sale issued; March 26, 1936, notice of sale completed; March 31, 1936, mortgaged ranch sold by sheriff at judicial sale to plaintiff for $37,623.23; April 13, 1936, motion by plaintiff for confirmation of judicial sale, for order directing execution and delivery of sheriff's deed to plaintiff as trustee for bondholders, and for writ of assistance to put purchaser in possession of premises; April 13, 1936, application for moratorium, objections thereto, and objections to confirmation of sale; July 27, 1936, moratorium denied and judicial sale confirmed.

In ruling on the issues of moratorium and confirmation, the district court found: "That the moratorium should be denied; that the value of the premises does not exceed the sum of $37,569.03, and that the defendant has no equity in said premises; that the sale was legally had and that another sale would not in all probability bring a larger bid."

From the judgment denying a moratorium and confirming the sale, Golba D. Groves, principal mortgagor, defendant, appealed.

Two controlling questions are presented by the appeal: Did Groves have such an interest in the ranch as to entitle him to a moratorium? Did inadequacy of price prevent a proper confirmation of the judicial sale? The answer to both of these questions depends on the certified transcript of the proceedings and judgment below and the evidence adduced before the district court on the issues of moratorium, value and sale price.

Original affidavits were filed in the supreme court to show alleged facts not presented to the district court nor preserved in the bill of exceptions. They cannot, therefore, be considered on appeal.

No witness was examined in the district court on the issues stated. The parties were heard on affidavits. Most of them contain immaterial matter and indicate bias. One affiant, who favored plaintiff, estimated the value of the 4,320-acre ranch at $25,920, and another at $21,600. Each of nine other affiants, friends or neighbors of Groves, made an affidavit in his favor. Their estimates of value ranged from $42,000 to $58,320. The latter was made by an affiant whose affidavit shows bias on its face and an unreasonable estimate in view of the entire record. Another affiant whose affidavit also was introduced in evidence by Groves, himself, stated the annual rental value of the ranch to be $1,000. As evidence of value of the ranch this would be only an income of 3 per cent. on capital or value of $33,333.33 1/3, whereas the sale price was $37,623.23. Moreover, an annual rental of $1,000 would pay less than one-third of the annual interest at the decreed contract rate of 10 per cent. per annum on the unpaid first mortgage lien of $33,947.91. The mortgage liens and the contract rate of interest were adjudicated in the decree of foreclosure and import verity because there is no appeal from this feature of the judgment below, and there is nothing in the bill of exceptions to show error in the amount of debt or interest. The better view of all evidence which can be considered on the appeal is that Groves has no equity in the ranch to be protected by a moratorium, as found by the district court. Fraud in the judicial sale is not shown or implied. There is no shocking discrepancy between value and sale price. The evidence is insufficient to prove the prospect of a higher bid in the event of a resale.

Questions arising prior to the confirmation of the sale were determined adversely to Groves, and this appeal does not include earlier rulings.

Error in the proceedings and judgment of the district court has not been found.

AFFIRMED.

ALMITTA NILSON, APPELLANT, V. TEKAMAH INVESTMENT COMPANY ET AL., APPELLEES.

274 N. W. 465

FILED JULY 9, 1937. No. 29997.

Executors and Administrators. "A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested in such settlement is a party in the probate court whether he is named or not." *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902.

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

W. A. Ehlers, for appellant.

Chatt & Ellenberger, contra.

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

EBERLY, J.

This, in substance, is the identical matter presented to this court, and by it determined, in the case of *In re Estate of Nilson*, 126 Neb. 541, 253 N. W. 675. The opinion in that case is here referred to as containing a full and complete recital of the facts, and the determination of the law of the case as thus made by this court.

After final disposition of the case, as then made by this court, plaintiff, Almitta Nilson, filed a new petition in the district court for Burt county, making the Tekamah Investment Company, a corporation, the sole defendant. Upon application of this defendant an order was entered by the trial court directing that E. I. Ellis, as administrator of the estate of Anders G. Nilson, deceased, be made a party defendant. This action of the trial court forms the basis

of one of plaintiff's exceptions presented on appeal. The action thus taken was clearly within the discretion of the trial court. Plaintiff was in no manner prejudiced thereby. Ample justification is found in the many precedents of this tribunal. *Cahn v. Lipson,* 39 Neb. 776, 58 N. W. 280; *Brown v. Brown,* 71 Neb. 200, 98 N. W. 718; *Kaplan v. City of Omaha,* 100 Neb. 567, 160 N. W. 960.

In *Sharp v. Citizens Bank of Stanton,* 70 Neb. 758, 98 N. W. 50, is found an example of the application of this rule impliedly approved by this court under circumstances quite comparable to the instant case.

Plaintiff's newly filed petition in the instant case, in addition to the usual formal allegations, charged that, "on or about the 21st day of March, 1930, this plaintiff delivered into the possession of one Emmett I. Ellis, who was then * * * the president of the defendant corporation, certain cashier's checks in the sum of $3,500 for the purpose of procuring cash upon said checks and to place the amount to her credit and for her account in and upon the books and records of said Tekamah Investment Company for safe-keeping and to be repaid to this plaintiff;" that this engagement was duly performed and the sum of $3,500 duly credited to plaintiff by that corporation, which, save and except the sum of $820.14, it still retains, and for $2,679.86 with interest thereon, plaintiff prays judgment.

The Tekamah Investment Company, as its answer to this pleading, in addition to a general denial, alleged specifically the facts embraced in the several transactions related to plaintiff's claim, the submission thereof to the county court and the district court for Burt county, and the determination as made by those tribunals thereon unfavorable to plaintiff; the appeal made by plaintiff from such adverse judgment to this court and the repeated adverse decision to plaintiff entered by this court therein, which is reported as *In re Estate of Nilson,* 126 Neb. 541, 253 N. W. 675. As part of these allegations this defendant's answer sets forth verbatim the opinion adopted by this court in determining the issues on appeal. Thereafter,

E. I. Ellis, as administrator, filed an answer denying generally the allegations of plaintiff's petition, but also pleading specifically the ultimate facts as to proceedings had and the final adjudication made in the case of *In re Estate of Nilson, supra,* in bar of plaintiff's present cause of action.

It may be said that no good purpose would be served by setting forth the subsequent pleadings at length. Suffice it to say that ultimately issues were joined by the parties, on the basis, however, of a substantial and necessary admission by plaintiff of the existence of the ultimate facts disclosed by the official records of the case of *In re Estate of Nilson, supra,* but challenging their competency as against plaintiff in favor of the present defendants. Thereupon the trial court sustained a motion by defendant for judgment upon the pleadings. Plaintiff appeals.

An examination of the record discloses that the transaction set forth in plaintiff's present petition was the controlling transaction set forth as the basis of the case of *In re Estate of Nilson, supra.* In that case plaintiff's claims were substantially identical with those she now presents. All of these claims were examined by this court in such case of *In re Estate of Nilson,* and determined adversely to plaintiff's present contention. These conclusions are supported not only by the necessary inferences arising from the formal disposition of the issues in that case, but also in the terms of the opinion by this court approved and adopted herein.

Our opinion, in fact, proceeds on the basis that in the case of *In re Estate of Nilson,* then before us, "the administrator alleged in his petition in the county court that he had possession of the property, and the evidence discloses that the fund in question was actually in his possession and under his control, and not in the possession of a third party (Tekamah Investment Company) except for safe-keeping and to identify the fund." Appellant concedes this, but claims that he had it for her. The evidence does not sustain this contention. We proceed upon the theory that the money was in the hands of the administrator, an

officer of the court, under its direction, supervision, and control, and therefore in the hands of the court. Thereupon the claim of plaintiff to the fund in suit was expressly denied, and the administrator was directed to make suitable disposition thereof as funds of his intestate. This disposition of the funds was approved by us in *In re Estate of Nilson, supra.*

We have given due consideration to plaintiff's contention that the Tekamah Investment Company was not a party to this proceeding, and therefore not entitled to any benefits thereunder; and that the plea of *res judicata* may not be successfully waged as a defense by a stranger to a judgment. But the administrator was a party to the proceeding and vitally interested in the issues tried in the instant case. In addition, he is identified in interest with the investment company with whom he made the deposit in suit. Again, plaintiff wholly ignores the fact that the vital question here presented arises out of a proceeding *in rem.* In this class of cases, the rule is: "A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem,* and every one interested in such settlement is a party in the probate court whether he is named or not." *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902. See, also, *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001; *Fischer v. Sklenar,* 101 Neb. 553, 163 N. W. 861.

The conclusion inevitably follows that the judgment entered in the case of *In re Estate of Nilson,* 126 Neb. 541, 253 N. W. 675, is determinative of the controlling issues presented in the instant case, and precludes recovery by plaintiff upon the cause of action set forth in her petition.

Therefore, it clearly appears that the judgment entered by the district court is correct, and it is

AFFIRMED.

ANNA M. LINDSTROM, APPELLANT, V. JOHN R. NILSSON, APPELLEE.

274 N. W. 485

FILED JULY 9, 1937. No. 29959.

1. **Judgment:** RELIEF IN EQUITY. While in a proper case an action in equity to obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law.
2. ———: ———. To be entitled to equitable relief, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 20-2001, Comp. St. 1929, to obtain a new trial.
3. **Attorney and Client.** When a litigant employs a competent attorney to represent him in a legal proceeding, knowledge of such attorney that an order of dismissal has been entered is attributable to and binds the client.

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

R. B. Hasselquist and *Donald S. Krause,* for appellant.

Gaines, McLaughlin & Gaines, contra.

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and SPEAR and KROGER, District Judges.

KROGER, District Judge.

Appellant, hereinafter referred to as plaintiff, sustained a fractured hip as a result of a fall on the 20th day of January, 1926, and appellee, a duly licensed and practicing physician and surgeon, hereinafter referred to as defendant, was employed to treat such injury.

In June, 1928, plaintiff filed an action in the district court for Douglas county, Nebraska, praying damages from defendant for alleged malpractice in the treatment of such injuries. To this petition, a motion was filed, and no further action was taken with reference thereto until in the year 1930, when the attorney originally employed by plaintiff withdrew from the action and other attorneys were employed, and an amended petition was filed. Defendant filed an answer to such amended petition. In October, 1930,

plaintiff's case was stipulated for trial, but when the trial date arrived, plaintiff's then attorneys also withdrew and the case was continued. Plaintiff was served with notice that on November 20, 1930, defendant's counsel would again ask the court to set the case for trial, and she thereupon secured a new firm of attorneys to represent her and the case was set for trial on January 6, 1931. On said date, plaintiff's attorneys withdrew from the case and the same was continued to January 12, 1931, to enable plaintiff to obtain other counsel. On January 12 another attorney appeared for plaintiff and asked for a continuance to enable him to investigate the case, and same was granted to January 31, 1931, at which time plaintiff's then attorney appeared and withdrew, and the trial court thereupon directed that the case be set definitely for disposition on February 7, 1931, and directed that the plaintiff be notified of such ruling. Defendant's attorneys sent plaintiff a registered letter under date of February 3, 1931, advising her of the action of the trial court, but this letter was returned with the notation "refused." On February 7, 1931, plaintiff was represented by a new attorney and he requested a further continuance to enable him to prepare for trial. This request was refused and the case was set for trial on February 9, 1931. On said date the attorney then representing plaintiff appeared and again made application for a further continuance, which was refused, and plaintiff not being ready for trial, an order was entered dismissing the action for want of prosecution. No further action was taken until in December, 1934, when plaintiff instituted an independent action in equity to set aside the order dismissing her law action, and in October, 1935, filed an amended petition in that proceeding. Issues were joined and trial had, at the conclusion of which the court entered a decree denying plaintiff the relief prayed for and dismissing plaintiff's suit in equity. It is from this order that this appeal is prosecuted.

It is the contention of the plaintiff that the attorney representing her on February 9, 1931, did not advise her

of the action of the trial court dismissing her law action, and that she did not learn of such action until in July, 1933, and that she has a meritorious claim and has been prevented from having the same heard, without any fault on her part.

This court is committed to the rule that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy. See *Brandeen v. Beale*, 117 Neb. 291, 220 N. W. 298; *Krause v. Long*, 109 Neb. 846, 192 N. W. 729.

Plaintiff's attorney of record was present on February 9, 1931, when the order of dismissal was entered, and he was fully advised at all times of the action taken. It has been repeatedly held by this court that notice to the attorney of record is notice to the party represented by such attorney. *Marshall v. Rowe*, 126 Neb. 817, 254 N. W. 480; *Goergen v. Department of Public Works*, 123 Neb. 648, 243 N. W. 886.

No good cause has been shown by plaintiff why proceedings were not instituted to vacate the order of dismissal within the two-year period provided by section 20-2008, Comp. St. 1929. Even after plaintiff discovered the situation, she delayed for a year and a half before taking any action whatsoever, and more than two years before filing her amended petition on which the trial was had. Five separate attorneys or firms of attorneys represented plaintiff up to the time of the dismissal of her action, three of whom withdrew at various times when the case was noted for trial. Each time the defendant had gone to considerable expense in preparing for trial. Defendant was entitled to a final disposition of the suit against him within a reasonable time, and the trial court did not err in dismissing plaintiff's action for want of prosecution, and we find no error in the decree of the equity court in refusing to set aside the order of dismissal.

The decree appealed from was proper and is

AFFIRMED.

BANKERS LIFE INSURANCE COMPANY, APPELLEE, V. THOMAS J. ARON, GUARDIAN, APPELLANT: ERIE L. STONE, APPELLEE.
273 N. W. 280

FILED JULY 9, 1937. No. 30030.

1. **Evidence.** A nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if such condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based.
2. **Insurance.** Evidence examined and *held* to show that the decedent was of sound mind at the time in question.
3. ———: BURDEN OF PROOF. The burden of proof is on the party, who alleges that the insured in a policy of life insurance was of unsound mind at the time of the change of his beneficiary, to establish such fact.

APPEAL from the district court for Saline county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Robert R. Hastings, for appellant.

John E. Mekota and *Peterson & Devoe, contra.*

Heard before ROSE, DAY, PAINE and CARTER, JJ., and HASTINGS, MUNDAY and RINE, District Judges.

MUNDAY, District Judge.

The plaintiff filed a bill of interpleader to have the court ascertain who was entitled to the proceeds of a life insurance policy belonging to Joseph Kristufek, deceased. The proceeds were paid into court by the plaintiff.

Joseph Kristufek died November 27, 1935, leaving his widow, Tony Kristufek, him surviving. The wife has been confined in the State Hospital for Insane at Lincoln suffering from dementia præcox. The contest here is between Erie L. Stone, appellee, niece of the deceased and the beneficiary in the policy at the time of his death, and Thomas J. Aron, appellant and guardian of Tony Kristufek, the former beneficiary.

The beneficiary of the policy was changed in September, 1935, on the application of Joseph Kristufek, made on

September 20, 1935. The guardian, Aron, contends that Joseph Kristufek was of unsound mind when the application was made and the beneficiary changed. The contention of undue influence was abandoned by the appellant.

The trial court, a jury having been waived, held that the decedent was of sound mind and competent and understood the nature and effect of his acts in changing the beneficiary of his insurance, and entered judgment in favor of the appellee.

The appellant relies upon two alleged errors for reversal of this judgment: (1) That the court erred in refusing to permit the witnesses, Mrs. Anton Daniel, John G. Franta and Mrs. Julia Aebig, to express their opinion as to the condition of the mind of Joseph Kristufek in March, 1935; (2) that the judgment is not sustained by sufficient evidence.

We will consider these contentions in the order set out. The record shows that the opinions of these witnesses related to the condition of Joseph Kristufek's mind at a time about six months prior to the change of the beneficiary.

Joseph Kristufek was 48 years of age at the time of his death, and had been a harness maker at Crete, Nebraska, for many years, until he sold his business in February, 1935, and on March 29, 1935, went for treatment for tuberculosis to the Modern Woodmen of America Sanatorium at Woodmen, Colorado, where he remained until September 21, 1935, when he returned to Nebraska and spent most of the time in Lincoln.

It is a settled rule of law in this state that a nonexpert witness who is shown to have had a more or less extended and intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Wilson,* 78 Neb. 758, 111 N. W. 788; *Torske v. State,* 123 Neb. 161, 242 N. W. 408; *Kehl v. Omaha Nat. Bank,* 126 Neb. 695, 254 N. W. 397.

The question arose in this case when the opinions of non-expert witnesses were offered to show the insanity of the decedent. Such testimony was excluded by the trial court on the ground that there was not sufficient foundation shown for such testimony by any one of the witnesses. Each of the witnesses was shown to have had an acquaintance with the deceased and some conversations with the deceased, which conversations were stated before the opinions as to the condition of mind were called for. On considering these conversations, and the actions of the deceased, as related by the witnesses, most of them seem about as consistent with sanity as insanity. However, we think the opinions should have been admitted. The fact that the opinions of the witnesses related to the condition of mind of the deceased at a time which was somewhat remote to the time in question, and that the conversations and facts stated on which the opinions were based were not very persuasive of insanity, were matters that should have been taken into consideration when considering the weight to be given the opinions and the facts on which they were based. But, owing to the remoteness of the time to which the opinions as to the mental condition of Joseph Kristufek related, the exclusion of the opinions was not such a substantial error and is not so prejudicial to appellant as to require a reversal of the judgment. All the testimony as to foundation for the admission of these opinions was before the trial court and is in the bill of exceptions. Conceding the witnesses, if they had been permitted to answer, would have stated that Joseph Kristufek was of unsound mind in March, 1935, it was not such a material error to exclude such opinions, under the circumstances above set out, as to change the final judgment of the district court. This will appear more fully in the discussion of the second assignment of error.

Appellant also contends that the decree of the district court is not sustained by sufficient evidence. Many persons who came in contact with Joseph Kristufek while at the sanatorium, at about the time the change in the bene-

ficiary was made, stated that he was sane at the time. These included the notary public, who was the record keeper and stenographer before whom the changes were made, his attending physician there, the colony secretary who had charge of the patients, and several patients at that institution. Also there were several persons who had had business transactions with the deceased before he went to the sanatorium, to the effect that he was of sound mind at that time.

Shortly before his death Joseph Kristufek came to Lincoln, and in the last of October, 1935, resided at the Lincoln Apartments, 1121 Q street. Mr. C. E. Siefert, who operates the Lincoln Apartments, conversed with Kristufek many times and on different subjects. Siefert stated that the deceased was dressed moderately and cleanly; that he always paid rent promptly; that the witness did not know of Kristufek's illness until the night he died, and that Kristufek was of sound mind and capable of transacting business while there.

The appellant, Aron, was cashier of the Crete State Bank and produced records showing business accounts of Joseph Kristufek for a period of years up to October 3, 1935. There seems to be nothing irregular in these business transactions. Mr. Aron did not state that in his opinion the deceased was of unsound mind, although he had done business with him since the spring of 1933.

The president of another bank in Crete testified to the checking account of Joseph Kristufek in his bank from December 23, 1933, to October 3, 1935, as a witness for appellant, and was not asked as to the mental condition of Kristufek.

It would serve no useful purpose to set out all the evidence as to the mental condition of Joseph Kristufek at the time in question. We are of the opinion that the overwhelming weight of the testimony in the record is to the effect that Joseph Kristufek was sane and competent to transact business at the time he changed his beneficiary, and the conclusion would be the same even though the

three witnesses, from whom appellant asked opinions as to the condition of mind of Kristufek, had been permitted to answer and had stated that in their opinion Kristufek was of unsound mind in March, 1935.

The burden of proof was on the appellant to show that the decedent was of unsound mind at the time of the application for and the change of his beneficiary in his life insurance policy. This burden he has failed to sustain.

The judgment of the district court should be, and is

AFFIRMED.

MUNDAY, District Judge.

By stipulation of parties it is agreed, and by the court hereby ordered, that the foregoing opinion shall be deemed governing and controlling in Midwest Life Insurance Co. v. Aron; Western Bohemian Fraternal Association v. Stone; Modern Woodmen of America v. Stone; and judgment of affirmance be entered accordingly.

WILLIAM CASFORD, APPELLANT, V. CITY OF MCCOOK, APPELLEE.

274 N. W. 464

FILED JULY 9, 1937. No. 30056.

1. **Pleading.** To be admissible, evidence offered must sustain allegations in pleadings.
2. **Appeal.** District court properly excluded evidence which was a complete departure from the theory set out in plaintiff's petition.

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

McNeny & Sprague, for appellant.

Wendell P. Cheney and *Butler & James, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and SPEAR and KROGER, District Judges.

SPEAR, District Judge.

Action for damages by Casford, plaintiff and appellant,

against city of McCook, defendant and appellee, for damages to property arising from the changing of the grade and building of a viaduct across the Burlington railroad in the city of McCook. The new viaduct replaced an old one, but extended some distance farther, thus bringing the approach in proximity to plaintiff's property. Plaintiff's petition alleges that the city of McCook built the viaduct; pleads certain jurisdictional facts; and claims damages. Defendant filed an answer which was in essence a general denial. Plaintiff's reply was also a general denial.

Plaintiff brought witnesses to prove damages and then offered in evidence an ordinance and contract by the terms of which the viaduct was to be constructed by the department of roads and irrigation of the state of Nebraska, as an improvement of the state and federal highway system, and which contract provided that the city should pay the damages to the abutting property owners. This ordinance and contract, upon objection by defendant, was excluded from evidence because it was at variance with plaintiff's petition. At the close of plaintiff's case, the court discharged the jury and dismissed the case. Plaintiff appeals from these rulings, citing four propositions of law, but we think that the only question before this court is whether or not the trial court properly refused to receive the ordinance and contract in evidence. Plaintiff's position is best stated in his brief, as follows: "Plaintiff attempted to introduce the evidence for the purpose of proving the allegation in his petition, 'that the city of McCook constructed the viaduct.' Although the city may not have done the actual physical work, they enacted the necessary ordinance and took the necessary steps to authorize and permit the building of the viaduct and the making of the change of the grade of the streets."

It will be noted that this statement of plaintiff's position goes far beyond the allegation in his petition that "the city of McCook constructed the viaduct." The ordinance and contract go much further. In fact, if these had been received, it would have constituted a new cause of action,

for, instead of an action for the taking of property by constructing the viaduct, it would have been an action based on the contract of the city to pay damages. If plaintiff intended to rely upon this contract, he should have pleaded the same in his petition. While the courts have departed somewhat from the rigor of the old days in matters of pleading, they have not gone so far as to permit a complete departure from the original cause of action. *Livanis v. Northport Irrigation District,* 120 Neb. 314, 232 N. W. 583; on rehearing, 121 Neb. 777, 238 N. W. 757. Plaintiff was represented by experienced and able counsel, who did not see fit to ask to amend plaintiff's petition after the ruling of the court. The petition alleges that the city constructed the viaduct. The exhibits offered would have informed the jury that the city had contracted to pay the damages, thus in fact submitting a new cause of action to the jury without the necessary pleadings to sustain same, without giving defendant an opportunity to attack the same by pleadings, and without giving the trial court an opportunity to pass upon them. It would have constituted one set of facts for the court and another for the jury, with plaintiff pleading one set of facts to satisfy the legal situation for the benefit of the court, and offering to show a different set of facts to supply the jury with evidence upon which to base a verdict. As remarked by the trial judge, these exhibits would be highly prejudicial to the defendant. Counsel for plaintiff chose their own ground and their own weapons and have elected to stand upon the same.

We find no error in the rulings of the district court. All other legal points raised herein become moot. The judgment of the district court is

AFFIRMED.

JEFFERSON SWYGERT ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.
274 N. W. 492

FILED JULY 14, 1937. No. 30040.

Trial. As a general rule, courts do not amend or correct verdicts in matters of substance after discharge of the jury, but this does not prevent corrections with respect to clerical errors or formal matters and the elimination of interest which the law forbids.

APPEAL from the district court for Lincoln county: ISAAC J. NISLEY, JUDGE. *Reversed, with directions.*

E. H. Evans and *Beeler, Crosby & Baskins,* for appellant.

Hoagland, Carr & Hoagland, contra.

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

ROSE, J.

The Platte Valley Public Power and Irrigation District commenced this proceeding in the county court of Lincoln county September 7, 1934, to condemn and appropriate to its own use 160 acres of land for the purposes of its Sutherland reservoir, in the basin of which the land is situated. It was owned by Jefferson Swygert and others and was described as the southeast quarter of section 13, township 13, range 34, Lincoln county.

The county court appointed appraisers who viewed the premises, heard the parties and, on September 24, 1934, assessed the value of the land and the damages by reason of the appropriation at $35 an acre, or $5,600. October 10, 1934, the appropriator turned the amount of the award, or $5,600, over to the county court for the benefit of the owners and took possession of the condemned land under the power of eminent domain.

The landowners appealed to the district court, where they were designated as plaintiffs and the Platte Valley Public Power and Irrigation District as defendant. On the

appeal, the cause was tried to a jury on the single issue of the fair market value of the land taken, and from judgment on a verdict in favor of plaintiffs for $6,128.38, defendant, the appropriator, appealed to the supreme court, and plaintiffs, the landowners, took a cross-appeal.

Defendant insists that the district court erred in directing the jury to include interest in their verdict in addition to the fair market value of the land, and also erred in rejecting a verdict in favor of plaintiffs for $35 an acre plus 6 per cent. interest and in sending the jury back to the jury room to change their first verdict by stating the total value of the 160 acres with interest.

The power of defendant to condemn the land, pay for it and take it is conceded. The only issue on appeal to the district court was the fair market value of the land. The trial court in one instruction stated that issue to the jury, but in a later instruction erroneously said to them:

"Should you, in your verdict, find for the plaintiffs, you must allow them interest at the rate of six per cent. from September 7, 1934, and add the same to your verdict."

It is well-settled condemnation law that landowners are not entitled to interest or costs in the district court on appeal unless the recovery there on the controverted issue exceeds the award of the appraisers in the county court. That award, $35 an acre, or $5,600, was in the county court awaiting acceptance by plaintiffs. It was rejected. After the jury heard in court and considered in the jury room all the evidence on both sides on the single issue of value, they returned with a verdict finding for plaintiffs and fixing the amount of recovery at $35 an acre plus 6 per cent. interest. While informal, this was a clear and definite verdict for $35 an acre or $5,600 for 160 acres. The parties were of the same mind as to the number of acres. The only defects in the first verdict were the mere informality in failing to state the simple result of multiplying 160 by 35, and the surplusage of "plus 6 per cent. interest," erroneously directed by an instruction. Instead of accepting this verdict and entering judgment thereon for

$5,600, the jury were sent back to the jury room with the following instruction:

"The jury are instructed that you must fix the total amount in your verdict including the interest instead of the amount per acre as you have done."

As directed by this instruction, the jury came back into court with a verdict in favor of plaintiff for $6,128.38, upon which judgment was entered.

Defendant takes the position that the judgment is excessive to the extent of the interest, and that it should be reversed and the cause remanded, with directions to the lower court to enter a judgment on the first verdict for $5,600 without interest or costs. Plaintiffs insist there should be a new trial if there is a reversal for any reason.

Can the first verdict be so corrected as to eliminate the surplusage of interest inserted through errors in the instructions, and thus avoid a new trial? The jury first distinctly separated the value of the land from the interest. The recovery which responded to the issue tried was $35 an acre for 160 acres. This was clear and definite as a verdict for $5,600, when considered with the entire record. The insertion, "plus 6 per cent. interest," resulted from errors of the court, which it had power to correct. Common-law rigors which prevented correction of mere informalities or clerical errors in a verdict after discharge of the jury have been ameliorated by the Code of Civil Procedure. Courts are admonished by statute to disregard any error or defect in the proceedings which does not affect the substantial rights of a party and not to reverse a judgment for such a defect. *Henkel v. Boudreau,* 88 Neb. 784, 130 N. W. 753. Where the law requires interest not included in a verdict, the court may make the computation and include the amount in the judgment. *Calnon v. Fidelity-Phenix Fire Ins. Co.,* 114 Neb. 194, 206 N. W. 765. By analogy, inclusion of interest which the law forbids may be deducted. The rule has been stated as follows:

"As a general rule the court cannot make an amendment or correction as to a matter of substance after the verdict

has been recorded and the jury discharged; but the discharge of the jury does not deprive the court of its power to amend or correct with respect to clerical errors or formal matters, and this may be exercised even at a term subsequent to that in which the verdict was rendered." 64 C. J. 1097.

There was no confusion as to the single issue of value raised by the pleadings, tried and determined by the first verdict, which is fully supported by the evidence. Plaintiffs had no right to interest in addition to full payment for the land taken. They will not be prejudiced if it is eliminated from the first verdict and the final judgment. There is no sufficient reason for a new trial. The cross-appeal is found to be without merit. The second verdict is set aside, the judgment thereon reversed and the cause remanded to the district court, with directions to enter judgment on the first verdict in favor of plaintiffs for $5,600 without liability of defendant for interest or costs.

REVERSED.

JAMES P. MOONEY ET AL., APPELLEES, V. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL., APPELLANTS.*

274 N. W. 467

FILED JULY 14, 1937. No. 30049.

1. **Drains.** A drainage district is a public corporation. It is an arm or branch of government over which the legislature has plenary control.
2. **Injunction.** A writ of mandatory injunction is an executory order, directing the performance of a preexisting duty.
3. **Drains.** Legislature may curtail or abrogate powers previously granted to public corporations, provided in so doing it does not impair the obligation of contract, nor interfere with vested rights.
4. **Record** examined, and trial court was in error in sustaining demurrer.

APPEAL from the district court for Richardson county: JOHN B. RAPER, JUDGE. *Reversed.*

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*Affirmed on rehearing. See opinion 134 Neb. ——.

Flansburg, Lee & Sheldahl and *Archibald J. Weaver,* for appellants.

Jean B. Cain, Kennedy, Holland, De Lacy & Svoboda and *Edson Smith, contra.*

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

PAINE, J.

This is a suit in equity, brought by James P. Mooney and others who are property owners in Drainage District No. 1, Richardson county, to obtain an injunction to prevent the said drainage district and its officers from dissolving said district until the judgment of the district court on the mandate from the supreme court in the case of *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910, has been fully performed and all outstanding indebtedness of said district is discharged. To this petition in equity a long answer and cross-petition of 14 pages was filed by said Drainage District No. 1 and the five defendants as individuals and as supervisors of Drainage District No. 1 of Richardson county, Nebraska. The plaintiffs filed, first, a motion, and after this was overruled in part and sustained in part, the plaintiffs filed a general demurrer to the defendants' answer and cross-petition, which was sustained by the court. The defendants elected to plead no further, and the court entered an order enjoining the drainage district from dissolving until after it had enlarged the channels to meet the order of mandatory injunction issued prior to the amendment of the law. From this judgment the defendants have appealed.

The second amended petition alleged that said Drainage District No. 1 was duly incorporated by decree of the district court on February 14, 1906.

It is further alleged that on April 23, 1930, the plaintiff, for himself and others, filed a petition in equity, the object and prayer of which was for an order requiring said drainage district to immediately construct an outlet in the lower Nemaha valley; that upon due hearing the district court

did on July 25, 1932, issue an order and judgment, from which an appeal was taken to the supreme court, and the mandate on its decision was duly entered in the district court for Richardson county on November 19, 1934, and it is alleged that in the opinion in the case of *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910, it was held that the district should be required to enlarge the outlet of its drainage system between bridge 64 and the Missouri river to a minimum carrying capacity of 20,000 cubic feet per second in the lower Nemaha valley, and that such mandate and judgment are now in full force and effect, but defendants have refused and neglected to comply therewith.

That the said defendants on April 1, 1936, filed a proceeding in the district court to dissolve said district under section 31-475, Comp. St. Supp. 1935, without first complying with said mandate.

That the defendants caused the legislature to pass a bill amendatory of section 31-463, Comp. St. 1929, in which the words added to said section are set out in italics, as follows:

"If at any time after the final construction of such improvement the same shall become out of repair, obstructed, inefficient, or defective from any cause, *except such as are the result of the use of said improvements as a joint outlet for other systems of drainage improvements,* the board of supervisors, *if in its discretion it is practicable and feasible to make such repairs, remove such obstructions and correct such inefficiencies,* may order an assessment upon the lands and property benefited by the drainage system for the purpose of placing the same in proper and suitable condition for drainage purposes." Laws 1935, ch. 74 (Comp. St. Supp. 1935, sec. 31-463).

And the defendants pretend to construe said amendment as depriving them of the power to proceed under the mandate of the court.

Plaintiffs further allege that this amendment did not go into effect until May 27, 1935, and that the defendants

should have proceeded to enlarge the outlet of their drainage system as ordered; that the aforesaid judgment is mandatory, and that the amendment, in so far as it allows the district to escape the obligation to enlarge said outlet, is null and void, and violates section 10, art. I of the Constitution of the United States, and the Fourteenth Amendment thereto, and prays that said defendant district be enjoined and restrained from dissolving until it has complied with the mandate of the supreme court. There are attached to said petition, as exhibits, the petitions of electors, dated March 27, 1936, of said defendant district, asking its board to call an election to vote on the dissolution of said district.

On June 5, 1936, the defendant district et al. filed their answer and cross-petition, admitting the incorporation of the district, and that a mandate from the supreme court was filed November 19, 1934, and said judgment and mandate are attached to said answer and cross-petition as exhibit B, and exhibit A attached thereto is the decree of the district court, entered on July 25, 1932, by John B. Raper, Judge.

Said answer and cross-petition admits the incorporation of said Drainage District No. 1, and that on April 23, 1930, the plaintiff filed a petition in equity, the object and prayer of which was for an order requiring the drainage district to immediately construct an outlet in the lower Nemaha valley, and that the final action is shown by the exhibits above set out.

It is further alleged that said judgment and mandate were not based on any specific plan or detailed specifications, formulated no particular method to be followed, but were in their nature purely executory orders, declaratory of the then-existing duty prescribed by statute, and that such judgment of the supreme court commanded the supervisors to proceed and comply with the obligations fixed by such statute, and that the plaintiff acquired no vested rights therein, and none which were not subject to repeal at the hands of the legislature.

Defendants say that after the entry of the judgment on the mandate on November 19, 1934, they proceeded in all good faith to comply with said judgment and order, as is specifically set forth in said answer, but that, before definite action could be taken and any contract rights established, the legislature had repealed the provisions of the statute upon which said judgment was based.

The defendants admit that they have taken the preliminary steps for holding an election to vote on the question of the dissolution of the district, but, finding that such resolution was premature, as there were some outstanding district warrants which were unpaid, and must be satisfied before the district could dissolve, the board withdrew the filing, and notified the clerk of the district court to proceed no further thereunder, and, as evidenced by the resolution certified to the clerk of the district court, it is not now the purpose nor the intent of the said defendants to dissolve, nor to hold an election for the dissolution of the district, except in accordance with the approval of the district court, and after no outstanding indebtedness remains.

It was further alleged in said answer that, when the judgment and mandate were entered on November 19, 1934, the winter months were coming on and it was too late to commence work of enlargement during that year, but that the defendants at once procured an engineer, made surveys, worked out plans, with detailed specifications, for the construction and enlargement of such channel as would fully comply with the order of the court, and that the report of said engineer was that it will cost $152,375 to enlarge the channel to a capacity of 20,000 cubic feet per second, as ordered in said judgment and mandate.

That upon the receipt of the plans the defendants took immediate steps to procure a federal grant, and applied to the headquarters of the public works administration in Nebraska, setting forth a copy of the plans and specifications; that a grant was approved by the Omaha headquarters, and they expected an allotment of the money on said grant, but in November, 1935, were advised that there

would be no more money for allotments that year in Nebraska.

It is further alleged in said answer that, before any contracts had been made by the defendants for the accomplishment of the enlargement of the outlet, the legislature of Nebraska amended the law, with emergency clause, as set out in chapter 74, Laws 1935 (Comp. St. Supp. 1935, sec. 31-463) and thereby took from the defendants the right to make such improvement.

It is further alleged in said answer that the legislature has full and unlimited control of the defendant district, and that the plaintiff and every other property-holder in the defendant district is charged with knowledge of the power of the legislature to amend and change the obligations and duties of said drainage district. That, when the supreme court decided the former case, the law (Comp. St. 1929, sec. 31-456) provided that, when the channels of one drainage district were used by another district, and it became necessary to deepen or enlarge the watercourse, such other district could be compelled to contribute to the cost thereof. But the legislature enacted a law, section 31-475, Comp. St. Supp. 1935 (Laws 1933, ch. 51), which became effective August 9, 1933, and permitted drainage districts which had no outstanding indebtedness to dissolve, under which statute, and by a decree of the district court, each of said drainage districts above Drainage District No. 1, defendant herein, being District No. 3 of Nemaha county, District No. 1 of Pawnee county, and Districts Nos. 2, 3, 4 and 5 of Richardson county, all were immediately dissolved, and if the defendant district is now compelled to comply with the order of the court as heretofore made, the engineer, employed by the defendant district since the judgment and mandate here entered, reports that such widening of the channel will cost $152,375, and the defendants have been advised that, under the law as now amended, they could not make any valid contracts for the construction of the work, for the district cannot make a levy of assessments to collect taxes against the property

in its district to make "improvements as a joint outlet for other systems of drainage improvements."

If compelled to spend this money, defendant district will have no right of contribution against said dissolved districts, which were all public corporations, and all legally dissolved before any rights of contribution had vested in behalf of Drainage District No. 1, and therefore the property owners in District No. 1 would be required to pay excessively large assessments to meet the cost of the enlargement of said channel in the sum of $152,375, and which enlargement would be for the benefit of the property-holders in the former districts now dissolved.

It is further alleged in said answer that the amendment deprives them of the power of entering into a contract, and that the defendants with justification cannot now safely take further action in pursuance of said order of court until the court construes, defines, and declares the powers of the defendant district in reference to the full meaning and extent of the amended section of the statute, which became effective May 27, 1935.

Wherefore, the defendants pray that the court find that the judgment does not constitute or create an indebtedness, and that the petition of the plaintiffs praying for an injunction shall be dismissed.

Defendants further, and by way of a cross-petition, set out much the same facts and the cost of making the changes ordered, and pray that the court notify and relieve the supervisors of the district and direct them to take no further steps toward the completion of the plan or the letting of contracts.

On July 14, 1936, the plaintiffs filed a demurrer to such answer, on the ground that it appears upon the face thereof that such answer does not state facts sufficient to constitute a defense to the action, and demur to the cross-petition for the same reasons.

On September 21, 1936, the demurrer was argued and submitted to the court, and the court sustained the demurrer. The defendants in open court thereupon elected

to stand upon their answer and cross-petition. It was therefore ordered, adjudged, and decreed by the court that Drainage District No. 1 and the officers thereof be and they are permanently enjoined and restrained from taking any steps looking to the dissolution of said drainage district until the orders of the district court and the supreme court have been fully, completely, and finally performed, and all outstanding indebtedness of said district discharged.

It appears that, since this Drainage District No. 1 was organized in 1906, many additional drainage districts have been organized above this district on the Nemaha river, and many laterals were put in, and water from an enormous area was accelerated and came down to this lower drainage ditch, so that it was unable to carry the water off from these additional districts.

This was the situation when this court rendered its decision in *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910. It was there said that bridge 64 of the Burlington railroad is between seven and eight miles from the junction of the Nemaha river with the Missouri river, and the carrying capacity of the outlet below this bridge 64 was 8,440 cubic feet per second to take care of the run-off of the watershed of 1,875 square miles; that the minimum capacity should be 20,000 cubic feet per second; that the consensus of evidence of experts is that to enlarge the outlet to 20,000 cubic feet would cost approximately $50,000, and, the opinion added, while it is a large sum of money, yet it will be spread by an assessment of about $1.65 an acre over 31,000 acres of land; or, on 6,000 acres of land of plaintiffs, 30 per cent. will be paid, and 70 per cent. on the remaining 25,000 acres, or only $1.40 an acre.

These are the optimistic figures this court placed in its opinion, filed February 21, 1934, based on testimony taken in the district court in 1932, and now we are faced with the statement in the answer, which we must accept as true for the purpose of ruling on this demurrer, that the cost now will exceed our former estimate more than three times, and be $152,375, and by the amendment to the law no part

of it can be levied and assessed against the land in the upper six drainage districts using this outlet, for tax levies on that land could only be made by their duly elected district supervisors, and all those districts have been legally dissolved, and have no officers; and in the cross-petition, which is also admitted by plaintiffs' demurrer, it is alleged in paragraph one that, to meet the cost of this improvement by a levy of taxes upon the property only in District No. 1, will require assessments of from $8 to $12 an acre.

A drainage district is a public corporation. It is an arm or branch of government over which the legislature has plenary control.

In *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N. W. 796, the owners of about 30,000 acres of swamp, overflowed, or submerged lands, situated in Richardson county, formed a drainage district, and it was held that a drainage district organized under article IV, chapter 89, Comp. St. 1909, is a *public,* and not a private, corporation. *Neal v. Vansickle,* 72 Neb. 105, 100 N. W. 200; *Richardson County v. Drainage District No. 1,* 113 Neb. 662, 204 N. W. 376.

In our former opinion it was held that there was a duty on District No. 1 to do certain things by reason of the statute, but the legislature, by changing the statute, has obliterated this means of recoupment from the other districts.

A writ of mandatory injunction is an executory order, directing the performance of a preexisting duty. It creates no new authority, and confers no new powers, and establishes no new rights. This characterization of such an order is found in *State v. School District No. 9, York County,* 8 Neb. 92, where Chief Justice Maxwell said: "A writ of mandamus is granted merely to compel action and enforce the performance of a preexisting duty. It creates no new authority, nor confers any powers which did not previously exist. It is therefore in no sense a creative remedy."

It is said that "A repeal of the law under which the

relator's right to the performance of a duty by respondent accrued justifies respondent's refusal further to obey the writ." 38 C. J. 937.

The case of *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. (U. S.) 421, 15 L. Ed. 435, was decided at the December term, 1855, and was a suit in equity, brought by a party operating steamboats over the Ohio river, which was a navigable stream. The object of the suit was to procure a mandatory injunction to require the defendant bridge company to remove or to elevate a bridge to a designated height. A mandatory injunction directed that it be done, but congress then enacted a law which applied to this bridge, and made it a lawful structure, which legislation the bridge company procured. It was said that, as a general proposition, congress could not annul a judgment of the supreme court of the United States, or impair rights so determined, yet that part of the decree holding the bridge was in conflict with the regulations of congress was executory, and congress, by the exercise of its constitutional power, having changed the law relating to obstructions, so that the bridge is no longer an unlawful obstruction, it is quite plain the decree of the court cannot be enforced. There is no longer any interference with the enjoyment of the public right inconsistent with law, no more than there would be where the plaintiff himself had consented to it, after the rendition of the decree.

In *City of Fremont v. Dodge County*, 130 Neb. 856, 266 N. W. 771, we held: "The legislature has a plenary lawmaking power over all subjects, whether pertaining to persons or things, within its territorial jurisdiction, and can make new laws or repeal old laws unless the same are expressly prohibited by the Constitution." In that decision is set out at length the leading case in the United States, *State v. Baltimore & O. R. Co.*, 12 Gill. & J. (Md.) 399, 38 Am. Dec. 317, which concerned a railroad charter requiring the railroad to build through three towns or forfeit $1,000,000 to the state of Maryland. When the railroad

failed to build through these towns and a suit was brought, the legislature passed an act releasing the railroad from the payment of the million dollars, and it was held that the act of the legislature in releasing the penalty did not violate the provisions of the Constitution prohibiting the legislature from impairing the obligation of a contract.

Again, in 1 Lewis' Sutherland, Statutory Construction (2d ed.) sec. 244, statutes are perpetual when no time is stated, but the operation of statutes may be suspended. "A state legislature has a plenary law-making power over all subjects, whether pertaining to persons or things, within its territorial jurisdiction, either to introduce new laws or repeal the old, unless prohibited expressly or by implication by the federal Constitution or limited or restrained by its own." A legislature may modify or abolish acts passed by itself or its predecessors; and in section 272, "Where the revising act prescribes its operation or effect upon a previous statute, it will have no other;" and in section 280, "If a conflict exists between two statutes or provisions, the earlier in enactment or position is repealed by the later."

In the case at bar, the prior law provided that the district "may" enlarge its channels and assess the costs. This court, in the decision in 126 Neb. 219, 252 N. W. 910, held that this word "may" was mandatory. Thereafter the legislature enacted a new law showing that the legislative intention was that a different policy should prevail than the interpretation placed upon the law by the court.

In considering Drainage District No. 1, as well as these other drainage districts from which water flowed down into District No. 1, it will be noted that they were all public corporations, each of which existed solely as a creature of the legislature, having only such powers as the legislature gave to each of them. If the legislature can give powers to such public corporations, it certainly has the right to take them away, and when the legislature decided to do so, and has seen fit to amend and change the law, we must interpret the law in the light of what the legislature has said.

The right to levy taxes for drainage improvements is wholly statutory in its nature, and the legislature may at any time curtail or abrogate powers previously granted to such public corporations, provided in so doing it does not impair the obligation of contract, nor interfere with vested rights. *City of Beatrice v. Gage County,* 130 Neb. 850, 266 N. W. 777; *Chester School District's Audit,* 301 Pa. St. 203, 151 Atl. 801; *Stone v. Street Commissioners of Boston,* 192 Mass. 297, 78 N. E. 478. It has been said there is no vested right in the continuance of a particular tax. 12 C. J. 967; Cooley, Constitutional Limitations (6th ed.) 469.

The allegations of the answer are controlling as to all questions presented in the demurrer. *Nesbitt v. Campbell,* 5 Neb. 429; *Oakley v. Valley County,* 40 Neb. 900, 59 N. W. 368. It may be argued that the allegations of the answer would not be sustained by the evidence if the case went to trial, but that question cannot be considered by us in passing upon this demurrer, for this court must assume that all proper allegations of the answer are controlling and would be sustained by the evidence. The law of the case as determined by the previous judgment entered by this court created no vested right, and would not appear to be controlling upon us now if the allegations of the present answer would be obnoxious to that decision, for we are now limited to the law as it stands at the present time.

In our former opinion we held it was a duty on the defendant district to do certain things by reason of the statute as it then existed, but as its means for contribution from the upper districts have now been obliterated by the legislature, and the authority of the defendant to construct said outlet having been taken away by the legislature, the directions we gave in our former opinion are not now subject to enforcement under the law as it now exists.

A former legislature gave certain rights and powers to the defendant district, and before the district had time to carry out the directions of this court founded on that former law, the legislature saw fit to take away those rights and powers.

It may be argued that the plaintiff is complaining of his damages, present and prospective. He may have a right of action against whoever has damaged him, but the defendant is a public corporation, and absolutely bound to act only as directed by the legislature.

Some cases in support of our findings are: *Hodges v. Snyder,* 45 S. Dak. 149, 186 N. W. 867; *Gibson v. Sherman County,* 97 Neb. 79, 149 N. W. 107; *State v. Rowe,* 108 Neb. 232, 188 N. W. 107; *School District of Omaha v. Gass,* 131 Neb. 312, 267 N. W. 528; *Munsell v. City of Hebron,* 117 Neb. 251, 220 N. W. 289.

For the reasons herein set out, we conclude that the trial court was in error in sustaining the demurrer to defendants' answer and cross-petition, and the judgment entered is reversed, and cause is remanded for such further proceedings as the trial court shall direct.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. JOE PHILLIPS, APPELLANT.
274 N. W. 459

FILED JULY 14, 1937. No. 30034.

1. **Municipal Corporations.** The business of house moving is one affecting public health and safety and is subject to regulation and license by a municipality under the police power.
2. **Licenses.** Where such business is licensed, the license fee should not exceed the cost of investigation, supervision and clerical work, and must not be used as a means of producing revenue.
3. ———. "Where such an ordinance is clearly within the general powers of a municipal body it is presumed to be reasonable, and the judicial power of the state will not be exercised to declare it void, unless from its inherent character, or by proofs adduced, it is shown to be unreasonable." *Littlefield v. State,* 42 Neb. 223, 60 N. W. 724.

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

Mockett & Finkelstein, for appellant.

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

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and SPEAR and KROGER, District Judges.

KROGER, District Judge.

Complaint was filed in the municipal court of the city of Lincoln charging the defendant, Joe Phillips, with violating the ordinance of the city by moving a house over and through the streets of said city without having first obtained a permit from the city council so to do. Defendant entered a plea of not guilty, and after trial was had, he was found guilty and he was sentenced to pay a fine of $100 and the costs of prosecution. From this sentence he perfected an appeal to the district court, and then demurred to the complaint on the ground that the city ordinance under which he was prosecuted was unconstitutional. The demurrer was overruled and trial had, and defendant was again found guilty and sentenced to pay a fine of $100 and costs of prosecution. It is from this sentence that this appeal is prosecuted.

Ordinance No. 879 of the city of Lincoln provides that it shall be unlawful for any person to carry on or engage in the business of house moving in the city of Lincoln without having first procured a license from the said city, and further provides that an applicant for such license shall accompany his application for license with a bond in the sum of $15,000, conditioned as set out in the ordinance, and provides for a license fee of $10 for a term of seven days, or of $20 a month for any period between seven days and five months, or of $100 for a period of one year, and, in addition to said license fee, provides that there shall be paid to the city treasurer $3 a day for each day any building shall remain on any public thoroughfare. The ordinance further provides that no building having a greater height than 18 feet nor a greater width than 20 feet shall be moved across or over any street or public way in the city of Lincoln, except that the city council may, upon written application, grant a special permit for the moving of

frame houses of greater dimensions than specified, when, in the opinion of the city council, the road over which such house may be moved will cause no exceptional hazard to persons or property; but, in the event such special permit is granted, the applicant shall file with the city clerk a bond of not less than $25,000, or such greater amount as the city council shall deem necessary, conditioned the same as provided for the bond of $15,000.

In this case it is admitted that defendant moved a frame house over and across a city street without having complied with the ordinance herein referred to, and without having given a bond in any sum or having been licensed as a house mover.

Defendant concedes that the city of Lincoln has authority under its charter to regulate and prohibit the moving of buildings through the streets of the city, but contends that the city has no authority to adopt an ordinance which requires a license and bond from those who desire to engage in the business of moving houses, and further contends that the ordinance is confiscatory, unreasonable and oppressive, and consequently unconstitutional.

Defendant relies upon the case of *State v. Wiggenjost*, 130 Neb. 450, 265 N. W. 422, in which this court recently held: "Municipal power to regulate commercial sign painting and sign hanging does not imply power to exact from a sign painter an annual license to pursue his vocation."

It may be stated as a broad proposition that there are some occupations which every citizen may engage in as a matter of right and which are not subject to regulation by public authorities. Such occupations, however, as may in their performance affect public health, morals, safety or welfare are proper subjects of regulation under the police power, and the question here presented is whether or not the business of house moving falls within the latter class.

It is obvious that in order to carry on the business of house moving it is necessary to make use of the city streets. During such time as the streets are used, they are at least partially and sometimes wholly blocked, and unless the

work is done by one experienced in that line of work, there is the danger of prolonged delay in clearing the streets of the obstruction. The evidence in this case discloses that there is also the danger of contact with electric wires, of damage to water mains that may be in the streets, and of damage to the paving.

Under its charter, the city has control of its streets and the right to regulate traffic and to prevent obstructions being placed thereon. Public safety requires that the streets be kept reasonably free from obstructions, and that during the time they are obstructed ample warning be given of that fact to the traveling public. In view of those facts, it is apparent that the business of house moving does affect public health and safety and is a proper subject of regulation under the police power.

This brings us to a consideration of whether the ordinance in question is confiscatory, unreasonable and oppressive, and therefore violative of both the federal and state Constitutions. The law is well settled that a license fee required by a municipality for the privilege of engaging in a certain occupation is not a tax and cannot be imposed by a city for the purpose of adding to its revenues. Such a fee should not exceed the sum required to reimburse the city for the expense of necessary investigation before issuing the license and the cost of supervision afterwards. As this expense cannot accurately be ascertained in advance, the courts will not interfere with the discretion of the council in fixing it, unless the fee required is clearly unreasonable.

This court in the case of *Littlefield v. State,* 42 Neb. 223, 60 N. W. 724, held:

"Such a measure will be upheld by the courts when plainly intended as a police regulation and the revenue derived therefrom is not disproportionate to the cost of issuing the license and the regulation of the business to which it applies.

"Where such an ordinance is clearly within the general powers of a municipal body it is presumed to be reasonable, and the judicial power of the state will not be exercised to

declare it void, unless from its inherent character, or by proofs adduced, it is shown to be unreasonable."

Defendant made no showing that the fee provided by the ordinance was unreasonable or in excess of what was the reasonable cost of investigation and supervision, and, on its face, it does not appear to be so.

Defendant's attack seems to be directed primarily against the provision for a bond of $15,000 and under certain specific circumstances $25,000 or more. His evidence deals largely with the cost of such a bond and is silent as to the necessity for the same. His own evidence, however, discloses that the high rate asked for such a bond by bonding companies is due to the hazard of the house moving business and indicates that some bonding companies will not write such a bond because of the hazard involved. The evidence produced by the city would indicate that the bond required was not excessive in amount and, as before stated, the evidence of defendant is silent on that question.

Under the circumstances, it cannot be said that the bond required is unreasonable or excessive or greater than necessary to protect the city and the public against the hazard involved.

No error being found in the record, the judgment and sentence of the trial court are

AFFIRMED.

B. J. SAFFORD ET AL., APPELLANTS, V. WILLIAM E. FLYNN ET AL., APPELLEES.
274 N. W. 461

FILED JULY 14, 1937. No. 30044.

1. **Fraudulent Conveyances.** ESTOPPEL. Where transfer is presumptively fraudulent, the burden is upon defendants to prove a good faith transfer for a consideration; and where defendants upon their own pleadings and evidence establish facts constituting an estoppel against them, the court may decree such estoppel, notwithstanding plaintiffs have not pleaded same.

2. **Homestead.** Evidence examined and found not to sustain finding of district court that homestead of defendants was not worth encumbrances and homestead exemptions.

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

Fradenburg, Webb, Beber, Klutznick & Kelley and *Robins & Yost,* for appellants.

Shotwell & Vance and *Ross L. Shotwell, contra.*

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

SPEAR, District Judge.

Action by Safford and Clark, depositors' committee of Farmers State Bank of Valley, plaintiffs and appellants, against William E. Flynn and Lillian Maud Flynn, defendants and appellees, to set aside an alleged fraudulent transfer of real estate by husband to wife. The bank is a creditor of Flynn, and Flynn and Lillian Maud Flynn are husband and wife.

Flynn owed the bank on three notes, one for $5,000, one for $2,100, and one for $700. All of these notes were due, repeated demands had been made upon Flynn, and the notes were in the hands of the bank's attorney for suit. On July 23, 1934, the plaintiffs sued Flynn on the $700 note in the county court of Douglas county. On answer day, August 6, 1934, Flynn filed proceedings under the Frazier-Lempke act, and stayed all proceedings until June, 1935. The Frazier-Lempke proceedings were dismissed by the referee, whereupon the plaintiffs took judgment in the county court, transcripted same to the district court, and a writ of execution was issued June 19, 1935. June 21, 1935, the sheriff went to Flynns to levy, but for some reason did not do so. However, both Mr. and Mrs. Flynn knew that the sheriff was there to levy to satisfy the judgment. On June 21, 1935, Flynn made a deed to his wife transferring the farm upon which they resided. The deed recites the consideration as "love and affection and one

dollar." Simultaneously, Flynn mortgaged his personal property to his son, and made an affidavit of exemption which was filed in the district court June 26, 1935. The plaintiffs took judgment against Flynn on the $2,100 note in the district court November 12, 1935, in the sum of $2,821.07. Execution was issued and returned unsatisfied, whereupon plaintiffs brought the action at bar to set aside the transfer, made June 21, 1935, from Flynn to his wife, alleging that the same was fraudulent, and that both Flynn and Mrs. Flynn knew that it was when the transfer was made. Defendants answered, and alleged that the conveyance was made in good faith; that Flynn was indebted to his wife; that the property was the homestead of the defendants; and that the interest of the husband in the property over the encumbrances and the homestead exemption was less than the indebtedness owing by Flynn to Mrs. Flynn.

The trial court found that Flynn was indebted to his wife in the sum of $1,000 since 1906, with accruing interest thereon, but that, by reason of her allowing Flynn to hold title for a long period of time, she was estopped from asserting a lien upon the real estate as against creditors. The court further found that the real estate was the homestead of defendants and was not worth the encumbrances and homestead exemptions, consequently not being subject to fraudulent conveyance. Plaintiffs appeal from these findings, and defendants complain that, there being no estoppel pleaded by plaintiffs, the trial court was powerless to decree that there was in fact an estoppel.

We do not believe that it was necessary for plaintiffs to plead estoppel. Plaintiffs in fact did not rely upon estoppel but relied upon the contention that Flynn did not owe his wife anything. The transfer is presumptively fraudulent and the burden is upon the defendants to prove a good faith transfer for a consideration. The defendant Mrs. Flynn did not, in the judgment of the trial court, show facts entitling her to any standing in a court of equity. The facts relied upon by defendants themselves constituted

an estoppel against Mrs. Flynn. The answers and the evidence in support thereof show that, in addition to the usual trifling contributions that defendants in these cases remember so meticulously, the principal claim of Mrs. Flynn is that, in 1906, she inherited $1,000 from her father, loaned it to her husband and allowed him to use it without let or hinderance until June 21, 1935 (the day the sheriff came). Mrs. Flynn's own testimony upon direct examination shows that, after she gave the $1,000 to Mr. Flynn in 1906, Mr. Flynn and she engaged in a number of real estate transactions, buying and selling farms in Iowa, Nebraska, and one in Colorado. The evidence is confusing, but there appear to be purchases of some nine separate properties. In 1923 Flynn bought 114 acres of land. Mrs. Flynn says that she did not approve of that purchase and asked Flynn to turn the home place (not the 114 acres) over to her, but that her husband "did not think he should for,—well, business reasons, you know, carrying on business in his name and my name; it wasn't just a very nice thing to do; it was better to carry it in his own name." It will be observed that this was 12 years before the transfer. For 17 years she permitted her husband to invest her money in real estate without any talk as to title of the lands, and then for 12 years thereafter she permitted him to retain the title in his own name, for the reasons set forth above, during which time the loans in question here were obtained from the bank, and at least one property statement given by Flynn to the bank making no mention of a debt to his wife. Her own pleadings and her own case are so repugnant to a court of equity that the trial court had no alternative but to find that she was estopped, regardless of whether or not an estoppel was pleaded by plaintiffs. This especially in view of her own testimony as to the agreement when the $1,000 was turned over to Flynn: "Well, it was agreed between us that my money was put in with our money, and whatever the outcome was, why, that is what I would be entitled to; would be my money invested with what was owned between us," and

the fact that in the deed in question here the consideration was "love and affection and one dollar," which deed was drawn by a competent lawyer after the sheriff had been out at the Flynn's to levy.

Coming to the question of the value of the homestead; while we recognize the rule that this court will give great weight to the findings of a trial court as to value, when the trial judge has inspected the premises, we think that the lower court erred in finding that the value of the real estate over and above liens and encumbrances was less than the homestead exemptions of the defendants. The total encumbrances amounted to $10,910. Adding to this $2,000 (the homestead exemptions) there is a total of $12,910. There appears to be 131½ acres of deeded land and 14½ acres of land leased for $1 a year plus taxes from the Union Pacific Railroad Company, which can only be leased to the abutting owner, so a sale of the property would convey these rights. Each side brought many experts on values, and, as usual, they are in total disagreement. The fact that seems controlling to us is the fact that the plaintiffs have repeatedly offered the defendants much more than $12,910 for the property. Over a month before the trial, plaintiffs offered to pay defendants $4,000 cash; give them the year's crop; cancel all claims against Flynn; and to assume the encumbrance of $10,000 for a deed to the home place. The court received this evidence, but stated that he did not think it competent as against the wife. We think that the court misapprehended the purport of this testimony, and applied the well-known rule of evidence that offers are not competent evidence as to values. A different situation prevails here. This was a definite offer made before the trial, at the trial, and again before the bar of this court. The homestead exemptions of defendants were joint and the offer and refusal definitely fixed the value as to both husband and wife. Therefore, the rule of evidence that the court had in mind does not apply. The question is not one of damages but as to what the land will bring. All of these facts impel us to the conclusion that

the experts on values presented by plaintiffs more nearly stated the correct value than did those of the defendants. Common sense dictates that there is an equity in this land for creditors. If not, why the deed, why all this dogged determination to hold the land? A sale will determine the value beyond all cavil.

The judgment is reversed; the deed from William E. Flynn and wife to Lillian Maud Flynn, recorded in book 633, page 412, of the deed records in the office of the register of deeds of Douglas county, Nebraska, is canceled; plaintiffs' judgment adjudged to be a lien upon said premises, subject only to prior mortgage liens and homestead rights; and the real estate ordered to be sold to satisfy same.

REVERSED.

IN RE ESTATE OF THOMAS M. ALEXANDER.
WILLIAM A. EHLERS, APPELLANT, V. HUGH MILLER, ADMINISTRATOR, ET AL., APPELLEES.
274 N. W. 551

FILED JULY 16, 1937. No. 30055.

1. **Attorney and Client.** Ordinarily, an attorney is entitled to a lien upon money in the hands of an adverse party in an action or proceeding in which he was employed only from the time of giving notice to that party. Comp. St. 1929, sec. 7-108.
2. **Executors and Administrators.** "The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof." *Atkinson v. May's Estate*, 57 Neb. 137, 77 N. W. 343.

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

William A. Ehlers, pro se.

H. D. Curtiss and *William M. Ely, contra.*

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and SPEAR and KROGER, District Judges.

GOSS, C. J.

William A. Ehlers unsuccessfully sought in the county court and in the district court to obtain from the estate of Thomas M. Alexander, deceased, an attorney's fee for services rendered Oliver G. Alexander, who was given by the will one of 13½ shares of the estate of his father. Ehlers was retained by him on a contingent fee, under which Ehlers was to have a certain proportion of what he secured for Alexander above the one share. A phase of the estate was before this court in 1935. *In re Estate of Alexander*, 128 Neb. 334, 258 N. W. 655. That opinion affirmed a judgment based on a verdict upholding the will. Ehlers, who was attorney for the unsuccessful appellant in that case, then undertook to collect a fee in the estate proceedings in the county court on the theory that his services in the county, district and supreme courts were of benefit to all the legatees and not only to Oliver G. Alexander; but his "petition in equity" to that end was overruled by the county judge on June 10, 1936, and Oliver G. Alexander and Ehlers promptly appealed to the district court and gave their appeal bond.

On August 10, 1936, in the district court, Oliver G. Alexander, for himself and Kathryn Alexander Strelow (perhaps an appellant, though she had not given a bond), dismissed their appeal from the county court.

In the district court the parties stipulated to submit the question on the petition in equity filed by Ehlers in the county court and on the demurrer thereto of the other parties interested. On the same day, October 12, 1936, the district court sustained the demurrer and also dismissed a petition of intervention filed by Ehlers in which he asked the district court to set aside this dismissal of the appeal by Alexander and Strelow. Ehlers stood on his petition in equity and appealed.

Nothing in the record shows that, at the time Alexander dismissed the appeal, Ehlers had given any legal notice to the adverse parties of his claim of an attorney's lien. So the first question for discussion is whether, in the circum-

stances, an attorney's lien could be enforced. Then, second, is an attorney who represents an unsuccessful party in a will contest entitled to compensation from the estate of a decedent?

Section 7-108, Comp. St. 1929, is the controlling statute on the subject of attorney's liens. It allows an attorney a lien upon money "in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party."

The first notice given by appellant to adverse parties was a notice to them filed in the district court on October 7, 1936. This was nearly two months after the appeal was dismissed by Oliver G. Alexander.

It would serve no useful purpose to recite the several Nebraska cases cited by appellant and to distinguish them. In every instance where an attorney's lien has been upheld in those cases the facts show that statutory notice of a lien had been given. It was said by Judge Letton, in *Griggs v. Chicago, R. I. & P. R. Co.*, 104 Neb. 301, 305, 177 N. W. 185: "And the uniform course of our decisions has been to construe the lien statute in such a manner as to protect just and honest claims for services rendered when a proper lien has been filed and notice given."

Ehlers argues that his services to have the validity of the will, which was attacked by his client on account of alleged incompetency of the testator, determined were rendered in good faith, were of great value to all the legatees, that they had paid him nothing, and "that in good conscience and equity this appellant was entitled to an allowance from the shares of said legatees." *Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418, is a very similar case, wherein an unsuccessful contestant of a will sought to recover costs and attorney's fees. The syllabus first disposes of the principles relating generally to costs and the fourth point says: "Contest of wills: Attorney's fees. The courts are not invested with the discretion to award costs or attorney's fees to an unsuccessful contestant of a will simply and solely because of the fact that he undertook the contest in

good faith, and at the time there existed probable cause therefor." This was broadened in *Atkinson v. May's Estate,* 57 Neb. 137, 77 N. W. 343, so that the syllabus reads: "The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof." See, also, *St. James Orphan Asylum v. McDonald,* 76 Neb. 630, 110 N. W. 626.

The judgment of the district court is

AFFIRMED.

THERESA GRASSO, APPELLEE, V. GLENS FALLS INSURANCE COMPANY, APPELLANT.

274 N. W. 569

FILED JULY 16, 1937. No. 30013.

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

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

Morgan, Sutton & Fromkin, for appellant.

Paul J. Garrotto and *Samuel P. Caniglia, contra.*

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

EBERLY, J.

This is an action at law prosecuted by the appellee (plaintiff below) against the appellant (defendant below), based upon the provisions of an insurance contract indemnifying against loss arising by reason of damages occasioned by lightning. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of $400. From the order of the trial court overruling its motion for a new trial, the defendant insurance company appeals.

The issuance of the policy by the defendant, the payment of the premium by the assured, and the identity of the property damaged are not controverted.

Certain questions of procedure are presented by appellant in its brief, but they are not deemed of importance in view of the record considered as an entirety.

The controlling question is whether the damages relied upon by plaintiff were occasioned by the direct effect of lightning, within the coverage stipulated by the terms of the policy. The defendant insists that the proof in the record is inadequate to establish that the damages sued for were the result of a stroke of lightning. On the 27th day of June, 1935, prior to an electrical and rain-storm, which occurred on that day, the property insured was in good condition, and had suffered none of the damages for which recovery is sought. This property is described in the policy as a "one story * * * frame building, including foundations, plumbing, electric wiring and stationary heating, lighting, * * * apparatus, * * * also all permanent fixtures * * * belonging to and constituting a part of said building," etc., occupied by assured and situated on the premises described in the policy. There were two boilers situated in the basement that supplied heat to radiators situated within the building, and radiators situated in a greenhouse constituting a part of the property insured. These boilers communicated with a chimney built within the foundation walls of this building at the northwest corner thereof, and such chimney was approximately 45 feet in height. A six-inch steel sewer pipe carried the sewage of the building through the north wall and continued some ten or twelve feet, where it joined and emptied into a "clay" pipe of equal size which carried its contents to the city sewer located in the street adjacent thereto.

An employee of plaintiff testifies that he was sleeping in the building insured on the night of June 26-27, 1935. About 1:30 a. m. he awoke, arose, and went out into the greenhouse and closed its ventilators or shutters for the protection of the growing plants. He then returned to his bed. He testifies that about 2:30 a. m. he heard a terrific crash; there was a flash of lightning; the whole house was shaking. He was jerked out of bed. As he was getting up

from the floor there was a flash of fire. He got his flash light and went down to the basement. He tried to turn on the electric lights, but they would not work. By aid of his flash light he saw the "north wall of the basement" was on top of the boilers and the water was shooting out of the broken sewer pipe. He had been sleeping on a steel bed which was situated "right close to a radiator." It appears that pipes leading from the boilers to the chimney, and from the boilers to the radiators, as well as the sewer pipe connecting the building with the city sewer, were badly broken or snapped off. He also testifies that when he first went down to the basement the north wall had been knocked down and water was coming into the basement through the broken sewer pipe, and in about 25 minutes the water came up to the top of the boilers. The lower part of this wall had been constructed of concrete, reinforced by steel or iron rods. Next above the reinforced concrete were a series of about eight or nine rows of eight-inch concrete blocks. The upper three rows were still in place. The result of the force applied had created a "half moon" opening into the basement through the lower part of the north wall about eight or ten feet deep and of almost the same width. The cement blocks that were thrown into the cellar were all in splinters.

It is obvious that, if plaintiff's witnesses are to be believed, a bolt of lightning was the cause of the situation disclosed by the evidence, and plaintiff would be entitled to recover under the terms of her policy. If we accord to plaintiff's experts due credit, the fact remains that the record presents two questions of fact for the determination of a jury, viz.: (1) Was the property damaged by lightning? and (2) what is the amount to which plaintiff is entitled? Both questions were properly submitted to the trial jury, and the verdict returned finds ample support in the evidence.

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

AFFIRMED.

BEN SWADLEY, APPELLEE, V. CITY OF LINCOLN, APPELLANT.
274 N. W. 581

FILED JULY 16, 1937. No. 30124.

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

Loren H. Laughlin and *George A. Piper*, for appellant.

Clifford L. Rein, contra.

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

EBERLY, J.

This is a companion case of *City of Lincoln v. Nebraska Workmen's Compensation Court*, p. 225, *post*, 274 N. W. 576.

In the instant case the city of Lincoln attempted to perfect an appeal to the district court for Lancaster county from the order or judgment entered by Honorable Frank M. Coffey, a judge of the Nebraska workmen's compensation court.

Subsequently, this appeal was dismissed by the district court for want of jurisdiction.

The proceeding now before us is an appeal from such order of dismissal. The principles announced by this court in *City of Lincoln v. Nebraska Workmen's Compensation Court*, p. 225, *post*, 274 N. W. 576, are here applicable and controlling.

Therefore, the judgment of dismissal entered by the district court is

AFFIRMED.

CITY OF LINCOLN, APPELLANT, V. NEBRASKA WORKMEN'S COMPENSATION COURT ET AL., APPELLEES.

274 N. W. 576

FILED JULY 16, 1937. No. 30125.

Workmen's Compensation. The right of either party to a "compensation proceeding" to refuse to accept the findings, order, award or judgment of the judge of the Nebraska workmen's compensation court who is assigned to hear the same, and to secure, in the manner provided by law, a rehearing or retrial thereof by such compensation court and a determination by a majority of the members thereof, is paramount to, and exclusive of, the right of appeal from such original decision.

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

Loren H. Laughlin and *George A. Piper*, for appellant.

Richard C. Hunter, Attorney General, Bert L. Overcash and *Clifford L. Rein, contra.*

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

EBERLY, J.

From the order of the district court for Lancaster county dismissing this action (which is in the nature of prohibition) for want of jurisdiction, and thereafter overruling its motion for a new trial, the city of Lincoln appeals.

The events out of which the litigation arises, include the following: On April 27, 1936, Ben Swadley filed his petition against the city of Lincoln, asserting claims under the Nebraska workmen's compensation law. It was in usual form, and its sufficiency is not questioned. To the petition the city of Lincoln filed its answer on May 9, 1936. A trial upon the merits was had before Honorable Frank M. Coffey, one of the judges of the Nebraska workmen's compensation court, by whom findings and judgment in favor of Swadley and against the defendant city were entered of record on January 14, 1937, but not to the extent prayed for by plaintiff. On January 15, 1937, Ben Swadley, as plaintiff, filed in

writing with the compensation court his refusal to accept "the findings, order, award and judgment" thus entered on January 14, 1937, for errors alleged to have been made in the determination of his claim, and applied to the compensation court for a rehearing of his cause before all of the judges of that court. On January 15, 1937, there was entered in said cause by the Nebraska workmen's compensation court an "Order for Rehearing," in substance, as follows:

"The plaintiff has filed due and timely notice of a refusal to accept the award made and entered by Judge Frank M. Coffey one of the judges of the compensation court, in the above cause on the 14th day of January, 1937, and requests that rehearing be had in said cause before the compensation court.

"It is, therefore, ordered, adjudged and decreed by the court that a rehearing shall be had before the compensation court, the date of said rehearing to be determined by the compensation court, subject to the provisions of the compensation law."

Thereafter a "Notice of Rehearing" was filed on January 25, 1937, which was transmitted to the representative of the defendant city by the United States mails.

On January 25, 1937, the city of Lincoln filed with the Nebraska workmen's compensation court a "Waiver of Rehearing and Notice of Appeal," in substance, as follows:

"The city of Lincoln, Nebraska, a municipal corporation, waives a rehearing of the above named cause before the Nebraska workmen's compensation court and elects to appeal directly to the district court for Lancaster county, Nebraska, from the award of Judge Frank M. Coffey, one of the judges of the Nebraska workmen's compensation court, made and entered therein on the 14th day of January, 1937, as provided by section 48-174, Comp. St. Supp. Neb. 1935."

A certificate of this fact was thereupon issued by the Nebraska workmen's compensation court, by Frank M. Coffey, presiding judge.

Thereupon, on January 27, 1937, what is denominated a "Special Appearance" was filed by the city of Lincoln, based on the claim that the perfected appeal by the city of Lincoln from the judgment as entered by the single judge of the Nebraska workmen's compensation court operated to deprive that court of jurisdiction to further proceed in the matter, and that the district court for Lancaster county thereby obtained, "and now has full, complete and exclusive jurisdiction over the parties to this proceeding and that the present attempt by the plaintiff to obtain a rehearing is null and void and without effect, and that the application of said plaintiff for rehearing, filed January 15, 1937, and the order of the Nebraska workmen's compensation court for a rehearing, made on said 15th day of January, 1937, are null, void, and without legal effect."

Thereafter this action in the nature of prohibition was instituted by the city of Lincoln as an original action in the district court for Lancaster county.

The determination of certain questions of procedure argued with great learning and skill at the bar of this court is deemed unnecessary to the decision of this case, and will not be determined.

The determinative question is the statutory power of the compensation court, under the facts disclosed by the record, to proceed further in the determination of this action. If the jurisdiction of the compensation court over the controversy continued, obviously the action of the district court for Lancaster county in dismissing the action without reference to any question of procedure was correct.

The following statutory provisions (appearing in chapter 57, Laws 1935) relate to the subject under consideration:

Section 1 provides in part: "There is hereby created, pursuant to the provisions of section 1, article V of the Constitution of the state of Nebraska, a court, consisting of three judges, to be appointed by the Governor and to be known as the Nebraska workmen's compensation court, which court shall have authority to administer and enforce all of the provisions of the Nebraska workmen's compen-

sation law and acts amendatory thereof except such as are committed to the courts of the appellate jurisdiction." Comp. St. Supp. 1935, sec. 48-162.

Section 5 provides, among other things: "A majority of the judges of the Nebraska compensation court shall constitute a quorum to transact business and the act or decision of any two of them shall in all cases be deemed the act or decision of the said court except as provided in section 13 of this act." Comp. St. Supp. 1935, sec. 48-166.

In part, section 6 provides: "The Nebraska workmen's compensation court may adopt all reasonable rules necessary for carrying out the intent and purpose of this act and shall administer and enforce all of the provisions of the Nebraska workmen's compensation law and acts amendatory thereof except such as are committed to the courts of appellate jurisdiction." Comp. St. Supp. 1935, sec. 48-167.

Section 11 provides: "All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment." Comp. St. Supp. 1935, sec. 48-172.

Section 12 provides: "The words 'Order,' 'Award,' and 'Judgment' as used herein are used interchangeably and are deemed to have the same meaning." Comp. St. Supp. 1935, sec. 48-173.

Section 13, covering the matter of procedure in the matters within its jurisdiction, after providing for pleadings of the respective parties, continues: "(4) At the expiration of the time fixed for filing the answer the court shall assign one of the judges of said court to hear the cause and make such findings, and such orders, awards or judgments as said court or judge is authorized by law to make, and such findings, orders, awards and judgments shall be signed by the judge before whom such proceedings were had. When proceedings are had before a judge of said court, his findings, orders, awards and judgments shall be conclusive upon all parties at interest unless reversed or modified upon appeal as hereinafter provided. (5) Either party at interest who refuses to accept the findings, order,

award or judgment of the said judge may, within fourteen days after the date thereof, file with the said court an application for a rehearing, plainly stating the errors on which such party relies for reversal or modification. Such party shall at the same time file with said court, copies of such application for the other party at interest. The said court shall then immediately serve upon such other parties by mail or otherwise, as elsewhere herein provided, a copy of said application for rehearing, and within thirty days thereafter shall proceed to hear said cause *de novo,* and a shorthand record shall be made of all testimony and evidence submitted in such proceedings. The hearing by the said court shall be held in Lancaster county, Nebraska, or in any other county in the state in the discretion of the court. Within fourteen days after such hearing the said court shall make its findings, order, award or judgment, determining the issues in said cause. The compensation court may, on its own motion, modify or change its findings, order, award or judgment at any time before appeal and within ten days from the date of the said findings, order, award or judgment for the purpose of correcting any ambiguity or clerical error: Provided, however, that in any case the employer or the injured employee, or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court of the county in which the accident occurred; provided, however, upon the written stipulation of the parties in the case the matter may be submitted to the district court of any county in the state either at or during a regular term of the district court of said county or during any period of time between the regular term time of the district court of said county, which court shall have authority to hear and determine the cause as in equity, when the same for all purposes shall be tried as one in equity; and that said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial *de novo.*

All findings, orders, awards and judgments of the said court shall be conclusive upon all parties at interest unless reversed or modified upon appeal as hereinafter provided. In case either party at interest refuses to accept any final order of the said court, such party may, within fourteen days thereafter file with the district court in the county in which said cause arose, a verified petition setting forth the contention upon which such party relies for reversal or modification, together with a transcript of the pleadings before the compensation court and the orders of said court certified to by the clerk thereof and file within thirty days from the date of said final order a transcribed copy of the testimony and evidence taken before said compensation court, which transcript when certified to by the stenographer who made the record and settled by the compensation court as such shall constitute the bill of exceptions." Comp. St. Supp. 1935, sec. 48-174.

Thus, it appears that Swadley, the plaintiff, is insisting on his statutory right to a rehearing or retrial before the entire Nebraska workmen's compensation court of the issues determined by Judge Coffey, as provided by section 13 of the compensation act above quoted. On the other hand, the city of Lincoln insists upon its right of appeal from that judgment as defined in the proviso forming a part of section 13, and contends that such appeal by it perfected precludes further consideration of the proceeding by the compensation court.

It may be considered that these provisions which are relied on by the parties, considered apart from the context of the act, are materially conflicting, and the legislative intent which is evidenced thereby must be determined by a proper consideration of the entire enactment of which each forms a part.

"The legislative intent is the cardinal rule in the construction of statutes." *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.*, 114 Neb. 734, 209 N. W. 497. See, also, *State v. School District*, 99 Neb. 338, 156 N. W. 641.

So, also, the principle of construction is unchallenged that, "In construing a statute the legislative intent is to be gathered from the necessity or reason for its enactment, and its several provisions should be construed together, in the light of the general objects and purposes of the act, so as to give effect to the main intent, although thereby particular provisions are not construed according to their literal reading. That which is implied is as much a part of the statute as that which is expressed. When the literal enforcement of a statute would result in absurdity, the courts will assume that such consequences were not intended. *People v. City of Chicago,* 152 Ill. 546." *Kearney County v. Hapeman,* 102 Neb. 550, 167 N. W. 792.

Another matter for our consideration is that chapter 57, Laws 1935, establishing a workmen's compensation court, was peculiarly a remedial act. As such, it was clearly within the scope of the rule heretofore announced by this court, viz.: "In construing a remedial statute three things must be considered, viz.: The old law, the mischief, and the remedy." *Clother v. Maher,* 15 Neb. 1, 16 N. W. 902.

In addition thereto, a remedial statute is to receive a liberal construction to carry into effect the purposes for which it was enacted. *State v. Fremont E. & M. V. R. Co.,* 22 Neb. 313, 35 N. W. 118; *Becker v. Brown,* 65 Neb. 264, 91 N. W. 178.

In this connection, this court is also committed to the view: "A statute of doubtful meaning should be construed, if reasonably possible, so as to carry out the purpose and intention of the legislature, and when this purpose is manifest it will prevail over a seeming conflict in the language." *State v. Ure,* 91 Neb. 31, 135 N. W. 224.

Our present workmen's compensation court law creates, in lieu of a single compensation commissioner, a court made up of three judges having special qualifications. This court is vested with exclusive jurisdiction over "compensation claims." A majority of the court as a quorum is empowered to transact business. The act expressly provides:

"All disputed claims for workmen's compensation shall be submitted to the Nebraska workmen's compensation court for a finding, award, order or judgment." True, as a matter of convenience, section 13 of the act provides for a preliminary trial by a single member of the court, but it also provides that either party at interest may refuse to accept such judge's decision, and upon compliance with the statute by the party so refusing, the law contemplates the rehearing or retrial shall proceed before the court of three judges as an entirety. All provisions of the compensation court act, construed together, fairly evidence the intent that the compensation claimant, as well as his employer, shall be assured a trial by the "court" as defined in the act, and which alone is expressly given jurisdiction to hear "all disputed claims for workmen's compensation." The act was plainly intended to assure all persons in interest that such claims would be so determined. The attainment of this end furnished the reason for the enactment, and this purpose is clearly expressed in every provision relating to this subject contained in this law, save and except in the proviso forming a part of section 13 hereinbefore quoted, which provides for a waiver of rehearing before the compensation court and for an immediate appeal directly to the district court.

"A proviso which follows and restricts an enacting clause general in its scope, should be strictly construed, so as to take out of the enacting clause only those cases which are fairly within the terms of the proviso, and the burden of proof is on one claiming the benefit of the proviso." 59 C. J. 1089.

This proviso under consideration does not in terms purport to limit the rights of any parties to the litigation. At most, it simply confers an optional right of appeal, after first hearing, on either or any party to the proceeding. It does not negative the right of the opposing parties to a rehearing or retrial in express terms.

Does it accomplish the result by necessary implication? The compensation court act does not expressly or by neces-

sary implication deprive any suitor of a full and complete hearing by the Nebraska workmen's compensation court. Indeed, to do so would violate the express terms of the act, and the rules provided for the government of the court created by it.

The situation here presented invokes the application of the rule announced by this court in the case of *In re Heirship of Robinson,* 119 Neb. 285, 228 N. W. 852, viz.: "A proviso in a statute should be strictly construed, and this in the light reflected by the act or statutes of which it forms a part, not in derogation of the intent and purpose of the original, but in furtherance thereof."

Therefore, in furtherance of the intent and purpose of the Nebraska workmen's compensation court act that every suitor is entitled to have his cause determined finally, at his election, by that "court" on rehearing or retrial, we hold that this right is in no manner subject to modification by exercise of the powers defined by the terms of the proviso under consideration, and that the right to a rehearing by the court as such, in due course of administration of its powers, is preeminent, and the rights of appeal provided by the terms of the proviso exist only in subordination thereto.

In the construction of statutes, implications which in effect are necessarily contrary to and incompatible with the spirit and purpose of the enactment being construed will not be indulged in, and this principle is controlling as applied to the Nebraska workmen's compensation court act.

It follows that in the instant case the Nebraska workmen's compensation court at all times possessed exclusive jurisdiction of the litigation before us, and that the judgment of the district court for Lancaster county in dismissing this proceeding was in all respects correct, and it is, accordingly,

AFFIRMED.

GRACE PERKINS, ALSO KNOWN AS GRACE PETERSEN, APPELLEE, V. LEO YOUNG, DOING BUSINESS AS LEO'S CAFE, APPELLANT.

274 N. W. 596

FILED JULY 16, 1937. No. 30172.

1. **Pleading.** A pleading may be amended to state the correct name by order of court to conform to the evidence.
2. **Workmen's Compensation.** The lack of a written notice is not a bar to proceedings under the workmen's compensation act if the employer has notice or knowledge of the injury.

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

Weaver & Giller, for appellant.

Lower & Sheehan and *Maurice F. Langdon, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and SPEAR and KROGER, District Judges.

DAY, J.

This is a workmen's compensation case. Leo Young operated a restaurant at 1304 Douglas street, Omaha, Nebraska, in which Grace Perkins claims she was injured while employed as a waitress on August 13, 1936. A member of the compensation court, after a hearing, made an award which was approved upon a rehearing before the entire court. An appeal was taken to the district court where an award was also made in favor of the claimant. This is an appeal from that judgment.

The judgment, argues the appellant, must be reversed, for one reason, that the action was not brought in the name of the real party in interest. This action was brought in the name of Grace Petersen, and an award was made to her under this name. During the rehearing, it developed that her real name was Grace Perkins. She was employed under the name of Grace Petersen and was known to many people at the time by that name. When it became apparent at the hearing before the compensation court that her real

name was Grace Perkins, she asked and was given leave to amend her petition by setting out her real name. No formal amended petition was ever filed, but thereafter the pleadings and orders designated her as Grace Perkins, also known as Grace Petersen. The plaintiff was entitled to amend her petition to conform to the proof. A pleading may be amended to state the correct name by order of court to conform to the evidence. Comp. St. 1929, sec. 20-847.

The petition was ordered amended in this case, and thereafter the case was tried upon the theory that it was so amended. It was not a material issue in this case as to the real name of the plaintiff. The issue was whether the plaintiff was injured in the course of her employment in the defendant's restaurant. There is no claim that she was not employed there.

The sufficiency of the notice of injury to the employer is challenged. A written notice was not given as provided by section 48-133, Comp. St. 1929. But the lack of a written notice is not a bar to proceedings under the workmen's compensation act if the employer has notice or knowledge of the injury. The act itself provides that a written notice shall not be necessary under such circumstances. The circumstances in the case at bar are that two witnesses upon two different occasions the following day notified the employer of the plaintiff's injury. It was a significant circumstance that the proceeding under the workmen's compensation law was filed September 30, 1936, while the plaintiff was injured August 13 of the same year. The proceeding was started within seven weeks of the date of the injury. This of itself constitutes sufficient notice to the employer of the injury and comes within the time limit required by the statute.

It is said by the appellant that the plaintiff has not sustained the burden of proof. The plaintiff claims to have been injured by slipping on some grease between the part that was used as a dining-room and the part that was used as a kitchen in the café. She claims it occurred after 10

o'clock at night and that she worked until 12. It seems that the only other employee present at the time was the cook, and that he did not know about the accident. Three customers testified that they did not know the plaintiff was injured. The plaintiff claims to have been injured by slipping and twisting her ankle and leg, and that as a result thereof an abscess formed which caused her disability. When she left the café at 12 o'clock, there is evidence that she was limping, and that two of her friends were waiting for her and assisted her into the car, took her directly home, and put her to bed. There are medical experts that testified that she had a bad abscess on her leg which was caused by a bruise. There is no question as to her subsequent disability. The evidence thus outlined is sufficient to sustain the burden of proof that the plaintiff was injured in the course of her employment and disabled thereby.

The defendant, owner of the restaurant, has contested the claim for compensation ever since the request for an award was filed with the compensation commission. The compensation commissioner made an award, as did also the compensation court upon rehearing, which was affirmed by the district court, which in turn is affirmed by this court. The award was substantially "up to and including the 29th day of January, 1937, a period of twenty-four weeks and one day, as and for her temporary total disability." Proper attorney's fees have been allowed up to date. There being no reduction of the judgment, attorney's fees will be allowed under section 48-125, Comp. St. 1929. The judgment of the district court is in no manner reduced in this court, and an additional allowance of $50 for attorney's fees is allowed the plaintiff's attorney for services in this court.

AFFIRMED.

HARRY MCGRATH, APPELLEE, V. GLADYS NUGENT, APPELLANT.

274 N. W. 549

FILED JULY 16, 1937. NO. 30023.

Appeal. It is error for trial court to fail to instruct on issue of contributory negligence when raised by the pleadings and supported by the evidence.

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

Dressler & Neely, for appellant.

Edward J. Dugan and *John A. McKenzie, contra.*

Heard before ROSE, GOOD, EBERLY, DAY, PAINE and CARTER, JJ., and RINE, District Judge.

PAINE, J.

This is a suit for damages for personal injuries suffered by the plaintiff as the result of an automobile accident while he was riding as a guest in the defendant's car. The jury returned a verdict for $2,000, upon which the court entered a judgment. Motion for new trial was overruled, and defendant appeals.

This suit grows out of the same accident as the case of *Breen v. Nugent, ante,* p. 131, 274 N. W. 379; the plaintiff in the case at bar was riding in the back seat as a guest at the time of the accident. The full details of the trip and the accident are all set out in the other opinion, and will not be repeated here. The evidence in that case, which was tried first in the district court, did not disclose that intoxicating liquor was an element in the case.

The evidence in the case at bar disclosed at once that the use of intoxicating liquor by some of the occupants of the car was an important issue in the case.

Of the 7 instructions given to the jury by the trial judge, the second and third instructions mentioned the use of liquor, and of the 13 instructions offered by the defendant and refused by the court, all except the first three pre-

sented the law on the various phases of the use of intoxicating liquor by the owner and guests of an automobile involved in an accident. Of the 18 errors relied upon for reversal of the judgment in the case at bar, the first 2 set out the refusal of the trial court to direct a verdict in favor of the defendant, and other 13 errors relate to instructions given on intoxicating liquors, as well as to those refused.

The evidence relating to use of intoxicating liquor disclosed that the owner of the automobile testified that she drank some of the liquor furnished by the plaintiff, and she said, "I felt my drinks," and asked another guest to drive her car on the return trip from Todd's lake. The accident occurred by the car being driven into the ditch some 18 miles from Omaha. She also testified that the plaintiff just before the accident acted peculiar, talked, laughed, and threw his hands around from the effects of the liquor. Some of the witnesses, who lived near the scene of the accident and ran over there immediately, testified that the odor of liquor about the upset car was very strong, and that some of the parties in the car staggered when they got out and tried to walk. The mother of the plaintiff testified, from seeing the plaintiff and defendant after they were brought to Omaha, "It has been a drinking party." This was amply supported by the testimony of several other witnesses.

Among the instructions offered by the defendant and refused by the court may be found these statements of law in reference to assumption of risk and contributory negligence:

"You are instructed that plaintiff admits that he purchased a quantity of whisky and drank some on the trip in question. I charge you that if you find that such whisky caused or contributed to the accident of which plaintiff complains plaintiff cannot recover."

"You are instructed that a person who voluntarily permits himself to be driven along a public highway in an automobile operated by a person who has been drinking intoxicating liquor and is in an intoxicated condition does

not exercise ordinary care for his own safety and he assumes the dangers incident to such driving when he voluntarily continues to ride in a car which is managed and controlled by an intoxicated or unfit driver."

"If you find from the evidence that the plaintiff drank intoxicating liquor while riding in the defendant's automobile and that the defendant and the woman driving the defendant's car at the time of the accident also drank intoxicating liquor furnished by the plaintiff, you are instructed that the plaintiff would be guilty of more than slight negligence as a matter of law and would not be entitled to recover any damages for whatever injuries he received in the automobile accident and it would be your duty to return a verdict in favor of the defendant."

Recent opinions, and the statement as given in Restatement of Law, appears to support these requested instructions. We will set out a few of such authorities.

In *Gudbrandsen v. Pelto*, 271 N. W. (Minn.) 465, it is said: "In action by guest against driver of truck for injuries received when truck struck automobile which was traveling in same direction when automobile attempted left turn into alley while truck driver's attention was momentarily distracted, question whether recovery by guest was barred because of guest's contributory negligence in riding with truck driver when he knew that truck driver had been drinking whisky over four-hour period *held* for jury."

In 4 Blashfield, Cyc. of Automobile Law and Practice, 246, sec. 2453, we find: "Where all the occupants of the vehicle engage in a drinking bout, while riding, and all become intoxicated, each participates in causing the intoxication of all of his companions, including the driver, and hence each occupant is as much responsible for the driving of the car by a drunken person as is the driver, and none can recover for injury caused by the negligent driving, where the statute makes it a misdemeanor for an intoxicated person to drive an automobile on a public highway."

In 2 Restatement, Torts, 1230, sec. 466, it is said: "e. Plaintiff entrusting his safety to incompetent person.

A common form of this type of contributory negligence dealt with in Clause (a) consists of the plaintiff's entrusting his safety to a third person whom he knows to be incompetent, customarily negligent or ill-equipped. Thus, if a plaintiff rides in an automobile knowing that the driver is drunk, ignorant of driving or habitually reckless or careless or that the machine has insufficient brakes or headlights, he can ordinarily not recover against the defendant through whose negligence an accident occurs, if the drunkenness, incompetence or carelessness of the driver or the bad condition of the vehicle is a contributing factor in bringing about the accident."

In *Franco v. Vakares,* 35 Ariz. 309, 277 Pac. 812, the very pertinent question is asked: "If it be contributory negligence to ride in an automobile with a driver knowing him to be intoxicated, what shall be said of him who furnishes the liquor and with the driver drinks it until both are drunk, or, if not drunk, at least are incapable of exercising the care of a reasonably prudent person?"

Additional authorities may be cited in support of the findings herein: *Koster v. Matson,* 139 Kan. 124, 30 Pac. (2d) 107; *Wayson v. Rainier Taxi Co.,* 136 Wash. 274, 239 Pac. 559, 45 A. L. R. 290; *Winston's Admr. v. City of Henderson,* 179 Ky. 220, 200 S. W. 330; *Kinnie v. Town of Morristown,* 184 App. Div. 408, 172 N. Y. Supp. 21; *Schwartz v. Johnson,* 152 Tenn. 586, 280 S. W. 32, 47 A. L. R. 323; *French v. Tebben,* 53 Idaho, 701, 27 Pac. (2d) 475; and 5 American Jurisprudence, 774, sec. 483.

While it is well understood that a trial judge is not required to give all proffered instructions, yet he is required to adequately present to the jury in his instructions the law relating to the issues set out in the pleadings and supported by the evidence. It was stated in *Goldman v. State,* 128 Neb. 684, 260 N. W. 373, that it was error to refuse an offered instruction which is warranted by the evidence and correctly states the law of the case, unless the principles of law involved are covered by some other instructions.

Other errors charged were examined by the court, but

need not be discussed, as the failure of the trial court to adequately instruct the jury upon contributory negligence was reversible error, and the judgment is set aside and reversed, and new trial ordered.

REVERSED.

WILLIAM A. EHLERS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
274 N. W. 570

FILED JULY 16, 1937. No. 30054.

1. **Witnesses.** A communication from client to attorney is not privileged when it is not made to the attorney in his professional capacity.
2. ———. Where attorney is acting as agent for his client, a communication in connection with such agency is not privileged.
3. **Depositions:** CONTEMPT. Record examined, and *held* that appellant was lawfully "ordered" to answer questions propounded to him.

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

W. R. Patrick and *W. A. Ehlers,* for appellant.

Monsky, Grodinsky, Marer & Cohen, contra.

Heard before GOSS, C. J., ROSE, GOOD, DAY and CARTER, JJ., and SPEAR and KROGER, District Judges.

KROGER, District Judge.

Appellant was arrested and placed in the county jail of Douglas county on a commitment issued by a notary public for contempt in refusing to answer certain questions put to him as a witness during the taking of depositions. He applied to the district court for a writ of habeas corpus and upon hearing had the court found he was not unlawfully detained and denied that he be released from custody.

It appears from the record that appellant was attorney for the defendants in a replevin action wherein the plaintiff

was seeking to recover possession of a certain Ford automobile. The officer not being able to locate the automobile, the depositions of appellant and his clients were being taken by plaintiff for the purpose of locating it. Appellant was asked if he had the automobile in his possession and if he knew where the automobile then was. To these and other similar questions, he refused to answer, giving as his reason that he was attorney for the defendants and that the information sought was confidential and privileged.

The notary thereupon issued an order of commitment, finding the witness in contempt for refusing to answer the questions and directing that he be placed under arrest and confined in the county jail of Douglas county until he submit to testify.

There are but two questions raised by this record. The first is whether the questions propounded to the witness called for confidential and privileged communications, and the second is whether the proceedings leading to the confinement of the witness were regular.

One of the questions asked the witness and which he refused to answer was: "Q. Do you have in your possession a Ford, two-door, automobile, year 1935, bearing motor No. 2193576?" If the witness obtained the automobile from his client, he obtained it either as an agent of his client or as a participant in the transaction, and in either event did not receive the same and the information he had as to its whereabouts did not come to him while he was acting in his professional capacity. Consequently, the question propounded to the witness did not call for the disclosure of a confidential communication between attorney and client and the witness was in contempt for refusing to answer the same.

Appellant argued in this court that the evidence sought to be elicited was not material to the replevin action and for that reason he was not in contempt for refusing to answer. This objection was not raised at the time the question was asked, nor was it raised in the district court, and

under the repeated holdings of this court will not be considered on appeal.

The proceedings leading to appellant's confinement are challenged by him on the ground that he was not "ordered" by the notary to answer the questions propounded to him and that consequently he could not be in contempt. It is undisputed that he was served with a subpœna and was paid his witness fee. He was asked by the notary if he refused to answer the questions put to him and answered that he did on the ground of privilege. He was asked if he was familiar with the penalty provided by statute for refusing to answer and he replied that he was. He was thereupon excused as a witness and a commitment was drawn and signed by the notary. This commitment recites the entire history of the proceeding and contains a finding that the witness is in contempt for refusing to answer the questions put to him. This was a substantial compliance with the statute. The appellant was not misled and he understood perfectly that he was being called upon to answer the questions then asked of him and that his refusing to answer would subject him to the statutory penalty.

We find no error in the record and the judgment of the trial court is

AFFIRMED.

L. W. JOHNSON ET AL., APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.
274 N. W. 581

FILED JULY 22, 1937. No. 29774.

1. **Railroads.** It is a general rule that a railroad right of way adjacent to tracks, when not a part of railroad transportation facilities devoted or necessary to public use, is private property of the carrier and that the latter may lease it for private purposes to one or more persons and deny a like privilege to others.
2. ———. The Nebraska 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 deny the same privilege to others, where the demised premises are not railroad transportation facilities devoted or necessary to public use.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

C. A. Sorensen and *P. E. Boslaugh,* for appellants.

T. W. Bockes, T. F. Hamer, G. C. Holdrege and *Fred C. Foster, contra.*

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

ROSE, J.

This is an appeal to the supreme court from a decision of the Nebraska state railway commission.

L. W. Johnson and F. J. Johnson, partners as Johnson Cash-Way Lumber Company, and John E. Forsell, complainants, are engaged in the retail lumber business and, under a lease assigned to them, occupy a portion of the right of way of the Union Pacific Railroad Company, defendant, at Grand Island, where they are using trackage privileges, buildings and other equipment. They complained to the Nebraska state railway commission that defendant attempted to cancel their lease and to oust them from their location. They also charged that defendant, illegally, by discrimination in favor of other lumber dealers operating in the same railroad yards, sought to deprive them of equal railroad facilities, services and accommodations. Complainants offered to pay the stipulated rentals and otherwise to comply with the terms of the lease. The prayer for relief follows:

"That after due hearing and investigation an order be made commanding said defendant to cease and desist from discrimination, favoritism, or partiality against the complainants, and each of them, and in favor of any other firm or corporation desiring the use of the premises covered by said lease, and be required to furnish the complainants, and each of them, adequate, reasonable and equal facilities,

service and accommodations in the operation of its business by permitting the complainants, and each of them, to retain possession and use of the premises covered by said lease."

An answer of defendant challenged the jurisdiction of the Nebraska state railway commission to grant any relief under the complaint; pleaded the assignment of the lease was void for want of written consent of lessor; cancelation of the lease pursuant to its own terms; put in issue the charges of discrimination. After a full hearing the complaint was dismissed for want of jurisdiction. Complainants appealed from the dismissal.

Had the Nebraska state railway commission power to grant the relief sought by complainants? There is no serious controversy over any material fact. The documents involved in the controversy are in the record. On the issues of jurisdiction and discrimination complainants rely on the constitutional provision creating the Nebraska state railway commission and the statutes relating to its powers and duties as well as on acts forbidding discriminations in rates and inequalities in facilities for railroad transportation. The Constitution provides:

"The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the legislature may provide by law." Const. art. IV, sec. 20.

Reference is made to the following provisions of statute:

"If any railway company or common carrier * * * makes or gives any undue or unreasonable preference or advantage to any particular person, company, firm or corporation or locality, or subjects any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever, the same shall constitute an unjust discrimination, which is hereby prohibited." Comp. St. 1929, sec. 75-702.

"Every railroad corporation shall give to all persons and associations reasonable and equal terms, facilities and accommodations for the transportation of merchandise, prod-

uce, commodities and other property of every kind and description upon any railroad owned, leased or operated within the state, and reasonable and equal terms, service, facilities and accommodations for terminal handling of all property and commodities whatsoever, including the use of depot and other buildings, yards and other grounds of such corporation." Comp. St. 1929, sec. 74-501.

The method by which complainants got possession of that part of their location on defendant's right of way may be explained as follows: June 15, 1933, C. H. Cousins, as a receiver of the Cousins Lumber Company, procured from defendant a lease of the premises in controversy for a term beginning January 1, 1933, and ending January 1, 1938, "unless sooner terminated," as in the lease provided. The contract, therefore, was not an unconditional lease for a definite period. It bound lessee in specific terms not to lease or sublease or assign the leased premises or any part thereof without the written consent of lessor. A violation of those obligations made the lease void at the option of lessor. Failure to pay rent in the amount and at the time specified had the same effect.

Lessee made default in payment of rent and did not procure written consent of lessor, defendant, to an assignment of the lease. Part of the land on which the lumber business was operated was owned by lessee adjacent to, but not on, the railroad right of way. June 1, 1935, the Cousins Lumber Company, by federal court receivers, C. H. Cousins and W. H. Gillispie, entered into a contract with John E. Forsell, complainant, to sell and transfer to him for $9,250 the entire stock of lumber and other materials in the lumber yard of the Cousins Lumber Company, including its buildings and real estate. This contract also provided for the assignment of the interests of lessee in the Union Pacific Railroad Company's lease to Forsell. The sale of the lumber yard and stock of materials and realty was authorized by the district court of the United States for the western division of the western district of Missouri. The property of lessee was transferred as provided in the

sale contract and the lease was assigned to Forsell. The evidence shows that, in the negotiations by Forsell for the purchase of the property of the Cousins Lumber Company, he acted as agent for the complainants Johnson and Johnson and the Johnson Cash-Way Lumber Company and for a time endeavored to conceal from lessor the fact that they were the real purchasers. Complainants took possession of the property purchased and the leased premises of the Union Pacific Railroad Company's right of way June 4, 1935. Defendant notified complainants June 15, 1935, that it exercised its option to cancel the lease and that it demanded vacation of the premises by July 22, 1935. Complainants adduced evidence tending to prove that ouster would deprive them of trackage, a privilege retained by their competitors, and drive complainants out of business in the railroad yards at Grand Island. Estimates of resulting losses in the event of eviction were also made. Their contention is:

"The defendant may not discriminate between the complainants and their competitors in the matter of leasing of its private property. Either all the lumber yards must be ordered off the right of way or all be allowed to stay."

This doctrine overlooks the distinction that the competitors had the privileges of right of way and trackage and complainants had not. The lease was canceled according to its own terms. The option to cancel and the breach that justified it were shown on the face of the lease in connection with the assignment itself. Assignee acquired no greater rights than lessee had. The lease was terminated. Complainants had seised a portion of the right of way. They assert that discrimination can be prevented only by driving all lumber dealers off. Complainants are in the position of asking the Nebraska state railway commission to protect them in their seisure and occupancy of the premises under the contract of lease and at the same time of insisting on an order to impair or destroy that part of the same contract which, in simple and direct language, grants defendant, the lessee, authority to cancel the lease

for the assignment of it without lessor's consent in writing. The power to impair or destroy the obligations of a contract by the seisure of private property for private use without the consent of the owner was never committed to the Nebraska state railway commission. If railroad corporations are to continue to furnish transportation of passengers and freight for the public, they must be permitted to adopt such honest, lawful, business methods and such reasonable and just control over their own property as will enable them to earn the necessary funds for that purpose. Revenue is essential to their existence and operation. Private enterprise on an unleased railroad right of way has no greater control over such private property than the common carrier that owns it. That part of the railroad right of way in controversy is a site for a wholesale lumber yard. The evidence indicates that there is a prospect of such an enterprise there and that it would increase defendant's revenue by an increase in both inbound and outbound tonnage. There is at present no wholesale lumber yard in the railroad yards of defendant at Grand Island.

Both the supreme court of the United States and the interstate commerce commission have adopted the general rule that a railroad right of way adjacent to tracks, when not a part of railroad transportation facilities devoted or necessary to public use, is private property of the carrier and that the latter may lease it for private purposes to one or more persons and deny a like privilege to others. *Donovan v. Pennsylvania Co.*, 199 U. S. 279; *Andrews Bros. Co. v. Pennsylvania R. Co.*, 123 I. C. C. 733. In a case analogous to the present controversy the supreme court of the United States said:

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and

for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States." *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 417.

Whatever proper view is taken of the present proceeding, the Nebraska state railway commission was without power to grant the relief sought by complainants. The dismissal is therefore

AFFIRMED.

CLAUDE E. REINSCH, APPELLEE, V. TRAVELERS INSURANCE COMPANY OF HARTFORD, APPELLANT.
274 N. W. 572

FILED JULY 22, 1937. No. 30062.

1. Insurance: CONTRACT: CONSTRUCTION: TOTAL DISABILITY. "A policy of insurance providing for total disability benefits when the insured 'has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation,' means inability to do all the substantial and ma-

terial acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850.

2. ———: ———: ———: ———. "Total disability to pursue any occupation exists when the injured party is unable to perform the substantial duties of that occupation." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.
3. ———. In an action to recover disability insurance, evidence outlined in opinion *held* sufficient to support a verdict in favor of plaintiff and insufficient to show as a matter of law that he unreasonably refused to submit to a surgical operation for disabling hernia.

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

Kennedy, Holland, De Lacy & Svoboda, for appellant.

Gaines, McLaughlin & Gaines and *Lawrence Fredericksen, contra.*

Heard before GOSS, C. J., ROSE, GOOD, EBERLY and DAY, JJ., and SPEAR and KROGER, District Judges.

ROSE, J.

This is an action to recover 13 monthly benefit instalments of $100 each for permanent total disability, or $1,300, under a life insurance policy issued February 20, 1932, to Claude E. Reinsch, plaintiff, by the Travelers Insurance Company, defendant. The petition states that plaintiff became totally disabled for life August 17, 1935, as a result of disease, and that defendant refused to make the stipulated payments. A copy of the policy is attached to the petition and among other things provides:

"In accordance with the provision for permanent total disability benefits, and subject to the conditions thereof, the company will pay to the insured a monthly income of One Hundred Dollars."

Other provisions follow:

"Upon due proof that since the payment of the initial premium upon this contract, before a default in the payment of any subsequent premium, and before the date set

on the first page hereof for initial payment of deferred income, the insured has become wholly disabled by bodily injuries or disease and will be continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit, the company will waive the payment of any premiums which may fall due on this contract during such disability and will pay for each completed month from the commencement of such disability and during its continuance the disability income stated on the first page of this contract. Provided that in a case not susceptible of proof of permanency when claim is presented, then after the insured has been wholly disabled by bodily injuries or disease and has been prevented thereby from engaging in any occupation or employment for wage or profit for a period of not less than three consecutive months, upon due proof thereof the company will grant the aforesaid benefits from the commencement of such disability and during its continuance. The premiums so waived and the disability income so paid will not be deducted in any settlement hereunder."

The policy was issued as stated and was in force at the time of the alleged disability. Total permanent disability within the meaning of the contract was pleaded in a petition alleging that disease, continuously since August 17, 1935, has prevented plaintiff, and will continue to prevent him for life, from engaging in any occupation or employment for wage or profit.

Defendant denies the disability alleged in the petition. It is affirmatively pleaded in the answer that plaintiff has, and prior to August 17, 1935, had, a left inguinal hernia; that it is his only illness; that it does not totally and permanently disable him; that he is able to carry on his profession and is able to work; that his hernia can be reduced and cured by a surgical operation without danger to his life or health; that without reason he wilfully refuses to submit to such an operation and thus precludes himself from maintaining this action.

Upon a trial of the cause the jury rendered a verdict in

favor of plaintiff for $1,300 and from judgment thereon defendant appealed.

The asserted insufficiency of the evidence to sustain the verdict is presented at great length. The evidence is quoted and analyzed from defendant's standpoint in support of the view that the illness of plaintiff does not disable him within the meaning of the insurance policy. As a condition of recovery plaintiff was not required to prove utter physical and mental helplessness. In a recent opinion discussing disability insurance in the light of reason and precedent it was said:

"The weight of modern authority is that utter physical and mental helplessness of insured as the result of an accident is not necessarily the test of his right to recover accident insurance for 'total disability,' that term meaning generally, in insurance law, such a disability as renders insured unable to perform the substantial and material acts of his business or occupation in the usual way." *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276.

In a still later case the same doctrine was emphasized:

"A policy of insurance providing for total disability benefits when the insured 'has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit or from following any gainful occupation,' means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850.

Plaintiff was a dentist who practiced his profession in Omaha prior to August 17, 1935. He previously had a hernia, but it did not prevent him from performing professional duties and services in the usual manner. The evidence in his favor tends to prove that on the date mentioned, while he was attempting to change a tire on a wheel, his automobile slipped and forced him against a

wall; that the resulting injury aggravated the hernia, causing him to lose permanent control of the movement of his bowels and of the voiding of his bladder; that he is frequently distressed by nausea, vomiting and dizziness; that he cannot stand long on his feet; that he is physically unable to pursue his profession; that he has since done no dental or other work and is wholly unfitted for it.

A former opinion reads thus:

"The courts usually take the view that total disability to pursue any occupation exists when the injured party is unable to perform the substantial duties of that occupation." *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397.

The testimony is in conflict, but it is a fair inference from the evidence that plaintiff cannot keep his person in a condition essential to the work of his profession in the usual way or to any other gainful work or occupation and that he is totally and permanently disabled within the meaning of the insurance policy. On this feature of the appeal the assignments of error are overruled.

A vast amount of evidence and an elaborate argument are directed by defendant to the defense that unreasonable refusal of plaintiff to submit to a surgical operation for hernia defeats his claim for benefits. The testimony of experts on this issue is in conflict to some extent. Physicians examined by defendant said plaintiff has a left inguinal hernia with hydrocele, the latter an accumulation of serous fluid in a sacculated cavity in the scrotum; that an operation was advisable and necessary and a permanent cure without serious risk. In their view of an operation the hazards of death and recurrence would be almost at the vanishing point, according to the estimates of such dangers given in percentages. There were, however, at least slight hazards of both death and recurrence. A physician called by plaintiff advised against an operation. Other experts estimated the chances of permanent cure without recurrence at 50 per cent. In one instance the danger of mortality was said to be as high as 5 per cent. to 10 per cent.

There is evidence that a difficult major operation would be required, owing to complications, and confine plaintiff in a hospital for several weeks. The longing for continued life, even with distressing handicaps, and the fear of death may make deep impressions on the human mind, when hazards of a major operation are considered. The surgery risk was plaintiff's. The disability risk was defendant's. A former observation follows:

"It has been held that, where doctors disagree as to the probable success of an operation, the trend of the decisions is that a refusal by employee to submit to the operation under such circumstances is not unreasonable." *Wingate v. Evans Model Laundry,* 123 Neb. 844, 244 N. W. 635.

A disability insurer may contemplate in advance the natural longing for life and the fear of death. The policy in suit does not make a surgical operation a condition of recovering disability claims for which the contract provides. The evidence does not prove as a matter of law that the refusal of plaintiff to submit to a surgical operation for hernia was unreasonable. Error prejudicial to defendant has not been found in the record.

AFFIRMED.

BERTHA J. LEONARD, ADMINISTRATRIX, APPELLANT, V. ROBERT S. TRIMBLE, APPELLEE.
274 N. W. 593

FILED JULY 22, 1937. No. 30025.

Evidence in the record examined, and *held* sufficient to justify the dismissal of the action by the trial court.

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

Frost, Hammes & Nimtz, for appellant.

Swarr, May & Royce, contra.

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

EBERLY, J.

This is an action to recover damages for the death of plaintiff's decedent, her husband. As administratrix, it is alleged substantially in her petition that on January 12, 1935, at about 6:00 p. m., while plaintiff's decedent was walking west on the north side of Harney street, a public highway in the business district of the city of Omaha, Nebraska, and was proceeding across Tenth street on the regular pedestrian crossing where said street intersects said Harney street, he was negligently and carelessly struck down on the pavement in the regular pedestrian crossing by a Buick automobile owned and driven by defendant, who was proceeding north in a negligent and careless manner on Tenth street, a public highway in the business district of said city, and that the impact was so great that deceased was violently and with great force knocked down to the pavement, his skull fractured, and was immediately rendered unconscious and lifeless, from which injuries caused by the negligence and carelessness of defendant, said deceased died on January 16, 1935, and damages claimed caused thereby are set forth. Eleven specific allegations of negligence are pleaded. In his answer defendant traverses the specific allegations of plaintiff's petition; alleges that the injuries received by Edward A. Leonard were either the result of unknown causes or were caused solely and proximately by the carelessness, recklessness and contributory negligence of the deceased; and denies generally the allegations in plaintiff's petition contained. To this answer a reply was filed, which, in effect, put in issue the new matter set forth in the answer. There was a trial to a jury, at the conclusion of which the district court sustained defendant's motion to discharge the jury and dismiss plaintiff's action. From the trial court's order overruling her motion for a new trial, plaintiff, the administratrix, appeals.

The sole question presented on appeal is the sufficiency of the evidence to sustain the judgment of dismissal thus entered.

The place where the injuries were received by plaintiff's decedent was near the junction of Tenth and Harney streets. These streets are 100 feet in width, measured from property line to property line, and the paving on each measures 60 feet in width from curb to curb. On Tenth street in this vicinity, extending from north to south and over and across this intersection, are two street-car tracks. The distance from the east rail of the east track to the east curb line of Tenth street is 22½ feet. As to the lights at the intersection of Tenth and Harney streets, at this time, an officer of the underground and street lighting department of the Nebraska Power Company, testifies, viz.: "Telephone pole on each corner; I mean the northeast corner and the southwest corner of our twin units, two lights per pole, four hundred candle power lamps, twenty ampere, making a total of sixteen hundred candle power, twenty ampere, at the intersection." Indeed, the opinion of this witness was that the intersection was so well lighted that a man could see to read a well-printed newspaper if he was close under either of these lamps.

It appears that plaintiff had caused the deposition of defendant to be taken. It was sought by her to introduce certain parts of it. However, upon cross-examination it appeared that other statements were made by defendant in the taking of this deposition, which wholly negatived the inferences sought to be established by plaintiff. In such case it is obvious that the deposition was an entirety, and that the statements thereof must be so considered in that light.

The rule is: "Every admission upon which a party relies is to be taken as an entirety of the fact which makes for his side, with the qualifications which limit, modify, or destroy its effect on the other side." 3 Jones, Commentaries on Evidence (2d ed.) 1957.

"When, therefore, the agent and officers of an insurance

company stated to the agent of a party claiming upon a policy of insurance that the preliminary proofs presented were sufficient as to the death of the insured, but that they showed the insured had committed suicide, the whole admission must be taken together. If sufficient to establish the fact of the death of the insured, it was also sufficient to show the manner of his death." *Insurance Co. v. Newton,* 22 Wall. (U. S.) 32.

The fact that an admission was made in a deposition duly taken does not make it conclusive upon the admitting party, and "its admissibility and weight are to be determined upon the same considerations as though the statement had been made extra-judicially, except for such weight as may fairly be attributed to the solemnity of the occasion." 3 Jones, Commentaries on Evidence (2d ed.) 1854.

"We are next to consider the effect of admissions, when proved. And here it is first to be observed, that the *whole admission is to be taken together;* for though some part of it may contain matter favorable to the party, and the object is only to ascertain that which he had conceded against himself, for it is to this only that the reason for admitting his own declarations applies, namely, the great probability that they are true; yet, unless the whole is received and considered, the true meaning and import of the part, which is good evidence against him, cannot be ascertained." 1 Greenleaf, Evidence (13th ed.) sec. 201.

Applying the foregoing principles to the record before us, the following facts are definitely established, viz.: The night of the accident, January 12, 1935, at about 6 o'clock p. m. was foggy and murky, a dark, drizzly evening after an afternoon of wet weather, and there was still mist in the air. At this time the defendant, accompanied by another person, was driving north in a Buick roadster which was in good condition; the brakes were in good condition; and the lights were burning. They were approaching the intersection at Tenth and Harney streets. The automobile lights alone would light up this area. Defendant and his

companion were observing. No one was seen in the intersection. The automobile was traveling ten, twelve, fifteen, or maybe seventeen miles an hour. The testimony of defendant, in part, is as follows:

"Q. If there had been some one in the intersection, would you have seen them? A. I certainly would. Q. Did you see any one on the cross walk on the corner of the Crane building, outside of the intersection? A. I did not. Q. If there had been any one standing there, you would have seen them? A. I would."

It also appears that defendant had good vision through the wind shield, and, though constantly observing, saw nothing. The testimony is also that there was no sound of impact in front of the car. But, just after crossing the intersection, the occupants of this Buick car were conscious of a noise similar to a tire dropping off the rear of the car, or a bump. This noise came from the rear on the right-hand side of the car. As to this evidence the defendant is fully corroborated by the party who was with him. The car was then stopped; the occupants of the car stopped it, opened the doors and looked back, and saw the deceased lying in the street, his head in a northeast direction and his feet some eight feet west of the east rail of the east street-car track. It was plain that he had received the injuries, from the effects of which he died. There is no testimony in the record which contradicts these facts thus testified to by defendant and his guest, or tends to render their existence questionable. They returned to the injured man, secured assistance, placed him in their car, and drove to a police station some four blocks distant. Here the accident was reported. Soon thereafter defendant's car was placed on the wash rack, and under electric lights a thorough examination was made by the police, which disclosed no evidence of collision or impact on the front parts thereof, but did disclose evidence of a mark as if brushed by an object from front to rear on the right rear fender.

In this connection, the doctor who performed the autopsy on the body of deceased testifies, in part, as follows:

"Q. Were there any marks on the man's body below his shoulders which would indicate that he had been struck by any object? A. No, sir. Q. No black and blue marks around his hips? A. No, sir. Q. Or above his hips, and his ankles? A. No, sir."

Thus, neither the automobile of defendant, the body of the deceased, the actual testimony of eyewitnesses of the progress of the car through the intersection, nor the surrounding circumstances tended in any manner to support the theory of plaintiff. We have carefully considered evidence in the record that the defendant stated, at certain times, in effect, that he had hit the deceased. In connection with the denials made, and the surrounding circumstances established by the record, including a total absence of explanation as to how the impact was occasioned, we are convinced that these statements would be wholly insufficient to sustain a judgment, even had one been entered. It would serve no purpose to further extend this opinion by lengthy quotations of testimony.

Facts constituting negligence must be established by proof and not left to inference. *Thompson v. Young Men's Christian Ass'n,* 122 Neb. 843, 241 N. W. 565. See, also, *Mischnick v. Iowa-Nebraska Light & Power Co.,* 125 Neb. 598, 251 N. W. 258; *Gates v. City of North Platte,* 126 Neb. 785, 254 N. W. 418.

In short, the action of the trial court in discharging the jury and dismissing plaintiff's action was fully justified and sustained by the proof in the record.

Therefore, the judgment entered is correct, and it is

AFFIRMED.

ROSE, J., dissents.

W. F. RIGGS ET AL., TRUSTEES, APPELLEES, V. CHARLES HROCH ET AL., APPELLANTS.

274 N. W. 598

FILED JULY 22, 1937. No. 30042.

1. **Creditors' Suit.** "There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his 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. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ." *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617.
2. **Fraudulent Conveyances.** Conveyances between close relatives are presumptively fraudulent as to an existing creditor, and in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence.
3. ———. "Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist*, 125 Neb. 247, 249 N. W. 678.
4. **Appeal.** "On appeal in equity cases, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying." *State v. Cheyenne County*, 123 Neb. 1, 241 N. W. 747.
5. **Evidence** in the record examined, and *held* sufficient to support the judgment of the district court.

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

Hubka & Hubka, for appellants.

C. B. Ellis, contra.

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

EBERLY, J.

This action is one in the nature of a creditors' bill, and

was brought by the plaintiffs to set aside two conveyances contemporaneously made by the judgment debtor husband, Charles Hroch, to his wife, Tillie Hroch, the one conveyance transferring a quarter-section of land in Gage county, Nebraska; the other likewise transferring personal property enumerated therein, and being all of the personal property owned by the defendant Charles Hroch immediately prior to and at the time of the execution of the instrument of conveyance by him.

The petition of plaintiffs alleges that these conveyances were each made without consideration, and for the purpose of defrauding, hindering, and delaying the creditors of defendant Charles Hroch, both present and prospective, in the collection of their debts against him; and that the same were received by the defendant Tillie Hroch with full knowledge of the purpose of the conveyances and with fraudulent intent to aid and assist in the same.

In their joint answer the defendants joined issue with the plaintiffs. Such answer consisted, first, of a general denial, and, secondly, alleged with particularity that the defendant Charles Hroch was indebted to the defendant Tillie Hroch in the sum of $4,500, together with accrued interest thereon, and that the actual consideration of said transfers by Hroch to his wife was the cancelation of said indebtedness; that at the time said property was transferred it was encumbered, and that Tillie Hroch, by the cancelation of said indebtedness, paid full value therefor.

The allegations of this answer were put in issue by the reply of plaintiffs thereto.

A trial was had, and the district court, after a hearing largely upon oral evidence and at which the witnesses personally appeared and testified, found generally in favor of the plaintiffs and against the defendants, and each of them, upon the cause of action set forth in plaintiffs' petition, and found that the allegations therein set forth were true; and further adjudged that there was due the plaintiffs upon their judgment the sum of $1,226.20 with interest thereon at 8 per cent., and costs of suit taxed at $16.60;

vacated and set aside the conveyances of the real estate and the personal property, and subjected both the personal property and the real estate (preserving, however, the homestead rights of the defendants) to the payment of the debt evidenced by plaintiffs' judgment.

It is contended by the defendants at the bar of this court that the judgment in this case must be reversed and a recovery denied, for the reason that plaintiffs have neither pleaded nor proved the issuance of an execution upon their judgment and its return *nulla bona* before the institution of this creditors' suit. However, the record before us discloses that this question was not presented to the trial court. Therefore, it may not be considered by us at the present time. *Halbert v. Rosenbalm*, 49 Neb. 498, 68 N. W. 622; *Goodwin v. Rosebud Cattle Co.*, 112 Neb. 90, 198 N. W. 568; *Lyons v. Austin*, 126 Neb. 248, 252 N. W. 908.

In addition, the undisputed facts disclosed by the present record invoke the rule of procedure announced by this court in *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N. W. 617, in the following terms, viz.:

"There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which an execution at law cannot be levied; the other in aid of an execution at law, as to set aside an encumbrance or a transfer of property made to defraud creditors. In the first class of cases the creditor must allege and show that he has exhausted his remedy at law, while in the second it is sufficient to show that his 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. The equity court in such case is merely lending its assistance to the legal tribunal to remove a fraudulent obstruction interposed to the execution of its writ."

See, also, *Thies v. Thies*, 111 Neb. 805, 198 N. W. 151.

Our statutory provision applicable to this class of cases is, viz.:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things

in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded shall be void." Comp. St. 1929, sec. 36-401.

In the application of this provision to transactions between husband and wife, especially where the result thereof is to deny creditors of the husband their just demands, we are committed to the doctrine that conveyances between close relatives are presumptively fraudulent as to an existing creditor, and in litigation between the creditor and the parties to the conveyance over its alleged invalidity, the burden is on them to establish the good faith of the transaction by a preponderance of the evidence. *Lincoln Savings & Loan Ass'n v. Mann,* 129 Neb. 26, 260 N. W. 559; *Waterbury State Bank v. O'Neill,* 129 Neb. 150, 260 N. W. 808; *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854.

In the instant case, the conveyances were made after both the husband and wife knew of the existence of the plaintiffs' indebtedness prior to the making of such conveyances, and also were advised of the intent of the creditors to early enforce the same by judicial proceedings.

The evidence of defendants is that, including a $2,000 homestead exemption and the prior encumbrances on the land, the actual consideration for the transfer by the husband to the wife was $13,107, and that the value of the land did not exceed $65 an acre.

Plaintiffs' evidence, given by witnesses who so far as the record discloses are disinterested, is that the value of the land alone amounted to $16,000, and the value of the personal property transferred amounted to approximately $1,500. The evidence also discloses that there was no inventory or valuation of the personal property transferred to the wife, and that the two transfers embraced all of the debtor's property.

The evidence as to the origin and continuance of the indebtedness that constitutes the foundation of the claim of Tillie Hroch, and its subsequent transfer to her, is wholly unsatisfactory and unconvincing.

"Fraudulent intent may be established by proof of facts from which such inference may be reasonably drawn." *Peterson v. Wahlquist,* 125 Neb. 247, 249 N. W. 678.

It is also true: "On appeal in equity cases, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying." *State v. Cheyenne County,* 123 Neb. 1, 241 N. W. 747. See, also, *Harbine Bank of Fairbury v. McCune,* 131 Neb. 419, 268 N. W. 358.

A careful examination of the entire record, in the light of the authorities cited, convinces us that the trial court was correct in the determination by it made in this action.

The judgment of the district court is, therefore,

AFFIRMED.

MARGARET CROSBY, APPELLANT, V. CHRISTOPHER C. CROSBY ET AL., APPELLEES.

274 N. W. 592

FILED JULY 22, 1937. No. 30059.

Evidence in the record examined *de novo,* and *held* to support and sustain the findings of the district court as to terms of the contract of sale in suit, but also *held* to establish that the total amount paid on said contract price by the defendants was the sum of $430, and no more.

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

Anson H. Bigelow, for appellant.

Samuel L. Winters, contra.

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and SPEAR and KROGER, District Judges.

EBERLY, J.

This is an action in equity wherein Margaret Crosby is plaintiff and appellant, and Christopher C. Crosby and Margaret Crosby, husband and wife, are defendants. From a judgment in favor of the defendants, plaintiff appeals.

This litigation arises out of the following events: Philip Crosby departed this life leaving an estate of which lots 9 and 10, block 29, Corrigan Place, First Addition to the city of South Omaha, Nebraska, constituted a part. He was survived by a brother, Christopher C. Crosby, and Margaret Crosby, Mae Estman (née Crosby), Elizabeth Johnson (née Crosby), sisters, and the descendants of a sister that had predeceased him. At the commencement of this suit in equity, according to the record, the administration of the estate of Philip Crosby had been completed, the final report of same had been approved, and the estate settled. The real estate described had vested in the parties above enumerated. It appears that negotiations were had between the survivors for the sale of the above real estate to Christopher C. Crosby, the exact nature and effect of which was one of the issues for determination in this litigation. Margaret Crosby had acquired the interest of her sisters and her deceased sister's descendants in the two lots described, and was then the owner of an undivided four-fifths thereof. Pursuant to negotiations had with her brother Christopher, she conveyed her four-fifths interest to him by a warranty deed executed on or about December 7, 1935. At this time he gave her a check for $500. As to the application of this $500, as made by agreement of parties, Margaret Crosby's testimony is, viz.:

"Q. Was the deed drawn up in Mr. Fitzgerald's office? A. Yes. Q. Go ahead and tell what happened then. A. Then he paid $430; that would be $430 on this interest in the property, and $70—that was his share—he said he would help pay for this abstract; the abstract was lost and we had to get a new abstract, and the special back taxes—that would make his share $70. Q. The special back taxes were how much? A. $313 or $314; the abstract was $37.50.

Q. It made all together what? A. About $70. Q. Well, how much all together? A. $350, I think—I don't know. Q. $70 for each fifth share; is that it? A. Yes. Q. $350? A. Yes. Q. Was this matter of taxes talked over before this sale of the property? A. Yes; it was talked over, and he said he was willing to go in it if we divided it amongst all of us, and we said that was because we didn't know of the special taxes or we would have paid it long ago, because we always paid our taxes. Q. What did he offer to do with reference to those taxes? A. Well, he offered to divide, and he did. Q. That is, he did what? A. He took that $70 for his share. Q. And how much did he pay you on that occasion? A. Well, $430. Q. And then the $70? A. Yes; for the taxes; that made a total of $500. Q. The check that he gave you was for— A. $500; yes. Q. Now, was there any talk at any time that he was not to pay the $70? A. No; no talk." On this particular subject Christopher Crosby testified:

"Q. When did the question of taxes come up? A. After they got the abstract then they found out the taxes, and that is the first time the taxes came up, after I got the deed. Q. Then what did you do? A. I told them I already knowed a couple of days before, I went down to Fitzgerald and he already told me there was some back taxes. Q. I am not asking you that: What did you do about the back taxes? A. Why, they took it out of the $500; I was willing to see it through; they told me I had a share in the property and was going to charge the taxes up, and I said all right."

It is obvious that the undisputed testimony of all parties is that $70 of Christopher's $500 was, by mutual consent, applied in payment of his share of the unpaid taxes and special assessments, which were unpaid liens on the premises, and his share of the cost of the abstract.

Thereafter, due to the disagreement of the parties as to the exact amount of purchase price, Margaret claiming that $1,000 was the price of the four-fifths share owned by her, and Christopher contending that the $1,000 agreed upon was for the premises as an entirety, this litigation followed.

Margaret, in her petition in equity, set forth her claims as to the terms of the contract; alleged that the defendant Christopher Crosby "paid to her a part only of the said consideration, to wit, the sum of $430;" offered to refund the same; and prayed for a cancelation of the deed of December 7, 1935, and for an order decreeing that defendants hold title to said property as trustees for the plaintiff as to a four-fifths interest therein, and for other relief.

To this petition the defendants filed their answer, in which were set forth their respective claims as to the actual terms incorporated in the agreement for the sale of the real estate between plaintiff and defendants; contained a general denial of the allegations of plaintiff's petition; and alleged the payment of the sum of $500 by the defendant on the agreed purchase price.

Upon the issues thus formed a trial was had, at the close of which a decree was entered, in substance, finding for the defendants; finding that they had paid the sum of $500 to plaintiff upon the purchase price, and determining the amount remaining unpaid to be the sum of $300, with interest from December 11, 1935, at 6 per cent. per annum.

A careful consideration of the record *de novo* leads to the conclusion that the finding of the trial court as to the terms of the contract of sale of the real estate is amply supported by the evidence, and we accept the same as correct. However, it also appears that the trial court erred in finding that the amount of the payment which defendants were entitled to have credited on the purchase price was $500. Under the undisputed evidence, hereinbefore set out, such payment amounted to the sum of $430 only. The judgment of the district court is reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff for the sum of $370 with interest at 6 per cent. from December 11, 1935; otherwise, judgment to be in accordance with the decree entered. It is further ordered that each party pay their own costs in this court.

REVERSED.

MINER HINMAN ET AL., APPELLEES, V. FRED L. TEMPLE ET AL., APPELLANTS.
274 N. W. 605

FILED JULY 22, 1937. No. 30121.

1. **Statutes.** Where an act of the legislature is complete and independent in itself, it may change or modify the provisions of existing statutes without controverting section 14, art. III of the Constitution, relating to amendments.
2. **Municipal Corporations:** IMPROVEMENTS. When the purpose and effect of an improvement is to improve the locality, the improvement is a local one though there is incidental benefit to the public; but if the primary purpose and effect is to benefit the public, the improvement is not local although it may incidentally benefit property in the particular locality.
3. ———: ———. The construction of a viaduct over a railroad right of way, under the facts disclosed by the record in this case, *held* to be an improvement for the benefit of the general public, and not a local one.
4. **Constitutional Law.** Where a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of a court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid.

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

James T. Keefe, Beeler, Crosby & Baskins and *Robert B. Crosby,* for appellants.

Halligan, McIntosh & Halligan, contra.

Richard C. Hunter, Attorney General, Bert L. Overcash and *W. J. Courtright, amici curiæ.*

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

CARTER, J.

This is a suit for an injunction brought by the plaintiffs to enjoin the defendants from the construction of a viaduct in the city of North Platte, to enjoin the sale of bonds to pay right of way damages therefor, and to restrain the

levying of any general property tax to pay the right of way damages growing out of the construction of the viaduct. The trial court enjoined the levying of a general property tax in the city of North Platte for the payment of damages or for the payment of bonds issued to raise money for that purpose. From this decree, defendants appeal.

It is the contention of the plaintiffs that the statute authorizing the issuance of the bonds of the city to pay damages resulting from the construction of the viaduct is unconstitutional for the reason that it attempts to amend numerous sections of the statutes of Nebraska without setting out the sections so amended, and repealing the old, contrary to section 14, art. III of the Constitution, and, for the further reason, that said statute provides for the levy of a general tax to pay for a local improvement contrary to section 6, art. VIII of the Constitution of Nebraska.

The act of the legislature authorizing the proceedings in the case at bar is Senate File No. 7, chapter 34, Laws 1935, Special Session, as amended by Senate File No. 14, chapter 35, Laws 1935, Special Session, the title to which is as follows: "An act to permit cities of the first class, second class and villages to avail themselves of federal funds for the construction of subways and viaducts over or under railroad tracks, providing methods and procedure therefor, including the acquiring of additional ground therefor, the determination of damages consequent to such taking and construction, provisions for compensation for property taken or damaged, methods for payment of damages, and the levy of taxes and issuance of bonds and warrants for such payment, and granting powers to such cities and villages and to the department of roads and irrigation to carry such projects into effect, and providing full and complete provision for all matters incident thereto; and to declare an emergency."

An examination of the act discloses that it is a complete and independent act. Such being the case, section 14, art. III of the Constitution, does not require that other statutes with which it conflicts should be set out as amended and

accompanied by a repeal of the older conflicting statutes. The applicable rule is stated in *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709, as follows: "If an act is complete and independent in itself, it may amend or modify the provisions of existing statutes without controverting the provisions of the Constitution relating to amendments." Other cases to the same effect are: *State v. Price,* 127 Neb. 132, 254 N. W. 889; *State v. Lehmkuhl,* 127 Neb. 812, 257 N. W. 229.

The contention is made that a viaduct is a local improvement and that the provisions of the statute under consideration providing for the payment of damages by taxing all of the property in the city violate section 6, art. VIII of the Nebraska Constitution. This section of the Constitution is as follows: "The legislature may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessments, or by special taxation of property, benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The term "local improvement" is not defined by statute. The difference between a local and general improvement is well discussed in the case of *Village of Downers Grove v. Bailey,* 325 Ill. 186, 156 N. E. 362, wherein the court said: "Whether an improvement is local or general depends upon the nature of the work, the situation of the improvement, the surrounding conditions, and whether the substantial benefits to be derived therefrom are local or general in their nature. * * * Whether an improvement is local or general is a question of law but whether the facts in a particular case bring an improvement within the definition of a local or general improvement is a question of fact, to be determined from all the facts and circumstances established by the evidence. * * * Whether or not an improvement is local or general depends upon the nature of the improvement and whether the substantial benefits to be de-

rived are local or general in their nature. If its purpose and effect are to improve a locality it is a local improvement although there is incidental benefit to the public, but if the primary purpose and effect are to benefit the public it is not a local improvement although it may incidentally benefit property in a particular locality. * * * The fact that an improvement will be of advantage to the city does not change its character as a local improvement if primarily of material advantage to the adjacent property, and where the improvement enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality it is a local improvement."

Also, in the case of *City of Waukegan v. DeWolf,* 258 Ill. 374, 101 N. E. 532, the court said: "A local improvement has been defined to be a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality. * * * This definition, which was intended to be explanatory of a 'local improvement,' has not, perhaps, added very much to the words themselves. As was said in *State v. Reis,* 38 Minn. 371, the only essential elements of a local improvement are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature and not enjoyed by property, generally, in the city. The definition given in *Crane v. Siloam Springs,* 67 Ark. 30, is: 'If we look for the technical or legal meaning of the phrase "local improvement," we find it to be a public improvement, which, although it may incidentally benefit the public at large, is made primarily for the accommodation and convenience of the inhabitants of a particular locality, and which is of such a nature as to confer a special benefit upon the real property adjoining or near the locality of the improvement.' An improvement is not a local improvement, within the meaning of the Constitution and statute, merely because it is constructed in a particular locality, since every improvement has a particular location, and is also local in the sense of being nearer to some per-

sons and property than to others. * * * Such a rule would authorize a special assessment for every improvement in a municipality. Neither is an improvement of a local nature merely because it confers a greater benefit on particular pieces of property than upon others throughout the municipality."

And, likewise, in the case of *Hurd v. Sanitary Sewer District*, 109 Neb. 384, 191 N. W. 438, we said: "The main sewers and disposal plant in question are general improvements conferring general benefits upon all property in the city—the disposal plant because it benefits all property in the city alike; the main sewers, for the same reason, to the extent that they serve the public generally as distinguished from the special service to abutting owners. 'A local improvement, within the meaning of the statute, is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it through the municipality.' *City of Chicago v. Blair*, 149 Ill. 310. A valuable discussion of the difference between general and local improvements will be found in *City of Waukegan v. DeWolf*, 258 Ill. 374."

Under these holdings it becomes necessary to determine from the evidence whether the viaduct is a general or local improvement. The city of North Platte is a city of the first class having a population approximating 12,000 persons. The evidence shows that the viaduct is being built on Jeffers street, one of the main streets of the city, at a point where it crosses the main line and switch tracks of the Union Pacific Railroad Company, and extends approximately 300 feet on each side of the railroad right of way. The record also discloses that U. S. Highway No. 30, commonly called the Lincoln Highway, crosses the Union Pacific Railroad tracks at this point. They are also crossed by U. S. Highway No. 183, commonly called the Great Plains Highway. Both of these highways are main transcontinental highways, carrying very heavy traffic. The city of North Platte is divided by the Union Pacific Railroad

tracks into a north and a south section. Many business places, residences and the railroad shops are located on the north side, while the post office, courthouse, high school, many business houses and residences are located on the south side. Several witnesses testified that the property adjacent to the viaduct was damaged thereby and that abutting properties received no benefit from the improvement. This evidence is not disputed in the record. Whether or not this viaduct is a local improvement to be paid for by special assessment within the purview of section 6, art. VIII of the Constitution, is dependent entirely upon the question of special benefits to abutting property owners. If the primary purpose of the improvement is to benefit the locality where it is constructed, it is, of course, a local improvement within the meaning of the constitutional provision. But, on the other hand, if the primary purpose and effect of the improvement is to benefit the public generally, it is not a local improvement although it may incidentally benefit property owners in the particular locality. Under the evidence shown by the record, we are constrained to hold that the viaduct in question is not a local improvement within the meaning of that term as used in section 6, art. VIII of the Constitution.

The question immediately arises whether the city of North Platte has authority to aid in the construction of a viaduct with funds raised by general taxation. It must be conceded that the damages occasioned by the construction of a viaduct are a necessary part of the costs of such construction. *Phœnix Mutual Life Ins. Co. v. City of Lincoln,* 91 Neb. 150, 135 N. W. 445. The construction of a viaduct over a railroad for public use is clearly a public improvement which may be paid for by special assessment to the extent that the abutting property is benefited, and by general taxation if it is not. In *Hurd v. Sanitary Sewer District, supra,* we said: "Special assessments can only be levied upon property specially benefited, and only to the extent of such benefit. They may not be based upon a general benefit which results from a public improvement; such

benefit is a proper basis for general, but not special, taxation. * * * Ample power to construct sewers is conferred by this and other sections of the statutes governing cities of the second class; but the cost thereof, beyond the special benefits conferred, must be raised by general taxes upon all the taxable property of the city, real and personal, on the basis of valuation." The viaduct in question being a public improvement of general benefit, we know of no constitutional provision that prevents the city of North Platte from levying a general tax to provide for the payment of its share of the cost.

The contention is made that the exemption of the railroad company from the payment of involuntary contributions violates sections 1, 2 and 6, art. VIII of the Constitution.

The part of the act in question reads as follows: "Grade crossing projects shall be undertaken on a basis that will impose no involuntary contributions on the affected railroads, and shall not interfere with the use of present railroad tracks without the consent of such railroad." Laws 1935, Special Session, ch. 34, sec. 2.

Section 1, art. VIII of the Constitution, provides: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property. Taxes other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the legislature."

That part of section 2, art. VIII, material to this case, provides: "No property shall be exempt from taxation except as provided in this section."

Section 6, art. VIII, has been hereinbefore set out in this opinion.

It is the contention of plaintiffs that, in exempting the railroads from the payment of involuntary contributions,

the statute thereby exempts them from the payment of their general taxes levied for the payment of the city's share of the cost of the viaduct. If it were the intention of the legislature to exempt the payment of such taxes, the contention of plaintiffs would be correct. However, it is the duty of this court to put a construction upon the statute in harmony with the Constitution, if it is possible to so do. In our opinion it was the intent of the legislature to exempt the railroad companies from the payment of special assessments on benefits received and not to exempt them from the payment of any general tax. This being true, the act in no way contravenes the sections of the Constitution mentioned.

We necessarily conclude that the questions raised by plaintiffs do not disclose any conflict between the viaduct statute and section 14, art. III, and sections 1, 2 and 6, art. VIII, of the Constitution of Nebraska. The trial court was in error when it enjoined the defendants from levying or collecting any taxes upon the taxable property of the city for the payment of the viaduct bonds issued by the city, or of the interest accumulating thereon, and in enjoining the issuance of additional bonds or warrants for the payment of damages authorized by the electors of the city. The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

OMAHA LOAN & BUILDING ASSOCIATION, APPELLEE, V. HARRIET L. BIGELOW ET AL., APPELLEES: METROPOLITAN UTILITIES DISTRICT, APPELLANT.

274 N. W. 574

FILED JULY 22, 1937. No. 30005.

Fixtures. Where the removal of the fixtures will not materially injure the premises, the seller thereof retaining title thereto may assert his rights against a prior mortgagee of the realty.

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

Dana B. Van Dusen, for appellant.

Penelope H. Anderson, R. B. Hasselquist and *Anson H. Bigelow, contra.*

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

LIGHTNER, District Judge.

This is a contest between a prior mortgagee and a conditional sales vendor, and the single question presented is the right of the conditional sales vendor to remove a gas furnace which it placed in the property subsequent to the date of the mortgage. The district court held that the rights of the mortgagee were superior and gave the vendor of the furnace a money judgment only.

The real estate mortgage was executed in March, 1929. Two and one-half years later, in October, 1931, the Metropolitan Utilities District sold to the mortgagor, and installed in the premises, a gas furnace, pursuant to the usual written form of conditional sale, reserving title in seller until completion of payments. No payments whatever were made on the conditional sales contract. The furnace was neither bolted nor otherwise secured to the realty and could be removed without injury thereto.

When the mortgage was given the property was equipped with a hot air furnace which was removed by appellant at the time of the installation of the gas furnace in question, more than two years after the execution and recording of the real estate mortgage.

"The preponderance of authority is to the effect that, where the removal of the fixture will not materially injure the premises, a seller thereof retaining title thereto may assert his right as against a prior mortgagee of the realty." Note, 13 A. L. R. 461.

The subject is further annotated in 73 A. L. R. 755, and 88 A. L. R. 1324. It appears from these annotations that

the overwhelming weight of authority sustains the rule above stated. The opposite rule known as the Massachusetts rule is referred to in 13 A. L. R. 471; 73 A. L. R. 763; 88 A. L. R. 1335. Our own court has adopted the majority rule. The latest expression is in *Swift Lumber & Fuel Co.* v. *Elwanger*, 127 Neb. 740, 256 N. W. 875, wherein our court holds:

"Articles, such as boiler, burner, tank and Frigidaire equipment, which may or may not become attached to the freehold, according to the circumstances, will retain their character of personalty where sold under contract in which title is retained in vendor until purchase price is paid, when the rights of innocent third persons are not adversely affected thereby.

"Where the removal of a boiler, burner and tank will not materially injure the premises, the right thereto of the vendor who retained title under conditional sale contract, *held* superior to that of prior real estate vendor of said premises under executory contract of sale who has not made any advances or lost any rights by reason of the annexation of such articles."

Just prior to the holding in the *Elwanger* case, our court held in *Frost v. Schinkel*, 121 Neb. 784, 238 N. W. 659, 77 A. L. R. 1381: "Where the removal of chattels will not materially injure the premises, the vendor who retains title may assert his right against a prior real estate mortgage." See, also, *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286, 77 N. W. 677, and *Edwards & Bradford Lumber Co. v. Rank*, 57 Neb. 323, 77 N. W. 765, which hold to the same effect.

"The reason is that, as the mortgage is merely security, the mortgagee has advanced nothing in reliance on the value of the subsequently annexed chattels and he should not be permitted to acquire them as a part of his security, contrary to the intention of the party making the annexation and to the injury of the seller." *Holland Furnace Co. v. Bird*, 45 Wyo. 471, 21 Pac. (2d) 825. See, also, *Swift Lumber & Fuel Co. v. Elwanger*, 127 Neb. 740, 256 N. W. 875.

Appellees rely upon the Massachusetts rule, but such has never been the law of Nebraska.

Our court, however, has not passed upon the effect of the fact that the new gas furnace replaced the old coal furnace. In the note from 13 A. L. R., above referred to, it is said at page 468: "There is a difference of opinion as to the effect upon the rights of the parties of the circumstance that the machinery to which the seller reserves title takes the place of old machinery removed from the premises."

The weight of authority referred to in the note indicates that, regardless of such fact the conditional sales vendor may enforce his contract. Cases cited are *Page v. Edwards,* 64 Vt. 124, 23 Atl. 917; *Raymond Co. v. Ball,* 210 Fed. 217; *Wolf Co. v. Hermann Savings Bank,* 168 Mo. App. 549, 153 S. W. 1094; *Davis v. Bliss,* 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. n. s. 458; *Hill v. Sewald,* 53 Pa. St. 271, 91 Am. Dec. 209.

In *Davis v. Bliss, supra,* it is held: "That a conditional vendee of real estate, in installing machinery thereon, removed from the premises old machinery which he sold and the proceeds of which he appropriated to his own use, does not, in the absence of anything to show that the vendor assented to its removal in reliance upon its being replaced by new machinery, entitle him to the latter as against the claim of the vendor, who reserved the title until the price was paid." 10 L. R. A. n. s. 458.

This New York case of *Davis v. Bliss, supra,* was cited with approval by our court in *Swift Lumber & Fuel Co. v. Elwanger, supra,* where, at page 747, it is said, referring to *Davis v. Bliss*: "The court also say that stress is laid upon the fact that, when the purchaser installed the engine, the old engine was removed and appropriated to his use, and then state that, if the vendor of the real estate has been wronged thereby, she has a right of action against the wrong-doer."

Appellees contend that the removal of the furnace from the building will materially injure the premises because it will not be as useful or as tenantable without it. The su-

preme court of Michigan dispose of this contention in *Woodliff v. Citizens Bldg. & Realty Co.*, 240 Mich. 413, 215 N. W. 343, as follows: "In this connection we note the argument of the defendants' counsel that, though the elevator could be removed without serious injury to the building, its removal would prevent the use and operation of the building as a 7-story apartment house, and for that reason could not be removed without material injury to the apartment. The fact that the elevator was essential to the use of the apartment house would not give the defendants any right to appropriate it. *Detroit Steel Cooperage Co. v. Sisterville Brewing Co.*, 233 U. S. 712."

The facts in regard to the removal of the old furnace and putting in of the new furnace are not stated very fully in the instant case. Appellant alleged in its answer that the gas furnace was installed pursuant to a conditional sales contract with Mr. Bigelow upon which nothing had been paid. The conditional sales contract does not refer to the old furnace. The stipulation of facts which constitutes the only evidence in the case in regard to the old furnace is as follows: "That at the time of the execution and delivery of the mortgage set out in plaintiff's petition, the real estate involved was improved by a modern residence in which a coal furnace had been installed; that at the time of the installation of the gas furnace referred to in the pleadings, the coal furnace was removed from the premises and replaced by said gas furnace, all without notice of any kind to the plaintiff, and without the consent of the plaintiff."

It will thus be seen that the condition of the coal furnace is not shown, nor its value, nor its adequacy as a heating plant for the residence in question at the time it was removed therefrom.

The proper course would probably be to permit the vendor to repossess the gas furnace in accordance with its contract, but adjusting the rights of the parties on account of the removal of the old furnace in accordance with equitable principles. However, in this case the facts mak-

ing such course possible were neither pleaded nor proved.

Reversed and remanded, with directions to the district court to grant appellant appropriate relief consistent with the views herein expressed.

REVERSED.

GEORGE A. FISHER, APPELLANT, V. NATIONAL MORTGAGE LOAN COMPANY ET AL., APPELLEES.
274 N. W. 568

FILED JULY 22, 1937. No. 29728.

Opinion on motions for rehearing of case reported in 132 Neb. 185, 271 N. W. 433. Former opinion modified, and motions for rehearing overruled, and judgment of the district court reversed and cause remanded, with directions.

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

Opinion on motions for rehearing of case reported in 132 Neb. 185. *Former opinion modified.*

Stewart, Stewart & Whitworth, Bernard S. Gradwohl and *Charles B. Paine,* for appellant.

Peterson & Devoe, Meredith K. Nelson and *E. S. Nickerson, contra.*

Heard before ROSE, EBERLY, DAY and CARTER, JJ., and HASTINGS, MUNDAY and RINE, District Judges.

MUNDAY, District Judge.

This case has been previously heard by the court and an opinion adopted. *Fisher v. National Mtg. Loan Co.,* 132 Neb. 185, 271 N. W. 433. Subsequently oral argument was ordered on the separate motion of each of the parties for rehearing.

We are convinced that the law of the case as set forth in syllabi 1, 2, 3, 4, 5, 6, 8 and 9, in the former opinion, is correct, and it is adhered to in this opinion.

However, on reconsideration we are also of the opinion that the facts shown by the record, most of which are set out in the former opinion, require: The appointment of a receiver for the defendant corporation; that an increased amount should be allowed for the services of appellant's attorneys and that the district court should determine on evidence such reasonable amount that should be so allowed for their services, both in the district court and this court, and tax the same as costs in the case; that the judgment of the district court should be reversed and the case remanded.

The former opinion contained the following order:

"The judgment of the district court is affirmed in that part wherein a receiver is not appointed and wherein it does not allow any attorneys' fees, expenses and other claims paid or obligations created by the defendant Hartigan for and in behalf of said corporation, and wherein it does not change the salaries of the officers of the corporation. In all other respects said judgment is reversed and it is ordered that the defendant Hartigan pay to said corporation the sum of $24,800 with interest thereon at 6 per cent. per annum from January 1, 1934; that the defendant corporation pay the sum of $400, taxed as costs, to plaintiff for plaintiff's attorneys for services to them in the district court and in this court in this case, and that the appellees pay the other costs taxed in the action both in the district court and in this court. Affirmed in part and reversed in part."

This order should be set aside and considered deleted from the opinion, and in lieu thereof the following order substituted:

That the judgment of the district court is reversed and the cause remanded to that court for the appointment of a receiver by that court for the defendant, National Mortgage Loan Company, to liquidate and wind up all the affairs of said corporation; that the district court determine on evidence the attorneys' fees that should be allowed appellant's attorneys for services in the case and tax the same as costs in the case; that the defendant Hartigan pay the

said corporation the sum of $24,800 and interest thereon at 6 per cent. per annum from January 1, 1934; that said receiver take charge of the assets and affairs of said corporation to the end that said corporation shall be liquidated and its affairs wound up, and do such things as are legal and ought to be done with reference to all claims of every nature against said corporation, and do the same as to recovery of excessive salaries, if any, taken by officers of the corporation, and do the same as to all other matters of the corporation, all under the direction of the district court; that the attorneys' fees so taxed as costs for appellant's attorneys be paid by the defendant corporation, and that all other costs both in the district court and this court be taxed to the appellees.

To the extent set forth in this opinion, the former opinion and syllabus 7 thereof are modified so as to conform with this opinion.

Motions for rehearing overruled.

FORMER OPINION MODIFIED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1937

IN RE INTEGRATION OF THE NEBRASKA STATE BAR ASSOCIATION.

275 N. W. 265

FILED SEPTEMBER 20, 1937. No. 30179.

1. **Constitutional Law.** 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.
2. ———. In the absence of an express grant of this power to any one of the three departments, it must, when the occasion demands, be exercised by the department to which it naturally belongs.
3. ———. The term "inherent power of the judiciary" means that power which is essential to the existence, dignity and functions of the court from the very fact that it is a court.
4. **Attorney and Client.** The supreme court of this state has the inherent power to regulate the conduct and qualifications of attorneys as officers of the court.
5. **Constitutional Law.** 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.
6. ———. 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.
7. **Attorney and Client.** This court, having the inherent power to define and regulate the practice of law, has authority, in the exercise of a sound judicial discretion, to promulgate rules providing for the integration of the bar of the state.

Petition for integration of the Nebraska State Bar Association. *Petition granted.*

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

CARTER, J.

This matter comes before the court upon the petition of David A. Fitch and others praying that the bar of the state of Nebraska be integrated by rule of this court. The petition recites that petitioners are a committee of lawyers of the Nebraska State Bar Association appointed to investigate and report concerning the integration of the bar of the state of Nebraska; that the committee made its report to the Nebraska State Bar Association and that it was duly approved by said association; that the report as approved provided for its submission to all members of the bar of the state and for the taking of a referendum by a secret mail vote thereon; that said report has been submitted and the vote taken with the result that 595 members of the bar voted for bar integration by supreme court rule and 155 against; that petitioners feel that a large majority of the members of the bar of this state, as well as informed public opinion, favor bar integration by supreme court rule as a means of providing better service to the public by the legal profession, of effectively combating the unauthorized practice of law, and of improving the ethical standards of the profession and giving to it the high public esteem that it should enjoy.

The presentation of this petition to this court immediately raises the question of the power of the court to proceed in the manner suggested by the petitioners.

Section 1, art. II of the Constitution of Nebraska, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." It is clear that this constitutional provision requires that the three departments of government must be kept separate and that each must operate only within its own sphere.

Section 1, art. V of our Constitution, vests the judicial power of the state in this and other courts named therein in the following language: "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law; but other courts may be substituted by law for justices of the peace within such districts, and with such additional civil and criminal jurisdiction as may be provided by law."

The Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "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.' 1 Andrews' American Law (2d ed.) sec. 182, p. 221." *In Matter of Richards,* 333 Mo. 907, 63 S. W. (2d) 672. And, also, in the case of *State v. Washburn,* 167 Mo. 680, 67 S. W. 592, the Missouri court aptly stated the rule in the following language: "All governmental powers are in their natures either legislative, executive or judicial. The Constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that belong to one department from those that belong to the two others are discernible to the learned mind. But in that article of the Constitution all the powers of the state government are disposed of, and every one who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the Constitution it is assigned."

There being no express grant of power in the Constitution to any of the three departments of government to define and regulate the practice of law, the question is—to what department does that power naturally belong?

In the case of *In re Disbarment Proceedings of Newby,* 76 Neb. 482, 107 N. W. 850, this court said:

"Attorneys practicing in the district courts of this state are officers of the courts in which they practice. Their position is an honorable one; they are the trusted advisers of the court. There can be no doubt that the court has ample power to protect itself against dishonorable and corrupt practitioners. * * *

"Our statute contains no provision for disbarment proceeedings. This matter is left to the common-law power and duty of the various courts. It is a principle of general, if not uniform, application that the court which is entrusted with the power and the duty of determining the qualifications for admission to the bar has, by implication, the power and duty also to determine when those qualifications are wanting, and when the privilege of that high calling has been forfeited. This court has the sole power of admission to the bar, and therefore has sole power to annul such admission when sufficient cause appears. Charges of misconduct and deceit in the district court are properly entertained and dealt with in that court. Charges of criminal or immoral conduct calling for disbarment should be addressed to this court." See, also, *State v. Goldman,* 127 Neb. 340, 255 N. W. 32.

In *State v. Barlow,* 131 Neb. 294, 268 N. W. 95, we held that this court was vested with exclusive power to determine the qualifications of persons who may be permitted to practice law in this state, was possessed of the exclusive power to disbar licensed attorneys who have been unfaithful to the trust which the court reposed in them, to define the practice of law and to punish by contempt proceedings persons not licensed to practice law for usurping the privilege of acting as attorneys. See, also, *Rhode Island Bar Ass'n v. Automobile Service Ass'n,* 55 R. I. 122, 179 Atl. 139; *People*

v. People's Stock Yards State Bank, 344 Ill. 462, 176 N. E. 901; *Fitchette v. Taylor,* 191 Minn. 582, 254 N. W. 910.

In sustaining the Bar Integration Act passed by the legislature of Kentucky, the supreme court of that state said:

"The power to regulate the conduct and qualifications of its officers does not depend upon constitutional or statutory grounds. It is a power which is inherent in this court as a court—appropriate, indeed necessary, to the proper administration of justice. That we have, in deference to the Bar Integration Act (Ky. St. secs. 101-1, 101-2), set up a standing board of commissioners and machinery to conduct and report on investigations concerning the conduct of attorneys, does not alter the fact that we are but exerting an inherent power. * * *

"The argument that this is an arbitrary power which the court is arrogating to itself or accepting from the legislature likewise misconceives the nature of the duty. It has limitations no less real because they are inherent. It is an unpleasant task to sit in judgment upon a brother member of the bar, particularly where, as here, the facts are disputed. It is a grave responsibility, to be assumed only with a determination to uphold the ideals and traditions of an honorable profession and to protect the public from overreaching and fraud. The very burden of the duty is itself a guaranty that the power will not be misused or prostituted. The power is not made arbitrary merely because it exists in this court as well as in other courts of the Commonwealth. If not an arbitrary power in other courts, it is not arbitrary here." *In re Sparks,* 267 Ky. 93, 101 S. W. (2d) 194. See, also, *Commonwealth v. Harrington,* 266 Ky. 41, 98 S. W. (2d) 53; *Clark v. Austin,* 101 S. W. (2d) (Mo.) 977.

The claim of inherent judicial power is no novelty. There are many cases in which it has been invoked over the membership of the bar. It has been invoked in the admission, suspension, discipline and disbarment of attorneys and in these no legislative permission is considered requisite,

and, if a statute exists, it is regarded as declaratory of the inherent power of the judiciary and not exclusive in its provisions. 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 *In re Disbarment of Greathouse*, 189 Minn. 51, 248 N. W. 735, the court said:

"An attorney is not an officer of the state in a constitutional or statutory sense of that term, but he is an officer of the court, exercising a privilege during good behavior. This privilege is granted by the court in the exercise of judicial power, not as a mere administrative power. * * *

"The judicial power of this court has its origin in the Constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. This same power authorizes the making of rules of practice."

It must be borne in mind that attorneys are officers of the court, amenable to it as their superior. This is not on the theory that they are agents in the ordinary sense, but because they sustain that close intimate relationship to the bench which can best be expressed by the phrase "officer of the court."

As a prominent member of the bar of this country has well said:

"Being such appointees, the court has an immediate interest in the character of the bar, for the court's own sake. A good bar is a necessity for a good bench; and the labors of the latter are lightened and rendered more effective by the learning and ability of the bar, exactly as they are facilitated by efficient receivers, commissioners, referees, masters in chancery, bailiffs or probation officers; all of whom are subject to removal by the court. * * *

"But aside from the mere intellectual aid to be rendered the court by a competent bar, there is the inherent right of the court to surround itself with honest assistants who are sympathetic and will unite with it in the proper adminis-

tration of justice and in maintaining that administration on a high plane. That is the main business of the court; and whatever obstructs or embarrasses its chief function, must be under its control; it cannot practically reside anywhere else." Henry M. Dowling on "The Inherent Power of the Judiciary," 21 American Bar Ass'n Journal, 635.

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

The inherent power of this court which petitioners ask us to invoke has always existed. This power is not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or fact-finding purposes and to make recommendations, but the final decision must rest with the court.

The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. 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.

The petition in the matter before us is a request that this court adopt rules providing for the regulation of the bar of this state. In view of the authorities cited, we have come to the conclusion that this court has the inherent power to promulgate rules providing for an integrated bar.

While this court has ample power to provide for an integrated bar by court rule, the question whether the court should invoke that power for the purpose of integrating the bar of the state is a matter within the sound discretion of

the court. The inherent power of the court ought not to be promiscuously used. As was said by Chief Justice Taney in *Ex parte Secombe*, 19 How. (U. S.) 9: "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

That the courts and lawyers have been subjected to public criticism is common knowledge. That a few unethical practitioners have degraded the public esteem of the bar as a whole is a fact well known to every lawyer. The denunciation of the bar by the public is based on the belief that the bar could purge itself if it would, but that it does not wish to do so. In the past, reliance has been placed in the bar associations of the state to accomplish effective corrective results. We have overlooked the fact that the bench and bar are so intimately related that the problems of one are the problems of the other. We have come to the conclusion that the bar, of itself, can do little to better the situation. But, with a cooperating bench and bar, it appears to us that a more effective and efficient regulation of the bar would be the result. Under the plan suggested by the petitioners, it can be accomplished without invoking any power that this court has not already exercised in the past and without the delegation of any of its judicial functions to any agency of the bar. The matter of the admission, suspension, discipline and disbarment of attorneys still rests in this court, and this court alone. In the event of a failure of the plan to function as hoped, it can be corrected or abandoned by the amendment or revocation of the rule by the court in the exercise of its sound judicial discretion. Most courts in the past have shown a reluctance to act that has contributed to the criticism to which the bar has been subjected. We feel that it is our duty, especially where the request comes from so large a majority of the

bar who participated in the referendum on the subject, to consider favorably the adoption of rules providing for the integration of the bar of this state by court rule under the powers lodged in this court by the Constitution of the state. The prayer of the petitioners will therefore be granted.

RULES CREATING, CONTROLLING AND REGULATING NEBRASKA STATE BAR ASSOCIATION.

For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar, there is hereby organized, created and formed the Nebraska State Bar Association.

ARTICLE I.

Name

The name of this association shall be Nebraska State Bar Association.

ARTICLE II.

Membership

1. Those persons who, on January 1, 1938, are residents of this State and are licensed to practice law in this State, and those who shall thereafter become licensed to practice law in this State and are residents of this State, shall constitute the membership of the Nebraska State Bar Association.

2. Each member shall, within sixty (60) days from the effective date of these Rules, file with the Secretary of the State Bar Association a statement setting forth his business address and his residence address, and the Judicial District within which his principal office is located. He shall notify the Secretary in writing of any subsequent change in address.

ARTICLE III.

Classes of Membership

1. Members of the State Bar Association shall be di-

vided into two classes; namely, active members and inactive members.

2. The class of active members shall include all members who have not specifically requested to be enrolled as inactive members.

3. Any member who is not engaged actively in the practice of law in this State may, if he so elects, and files written application with the Secretary, be classified as an inactive member. Any inactive member may, on filing application with the Secretary, and on payment of the required dues, become an active member. No inactive member shall practice law, vote, or hold office in the State Bar Association.

ARTICLE IV.

Membership Dues

1. The annual dues for active members shall be Five Dollars ($5.00) per year, payable on or before January 1st of each year.

2. Persons admitted to the Bar after January 1st of any year shall, within sixty (60) days after such admission, register with the Secretary of the State Bar Association to be entitled to practice law, but shall not become liable for dues until January 1st following such admission.

3. When any member is in arrears more than two (2) months, the Secretary shall send written notice by registered mail to such member, addressed to his last recorded business address. Any member who shall fail to pay such arrearages within thirty (30) days after the receipt of such notice shall cease to be a member of this Association, and shall not practice law until the arrearages be fully paid.

4. The annual dues for inactive members shall be One Dollar ($1.00) per year, payable on or before January 1st of each year; and if any inactive member shall fail to pay his dues within thirty (30) days after receiving notice of such arrearage, as above provided, his license to practice law shall be suspended, and shall not be reinstated until and unless such arrearages shall have been paid.

ARTICLE V.

Officers

1. The officers of this Association shall be a President, three Vice Presidents, all of whom shall be elected at the annual meeting for a term of one (1) year, and a Secretary-Treasurer.

2. In addition thereto there shall be elected nine (9) members of the Executive Council, three (3) of whom shall be known as "Members at Large," and six (6) of whom shall be known as "District Members."

3. The first Executive Council of this Association shall be composed of the members of the Executive Council of the Nebraska State Bar Association, a voluntary association. As the term of office of the Members at Large of such Executive Council shall expire, their successors shall be elected by the Association at its annual meeting, for a term of three (3) years.

4. The District Members shall be elected as follows: There shall be elected one (1) member for each of the six (6) Supreme Court Judicial Districts, as said Districts are now numbered and constituted, or as they hereafter may be constituted. Said members shall be residents of the District which they represent, and shall be elected by the qualified members of the Association residing within such District. Their term of office shall be three (3) years.

5. The District Members shall be elected by a secret mail ballot within the calendar month next succeeding the annual meeting of the Association, in the following manner: The Secretary shall receive nominating petitions until the close of the day next following the conclusion of the annual meeting of the Association. The names of the two members whose petitions contain the largest number of signatures of members qualified to vote shall be placed on a printed ballot, except that every nominee receiving fifteen signatures or more shall be placed upon such ballot, but signatures for more than one candidate shall not be counted. If nominating petitions are not presented to the Secretary within the time prescribed, nominating at least two (2) candidates,

the Executive Council shall nominate additional members so as to place two (2) candidates on the ballot; but, in such case, there shall be nothing to indicate whether a candidate was nominated by petition or by the Executive Council. The ballot shall contain one blank space for writing in any name the voting member may desire.

6. Ballots shall be mailed to every member of the Association within the proper district not later than the 15th day of the calendar month succeeding such annual meeting. The ballots shall be returned to the office of the Secretary not later than the last day of such month, and only the ballots of those members shall be counted who are in good standing, including the payment of their dues for the year next preceding such election. The member receiving the highest number of votes at such secret ballot shall be the duly-elected member of the Council for such district, and shall take office immediately upon his election.

7. The Council shall make necessary rules for the distribution of ballots, for the counting of votes, and for the conduct of elections as shall carry out the true purpose of this section, but such regulations shall not contravene the express provisions hereof.

8. The President shall preside at all meetings of the Association and of the Council, and shall perform the duties usually belonging to such office. He shall also deliver an address at the regular meeting of the Association next succeeding his election.

9. The Vice Presidents, in the order of their election, shall preside at the meetings of the Association in the absence of the President, and perform such other duties as usually pertain to such office.

10. The Clerk of the Supreme Court shall be the Secretary-Treasurer of the Association. The Secretary-Treasurer shall be the custodian of the records and archives of the Association, and shall preserve and record its transactions. He shall collect all dues and other moneys belonging to the Association, and shall send out notices to delinquent members. He shall be the custodian of the moneys of the As-

sociation, which he shall disburse under the authority of the Council upon warrants of the President and Chairman of the Finance Committee, and shall make a report as Treasurer at the annual meeting, and shall receive reasonable compensation for his services.

11. The Executive Council shall consist of the President and the nine members above provided for. In addition to the other duties hereinbefore provided, it shall be the executive organ of the Association, shall provide suitable programs and entertainment at the meetings thereof, recommend by-laws from time to time as they appear to be required, fix the compensation to be allowed any officer, nominate officers, including Members at Large of the Council, to be voted upon by the Association. The Council shall not nominate any one of its membership for any office. In case of any vacancy in its membership, the Council shall have the power to fill such vacancy by appointment until the next regular election as herein provided.

12. Nominations other than those by the Council may be made by any member, but only in writing, filed with the Secretary. In case there are nominees for any office other than those by the Council, election on such office shall be by secret ballot, restricted to members in good standing.

ARTICLE VI.

Committees

1. As soon as possible after the regular annual meeting of the Association, the President shall appoint standing committees for the ensuing year, to consist of not fewer than three (3) members each, to wit:

a. A Committee on Legislation.

b. A Committee on Judiciary.

c. A Committee on Legal Education.

d. A Committee on American Citizenship.

e. A Committee on Cooperation with the American Law Institute.

f. A Committee on Unauthorized Practice of the Law.

g. A Committee on Finance.

2. It shall be the duty of the Committee on Legislation to consider and recommend to the Association action concerning proposed legislation and constitutional amendments.

3. It shall be the duty of the Committee on Judiciary to consider and recommend to the Association action concerning the relation between the Bench and the Bar, and the procedure and rules of court.

4. It shall be the duty of the Committee on Legal Education to consider and recommend to the Association action concerning the legal education in public and private institutions in the State of Nebraska, and qualifications for admission to the Bar.

5. The Committee on American Citizenship shall consist of a Chairman to be appointed by the President of the Association; the State member of the General Council of the American Bar Association, as Vice Chairman; the President of the State Bar Association as a Vice Chairman; the Secretary of the State Bar Association, who shall serve as Secretary of the Committee, and in addition thereto one member of this Association from each Congressional District in the State to be appointed by the President of the Association. The Committee so constituted shall function in an executive capacity for a larger committee, to be selected by the committee of ten above named, and to consist of at least one representative from each Judicial District in this State, exclusive of the members of said Executive Committee. This Committee as a whole shall be called together for joint conference at least once each year. It shall be the duty of such committee to use every lawful means to have the Constitution of the United States and of Nebraska, together with the meaning and ideals of good citizenship, taught in all schools, colleges and universities in the State; to further knowledge of the history, institutions, traditions, and form of government of the United States; to cooperate with other civic organizations, including local and national bar associations, and with the press, in the furtherance of a national movement on behalf of a

better and more loyal adherence to American institutions and ideals.

6. The Committee on Cooperation with the American Law Institute shall consist of five (5) members, to be appointed by the President of the Association. One of these members so appointed shall be a member of the Nebraska District Judges' Association. In addition to members appointed by the President, all members of the American Law Institute from Nebraska shall be members *ex officio* of this Committee. The duties of this Committee shall be to cooperate with the American Law Institute in the restatement of the American common law, to give publicity to this work in Nebraska, and to afford the Nebraska Bench and Bar opportunities for information, suggestion and cooperation.

7. The Committee on Unauthorized Practice of the Law shall consist of five (5) or more members, and it shall be its duty to consider and report to the Association on professional encroachment and unauthorized practice of the law.

8. It shall be the duty of the Committee on Finance to audit the books and records of the Secretary-Treasurer at least once each year.

9. Such other committees, standing or special, shall be appointed as are authorized by the Association.

10. The traveling and other expenses incurred by any Committee, standing or special, for meetings of each Committee or otherwise, during the interval between annual meetings of the Association, shall be paid by the Treasurer out of such appropriation as the Executive Council shall have made on application in each case in advance of its expenditure. Such application shall be made in writing by the Chairman of each Committee within sixty (60) days after his appointment and upon a specific budget.

ARTICLE VII.

By-Laws

Suitable by-laws not inconsistent with these rules may be provided by a majority vote at a regular meeting.

ARTICLE VIII.

Meetings

1. The Association shall have one regular meeting annually at a time and place to be fixed by the Executive Council three (3) months prior to such meeting. Immediately upon the designation of the time and place of such meeting by the Executive Council, each member of the Association shall be notified thereof by the Secretary by mail. If the Council so orders, the proceedings of such meetings may be edited and published in a suitable form by the Secretary-Treasurer, and a copy thereof furnished to each member free of charge.

2. Special meetings of this Association may be held at such times and places as shall be determined by the Executive Council, and the Secretary-Treasurer shall call a special meeting of the State Bar Association upon petition signed by not fewer than twenty (20) of its active members, and such meetings shall be held within thirty (30) days after said petition is filed.

3. A ten-day notice shall be given to all members of a special meeting, and such notice shall include the purposes for such meeting, and no other business than that set forth in such notice may be transacted.

ARTICLE IX.

Amendments

Recommendation to the Court of amendments to these rules recommended by a three-fifths (3/5) vote of the Council may be adopted by a majority of the Association present at any regular meeting. Recommendation for amendments not so recommended by the Council must be submitted in writing at a regular meeting, and unless approved by a vote of two-thirds (2/3) of the members of the Association present, shall then lie over and not be acted upon until the next meeting.

ARTICLE X.

Rules of Professional Conduct

The ethical standards relating to the practice of law in

this State shall be the canons of Professional Ethics of the American Bar Association, and those which may from time to time be approved by the Supreme Court.

ARTICLE XI.

Complaints

1. The Supreme Court shall appoint a committee in each Judicial District consisting of not fewer than three (3) members, and all complaints of professional misconduct shall be made to the committee in the District where the member complained of resides.

2. It shall be the duty of a Committee, upon receiving a complaint of professional misconduct on the part of a member, to make an informal and private investigation of the matter; and upon being satisfied that such complaint is without merit, the Committee shall proceed no further, and shall dismiss same.

3. If, however, a Committee, after making said informal investigation, concludes that there is reasonable ground to believe that the member complained of is guilty of an offense which requires and justifies further action, the Committee shall immediately cause the complaint to be reduced to writing, specifying with particularity the facts which constitute the basis of the complaint, and shall serve a copy of said complaint upon the member complained of; and the member so complained of shall have the right and opportunity to file with the Committee, within twenty (20) days after being served with said copy, any statement, answer, affidavit, or document which he may desire; and said Committee, if it still believes that there is reasonable ground as aforesaid, shall thereupon transmit to the Supreme Court said complaint and the statements, answer, affidavits or documents submitted and filed by the member complained against, together with the Committee's report of investigation. Said Committee shall take final action upon all complaints within ninety (90) days after the same are made. Such complaint shall be made in the name of the State on the relation of the Nebraska State Bar Association.

4. Upon receipt of any complaint forwarded by such Committee, as aforesaid, the Supreme Court may take such action as to it seems just and proper. It may refer said matter to a Special Master to take evidence of and concerning same, upon twenty (20) days' notice as to the time and place of hearing given to the member complained of. Said Special Master, if so appointed, shall have the power and authority to administer oaths and affirmations to witnesses, to subpœna witnesses *duces tecum,* or otherwise; and the said Master shall, upon præcipe filed by the member complained of, subpœna witnesses *duces tecum,* or otherwise, as shall be requested. Said Master shall cause all of the evidence offered and adduced at such hearing to be taken by a reporter and afterwards transcribed to typewriting; and said record, as so made, including all exhibits offered or received, shall be transmitted to the Court with the Special Master's findings and recommendations.

5. In the event the Court deems it necessary, the Court may appoint an attorney to prosecure such action.

6. All expense incurred in connection with such hearings shall be borne by the Association, but shall be first allowed and approved by the Supreme Court.

7. Unless requested by the accused member, neither the hearings, records or proceedings of the Committee, nor those of the Special Master appointed by the Court shall be public, nor shall any publicity be given thereto prior to the filing of the report of the Special Master.

8. In case the Committee aforesaid shall determine that there is no reasonable ground to believe the member complained of guilty of an offense which justifies further action, or in case said Committee fails to act within ninety (90) days after complaint has been made, then the complainant shall have the right to present said matter directly to the Supreme Court by informal complaint filed with the Clerk thereof, supported by affidavits or other *prima facie* evidence; if probable grounds for disciplinary action appear, such complaint may be referred to the Attorney General for prosecution under the present rules of

the Supreme Court, with amendments which may be made thereto. The intention being that the provisions of this article shall be cumulative and not exclusive, but that no complaint shall in any case be filed with the Supreme Court until it shall have first been presented to the proper Committee as herein provided.

PAULINE TIEDTKE, APPELLEE, V. ROY WHALEN, SHERIFF: BERNHARD POESCHEL ET AL., INTERVENERS, APPELLANTS.
275 N. W. 79

FILED SEPTEMBER 24, 1937. No. 30053.

1. **Action.** A civil action is commenced by filing in the proper court a petition and causing a summons to be issued thereon.
2. **Replevin.** A writ of replevin which is quashed or dismissed does not give the court jurisdiction to continue with the action.

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

C. H. Hendrickson and *A. E. Wenke,* for appellants.

A. R. Oleson, contra.

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

DAY, J.

This is an injunction case to prevent the collection of a judgment in Stanton county, transcripted there, which had originally been entered in Wayne county, Nebraska. The trial court granted the injunction.

Arthur Tiedtke started a replevin action in Wayne county to foreclose a chattel mortgage of approximately $7,300 on some chattels. After he had taken possession of these chattels and had sold them according to the terms of his chattel mortgage against the makers, Bernhard Poeschel and Lena Poeschel, the defendants Poeschel filed a motion to quash the action for replevin for that no petition had been filed. This motion was sustained and the replevin

action was quashed but, as argued, not dismissed. It is contended that this ended the replevin action.

Afterwards the defendants Poeschel insisted on continuing with the case after the affidavit for replevin had been quashed, on the theory that the plaintiff did not return the chattels and that they were entitled to a return of them or the value thereof. It is not necessary to go into all the judicial history, but suffice it to say that a judgment was entered against Arthur Tiedtke for $3,000. Arthur Tiedtke subsequently transferred some of his property to his wife, and this action is brought in the name of his wife because of the threatened levy by the sheriff of Stanton county on property which had been transferred to Pauline Tiedtke. In the suit in Stanton county, the Poeschels filed a petition as interveners and appear here as appellants.

There is but very little, if any, merit to the contention of the Poeschels in this court, for the reason that Bernhard Poeschel was adjudged a bankrupt in the federal court, and the bankruptcy court declined to accept this property burdened with this mortgage, so that in any event there was nothing for the Poeschels. The rights of the Poeschels were adequately cared for as to homestead rights, and the like, in the bankruptcy court. But there is an important principle of law involved, and the question presented to us is whether or not the judgment was void because the court did not have any jurisdiction to render it. It is the opinion of this court that, when the district court for Wayne county quashed the return of the replevin, for the reason that no petition was filed on the motion of the Poeschels, the suit was ended. The Poeschels might have had some other remedy, but surely they could not be allowed to proceed with the replevin action when they themselves had caused it to be quashed.

The rule is well established in this state that a civil action is commenced by filing in the proper court a petition and causing a summons to be issued thereon. This is a legislative mandate contained in section 20-501, Comp. St. 1929.

While this case was not dismissed, the writ of replevin was quashed by the district court for Wayne county which was equivalent to ending the case. A writ of replevin which is quashed or dismissed does not give the court jurisdiction to continue with the action. In *Pennington County Bank v. Bauman,* 87 Neb. 25, 126 N. W. 654, cases are reviewed and this point is made plain. See, also, *Reid, Murdoch & Co. v. Panska,* 56 Neb. 195, 78 N. W. 534; *State v. Letton,* 56 Neb. 158, 78 N. W. 533. There are many other cases in this jurisdiction to the same effect, and the judgment of the trial court should not be set aside.

AFFIRMED.

CARL F. BELK, APPELLANT, V. MASSMAN CONSTRUCTION COMPANY, APPELLEE.
275 N. W. 76

FILED SEPTEMBER 24, 1937. No. 30011.

1. **Admiralty.** The fact that a tort occurs in navigable waters does not necessarily make it maritime in character and of exclusive admiralty jurisdiction.
2. ———. Where the circumstances out of which a tort arises are nonmaritime in character or of purely local concern, a local statute regulating liability may abrogate a remedy in admiralty which otherwise might exist.
3. ———. "Where employment pertains to local matters having only incidental or indirect relation to commerce and navigation, local regulations of employer-employee relationship work no prejudice to general laws of navigation and commerce, and state can prescribe exclusive remedy to compensate such employee for injury sustained in such employment." *Woods v. Merrill-Stevens Dry Dock & Repair Co.,* 14 Fed. Supp. 208.
4. ———. Under the facts in this case, the Nebraska workmen's compensation law, and not the seamen's act (41 U. S. St. at Large, ch. 250, sec. 33, p. 1007), *held* to provide the exclusive remedy for injuries sustained by employee.

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

Frank A. Dutton, Albert D. Menefee and *Sanden & Anderson,* for appellant.

Thomas E. Dunbar and *Martin J. O'Donnell, contra.*

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

CARTER, J.

Plaintiff commenced this action in admiralty for damages under the seamen's act (41 U. S. St. at Large, ch. 250, sec. 33, p. 1007) for personal injuries sustained while employed as a seaman by the defendant, Massman Construction Company. At the close of plaintiff's evidence, the trial court directed a verdict against the plaintiff and dismissed his petition. From the overruling of his motion for a new trial, plaintiff appeals.

The defendant was engaged in improvement work on the Missouri river in Otoe county. The work necessitated the driving of piling along the bank and out into the river itself. Plaintiff was first employed by defendant to fire a pile-driver boiler on the bank, and, after the completion of that work, was again employed to fire a pile-driver boiler on pile-driver barge No. 3, which was working in the river immediately east of its west bank. While working on this barge in the early morning of November 23, 1934, plaintiff was injured by getting his foot and leg caught in a revolving cable drum. This action was commenced under the seamen's act on the theory that plaintiff was a seaman engaged in navigation and commerce on a navigable stream within the provisions of the act at the time of his injury.

The record discloses that plaintiff contracted in writing to be bound by the workmen's compensation law of the state of Nebraska. Plaintiff resided in Nebraska and was working in Nebraska at the time he was injured. It is clear therefore that, unless the facts bring the case within the exclusive jurisdiction of maritime law, the rights of the parties must be determined in accordance with the workmen's compensation law of this state.

The record discloses that plaintiff lived at Dunbar, Nebraska, and that he went home after each day's work. The barge, upon which he was working at the time he was injured, was always towed and had no motive power of its own. It was either anchored in the stream or tied to the piling already driven while the work was being performed. The principal duty of plaintiff was to fire the boiler of a stationary engine attached to the floor of the barge. The detailed statement of his other duties is not very satisfactory. We do not doubt that the accident in question was maritime in nature, at least it occurred on a navigable river. In determining whether, under the facts in this case, the compensation law of Nebraska provides the exclusive remedy, we must bear in mind that the supreme court of the United States has plenary and final jurisdiction over matters maritime. Necessarily we must look to the decisions of that court for the governing rules.

The general rule is that any work performed by workmen upon navigable waters, no matter what its character may be, is essentially maritime in its nature and controlled by the principles of admiralty.

There is a recognized exception to this general rule which materially affects its application. It has been held that, where the employment, although maritime in its character, pertains to local matters having no direct relation to navigation and commerce, the maritime law can be modified or supplemented by state statutes, since the regulation "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." *Western Fuel Co. v. Garcia,* 257 U. S. 233.

In the case of *Grant Smith-Porter Co. v. Rohde,* 257 U. S. 469, the court said:

"In *Western Fuel Co. v. Garcia* (*supra*) we recently pointed out that, as to certain local matters regulation of which would work no material prejudice to the general maritime law, the rules of the latter might be modified or

supplemented by state statutes. The present case is controlled by that principle. The statute of the state applies and defines the rights and liabilities of the parties. The employee may assert his claim against the Industrial Accident Fund to which both he and the employer have contributed as provided by the statute, but he cannot recover damages in an admiralty court.

"This conclusion accords with *Southern Pacific Co. v. Jensen,* 244 U. S. 205; *Chelentis v. Luckenbach S. S. Co.,* 247 U. S. 372; *Union Fish Co. v. Erickson,* 248 U. S. 308; and *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

Also, in the case of *Millers Indemnity Underwriters v. Braud,* 270 U. S. 59, the court said: "In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state compensation act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist." See, also, *Alaska Packers Ass'n v. Industrial Accident Commission,* 276 U. S. 467.

We necessarily conclude that, if plaintiff when injured was not engaged in work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law, then he is bound by the compensation law of this state and he has no right to resort to the admiralty court. Is the case

before us a matter of local concern within the above rule?

In *Grant Smith-Porter Co. v. Rohde, supra,* where a carpenter, engaged in the construction of a ship nearly completed, was injured, and where the parties had accepted and proceeded under a workmen's compensation statute, it was held to be a matter of local concern.

In *Millers Indemnity Underwriters v. Braud, supra,* a diver submerged himself from a floating barge anchored in a navigable river for the purpose of sawing off timbers of an abandoned set of ways which had become an obstruction to navigation. The air supply failed and the diver suffocated. It was held to be a matter of local concern and that the state compensation law applied.

In *Sultan Railway & Timber Co. v. Department of Labor,* 277 U. S. 135, the injuries in question arose out of employment on a navigable river in assembling logs in booms for towage. Recovery was permitted under the state compensation law, the court saying: "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

In *Woods v. Merrill-Stevens Dry Dock & Repair Co.,* 14 Fed. Supp. 208, the court said: "What work has a direct relation to navigation or commerce must be determined with reference to the surrounding circumstances of each case. * * * All torts are not maritime in character and of exclusive admiralty jurisdiction merely because they occur on navigable waters. * * * Where the circumstances out of which the tort arises are nonmaritime in character or of purely local concern, a local statute regulating liability may abrogate a remedy in admiralty which otherwise might exist. * * * The state statute may therefore prescribe an exclusive remedy to compensate such employee for injury in these circumstances."

Measured by the law laid down by the authoritative court, it is our opinion that plaintiff is within the terms of the workmen's compensation law of this state. Manifestly, the work in which plaintiff was engaged was purely local in nature; it had no direct relation to commerce or navigation; and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law, nor interfere with the harmony or uniformity of that law in its international or interstate relations. The compensation law of this state provides the only remedy. It, being exclusive, abrogates the right of plaintiff to resort to the admiralty court.

The trial court properly directed a verdict for defendant and the judgment entered thereon is

AFFIRMED.

WILLIAM H. PATTON ET AL., APPELLEES, V. MAX RAPP ET AL., APPELLANTS.

275 N. W. 315

FILED SEPTEMBER 24, 1937. No. 29974.

1. **Conspiracy.** "A conspiracy, like other facts, may be proved by circumstantial evidence, and one means of proof is by showing overt acts of the individuals charged with conspiring. From the fact that different persons at different times by their acts pursue the same object, the jury may, in connection with other facts, infer the existence of a conspiracy to effect that object." *Farley v. Peebles*, 50 Neb. 723, 70 N. W. 231.
2. **Evidence** examined and found, as to all defendants, to warrant submission of case to jury.
3. **Verdict** found to be sustained by sufficient evidence.
4. **Appeal.** No prejudicial error found in argument to jury by plaintiffs' counsel.

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

Gray & Brumbaugh and *Fradenburg, Webb, Beber, Klutznick & Kelley,* for appellants.

Merrow & Murphy and *O'Sullivan & Southard, contra.*

Heard before GOSS, C. J., ROSE, GOOD and CARTER, JJ., and SPEAR and KROGER, District Judges.

SPEAR, District Judge.

Action for alleged fraud and conspiracy to defraud, brought by William H. Patton and Blanche Patton, husband and wife, plaintiffs and appellees, against Max Rapp and Elsie Rapp, husband and wife, the Eagle Jewelry Company, and Joe Ban, defendants and appellants.

Plaintiffs' petition alleges that they were, on April 24, 1933, the owners of certain lots in the city of Omaha subject to a mortgage of $1,626 owned by the defendant Elsie Rapp; that the defendants Rapp at said time purchased the property and that the consideration therefor was cancelation of the mortgage and a perfect diamond weighing close to four carats. Plaintiffs say that Max Rapp induced them to go to the defendant Joe Ban, owner of the Eagle Jewelry Company, to have the diamond appraised, after Rapp had falsely told him that the stone was worth $3,000, and that Rapp and Ban conspired together to defraud plaintiffs. In furtherance of this scheme to defraud, plaintiffs claim that Ban appraised the diamond at $3,000, but that in truth it was worth only about $875, and that both Rapp and Ban knew this fact. Plaintiffs asked for damages.

Defendants answers are quite elaborate, but they really constitute a denial of the allegations in plaintiffs' petition.

A trial was had to a jury and the jury returned a verdict against all of the defendants in the sum of $2,396.73. Defendants each appeal. A great many assignments of error are made by defendants and many propositions of law are advanced by the respective parties. However, lack of space makes it imperative that we rather loosely group these contentions and discuss them generally.

Mr. Patton was 57 years old at the time of the trial and quite deaf. Mrs. Patton was 40. Patton is a blacksmith and automobile repair-man, and had done work for Mr. Rapp since 1915. In 1932 Mrs. Rapp had a mortgage of

$1,626 against the premises and was threatening foreclosure, so Pattons gave a deed to Mrs. Rapp with an option to redeem same within a year. Rapp, on the theory that he would sell the property, induced the Pattons to give him the option, that is, the instrument evidencing same, and refused to return same. Rapp then tried to trade the Pattons other properties for their rights under the option. Early in 1933 he began a campaign to trade the diamond for plaintiffs' option. After some negotiations the deal was consummated on April 24, 1933. Boiled down to essentials, the position of plaintiffs is that Rapp said that this was a fine blue white diamond worth $3,000, when in fact he knew it was worth only $800, thus deceiving plaintiffs, and that, in addition thereto, Rapp conspired with Ban, who also falsely and knowingly deceived plaintiffs as to the value of the jewel. Rapp's position, in short, is that he did not make these statements, and, in fact, told the Pattons that it was worth only $800; also, that there was no scheme to defraud between him and Ban. Ban's position is that there was no conspiracy between him and Rapp and that he gave his honest opinion that the stone was worth $3,000.

Defendants complain that the trial court erred in permitting plaintiff Blanche Patton to testify that she had attended school only through the first year in high school, and in permitting Patton to testify that he went through the seventh grade, when there is no allegation in their petition that either was illiterate. This is not error. The evidence was not offered upon the theory of illiteracy, but to show that plaintiffs were not of the same mental stature as Rapp and Ban. As such it was admissible under the general issues.

Defendants contend that the first paragraph of instruction No. 1 is erroneous. It is as follows:

"Plaintiffs bring this action to recover damages for alleged false representations as to the value of a diamond ring alleged to be a part of the consideration of the sale of a lot described in the evidence, the balance of the con-

sideration being $1,626 represented by a mortgage upon the premises, and plaintiffs allege that defendants Max and Elsie Rapp represented that said diamond was a perfect and flawless blue diamond, worth $3,000 and weighing from three and one-half to four carats."

The court then goes on to tell of the contentions of fraud. Defendants seem to contend that the deed had been given long before, and that the deal in question was over the option to repurchase, so that therefore the instruction is not proper. We think that there is no error in the instruction. The deal involved plaintiffs' rights in the land, and whether the "sale" was made when the deed was delivered, or over a year later when the repurchase option was returned, is immaterial as far as the jury are concerned. The question for the jury was as to the fraud, and the court endeavored to confine the case to that issue, without going into technicalities as to the legal effect of the deed and option.

Most of defendants' other specifications of error may be grouped in the claim that there is not sufficient evidence of fraud and conspiracy and that therefore the court should have directed a verdict for defendants. Counsel for the Rapps both in their brief and in oral argument before this court complained of plaintiffs' attempts to show the value of the premises, but in the same breath argued that plaintiffs had no substantial equity in the land in any event. In any event, after carefully going over the record we find no error in the rulings of the court in this regard.

There are a few fundamental facts about which there can be little dispute, to wit: Rapp wanted the plaintiffs' premises badly enough to make quite an effort to get them; that the diamond was worth about $875 instead of $3,000 and that Rapp knew that the ring was only worth about $800 at the time of the transaction. However, Rapp says that the plaintiffs knew that the stone was worth only $800, and that this is evidenced by a letter dictated by Rapp and signed by the Pattons at the time of the transaction, in which they said that they had had the diamond ring appraised and that they received it at a value of $800. The

Pattons claim that they signed this without knowing it, or at least they did not know what it contained. There is also some cross-examination of Mrs. Patton which indicates that in a deposition, and at a former trial of this case, she thought at the time of the trade that the diamond was worth only about $1,000. Too, upon direct examination in the case at bar she did not claim that she was deceived as to value. She seemed to regard the signed appraisal as a guarantee rather than a representation, for we find her going back to Rapp's office and insisting upon having personal possession of the appraisal. In any event, Mr. Patton says that he was deceived and misled by Rapp's statements and by Ban's appraisal. Some unexplained things have occurred in this transaction. Why did Rapp stand by and let Ban make a written appraisal for Patton's benefit wherein the ring was valued at $3,000, when he knew it was only worth $800, and that he had recently paid $800 for it? Why did he then get the Pattons to sign a letter stating that they were taking it at a valuation of $800? On the other hand, why did the Pattons sign this letter, if they thought it worth $3,000? This is a case wherein the jury and the trial judge heard the evidence, saw the witnesses, observed their demeanor and the manner in which they answered the questions. The district court found for plaintiffs, and while the evidence is conflicting upon perhaps most of the essential propositions, we feel that this is a case where the verdict of the jury should not be disturbed. Reasonable minds could have drawn different conclusions from the evidence, and we feel that the trial judge did not err in refusing to dismiss the case at the conclusion of the testimony.

Defendant Ban in a separate brief contends that there is no evidence involving him in any conspiracy to defraud the Pattons. Patton says that Ban was Rapp's choice, Rapp says that Ban was Patton's choice, and Ban says that he knew neither Patton nor Rapp. There is no evidence of meetings, acquaintance, or telephone conversations between Rapp and Ban. In fact, there is no direct evidence

of any kind to prove a conspiracy. Is there sufficient circumstantial evidence? The jury said that there was. Is that verdict sustained by sufficient evidence as against the defendant Ban? The alleged circumstances relied upon by the plaintiffs are in the main that Ban was a pawnbroker and jeweler of many years of experience; that the diamond was valued by Ban at $3,000, when he knew it was worth only $800 to $900; that this appraisement conformed exactly with the value fixed by Rapp in his statements to the Pattons; that Ban told them that it was what was called a perfect stone, when it was not; and that even now Ban claims that the ring is worth $3,000. The principal contentions of Ban, as we view them, are sought to be supported by *Emerson v. Citizens State Bank,* 125 Neb. 632, 251 N. W. 285, *Harvey v. Harvey,* 75 Neb. 557, 106 N. W. 660, and *Reed v. Occidental Bldg. & Loan Ass'n,* 122 Neb. 817, 241 N. W. 769. We do not find these cases applicable. In the *Emerson* case this court said: "There is no evidence that any officer of the bank had any knowledge or information of anything approaching a confidential relationship between plaintiff and Munger (Munger was a party to the suit)." In the *Harvey* case no facts were shown to connect William H. Harvey with the tort, but the court held that he should have moved separately for a directed verdict. In the *Reed* case the court held that no damage was alleged and therefore the case was properly dismissed. We think the case of *Farley v. Peebles,* 50 Neb. 723, 70 N. W. 231, is controlling. In that case this court quoted from a textwriter in part as follows: "Perhaps the safer rule to lay down upon the subject would be that, wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, it is admissible in evidence." See, also, *Talich v. Marvel,* 115 Neb. 255, 212 N. W. 540. So, in the case at bar there is evidence that both Rapp and Ban placed a valuation of $3,000 on the diamond, when each knew that it was worth only $800. Although they claim that they were not acquainted, this is

competent evidence to establish a conspiracy, if believed by the jury. Ban acted in a confidential, professional capacity as to Patton. He must have known that some kind of a deal was pending between Patton and Rapp, and that the valuation of the diamond was of the utmost importance. Under these circumstances this court will not set aside the verdict of the jury.

The defendants in conclusion complain of improper conduct in the argument of plaintiffs' counsel. The record discloses the situation so common in jury cases, especially if the judge leaves the bench during arguments of counsel. Counsel for one side is alert for the slightest real or imagined misconduct and makes objection thereto. Counsel for the opposing side promptly seizes upon this opportunity to warn the jury that the other counsel is a base deceiver trying to keep evidence from the jury. In the instant case each attorney, in his own way, made the most of a situation which meant nothing to the jury as far as the facts were concerned. It seems that one side read from the petition, and thereupon the other side argued that the petition was a "letter" to the court. Objections and argument followed, but we see no prejudicial error in the statements of counsel or the rulings of the court thereon.

The judgment of the district court is right and is

AFFIRMED.

JAMES C. VAN AVERY, APPELLEE, V. PLATTE VALLEY LAND & INVESTMENT COMPANY, APPELLANT.

275 N. W. 288

FILED OCTOBER 1, 1937. No. 30026.

1. **Landlord and Tenant.** The validity of a lease of real estate, and the *bona fides* of the relation of landlord and tenant created thereby, are in no manner affected by the provisions thereof merely determining that the amount of the rental shall be fixed at a definite percentage of the amount of income received by the tenant from a garage business carried on by him in the premises demised.

2. ———: CAVEAT EMPTOR. "The rule of *caveat emptor* applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety." *Lowe v. Payne*, 107 Neb. 378, 186 N. W. 320.

3. ———. "In the absence of fraud, deceit or concealment, a lessor is not liable in damages to the lessee for defects in a building which are plainly discernible, when liability therefor is not reserved in the lease." *Lowe v. Payne, supra.*

4. ———: INVITEES. Subject to limited exceptions, the general rule is that guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has.

5. ———. Record examined, and *held* wholly insufficient to invoke the jurisdiction of this court on the subject of alleged liability of the landlord, based upon the existence and breach of a covenant binding upon him, to repair the *locus in quo.*

6. ———. Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

7. ———: LIABILITY OF LESSOR. Where, however, premises are leased for a public or semipublic purpose, and the lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of such lessee who, upon invitation express or implied, are admitted to such demised premises to make use of the same for the particular purpose for which it was leased.

8. ———: ———. The owner's liability for the condition of his premises, leased for a public or semipublic purpose, is only co-extensive with the limits of the invitation, express or implied, which may be deemed to be extended to the patrons thereof. To entitle a person to recover for injuries as an invitee, he must show that at the time of the injury he was using the premises demised for the purpose contemplated by such invitation. A person may not be deemed an invitee when using a part of the premises to which the invitation does not extend, and if he goes beyond the bounds of such invitation, he acts at his peril.

9. ———: INVITEES. Evidence in the record examined, and *held* to establish affirmatively that plaintiff was not, under the facts

and circumstances in this case, an invitee to that portion of the leased premises where his injuries were received.

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

Brogan, Ellick, Shoemaker & Fitzgerald and *Robert B. Hamer,* for appellant.

Wear, Boland & Nye, contra.

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

PER CURIAM.

This is an action at law to recover for personal injuries sustained by plaintiff, Van Avery, on March 1, 1935, as the result of falling into a "pit" or "stairway" located in the interior of a building owned by defendant for some eight or nine years, and, by a lease in writing, leased to one Herman Monico, who then was, and for more than two years prior had been, in exclusive possession thereof. Plaintiff made the defendant landlord the sole defendant. The building leased was occupied by the tenant as a public garage, primarily for the day storage of automobiles. A trial of the issues involved to a jury resulted in a verdict and judgment for plaintiff, and, from the order of the trial court overruling its motion for a new trial, the defendant appeals.

The record establishes the following:

Plaintiff called at the garage conducted by Herman Monico on the 1st day of March, 1935, about 4:30 p. m. This is a brick building situated at the southwest corner of the intersection of Seventeenth and Jackson streets in the city of Omaha, Nebraska, and is constructed on the north 80 feet of lots 1 and 2, in block 5, of Kountze & Ruth Addition to Omaha. The large entrance for receiving automobiles is in the north wall. The building, the evidence indicates, extends east to west. A brick partition wall extending from the north to the south wall divided the building into two rooms, at least, the exact dimensions of which are not disclosed by the record, but the larger of which,

extending eastward from this partition to the west wall of the building, constituted the garage proper. The evidence discloses no openings admitting light in the west wall. Some ten feet east of the southwest corner of the room a brick partition connecting with, and built at right angles with, the south wall of the garage, extending from floor to ceiling of the room, projects into it for a distance of some ten or twelve feet. The floor is composed of cinders. Resting on its edge on the floor, extending from the base of the projecting wall west to the west wall, at the time of the accident, a 2 by 12 plank was fastened. The irregularities of the floor at this point were such that the distance from the top of the black cinder floor to the top of this plank as it was in place varied from about four inches to nine or ten inches. The three walls were on the west, south and east sides of what is referred to in the evidence as the "pit," which in fact was the open flight of stairs leading to the engine room containing the heating plant of the building. The plank furnished the protection on the fourth side. The evidence is without contradiction that the space within the garage along the west wall immediately northward was wholly devoted to the storage of automobiles. Here the automobiles were ordinarily backed to the west wall and, parallel to each other, extended eastward into the garage. North of and immediately adjacent to this plank was the stall or place in which the automobile of witness Ralph C. Phelps had been regularly since 1933 daily placed and kept. This automobile when in its usual and proper position stood with its rear close to the west wall and its front extending just beyond the projecting brick wall already mentioned. In this situation it formed, together with the other three brick walls, a practical barrier to the so-called "pit" or "stairway." In the three walls last mentioned as constituting the surroundings on three sides of the stairway, there were no windows or openings for the admission of light to the space thus inclosed. While electric fixtures were provided for lighting this part of the premises, they were not lighted at the time of the accident, and the exact situa-

tion of the cars at that moment, in the southwest corner of the garage and along the west wall thereof, is a matter of disputed evidence. The inclosing wall and absence of artificial lights created within the space thus inclosed, according to plaintiff's evidence, such a pall of darkness in the southwest corner of the garage, especially in the space included within the surrounding walls referred to, that said "pit" was dark, obscured and concealed. But it must be admitted that there was nothing to indicate that this portion of the garage was devoted to any purpose whatever save for the placing and storage of automobiles. Immediately east of the east wall inclosing the pit was a space illuminated by a window or opening in the south wall of the garage.

After entering the large north door of the garage, plaintiff proceeded at once to the "office." This office was a construction about six foot square, with windows on two sides and a door, supplied with a desk, chairs, and stove for heat, located about the center of the garage and devoted to the purpose its name implies. Herman Monico, Sr., the proprietor of the garage, was absent, but Herman Monico, Jr., a youth of 17 and a son of the proprietor, "who worked in the garage," was sitting therein. Without in any manner announcing the purpose of his visit, plaintiff inquired of young Monico where his father, Herman, was. The son replied, "He is out in the back room," and at the same time pointed toward the west wall of the garage and in the general direction of the north door in the west wall, which was the only door in sight in that wall from the position that young man then occupied. This door was located from 75 to 100 feet from the front of the building. Plaintiff testifies that on receiving this information, without in any manner announcing his business or purpose, he left the little office and walked straight west "to the large door" in the west wall, or the door covered with canvas, "pushed the canvas to one side and called 'Herman' " and "tried to get hold of Herman." Looking into the dark southwest corner of the building, the plaintiff discovered a closed door in

the west wall near its junction with the south wall of the garage. He turned southward and walked toward it. Plaintiff testifies that he did not look down as he passed along; that he did not see the 2 by 12 plank that constituted a part of the north barrier to the pit; that "his head was about even with his vision," and he looked straight out. He first testified that he knew of no cars at this time parked along the west side of the garage. His attention was then called to his deposition previously taken, covering the facts relating to the accident in suit, in which the following question was propounded: "Were there many cars parked on the main floor of the garage at the time you first went into the office to talk to the boy?" To which he had replied, "There were several that were parked on the west side." His memory being thus refreshed, he then replied, "Yes, I would say several were." But plaintiff is unable to locate these cars in their relative positions along the west wall. He testifies further, however, that when getting no response to his call for "Herman" through the door from which he had removed the canvas, he "decided he must be in another room," and that the closed door in the extreme southwest corner he had seen was the door leading to a back room, and he walked toward it, and the next thing he knew he was tumbling into space. Herman Monico, Jr., from his position at the office, was the only other eyewitness to the accident. That young man testifies that at the time of the accident four automobiles were backed up to the west wall of the garage, extending to the eastward; that the Phelps car was in place immediately north of the "pit;" that Mr. Frost's car was standing immediately north of the Phelps car in its proper position; that then came an open space of a few feet, being a passageway leading to the canvas-covered door in the west wall. Immediately north of the narrow open space two more automobiles were standing parallel with the two already described. He further testifies that, after plaintiff called three times for Herman Monico, he walked first east and then south; that he stepped on the bumper of the Phelps car, then on the

fender, and "into the pit he went." Plaintiff denies this, and swears no automobile was standing immediately in front of the pit at the time he walked into it. Nevertheless, the evidence may be said to be almost uncontradicted that, in order to remove the plaintiff from where he had fallen to the garage office, an automobile was driven 30 feet eastward to make a passageway. For the purpose of this opinion, plaintiff's version on this point that he did not come into personal contact with the automobile before falling into the pit will be accepted as correct.

The gist of the present action is the alleged negligence of the defendant landlord in permitting the "pit" or "stairway," constituting the sole means of access to the heating plant of the garage leased by it as landlord, to remain unguarded and unbarricaded on the north side thereof, thereby constituting a dangerous condition resulting in injuries to plaintiff, then and there an invitee.

In this connection, it is suggested that the normal conception of negligence is the doing of an act in a manner which creates an unreasonable danger of invading the legally protected interests of another person or group of persons. It is only in the exceptional situation that the failure to act subjects one to liability. Bohlen, Studies in the Law of Torts (1926) 33, 38-65.

Preliminary to the consideration of the determinative issues presented in the record before us, it may be noted that the validity of the lease of real estate here involved, and the *bona fides* of the relation of landlord and tenant created thereby, are in no manner affected by the provisions thereof determining that the amount of the rental shall be fixed at a definite percentage of the amount of income received by the tenant from the garage business carried on by him in the premises demised. 16 R. C. L. 578, sec. 53; 35 C. J. 955; *Z. C. Miles Co. v. Gordon,* 8 Wash. 442, 36 Pac. 265; *State v. Superior Court,* 108 Wash. 443, 184 Pac. 348; *Gottlieb Bros. v. Culbertson's,* 152 Wash. 205, 277 Pac. 447; *Ault Woodenware Co. v. Baker,* 26 Ind. App. 374, 58 N. E. 265; *Norton v. Wiswall,* 26 Barb. (N.

Y.) 618; *Milton-Alvin Holding Co., Inc., v. Williams,* 102 Misc. Rep. 117, 168 N. Y. Supp. 171; *Tomlinson v. Dille,* 147 Md. 161, 127 Atl. 746; *Hansen v. Hansen,* 88 Neb. 517, 129 N. W. 982.

Turning to the real merits of this appeal, it may be said that in this jurisdiction we have long been committed to these views, viz.:

"The rule of *caveat emptor* applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety." *Lowe v. Payne,* 107 Neb. 378, 186 N. W. 320.

And, also, "In the absence of fraud, deceit or concealment, a lessor is not liable in damages to the lessee for defects in a building which are plainly discernible, when liability therefor is not reserved in the lease." *Lowe v. Payne, supra.*

See, also, *Davis v. Manning,* 98 Neb. 707, 154 N. W. 239; *Roberts v. Rogers,* 129 Neb. 298, 261 N. W. 354.

It would seem axiomatic that a tenant would be incapable of conferring, either by contract or by delictum, a greater right than he himself possesses. It is therefore unquestionably the rule generally that guests and invitees of the tenant derive their right to enter upon the premises leased, through the tenant, and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects on the premises than the tenant has. 36 C. J. 204; 16 R. C. L. 1067, sec. 588; *Mackey v. Lonergan,* 221 Mass. 296, 108 N. E. 1062; *Harpel v. Fall,* 63 Minn. 520, 65 N. W. 913; *Towne v. Thompson,* 68 N. H. 317, 44 Atl. 492; *Meade v. Montrose,* 173 Mo. App. 722, 160 S. W. 11; *Bender v. Weber,* 250 Mo. 551, 157 S. W. 570; *Fraser v. Kruger,* 298 Fed. 693; *Land v. Fitzgerald,* 68 N. J. Law, 28, 52 Atl. 229; *Goodman v. Town of Provincetown,* 283 Mass. 457, 186 N. E. 625; *Garland v. Stetson,* 197 N. E. (Mass.) 679; *Kinney v. Luebkeman,* 214 Wis. 1, 252 N. W. 282; *Hogan v. Metropolitan*

Bldg. Co., 120 Wash. 82, 206 Pac. 959; *Bolden v. Independent Order of Odd Fellows*, 133 Wash. 293, 233 Pac. 273; *Mahnken v. Gillespie*, 329 Mo. 51, 43 S. W. (2d) 797; *Cullings v. Goetz*, 256 N. Y. 287, 176 N. E. 397; *Jackson v. Amador*, 75 S. W. (2d) (Tex. Civ. App.) 892.

The plaintiff, however, conceding the existence of the general rules governing the relation of landlord and tenant already referred to, contends that the facts of the present record bring the case well within the scope of two rules relating to this subject, which are in the nature of exceptions to the principles sustained by the authorities heretofore cited, viz.: (1) A rule imposing a tort liability upon a lessor who, knowing the dangerous condition of the premises demised by him, leases the same for a public purpose; and (2) a rule imposing a tort liability in cases of this kind for breach of covenant to repair the demised premises, on part of the lessor.

While appellee's brief contains a wealth of authority, he cites no Nebraska cases sustaining these contentions, and we are unable to find any definite pronouncement of this court on the exact questions here presented for decision.

Taking up appellee's contentions in the adverse order of statement, we find the authorities outside of this jurisdiction are divided as to the imposition of a tort liability upon a landlord for breach of his covenant to repair.

In the leading case of *Cullings v. Goetz*, 256 N. Y. 287, 176 N. E. 397 (a garage case where this question was raised) Cardozo, C. J., said, in part:

"The subject has divided juridical opinion. Generally, however, in this country as in England, a covenant to repair does not impose upon the lessor a liability in tort at the suit of the lessee or of others lawfully on the land in the right of the lessee (see e. g., *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169; *Miles v. Janvrin*, 196 Mass. 431; *Fiorntino v. Mason*, 233 Mass. 451, 454; *Carroll v. Intercolonial Club*, 243 Mass. 380, 383; *Dustin v. Curtis*, 74 N. H. 266; *Davis v. Smith*, 26 R. I. 129; *Brady v. Klein*, 133 Mich. 422; *Cavalier v. Pope* (1905) 2 K. B. 757, 762, 764; *Cavalier v. Pope*

(1906) A. C. 428, 433; *Cameron v. Young* (1908) A. C. 176; and see, also, 8 A. L. R. 766, collating the decisions). There are decisions to the contrary (*Flood v. Pabst Brewing Co.*, 158 Wis. 626; *Merchants' Cotton Press & Storage Co. v. Miller*, 135 Tenn. 187; *Barron v. Liedloff*, 95 Minn. 474) but they speak the voice of a minority. Liability in tort is an incident to occupation or control (American Law Inst., Restatement of the Law of Torts, sec. 227). By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair (*Cavalier v. Pope* (1906) A. C. at 433; Pollock, Torts (13th ed.) 532; Salmond, Torts (7th ed.) 477). The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need. The landlord has at most a privilege to enter for the doing of the work, and at times not even that if the occupant protests. 'The power of control necessary to raise the duty * * * implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them' (*Cavalier v. Pope* (1906) A. C. 433). In saying this we assume the possibility of so phrasing and enlarging the rights of the lessor that occupation and control will be shared with the lessee. There are decisions in Massachusetts that draw a distinction between a covenant merely to repair and one to maintain in safe condition with supervision adequate to the end to be achieved (*Miles v. Janvrin, supra; Fiorntino v. Mason, supra; Carroll v. Intercolonial Club, supra;* see, also, *Robinson v. Heil*, 128 Md. 645; *Collison v. Curtner*, 141 Ark. 122). In the case now at hand, the promise, if there was any, was to act at the request of the lessee. What resulted was not a reservation by an owner of one of the privileges of ownership. It was the assumption of a burden for the benefit of the occupant with consequences the same as if there had been a promise to repair by a plumber or a carpenter (cf. *Zurich Gen. Acc. & L. Ins. Co., Ltd., v. Watson Elevator Co.*, 253 N. Y. 404, 409; *Mollino v. Ogden & Clarkson Corp.*, 243 N. Y. 450).

"The rule in this state is settled in accord with the prevailing doctrine. Dicta, supposed to be inconsistent, are summoned to the support of a contrary position. They will be considered later on. Whatever their significance, they cannot overcome decisions directly to the point. As often as the question has been squarely up, the answer has been consistent that there is no liability in tort. Some of the decisions rejecting liability are judgments of this court (*Kushes v. Ginsberg,* 188 N. Y. 630, affg. 99 App. Div. 417; *Sterger v. Van Sicklen,* 132 N. Y. 499; cf. *Reynolds v. Van Beuren,* 155 N. Y. 120, 125; *Wolf v. American Tract Soc.,* 164 N. Y. 30, 35; *Golob v. Pasinsky,* 178 N. Y. 458, 461). Others too many to be fully numbered are in courts of intermediate appeal (*Schick v. Fleischhauer,* 26 App. Div. 210; *Frank v. Mandel,* 76 App. Div. 413, 417; *Stelz v. Van Dusen,* 93 App. Div. 358; *Boden v. Scholtz,* 101 App. Div. 1, 2; *Pernick v. Central Union Gas Co.,* 183 App. Div. 543). The doctrine, wise or unwise in its origin, has worked itself by common acquiescence into the tissues of our law. It is too deeply imbedded to be superseded or ignored. Hardly a day goes by in our great centers of population but it is applied by judges and juries in cases great and small. Countless tenants, suing for personal injuries and proving nothing more than the breach of an agreement, have been dismissed without a remedy in adherence to the authority of *Schick v. Fleischhauer* and *Kushes v. Ginsberg.* Countless visitors of tenants and members of a tenant's family have encountered a like fate. If there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right (*Miles v. Janvrin, supra,* at p. 440; *Elefante v. Pizitz,* 182 App. Div. 819, 821). Liability has been enlarged by statute where an apartment in a tenement house in a city of the first class is the subject of the lease (*Altz v. Lieberson,* 233 N. Y. 16). The duty in such instances is independent of the contract. It is one imposed by law, with liability in tort where the duty is ignored. Here the plaintiff was injured in the use of a garage. His remedy is against the tenant at whose invitation he was there.

"We have spoken of dicta that are cited to the contrary. They do not touch the liability of the landlord for conditions within the premises affecting only the lessee or those who enter upon the premises in the right of the lessee. They have to do with nuisances threatening danger to the public beyond the land demised (cf. *Sterger v. Van Sicklen, supra,* at p. 501; *Ahern v. Steele,* 115 N. Y. 203, 209; *City of Brooklyn v. Brooklyn City R. Co.,* 47 N. Y. 475, 483; *Clancy v. Byrne,* 56 N. Y. 129; *Jaffe v. Harteau,* 56 N. Y. 398; *Brady v. Klein, supra;* 18 Halsbury, Laws of England, sec. 989; 21 id. secs. 651, 955). Even when thus confined, they are dicta, and nothing more, at least in this state, though reiteration may have given them an authority not otherwise belonging to them. Be that as it may, the fact remains that the decision in every instance exonerated the lessor. One case, it is true, there is (*Kilmer v. White,* 254 N. Y. 64, 69), which had to do with conditions within the premises, and not with those outside, but it cites *Jaffe v. Harteau, supra,* and does not suggest even remotely a purpose to establish a new rule. There is merely a cautious reservation of the doctrine to be applied in situations different from any before us at the time."

The minority doctrine as to the liability of owners who have made covenants to repair has, it is said, won the approval of the American Law Institute. This statement, to be correct, must, as applied to the facts here presented, be modified. Restatement, Torts, sec. 356, reads as follows:

"Except as stated in sections 357 to 362, a lessor of land is not liable for bodily harm caused to his lessee or others upon the land with the consent of the lessee or a sublessee by any dangerous condition whether natural or artificial which existed when the lessee took possession."

The effect of the section quoted is to reaffirm the rule of exemption of the landlord, already stated, but subject to six exceptions, viz.: (1) Where lessor covenants to repair; (2) concealed dangerous condition on demised premises; (3) when land is leased for a purpose involving admission of numerous persons; (4) where part of the demised land

is retained in lessor's control which lessee is entitled to use; (5) when part of the land is retained in lessor's control but such part is necessary to the safe use of the part leased; (6) where negligent repairs are made in the leased premises by the lessor.

It is obvious that only the first and second of the exceptions above referred to can possibly have any application to the instant case.

The first exception referred to is stated in the following language, in Restatement, Torts, sec. 357:

"A lessor of land is subject to liability for bodily harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession, if

"(a) the lessor, as such, has agreed by a covenant in the lease or otherwise, to keep the land in repair, and

"(b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented."

But, this language is construed by the Restatement under the heading of "Comment, Nature of lessor's duty," in part, as follows:

"Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless the contract stipulates that the lessor shall inspect the premises to ascertain the need of repairs, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given him notice of the need of repairs."

In the instant case the terms of the covenant or contract to repair are not pleaded by plaintiff, either according to legal effect or verbatim. At all events, defendant's answer includes a general denial. The only evidence introduced at the trial relating to this subject of covenant or agreement to repair is certain parts of a deposition of Joy M. Hackler, president of the defendant corporation, taken by plaintiff prior to the trial, and which were received in evidence by

the trial court, not as a technical deposition, but as amounting to declarations against interest of the declarant.

For this purpose the plaintiff caused to be read in evidence the following questions and answers: "Q. Who pays the expenses of the upkeep of the garage; that is, of the building itself? A. We paid the taxes, insurance, and things like that. Q. And if there are any repairs to be made, who makes them? A. There has been very little of that to do, but if it amounted to anything, we would have to pay them." The following portion of this deposition was then read in evidence by the defendant: "Q. Do you have any arrangement with Mr. Monico about making any alterations or changes in the building, or floor plans, or floors or partitions? A. Not particularly, except I believe he filled one of the pits and leveled it up so that it would be on the level of the street, so that they could drive cars in there." Then, after testimony that Herman Monico rented the building from the defendant company in September, 1932, these further questions with answers thereto were read in evidence by defendant: "Q. Do you have a written lease with him? A. Yes, sir. Q. Is it on record? A. No. Q. When was that lease executed? A. In September, 1932. Q. For what period of time did it run? A. I could not answer that without looking at it."

This written lease was not introduced in evidence, nor is the substance of its terms otherwise set forth in the record. Plaintiff, it appears, has wholly failed to set forth his case on this point by either affirmative allegation in pleading or competent proof by way of evidence. This conclusion is not only sustained by the text and comment of the Restatement, already referred to, but even the minority decisions, which alone support even the qualified statement of the minority rule, also premise it with the following:

"The landlord must, however, in order to be liable, have bound himself to repair, and a mere reservation of the right to enter and inspect and make such repairs as he may see fit is not deemed the equivalent of a covenant to repair.

Nor will mere custom of the lessor to make repairs, without any agreement, suffice to render him liable." 16 R. C. L. 1064, sec. 585.

"Where repairs are gratuitously made by the landlord, such fact is not an admission of liability on the part of the landlord to make repairs generally and keep the premises in repair." 36 C. J. 232.

It follows that under the facts disclosed by the present record there can be no recovery by the plaintiff on the theory of an existing covenant to repair and its breach by the defendant.

Plaintiff's contention is stated in his brief in the following terms:

"Where premises are leased for a public or semipublic purpose, and the lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the use intended, the lessor is liable for injuries sustained on account thereof by third persons rightfully on the premises in connection with the use for which same were demised."

The American Law Institute's Restatement of the Law of Torts, section 359, as merely an express exception to the general rule stated in section 357, already quoted herein, provides:

"A lessor who leases land for a purpose which involves the admission of a large number of persons as patrons of his lessee, is subject to liability for bodily harm caused to them by an artificial condition existing when the lessee took possession, if the lessor

"(a) knew or should have known of the condition and realized or should have realized the unreasonable risk to them involved therein, and

"(b) had reason to expect that the lessee would admit his patrons before the land was put in reasonably safe condition for their reception."

Here again it is to be noted that the "Comment" to this section of the Restatement points out that liability is limited to the lessee's patrons who are admitted for the particular

purpose of using the land for the particular purpose for which it was leased. Thus, the language of the "Comment" on this point is:

"Ambit of liability. * * * He (lessor) is not subject to liability to those licensees whose character as business visitors is derived from the fact that they come upon the premises primarily upon their own business concerns, such as persons coming upon the premises to deliver provisions or the like. Nor is the lessor subject to liability under the rule stated in this section to the social visitors of the lessee who utilize the place merely as a means of paying the lessee a social call which has no relation to the purposes for which the land is held open to the public." Restatement, Torts, p. 972.

Bearing in mind the limited and restricted ambit of liability of the rule above quoted, these facts are undeniable, viz.: That plaintiff, prior to receiving the injuries in suit, never declared to the representative of the lessee then present the purpose of his coming into the leased garage on March 1, 1935; and that only after the injuries in suit had been received did he first make the claim that he had entered this garage for two purposes only, viz.: (1) To collect for certain toys sold to the lessee prior to the preceding Christmas, a matter wholly unconnected with the garage business; and (2) to collect for certain damages sustained by an automobile owned by him during a week it had been stored in this garage in the preceding September. It further appears that this automobile had been withdrawn from such storage during this same month of September and had never been returned to this garage. It also appears that no express invitation was ever extended to the plaintiff to go where his injuries were received. But, even if an invitation of some sort is to be implied in the instant case, the owner's liability for the condition of his premises is only coextensive with the limited invitation such facts establish necessarily, if any. *Coberth v. Great Atlantic & P. Tea Co.*, 36 App. D. C. 569; 45 C. J. 830.

And, in addition, to entitle a person to recover for in-

juries as an invitee, he must show that at the time of the injury he was using the premises for the purpose contemplated by such invitation. 20 R. C. L. 69, sec. 60. If the invitee goes beyond the bounds of his invitation he acts at his peril. *Landy v. Olson & Serley Sash & Door Co.*, 171 Minn. 440, 214 N. W. 659; *Schmidt v. George H. Hurd Realty Co.*, 170 Minn. 322, 212 N. W. 903; *Menteer v. Scalzo Fruit Co.*, 240 Mo. 177, 144 S. W. 833.

In other words, a person may not be deemed an invitee when using a part of the premises to which the invitation did not extend. *Keeran v. Spurgeon Mercantile Co.*, 194 Ia. 1240, 191 N. W. 99, 27 A. L. R. 579; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; *Collins v. Sprague's Benson Pharmacy*, 124 Neb. 210, 245 N. W. 602.

A public garage, such as is involved in the instant case, may be defined to be one devoted to the safe storage of automobiles and property contained therein. The office provided for the convenience of the public, a safe way of access thereto, and of entry of automobiles to be stored, and their removal therefrom, constitute the extent of the public invitation. The very nature of the business carried on and the responsibility for safe storage and return of property received by the proprietors preclude the existence of an implied invitation to persons generally, unaccompanied by automobiles and without interest in automobiles in storage, to come upon the portion of the premises devoted to storage, pass through and between automobiles then kept, and loiter about to suit their own convenience and purpose. It is only by the maintenance of a substantially exclusive control of the property bailed to them that proprietors of public garages may efficiently perform the obligations they assume.

In the instant case, under the circumstances clearly established in the record, the plaintiff could not be deemed an implied invitee to the portion of the premises where the injuries were received. *Johnson v. Mau*, 60 N. Dak. 757, 236 N. W. 472; *Southwest Cotton Co. v. Pope*, 25 Ariz. 364, 218 Pac. 152; *Cowen v. Kirby*, 180 Mass. 504, 62 N. E. 968.

The plaintiff, at the place where his injuries were received, was clearly within the purview of the rule that "The owner or occupier of real property is under no obligation to make it safe, or to keep it in any particular condition, for the benefit of trespassers, intruders, mere volunteers, or bare licensees, coming upon it without his invitation, express or implied." 1 Thompson, Commentaries on the Law of Negligence (2d ed.) sec. 945.

It follows therefore that the trial court erred in overruling defendant's motion for a directed verdict in its favor, and in overruling its motion for a new trial.

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

REVERSED AND DISMISSED.

IN RE ESTATE OF HAROLD GIFFORD.
BENSON & GARRETT COMPANY ET AL., APPELLEES, V. GEORGE T. MORTON, ADMINISTRATOR WITH THE WILL ANNEXED, ET AL., APPELLANTS: SANFORD R. GIFFORD, EXECUTOR, APPELLEE.

275 N. W. 273

FILED OCTOBER 1, 1937. No. 29984.

1. **Executors and Administrators:** CLAIMS AGAINST ESTATE. The "claim or demand" against the estate of a deceased person, "whether due or to become due, whether absolute or contingent," which is required by sections 30-609, 30-701, 30-702 and 30-704, Comp. St. 1929, to be presented to the county court within the time named therein or be forever barred, is such "claim or demand" as existed against decedent at the time of his death.
2. **Judgment:** RES JUDICATA. "Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject-matter of the two suits is the same or not." *Wheeler v. Brady*, 126 Neb. 297, 253 N. W. 338.
3. ———: ———. The question of jurisdiction to render the

judgment upon which this action is based was raised, considered and settled in the action in which it was rendered, and on this issue the former judgment is *res adjudicata*, and is not subject to again be litigated in this action.

4. **Executors and Administrators**: CLAIMS AGAINST ESTATE: NOTICE: WAIVER. Where a judgment rendered against an estate is presented to the county court in which settlement of the estate is pending, with an application for an order directing the personal representatives to pay the same, and the administrator with will annexed appears and pleads to the merits without raising any question to the jurisdiction of the court for failure to give notice of the pendency of the application, failure to give notice thereof is waived.
5. ———: JUDGMENT: PAYMENT. The judgment, upon which this action is based, construed, and *held* not to require the judgment creditor to first pay subcontractors, and others designated therein, the sums found due them as a condition precedent to the payment of said judgment by the judgment debtor.
6. ———: ———: ———. The judgment appealed from construed to direct the personal representatives to pay Benson & Garrett Company the sum of $17,861.30, with interest at 6 per cent. from November 3, 1933, and the costs by them recovered in the former action, and that such judgment does not direct payment to be made by the estate to subcontractors and other claimants.

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

Will H. Thompson, for appellants.

Gaines, McLaughlin & Gaines, King & Haggart, Wear, Boland & Nye and *Clinton Brome, contra.*

Heard before ROSE, GOOD, DAY and CARTER, JJ., and HASTINGS and RINE, District Judges.

HASTINGS, District Judge.

The basis of this action is a judgment recovered by Benson & Garrett Company against Sanford R. Gifford, sole executor and trustee of the estate of Harold Gifford, deceased, in an action commenced in equity in the district court for Douglas county, Nebraska, by the Parsons Construction Company v. Sanford R. Gifford, sole executor and

trustee of the estate of Harold Gifford, deceased, and Benson & Garrett Company et al., to foreclose a mechanic's lien upon certain real property of said estate. From that judgment the executor and trustee prosecuted an appeal to this court. By the decision of this court the judgment of the district court, slightly modified, was affirmed. *Parsons Construction Co. v. Gifford,* 129 Neb. 617, 262 N. W. 508. A full statement of the facts and issues upon which the decision is based appears in that opinion and renders a further statement unnecessary.

Thereafter, on the 16th day of January, 1936, pursuant to the mandate of this court, the district court entered judgment in favor of Benson & Garrett Company for the sum of $17,861.30 against the executor and trustee of said estate. It was provided in said judgment that out of the amount recovered by Benson & Garrett Company there should be paid to the Parsons Construction Company $4,386.22; $3,503.16 to B. Gunwald, Inc.; $526.77 to Harry Binder; $373.87 to Latenser & Sons, and $609.25 to Harry Tukey.

On the 29th day of January, 1936, the Parsons Construction Company, Benson & Garrett Company, B. Gunwald, Inc., John Latenser & Sons, Harry Binder, Harry Tukey and Allan Tukey, appellees, filed an application, with a certified copy of said judgment attached thereto, in the county court of Douglas county, Nebraska, asking for an order directing and commanding Sanford R. Gifford, sole surviving executor and trustee, and George T. Morton, administrator with will annexed of the estate of Harold Gifford, deceased, to make payments on said judgment. The administrator with will annexed filed an answer and objections to the granting of the application. The executor and trustee filed no pleading. The county court entered an order denying the application. Appeal was taken by applicants from said order to the district court for Douglas county. On appeal, the applicants filed a petition substantially the same as their application in the county court. The administrator with will annexed filed an answer

on behalf of the estate. Elizabeth Peckham, claiming to be a legatee under the last will of Harold Gifford, deceased, filed an answer, in effect, the same as that of the administrator. The executor and trustee of the estate filed no pleading.

The defenses alleged in each of said answers were that the claim of Benson & Garrett Company on which the judgment sought to be enforced was based had not been exhibited to the county court within the time fixed for that purpose, and was, by the statute of nonclaims, forever barred, and that the judgment sued upon, being a money judgment only, and originating in the district court, was a nullity.

Appellees filed a motion to strike each of said answers from the files, for the reason, among others, that both questions had been determined and adjudicated in the case of *Parsons Construction Co. v. Gifford, supra,* and that the facts alleged stated no defense to their petition.

Considerable evidence was introduced by both parties in support of and against the motion to strike. The court, on the evidence adduced, sustained the motion and entered a judgment reversing the county court, and directing and ordering the executor and trustee, and the administrator with will annexed of said estate, to pay or cause to be paid forthwith out of any assets of said estate in their hands, as such officials, the amounts set forth in the final decree of said court in the suit of *Parsons Construction Co. v. Gifford, supra.*

Of the assignments in error it is only those discussed in the brief and the oral argument to which consideration will be given.

Appellants assign as error: "The court erred in that, if said judgment be valid, it is a claim against the estate which has not been filed with the county court within the time prescribed by statute and is 'forever barred.' "

It is the contention of counsel for appellants that the judgment not having been presented to the county court as a claim against the estate until the 29th day of January,

1936, was barred under sections 30-609, 30-701, 30-702 and 30-704, Comp. St. 1929.

A consideration of this assignment requires a brief statement of the facts in relation thereto. The record shows that Harold Gifford died testate on the 28th day of November, 1929, and his will was allowed and admitted to probate on the 26th day of December, 1929. The last day fixed by the order of the county court for filing claims was April 24, 1930, and by a subsequent order the time for filing claims was extended to August 25, 1930, at which time an order was made barring all claims. A short time before the death of Harold Gifford, Benson & Garrett Company entered into a contract with decedent to erect four additional stories on the Sanford Hotel in Omaha owned by him. Nothing had been done toward carrying out this contract at the time of Dr. Gifford's death. After the death of Dr. Gifford it was agreed between the executors of the estate and the contractors, Benson & Garrett Company, that the contract entered into by decedent could not be carried out by the parties. The executors of the estate and Benson & Garrett Company entered into negotiations in reference to making a new contract for the construction of the additional stories on said building, and after having reached a satisfactory arrangement the executors, on September 17, 1930, made application to the county court for authority to proceed to enter into said proposed new contract. On the same day the county court granted said application, and authorized said executors to use the funds of the estate for the payment of the improvement. Under the contract the improvement was to be completed by January 15, 1931. The erection of the additional stories was sublet by Benson & Garrett Company to the Parsons Construction Company. Before the time for the completion of said improvement the concrete work by the Parsons Construction Company was found to be defective and was removed. The executors then extended the time for the completion of the improvement to August 15, 1931, and on or about May 27 Sanford R. Gifford, then the sole surviving

executor, stopped further work upon said structure and ordered removed all the property of the contractors from the premises. It was for this breach of the contract entered into between Benson & Garrett Company and the executors of the estate that the judgment involved herein was recovered.

The statutory provisions relied upon by counsel for appellant to support their contention, so far as material, are:

Sec. 30-609. "Every person having a claim or demand against the estate of a deceased person, whether due or to become due, whether absolute or contingent, who shall not after the giving of notice as required in this chapter exhibit his claim or demand to the judge within the time limited by the court for that purpose, shall be forever barred from recovering on such claim or demand, or setting off the same in any action whatever."

Sec. 30-701. "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which if satisfied that such claim is a legal demand against said estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute, or, if the estate shall be insolvent, sufficient to pay a proportion equal to the dividends of other creditors."

Sec. 30-702. "If such contingent claim shall become absolute, and shall be presented to the county court, or to the executor or administrator at any time within two years from the time limited for other creditors to present their claims, it may be allowed upon due proof, as in case of other claims."

Sec. 30-704. "If the claim of any person shall accrue or become absolute at any time after the time limited for creditors to present claims, the person having such claim may present it to the court, and prove the same at any time within one year after it shall accrue or become absolute."

The claim upon which the judgment is based arose out

of the breach of a contract entered into after the death of the deceased, during the course of administration, pursuant to an order of the county court authorizing the executors to enter into such contract, and after the time the order barring claims was entered under section 30-609. It is manifest that the statutory provisions quoted were not intended to apply to this situation.

The decisions of this court cited by counsel for appellants in support of their contention relate to claims that existed at the time of the death of the decedent arising out of contracts entered into or obligations incurred during the lifetime of the decedent, and have no application to claims against an estate arising during the course of administration. The precise question involved here has not been passed upon by this court.

"The statutes of nonclaim usually apply only to claims which existed against decedent in his lifetime, and do not require the presentation of claims which come into existence after his death, but some statutes which provide that such claims shall be charges against the estate require that they shall be presented to the probate court for inspection and allowance. It has been considered that, even though presentation of such claims is not required, they may be presented for the purpose of obtaining an order directing the representative to pay them as expenses of administration, and where claimant has an election to look to the representative personally or to the estate, he must present the claim if he wishes to assert it against the estate." 24 C. J. 330.

The "claim or demand" against the estate of a deceased person, "whether due or to become due, whether absolute or contingent," which is required by sections 30-609, 30-701, 30-702 and 30-704, Comp. St. 1929, to be presented to the county court within the time named therein or be forever barred, is such "claim or demand" as existed against decedent at the time of his death.

The claim on which the judgment against the estate is based, not being one that existed against the decedent at

the time of his death, either as an absolute or contingent claim, was not barred by any of said statutory provisions.

The claim having been reduced to judgment, the judgment was properly presented to the county court for the purpose of obtaining an order for its payment by the executor and administrator with will annexed during the course of administration of said estate.

Error is assigned and the contention made that the judgment sought to be enforced, being a money judgment against the executor of the estate and originating in the district court, is a nullity and unenforceable.

It appears from the record that on the trial of the case of *Parsons Construction Co. v. Gifford, supra,* objection was made to the jurisdiction of the court to hear and determine the issue between the cross-petitioner Benson & Garrett Company, and the cross-petitioner Gifford, executor, on the ground that the executor was not subject to an action for the recovery of money only. The objection was overruled and on appeal of the case to this court the same contention was made as is here made, and in holding adversely to that contention we said: "A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject-matter." *Parsons Construction Co. v. Gifford, supra.*

In *Dutch v. Welpton,* 121 Neb. 480, 237 N. W. 579, we held: "A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat such contentions, but also as to any other admissible matter which might have been offered for that purpose."

And in *Wheeler v. Brady,* 126 Neb. 297, 253 N. W. 338: "Any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, pur-

pose, or subject-matter of the two suits is the same or not."

The judgment upon which this action is based is not void for want of jurisdiction of the court. The jurisdiction to render the judgment against the Gifford estate was questioned and settled in the action in which it was entered, and is not subject to be relitigated in this action.

Error is claimed in that notice was not given by the county court of the filing of the application for the payment of the judgment; that the order entered by the county court denying the application was void, and that the appeal to the district court did not vest that court with jurisdiction. The claim of error in this regard is without merit. It is evident from the record that the administrator, as well as others interested in the estate, knew of the filing of the application for an order directing payment of the judgment. The time for the hearing on the application appears to have been fixed by the court. The administrator with will annexed appeared in the county court, filed an answer to the application and raised no objection to the jurisdiction of the court for failure to give notice of the filing of said application, and on a hearing had in that court obtained a judgment in favor of the estate denying the application. By said acts, notice of the filing of said application, if such notice was required, was waived and the county court vested with jurisdiction to hear and determine the issue presented, and on appeal by the applicants from the judgment denying them the relief sought, the district court became vested with jurisdiction.

It is contended by counsel for appellants that the judgment in favor of Benson & Garrett Company was to be paid by the Gifford estate only after Benson & Garrett Company paid to the others named therein the amounts due each of them from Benson & Garrett Company, and said amounts not having been paid by Benson & Garrett Company that it was error to order the executors to pay prior to the time the condition had been met.

We do not think the judgment will bear the construction

placed upon it by counsel. It was not intended that Benson & Garrett Company, as a condition of the payment of the judgment by the estate, should first pay the amounts due others as found therein. The plain import of the judgment is that Benson & Garrett Company shall pay to those named therein the amounts found due to them out of the proceeds of the judgment when the same is paid by the estate. The sole liability of the estate on the judgment is to Benson & Garrett Company. When the amount of the judgment is paid into court the judgment will be satisfied.

Finally, it is urged by appellants that the "court was without jurisdiction to order the estate to make payment to the subcontractors, as the estate was not subject to any suit in favor of the subcontractors, and the order is not supported by any judgment or decree in their favor."

We construe the judgment appealed from to direct the personal representatives to pay Benson & Garrett Company the sum of $17,861.30, with interest at 6 per cent. from November 3, 1933, and the costs by them recovered in the former action, and that such judgment does not direct payment to be made by the estate to subcontractors and other claimants.

The judgment is right and is

AFFIRMED.

CLARA ALICE STREIGHT, APPELLANT, V. FIRST TRUST COMPANY OF OMAHA ET AL., APPELLEES.
275 N. W. 278

FILED OCTOBER 1, 1937. No. 30033.

1. **Limitation of Actions:** PLEADING: AMENDMENT. The second amended petition, the substance of which is set forth in the opinion, *held* to introduce new causes of action barred by the statute of limitations. The new allegations cannot be the foundation for a recovery against the defendants. This rule does not apply to such allegations as were found in the original petition which was filed before the statute of limitations became a bar and were restated in such second amended petition.

2. Trusts. Evidence examined and *held* to be insufficient to support a finding that the trustee was guilty of fraud, misrepresentation or concealment.
3. ———: LIABILITY OF TRUSTEE. Where the trustee fails to notify the *cestui que trust* of facts of which she was entitled to be advised, resulting damages, in the absence of fraud, will not be presumed because of such conduct alone, but must be proved before recovery can be had.

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

William C. Ramsey and *Sherman Welpton, Jr.*, for appellant.

Finlayson, Burke & McKie, contra.

Heard before ROSE, GOOD, EBERLY, DAY and CARTER, JJ., and HASTINGS and RINE, District Judges.

RINE, District Judge.

This is an action brought by the appellant, Clara Alice Streight, who will hereinafter be referred to as plaintiff, against the appellees First Trust Company of Omaha and the National Company of Omaha, who will be hereinafter referred to respectively as Trust Company and National Company, for damages claimed to have been sustained by plaintiff through the alleged wrongful conduct of the defendant Trust Company while acting in a trust capacity. The defendant National Company succeeded to all the rights and assumed all the liabilities of the defendant Trust Company and cause of action against it is based upon that fact.

At the close of plaintiff's case defendants moved the court for a directed verdict in their favor. This motion was sustained and the case was dismissed. From that action plaintiff has appealed.

On April 20, 1923, one Laura I. Troth obtained a loan of $75,000 from defendant Trust Company. This loan was evidenced by 85 separate bonds or notes, 65 of which were for $1,000 each, and 20 of which were for $500 each. An

examination of these bonds or notes clearly indicates that it was contemplated that they should be sold and that when held by third persons the Trust Company should act as trustee for such persons in handling the loan. For convenience they will be referred to as bonds. These bonds were drawn payable to the order of First Trust Company of Omaha, drew interest at the rate of 5½ per cent. per annum, payable semiannually; the interest payments were represented by coupon notes which were made payable to First Trust Company of Omaha or bearer; both the bonds and coupon notes were made payable at the office of the Trust Company, Omaha, Nebraska.

The bonds that are the subject of this controversy were indorsed as follows: "For value received, the within note and attached coupons are hereby assigned without recourse. First Trust Company of Omaha, By Will T. Graham, Vice President."

This Troth loan was secured by a first mortgage upon real estate located in Dixon county, Nebraska, consisting of several tracts of land aggregating somewhere between 860 and 880 acres. In addition to this first mortgage, the mortgagor therein at the same time gave a second mortgage for $3,750, which was payable in five annual instalments on May 1, 1924, 1925, 1926, 1927 and 1928. These instalment payments were evidenced by five promissory notes for $750 each, payable to the order of the Trust Company, and represented the commission for making the loan.

Part of these bonds which the first mortgage was given to secure were sold by the Trust Company to investors; the remainder were retained by the Trust Company and were held by defendant National Company, the Trust Company's successor, at the time of the trial of this case.

This first mortgage, among other things, provided that the mortgagor should procure and maintain policies of insurance on the buildings located upon the mortgaged premises in the amount of $8,000, loss, if any, to be payable to the mortgagee, the Trust Company, and that the mortgagee should have the right to collect and receive all moneys

which might become payable from such insurance, and apply the same, when received, to the payment of the bonds and all amounts due thereunder; that the mortgagor should pay the taxes, assessments and public charges levied against the mortgaged premises, or any part thereof, before the same became delinquent, and all insurance premiums for the amount of insurance provided for in the mortgage, and that, if any thereof were not paid, the mortgagee might elect to pay such taxes, assessments, public charges and insurance premiums, and the amount so paid should be a lien upon the mortgaged premises, and be secured by the mortgage, with interest thereon at the rate of 10 per cent. per annum; that if the mortgagor should fail to pay the bonds secured or any interest on any of such bonds according to the tenor and effect of the bonds and coupons when the same became due, or if the mortgagor should fail to pay any tax, assessment or public charge or any insurance premium, or should fail in any particular to conform or comply with any of the conditions or agreements of the mortgage, then all of the bonds and interest thereon, secured by the mortgage, should at the option and upon the declaration of the mortgagee, without notice, at once mature and become payable; that in case the bonds and coupons secured by the mortgage, or any of them, were held by another party or other parties than the mortgagee, and by lapse of time matured and were not paid, or in case of default in any particular, either in the bonds or coupons, or in the provisions or conditions of the mortgage, and by reason thereof the bonds and indebtedness should be declared matured and payable, then, in either case, the Trust Company, as a trustee, for the like use and benefit of the holders of the bonds and the obligations secured by the mortgage, might proceed to collect all of the bonds, interest thereon, and indebtedness however evidenced, by action or actions at law, and to foreclose the mortgage; that each and all of the bonds matured on May 1, 1933, and were without preference or priority or distinction as to lien or otherwise of any one bond over any

other bond by reason of priority in issue or negotiation thereof or for any reason whatsoever. These were the only provisions of the mortgage relevant here.

The first mortgage bonds contained, among other things, statements and provisions as follows: That the bonds were secured by a mortgage made by Laura I. Troth, widow, conveying to the Trust Company real property in Dixon county, Nebraska, and that it had been agreed that, in case default was made in the payment of any interest coupon or in the performance of any covenant contained in the mortgage, the bond and all interest coupons should forthwith mature and become due and payable, at the option of the Trust Company as trustee for the holder of the bond, without demand or notice; that the bonds should bear interest after maturity whether maturity resulted through the lapse of time or default, at the annual rate of 10 per cent., payable annually until paid; that each bond was one of a series of 85 bonds aggregating $75,000 secured by the Troth first mortgage, and that each and all matured on the same date and were without preference or priority or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or negotiation thereof or for any reason whatsoever, and that if any default occurred in the bond or any of the bonds, or in the mortgage, then the Trust Company might, as trustee for the holders of the bond and of all the bonds, without notice to or hindrance from any one, declare the bond and all of the bonds matured, due and payable.

On March 14, 1924, plaintiff purchased from the defendant Trust Company seven of these first mortgage bonds for $6,000, their par value.

The record shows that subsequent to the purchase of these bonds by plaintiff the mortgagor failed to pay the interest coupons promptly as they became due. The mortgagee advanced the $2,062.50 necessary to pay the interest coupons falling due on May 1, 1924. This advancement was repaid by the mortgagor as follows: May 3, 1924, $1,325; May 22, 1924, $737.50. Money to pay the November 1,

1924, interest coupons in the amount of $2,062.50 was advanced by the mortgagee, and it was repaid by the mortgagor as follows: November 3, 1924, $1,670.01; December 6, 1924, $269.47; December 31, 1924, $123.02. Of the money necessary to pay the May 1, 1925, interest coupons, $483.40 was advanced by the mortgagee, and it was repaid by the mortgagor on May 7, 1925. The interest was also advanced to take up the November 1, 1925, interest coupons and was repaid as follows: December 31, 1925, $1,195.62; January 8, 1926, $346.95; March 12, 1926, $519.93. Of the money necessary to pay the interest coupons due May 1, 1926, $494.68 was advanced by the mortgagee; this was repaid on May 12, 1926. No further interest payments were made by the mortgagor, although the mortgagee made efforts from time to time to make collections. When the defaults continued in 1927 the defendant Trust Company took steps to and did acquire title to the mortgaged property without foreclosure, as trustee for the bondholders, and proceeded to manage the property for the benefit of the bondholders. The mortgagee advanced the money for the payment of the interest coupons due on November 1, 1926, and for subsequent interest payments up to the interest payments due November 1, 1930. It also advanced the necessary expenses incident to acquiring and operating the mortgaged property, but as the income from the operations of the mortgaged property over a period of years had not been sufficient to pay the operating expenses and the amount of interest falling due on the loan, the Trust Company discontinued making advancements for payment of interest. In handling these transactions the Trust Company had a separate book account dealing with this loan wherein it debited the trust estate for all advances made, expenses incurred, and other charges against the trust estate, and debited itself for the money it received from the operation of the mortgaged property. The result of this bookkeeping discloses that on November 6, 1930, the mortgagee had made advancements to pay interest, taxes, repairs and otherwise looking after this property in the sum

of $26,872.25, and had received from the operation of said mortgaged premises the sum of $7,756.41. The security was still held at the time of the trial by the trustee, without any claim to ownership therein but as trustee for the bondholders. Approximately all the bondholders had from time to time been advised of what was being done by the mortgagee acting as trustee for the bondholders during all the times that the loan was in default. Plaintiff, however, was not so advised until October 31, 1930. The fact that plaintiff was not so advised earlier was explained by the witness Selby, an officer of the Trust Company, as being due to the fact that plaintiff was a resident of California, while nearly all of the bondholders resided either in Omaha, Nebraska, or in the immediate vicinity of that city. These bondholders usually presented the interest coupons personally at the window of the Trust Company's place of business for payment, at which time the bondholders were advised by the Trust Company as to what was going on and how the matter was being handled, and in this connection were shown the books of the company relating to this loan. Shortly prior to the interest payment date of November 1, 1930, defendant Trust Company determined that it would no longer make advancements to pay interest coupons as they fell due, and on October 31 advised plaintiff as follows:

"We return herewith seven Coupons No. 15, on Bonds Nos. 7333, 7334, 7335, 7336, 7337, 7371 and 7372, aggregating $165—Laura I. Troth, evidencing the November 1, 1930, interest.

"Our committee has concluded that in the future the interest on these bonds must be paid from the earnings of the property, and inasmuch as there are not sufficient funds to retire these coupons at the present time, we must necessarily return them unpaid.

"In a few days we will forward a statement showing the general situation with reference to this loan."

A short time after plaintiff received the statement referred to in this letter, which in part reads as follows:

"Omaha, Nebraska, November 6, 1930.

"Memorandum to the Bondholders of Laura I. Troth Bonds, Loan No. 7298:

"We submit herewith a statement of the situation showing the transactions in connection with the above matter, including all advancements by First Trust Company, Trustee:

Advancements—Interest, Taxes, Repairs, etc.—	$26,872.25
Receipts—	7,756.41
"Balance due First Trust Company—	$19,115.84

"Sometime ago the borrower became involved and by reason of representations which were thought to be sufficient at the time the trustee advanced interest and taxes, etc., in accordance with the statement above. It soon became obvious, however, that the borrowers were too heavily involved to carry on and the Trust Company, in behalf of the bondholders, arranged a settlement in lieu of foreclosure, acquiring the title for the benefit of the bondholders, and since that time has been managing the farms. * * *

"The loaning committee of the Trust Company has adopted a policy which will be followed until further notice, viz.: That taxes, repairs, etc., will be paid out of income and that all excess income will be divided between the bondholders and the Trust Company in proportion to their respective interests, until the property is sold, at which time the proceeds will be divided as provided in the mortgage."

Following this memorandum plaintiff received from the Trust Company an itemized statement of the advances and the money received as of date May 11, 1931. This discloses that at the date of this memorandum there was due upon this loan $77,062.50, and that the interest of the Trust Company by reason of advancements, expenses, etc., was $19,142.71. Plaintiff also received a further statement of the same date which disclosed that the entire obligation against the mortgaged real estate, including the advancements made by the Trust Company, was $96,205.21, and

this statement showed the proportionate interest of the several parties to be as follows:

Plaintiff's interest in the real estate	6.408	per cent.
Interest of other bondholders	66.752	per cent.
Interest of First Trust Company by reason of advancements	19.897	per cent.
Interest of First Trust Company by reason of bonds owned	6.943	per cent.
Total	100.	per cent.

No action was taken by plaintiff after she was advised of the manner of the handling of this loan by the defendant Trust Company on October 31, 1930, until June 16, 1934, when she filed a petition against defendants in this proceeding wherein she alleged for cause of action that during all the period of time from November 1, 1926, until and including May 1, 1930, default had been made by the mortgagor in the payment of taxes assessed against the mortgaged real estate for the years 1925 to 1929, inclusive, and that default had also been made, by the maker of the bonds, in the payment of interest due upon the bonds; that defendant Trust Company, in derogation of its duty and of the rights of plaintiff, wrongfully, fraudulently and without notice to plaintiff, advanced the interest due plaintiff upon her said bonds, and wrongfully, fraudulently and negligently failed to notify or apprise plaintiff of the defaults which had existed under the terms of said bonds and mortgage since November 1, 1926; that plaintiff did not know of the complained of conduct of defendant Trust Company until October 31, 1930; and that the defendant Trust Company was negligent and derelict in the performance of its duty as agent or trustee of plaintiff during all of the period from November 1, 1926, until and including October 31, 1930, in failing to disclose to plaintiff the conditions and circumstances which existed relative to the nonpayment of the interest on her bonds and the nonpayment of taxes assessed against the mortgage security; that the security for plaintiff's bonds had depreciated and steadily

declined in value from November 1, 1926, until October 31, 1930; and that the defendant Trust Company was further negligent and derelict in the performance of its duty to plaintiff in failing to promptly institute an action to foreclose the mortgage, to protect plaintiff's right and interest in the security, and in making advancements of interest to plaintiff without imparting knowledge or notice of such fact to plaintiff, and that if plaintiff had known of defaults which had occurred, within reasonable time after their occurrence, plaintiff could have protected herself and saved the face amount of her bonds. The prayer of this petition is for damages in the amount of $4,000, which she alleged arose because the security for her bonds was worth at the time of the filing of the petition not to exceed $2,000, and that she had been damaged to the extent of the difference between the present value of her interest in this security and the face value of her bonds. She then prays for $4,000 damages, with interest at 6 per cent. per annum from October 31, 1930.

Thereafter, on November 2, 1934, plaintiff filed her amended petition which we will refer to as first amended petition. This petition is in all respects, so far as matters here considered, similar in form and language to the original petition. On February 13, 1935, after the statute of limitations had run against the claimed cause or causes of action of the plaintiff arising out of the matters in controversy, she filed her second amended petition. In this petition she alleges as a basis for her right to recover against the defendant Trust Company that that company was negligent, derelict and fraudulent in its duties and obligations to plaintiff under the trust reposed in said defendant Trust Company in the following respects:

(a) That the Trust Company negligently, wrongfully and fraudulently permitted the taxes for the years 1925, 1926, 1927, 1928 and 1929, assessed against the mortgaged real property, to become delinquent, without imparting knowledge or notice to plaintiff, and purchased said taxes at a tax sale, seeking thereby to acquire a superior lien to that of the plaintiff.

(b) That said defendant Trust Company negligently, wrongfully and fraudulently and in violation of the duties imposed upon it by virtue of its confidential relationship permitted the mortgagor to default in the payment of the interest due under the bonds November 1, 1926, May 1, 1927, November 1, 1927, May 1, 1928, November 1, 1928, May 1, 1929, November 1, 1929 and May 1, 1930, without notifying or apprising plaintiff of the nonpayment of said interest items by the original mortgagor, and in further concealing from plaintiff the nonpayment of said interest items by advancement to plaintiff of the interest which was due and payable on her said bonds and each of said bonds.

(c) That the defendant Trust Company was negligent, fraudulent and remiss in its duties in failing to disclose to and in concealing from plaintiff the defaults that existed, as alleged in the two paragraphs (a) and (b) above set out, and in failing to institute foreclosure proceedings or to take any other action to properly protect the interests of plaintiff from the time that defaults originally existed under the terms of said bonds.

(d) That the defendant Trust Company was the owner of a second mortgage covering the mortgaged real property; that in seeking to protect its own interests which were in conflict with the interests of plaintiff herein, said Trust Company, in further derogation of the rights of plaintiff and in utter disregard of its duties to plaintiff, accepted a deed granting and conveying said real estate to said Trust Company and excused and exonerated the original mortgagor from personal liability on said mortgagor's note at a time when said mortgagor was financially responsible for the payment of the same, and treated said real estate as its own; and in that connection, said Trust Company, notwithstanding it was now the owner of said real estate in fee simple and had thus merged its interest therein, in further derogation of the rights and interests of plaintiff collected the income from said real estate, amounting to several thousands of dollars, and retained said income for its own, purporting to use a part of said money to dis-

charge items unpaid on its said second mortgage and to reimburse itself for advances made to bondholders as hereinbefore alleged, for which said Trust Company at that time had no valid claim, having become the owner in fee simple title to said real estate, and having merged its interest thereon.

(e) That said Trust Company incurred numerous and excessive expenses and charges in connection with using said real estate as its own, and seeking to profit at the expense of the bondholders, including plaintiff herein, all of which said expenses the Trust Company now seeks to foist and impose on those interested in said mortgage lien, among them the plaintiff.

The plaintiff further alleges in this second amended petition that at the time of the purchase of her bonds, and that at all times until 1928, the bonds were worth their face, fully and amply secured, but that the value of the security of the bonds was depreciating steadily during the years 1926, 1927, 1928, 1929 and 1930, and further, that had plaintiff been promptly informed of the defaults that existed under the terms of her bonds, she would have insisted that foreclosure action be instituted promptly, or that other action be taken to prudently and properly protect her rights and interest, and would thus have saved the full amount that she had invested in said bonds, or had said Trust Company properly served the interests of the bondholders and the plaintiff by instituting foreclosure action or by taking other proper steps to protect the interest of the bondholders at the time the original defaults existed under the terms of said mortgage, it would have saved for plaintiff the face amount of her said bonds, but that as a result of the negligent, false, fraudulent and wrongful conduct of said defendant Trust Company, as alleged in the second amended petition, the value of plaintiff's bonds had been wholly and completely destroyed, and by reason thereof plaintiff had been damaged in the sum of $6,000. In this petition she prays for judgment for $6,000, with interest thereon at the rate of 6 per cent. per annum from May 1, 1930.

At the close of the plaintiff's testimony she asked leave of court to amend her second amended petition by striking out of the last paragraph thereof the following: "But that as a result of the negligent, false, wrongful and fraudulent conduct of said Trust Company, as hereinbefore alleged, the value of plaintiff's said bonds has been wholly and completely destroyed and by reason thereof plaintiff has been damaged in the sum of $6,000" and substitute in lieu thereof the following: "But as a result of the negligent, false, wrongful and fraudulent conduct of said Trust Company, as hereinbefore alleged, the value of all of said real estate depreciated until it was worth not to exceed $35,200 in the last few months of 1930, and has been worth not to exceed said amount since that time; that plaintiff's interest in this security, according to the computation of said Trust Company, is 6.408 per cent. or not to exceed $2,300 since October, 1930; that the full amount due on plaintiff's said bonds, with interest thereon at the rate of 5½ per cent. per annum, as of this date, is in excess of $7,950; that plaintiff, accordingly, has been damaged in the amount of $5,650 as of this date." And in place of the prayer of said amended petition, to amend said prayer so as to pray for a judgment for damages in the amount of $5,650, with interest from the date of the amendment. Leave was granted to make this amendment, by the court, over the objection of the defendants. Following the making of this amendment and after plaintiff had rested, defendants made the following motion:

"Come now the defendants, the First Trust Company and the National Company of Omaha, and move the court to direct a verdict in favor of these defendants, and against the plaintiff, or in the alternative to dismiss the petition of the plaintiff for the following reasons:

"First: That the cause of action alleged in plaintiff's second amended petition is barred by the statute of limitations; said cause of action appearing from her petition to have accrued on the 31st day of October, 1930, and said second amended petition having been filed on the 13th day of February, 1935.

"Second: That the cause of action alleged in plaintiff's second amended petition is a new and different cause of action than that alleged in her petition, and the cause of action alleged in said second amended petition is barred by the statute of limitations, the cause of action therein stated having been abandoned by plaintiff at the time she filed her second amended petition.

"Third: That plaintiff has failed to state a cause of action and produce evidence in support thereof, either on her second amended petition or on the amendment thereto, and there is insufficient evidence thereon to be submitted to the jury in the following respects:

"(a) That there is no evidence of negligence on the part of the defendants for consideration by the jury.

"(b) That there is no evidence of fraud and concealment, as alleged in the petition, for submission to the jury.

"(c) That there is no evidence to show that the plaintiff could have done anything to protect her interests, had she known of the situation alleged in her petition, and that if offered such showing would be incompetent and speculative, she being the holder of only $6,000 in bonds of a $75,000 bond issue, and suing in her own behalf and not on behalf of other bondholders.

"(d) And that there is no evidence that the interests of the plaintiff have not been fully protected by the defendants in the management and handling of the trust estate.

"Fourth: That there is no evidence that the course of action pursued by the defendants in the management of the Troth loan was detrimental to the interests of the plaintiff, nor that they were remiss in their duties toward plaintiff, or that plaintiff could or would have pursued a different course had she been advised of the situation.

"Fifth: That there is no proper evidence of damages, and no evidence on which the question of damages or the measure thereof can be submitted to the jury."

The motion was sustained and the case dismissed. Of this action plaintiff complains in this appeal.

It is strongly urged by defendants that the action of the

trial court should be sustained on the ground that the second amended petition pleaded a new and different cause of action than that pleaded in the original and first amended petitions; that against the new cause of action the statute of limitations had become a bar before the second amended petition was filed; that the statute of limitations was pleaded within time and that, therefore, no recovery could be had in this case; also that plaintiff could not avail herself of the amendment of this second amended petition made at the close of plaintiff's case for the reason that by filing the second amended petition plaintiff thereby withdrew the cause of action pleaded in the original and first amended petition, which cause of action could not be revived by amendment after the statute of limitations had barred the cause of action that had been withdrawn. The record shows that at the time of the filing of the second amended petition the statute of limitations had barred all grounds for recovery, not theretofore pleaded, which plaintiff might otherwise have had against defendants.

The law is clear that, where the facts incorporated into a petition by way of amendment constitute a cause of action separate and independent from that stated in the original petition, the statute of limitations against the cause of action pleaded in the amendment runs until the filing of such amended petition. *Buerstetta v. Tecumseh Nat. Bank,* 57 Neb. 504, 77 N. W. 1094. This principle of law was restated in *Thurston County v. Farley,* 128 Neb. 756, 260 N. W. 397, as follows: "It is not permissible for a plaintiff to amend a cause of action barred by the statute of limitations by introducing, in substitution for the other, another and a different cause not so barred."

In applying this rule of law in the case of *Thurston County v. Farley, supra,* this court cited and quoted with approval two earlier cases which explained its application, as follows:

"In *Emel v. Standard Oil Co.,* 117 Neb. 418, the original petition alleged that defendant's driver was in the habit of

inviting Emel, an infant, to ride upon defendant's truck; that he invited him on this occasion, and Emel fell from the truck to the ground and was killed. The amendment charged that the driver invited the boy to ride, as was his custom, and, when the child was about to take hold of the truck to mount it, the driver swerved the truck so that the child 'missed his hold on said truck and his footing thereon,' fell and was killed. It was held that the amendment introduced a new cause of action and its allowance was erroneous.

"In *Johnson v. American Smelting & Refining Co.*, 80 Neb. 255, it was held: 'A cause of action alleged in an amended petition, although founded upon the same injury as that described in the original, is a different cause of action, if it is dependent entirely upon different reasons for holding the defendant responsible for the wrong alleged.' "

To sustain defendants' position in this regard, we must assume that the second amended petition does not plead any cause of action which was pleaded in the first two petitions. This we cannot do. While there has been considerable shifting of position by plaintiff in this case, and while the allegations of the second amended petition are confusing and much improper new matter has been added, nevertheless, there has been, we believe, a sufficient continuity of claim made by plaintiff in her several petitions to indicate that the plaintiff has at all times asserted that the defendant Trust Company had been guilty of certain negligence and fraudulent conduct by reason of which plaintiff suffered damages. It follows that the granting of the motion to dismiss the case cannot be sustained upon the ground that the statute of limitations barred all the grounds for recovery pleaded. However, as to any claim against the defendants first asserted in the second amended petition, no recovery can be had because of the bar of the statute of limitations.

The record fails to sustain the allegations made in plaintiff's second amended petition that the Trust Company acted fraudulently in handling this trust. It affirmatively

shows that what was done was done by the Trust Company in good faith and without concealment. Mr. Selby, an officer of the Trust Company, called as a witness by plaintiff, testified, in answer to a question as to whether or not other holders of the bonds were acquainted and familiar with the entire situation relating to the Troth bonds, as follows:

"The bulk of the bondholders in this case were right here in the city or reasonably close, and came in and presented their coupons at the cashier's window, and the books were available to all the bondholders, the correspondence files turned over to them, and the matter was a subject for discussion from time to time as they presented their coupons at the window." The witness further testified that when he referred to "the window" he referred to the window of the accounting room of the Trust Company.

At the trial a list of the bondholders was demanded by the plaintiff and produced. This list showed the address of each bondholder and the amount of the bonds held. It disclosed that fourteen of these bondholders resided in Omaha, two in Council Bluffs, and two in Lincoln, Nebraska. Although these bondholders were easily accessible, plaintiff failed to call a single one of them to refute this testimony, or to show concealment of the transaction complained of, or to show concealment from the stockholders of the defaults made in this loan. Plaintiff also failed to call as a witness any of the bondholders to refute the claim of the Trust Company that it acquired and at all times held the mortgaged property as trustee for the bondholders, although the bondholders in the vicinity of Omaha must have known in what capacity the Trust Company held this property.

The rule announced and applied in the foregoing cases eliminates from consideration here all allegations contained in subsections "d" and "e" of paragraph VI of the second amended petition, as these allegations relate to new matter not pleaded in either of plaintiff's first two petitions. These allegations are hereinbefore set out in this

opinion. But it is not necessary for the Trust Company to rely upon this rule of law to successfully defend against said charges in these subsections, as the record fails to sustain any allegations of conversion, fraud, or any other wrongful conduct charged therein.

No complaint was made of the action of the Trust Company in taking title to and preserving the mortgaged property for the benefit of the stockholders in either of plaintiff's first two petitions. It will, therefore, be unnecessary for us to discuss that action here.

We have carefully examined the record and find no evidence therein of bad faith, concealment or misrepresentation on the part of the Trust Company. In circumstances and under facts very like those involved here, we said in *Fleener v. Omaha Nat. Co.*, 131 Neb. 253, 267 N. W. 462: "We fail to find evidence of bad faith, concealment or misrepresentations on the part of the trustee."

We have not overlooked the point made by the plaintiff relative to the payment by the Trust Company of two of the second mortgage notes. The evidence indicates that these notes were not paid out of the assets of the trust estate. While in the account kept with the trust the Trust Company has credited itself with this item as an advancement, that is merely a matter of bookkeeping which will be up for determination when the Trust Company as trustee has a final accounting with the bondholders. But in no event can that question be raised here, as it was not pleaded in either the first or second amended petitions of plaintiff.

In her briefs plaintiff makes the claim that in this case there is no trust agreement involved but only promissory notes secured by an ordinary mortgage. In this she is in error. The bonds by their terms refer specifically to the mortgage and the provisions of the bonds and the provisions of the mortgage taken together constitute the trust agreement. *Fleener v. Omaha Nat. Co., supra.* This trust agreement indicates that, as to third parties who are bondholders, the Trust Company acts as a trustee for such bond-

holders in all things to be done by the Trust Company under the trust agreement.

The plaintiff alleges that the Trust Company was derelict in failing to institute foreclosure proceedings at the time of the first default in this loan and in failing to liquidate the trust property. There is no merit to these contentions. In considering this claim of plaintiff, all defaults prior to those which occurred in November, 1926, should be eliminated as the first two petitions of plaintiff made no complaint of earlier defaults. By the terms of the mortgage it is provided that, in case of default in the bonds or in the mortgage, then all the bonds and interest thereon secured by the mortgage shall *at the option and upon the declaration of the Trust Company* at once become due and payable, and by the terms of the bonds it is provided that, if default occurs in any of the bonds or in the mortgage, the Trust Company as trustee for the holders of the bonds without hindrance from any one may declare all of the bonds due and payable at the option of the Trust Company as trustee for the holders of the bonds. In *Fleener v. Omaha Nat. Co., supra,* this court held as to a trust agreement giving the trustee less discretion in exercising such an option that the trustee had a right to exercise discretion and was not required to bring foreclosure proceedings immediately upon default. Here the trust agreement specifically provides that the trustee may exercise its option "without * * * hindrance from any one." There is nothing in the trust agreement which requires the Trust Company to speedily liquidate the mortgaged premises. We held in the *Fleener* case: "A trustee cannot be held liable for honest mistakes of business judgment which can be ascertained only from a retrospective point of view." In view of the fact that the defaults we are considering took place in the latter part of 1926 and subsequent thereto; that the Trust Company speedily acquired title for the benefit of the bondholders, thereby saving part of the delay that would have been occasioned by foreclosure proceedings; that at the time there was practically no market for land where

this property is located; and that nearly all the bondholders were being consulted from time to time by the Trust Company as to policy to be pursued in handling this mortgaged property, we do not think it can be fairly said that the Trust Company was negligent in failing to liquidate this property. It follows that the Trust Company is not liable for any subsequent depreciation in the value of the property because of a delay in foreclosing and in liquidating the same.

Plaintiff also contends that the Trust Company should have obtained a personal judgment against the mortgagor at a time when the mortgagor was financially responsible, and that in releasing the mortgagor from personal judgment the Trust Company breached its trust to the damage of plaintiff. There is no complaint made in reference to this matter in the first two petitions of plaintiff. Furthermore, the record fails to show that the plaintiff suffered any damage because of the conduct of the Trust Company in this matter. In the *Fleener* case this court said: "Appellants contend that the trustee should have obtained a personal judgment against the mortgagor and allege that, if the property had been foreclosed at an earlier date, the mortgagor would have been financially able to pay off a deficiency judgment. The record contains no evidence to sustain this allegation and it necessarily fails for want of proof." Under the facts as shown by the record, plaintiff cannot recover upon this ground.

Plaintiff claims that the Trust Company was negligent in failing to notify the plaintiff of certain defaults in the payment of interest on this loan which occurred from time to time between November 1, 1926, and May 1, 1930, and in failing to notify plaintiff that the Trust Company had advanced the money to pay the delinquent interest; and was negligent in failing to notify the plaintiff of certain defaults in the payment of taxes levied from time to time upon the mortgaged property and becoming delinquent during said years; and in failing to notify the plaintiff that the Trust Company had advanced the money to pay

said delinquent taxes; and that the Trust Company was also negligent in failing to disclose to plaintiff the conditions and circumstances which existed relative to the nonpayment of the interest on said bonds and the nonpayment of the taxes assessed against the mortgaged security, and claims to have sustained damages by reason of such negligence.

It is negligence on the part of a trustee to overlook notifying a bondholder or to fail to keep all bondholders promptly advised of matters relative to the trust which would be material in preventing loss to bondholders, but to recover damages for such negligence, the negligence must have caused the bondholder to be damaged. In other words, the rule in this situation is no different from other cases involving negligence. Where negligence is pleaded and proved, before recovery can be had, it must be shown that damage resulted from the negligence to the bondholder. Speculation cannot be indulged in; proof must be adduced.

In the *Fleener* case this court cited and approved the language in *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333, that where material information is withheld from the bondholder "to his injury, the trustee * * * may be required to respond in damages." In the *Fleener* case recovery was sought because the trustee had made advancements of interest and had collected such advancements thereafter from the mortgagor, had made payments of delinquent taxes under circumstances similar to those under which taxes were paid in this case, all without notifying the bondholders, and had failed to commence foreclosure proceedings for nearly five years after the first default in the mortgage. No recovery was permitted in that case because there was no evidence to sustain plaintiff's allegations. We have already pointed out in this opinion that as to whether or not plaintiff suffered damages by reason of the acts of the Trust Company is not to be determined by speculation or conjecture, but must be substantiated by proof.

There is no evidence in the record that, had plaintiff

been advised promptly by the Trust Company of the defaults in the loan and of the acts of the Trust Company in handling the trust property, she could have averted any loss she has sustained by reason of the depreciation in value of the mortgaged property or otherwise. Under the trust agreement an option was given to the Trust Company to declare the entire amount due upon default being made in the loan, and in this option it is expressly provided that the option should be exercised "without * * * hindrance from any one." In this loan there were bonds outstanding of the par value of $75,000 of which plaintiff only owned bonds of the par value of $6,000. In other words, six-seventy-fifths of the issue. In such circumstances she could not alone have forced the trustee to foreclose the mortgage or to liquidate this loan, had she been promptly advised of all that took place.

The great body of the bondholders were fully advised as to this loan and were, so far as the record shows, satisfied with the manner in which the Trust Company was handling the security. It is fanciful to say in these circumstances that plaintiff could have forced foreclosure and liquidation and averted a loss had she been fully and promptly advised by the trustee. A careful examination of the record in this case convinces us that the Trust Company not only acted in good faith but was diligent in seeking to collect the interest from time to time and to liquidate the trust property, but that the condition of the times was such that this could not have been advantageously done. No other bondholders, so far as the record discloses, ever complained of the manner in which this trust was being held and carried out. The plaintiff, for the reasons stated in this opinion, has failed to establish a case for reversal. There being no error in the record, the judgment of the district court is

AFFIRMED.

GERALD H. PALMER, ADMINISTRATOR, APPELLEE, V. WILL H. HAMER, APPELLANT.
275 N. W. 322

FILED OCTOBER 1, 1937. No. 30147.

1. **Master and Servant:** WORKMEN'S COMPENSATION LAW: DEPENDENTS. Where deceased was divorced but legally bound to support his children; where the divorced wife had remarried and she and her children were being supported by the stepfather; and where deceased had also remarried but was not living with his second wife at time of his death, the children of his first marriage cannot recover compensation unless they prove actual dependency upon deceased.
2. **Evidence** examined and found not to prove actual dependency.

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

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

John E. Wakeley and *Clair F. Mulvihill, contra.*

Heard before GOSS, C. J., GOOD, EBERLY, DAY and PAINE, JJ., and SPEAR and KROGER, District Judges.

SPEAR, District Judge.

Compensation proceedings brought by Gerald H. Palmer, special administrator of the Estate of Ernest H. McNutt, also known as Harry Miller, deceased, plaintiff and appellee, against Will H. Hamer, defendant and appellant, on account of the death of McNutt. Deceased was an itinerant and intermittent house painter, who had been working off and on for defendant Hamer, a painting contractor. Deceased, at the time of his death, was engaged in his master's business, and the evidence shows was making an average of about $10.40 a week, although he was paid 75 cents an hour.

The district court found for plaintiff and awarded compensation at the rate of $15 a week, and also various medical expenses, funeral expenses, and attorney fees. Defendant appeals, contending in short, that deceased had been

divorced from his wife some years before; that she had remarried and that she and the stepfather were supporting the children; that the children had received practically nothing from deceased for years; that a legal duty to support the children will not support an award of compensation under these circumstances, unless actual dependency is shown; and lastly that the amount of the award is excessive.

The facts are briefly as follows: In 1927 deceased and his wife were divorced, the decree providing that the custody of the minor children be awarded to Mrs. McNutt and providing for the payment by McNutt of $25 a month for support of the children. After the divorce Mrs. McNutt married one Willie Brooks and she and three of the children who are now under eighteen years of age live with him on a farm in Missouri. In the meantime McNutt married again but was not living with his second wife at the time of his death, although he was not divorced from the second wife.

Section 48-124, Comp. St. 1929, provides:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: * * * (c) Child or children under the age of eighteen years * * * upon the parent *with whom he is or they are living* at the time of the death of such parent, there being no surviving parent. * * * (d) * * * The terms * * * 'children' shall include stepchildren if members of the deceased's household at the time of his death. * * * (e) *In all other cases,* questions of dependency, in whole or in part, *shall be determined in accordance with the fact,* as the fact may be *at the time of the injury*; * * * if there is no one wholly dependent and more than one person partly dependent, the death benefit shall be divided among them according to the relative extent of their dependency." (Italics ours.)

The situation as regards children has never been considered in a reported case by this court, so a new question is here presented.

Under the provisions of our statute, must the children, in order to recover compensation, show that they were dependents in fact, i. e., that the father contributed to their support or would probably make contributions to them, or is it sufficient to show that the father was legally liable for their support?

At the risk of getting the cart before the horse, we may say at this point that the testimony of the daughter, Cleo, that her father sent her $40 to $60 a month is such utter perjury that it is not worthy of consideration. Her father was going about the country, with no work a great deal of the time, married again, though not living with his wife, and there are no evidences of payments except her own word. Her stepfather knows of no such payments, although he testified to four payments totaling $65, and some gifts of clothing. So we have a situation where the father for eight years did not support his children.

We do not believe that legal dependency is sufficient, under our statute, to support a claim for compensation. If it were, there would be no requirement in the statute that, in order to create a conclusive presumption of total dependency, the children must be living with the parent at the time of his death, as distinguished from the section which states that dependency in other cases shall be determined in accordance with the fact. Do the words "in accordance with the fact" permit this court to say that the statute means in accordance with the legal fact and not as to the actual facts existing at the time of the death of the parent? Can this court interpret the statute to mean where one is legally entitled to support that he comes within the purview and protection of the statute? In determining this, we must bear in mind that this court is not permitted to add to the classes of those entitled to compensation as fixed by the legislature, regardless of how just it may seem in a particular case. It appears that 2 Schneider, Workmen's Compensation Law (2d ed.) sec. 374, states the general rule, as follows:

"Where a father has abandoned his wife and children,

the mother obtains a divorce, and the custody of the children has been given to a person other than the father, it cannot be said that the children are living with the father within the conclusive statutory presumption that children living with the parent are dependent upon such parent. The legal obligation of the parent to support the child is insufficient to bring the child within the statutory presumption; and to establish dependency of such children, actual support must be shown."

Had the deceased, in the case at bar, been living with his second wife at the time of his death, she would have been, beyond doubt, entitled to compensation. Had his second wife had stepchildren living with deceased, they would have been entitled to compensation. We do not feel it incumbent upon this court to read a section into the statutes which would in effect state that, in the event deceased had no wife or stepchildren living with him, others legally entitled to his support would be entitled to compensation, even if, in fact, deceased had not been supporting them. See *Roberts v. Whaley,* 192 Mich. 133, 158 N. W. 209; *Weliska's Case,* 125 Me. 147, 131 Atl. 860.

Plaintiff cites *Parson v. Murphy,* 101 Neb. 542, 163 N. W. 847, and contends that this decision is decisive in the instant case. In that case the mother of the deceased, who was not living with him or being supported by him during his lifetime, was allowed compensation. This court said that the presumption that a man would do his duty would apply "until overcome by proof," and that under the facts in that case it would not be presumed that the son would be "unmindful of his duty." The son had not made any contributions to his mother during his lifetime, but she testified that about five months before his death she received a letter from him in which he promised to come and live with her and to support her, but that he became ill and could not do so. This court also said: "The question of legal liability to support does not of itself determine the question at issue."

Plaintiff also relies upon the case of *Harrison v. Cargill*

Commission Co., 126 Neb. 185, 252 N. W. 899. In that case it was held that a wife in an insane asylum was living with husband within the purview of the statute.

In the case at bar the children of deceased were being supported by the stepfather and the evidence shows that the father had no intention of supporting them. If the contention of plaintiff is correct, this court must read into the statute a provision that children legally entitled to support from the parent are entitled to recover. In a case such as the case at bar, if all parties resided in Nebraska, such a holding would result as follows: The children of deceased would be entitled to compensation, the widow of deceased would be entitled to compensation, and on the other hand the stepchildren would be considered wholly dependent upon the stepfather, if the mother did not survive the stepfather. We think the better view is that, in a case where the children are living with a stepfather, in order to establish dependency of such children, actual support must be shown. The plaintiff has failed to do this and therefore cannot prevail.

REVERSED.

ROBERT BUTKE, APPELLEE, V. HERMAN NACHSCHOEN ET AL., APPELLANTS.
275 N. W. 318

FILED OCTOBER 8, 1937. No. 29849.

1. **Fraudulent Conveyances.** "A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer." 27 C. J. 415.
2. ———: INTENT. "The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors." *Tanner v. Frink*, 103 Neb. 817, 174 N. W. 417.
3. ———: CONVEYANCE FROM HUSBAND TO WIFE: BURDEN OF PROOF. A conveyance from a husband to his wife is presump-

tively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Christensen v. Smith*, 123 Neb. 388, 243 N. W. 118.

4. ———. Where a preponderance of the evidence discloses that a conveyance of real estate from a husband to his wife was made in good faith for an adequate consideration, then such conveyance may be sustained.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. Opinion on motion for rehearing of case reported in 132 Neb. 514. *Judgment of district court reversed and action dismissed.*

O'Sullivan & Southard, for appellants.

Floersch & Floersch, contra.

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

MESSMORE, J.

This is an action in the nature of a creditor's bill. The plaintiff seeks to set aside a conveyance made by Herman Nachschoen to his wife Anna. The decree of the district court for Douglas county set aside such conveyance as fraudulent. Defendants appealed, and this court, in an opinion reported in 132 Neb. 514, 272 N. W. 326, held that the defendants were entitled to file an amended answer. All parties asked a rehearing, which was granted. By agreement of the parties hereto in their motions for rehearing, the amended answer of the defendants is to be considered as filed. The cause was argued and submitted, and is now tried in this court *de novo.*

Plaintiff's petition alleges the plaintiff obtained a deficiency judgment against the defendant Herman Nachschoen and others in the amount of $18,843.07, on June 28, 1934; that Herman Nachschoen voluntarily transferred by warranty deed for a consideration of one dollar, love and affection, to Joseph Bohan, the south 48 feet of lot 4, block 44, Omaha, Nebraska, which was transferred by

Joseph Bohan for the same consideration on May 28, 1932; that said conveyances were made without consideration and for the purpose of hindering, delaying and defrauding the creditors of Herman Nachschoen, and especially the plaintiff; and prays that said conveyances be set aside.

Defendants' amended answer admits the obtaining of the deficiency judgment by plaintiff; that execution was returned wholly unsatisfied; and alleges that defendant Anna Nachschoen was and is the owner of the real estate described in plaintiff's petition; that the deed conveying said real estate to Bohan was signed by Herman Nachschoen simply as the husband of Anna Nachschoen, and was given by Anna as security for a 1,000-dollar loan, made by John Bohan to Anna, which debt has been paid and reconveyance of the real estate had to Anna Nachschoen; that the conveyance of July 24, 1923, from Herman Nachschoen to Anna, his wife, was made ten years before the commencement of this action and more than ten years before recovery of plaintiff's judgment; that plaintiff knew of said conveyance at the time the same was made; and pleads the statute of limitations. Plaintiff's reply alleges the indebtedness of Herman Nachschoen to plaintiff as of June 1, 1922, and that the transfer of the real estate in question from Herman Nachschoen to his wife Anna was without consideration.

The principal facts are as follows: Robert Butke, the plaintiff, a contractor, contracted with defendant Herman Nachschoen to build a garage at Seventeenth and Cass streets, in Omaha, Nebraska, for the amount of $18,500, which contract was dated May 22, 1922. Three thousand dollars was paid by Herman Nachschoen, as provided by the contract; $12,000 was not paid, as provided by the contract, Nachschoen having failed to secure a loan which he had anticipated. Butke then took a first mortgage on the property for $12,000 and a second mortgage for $3,500, dated July 1, 1922. In the spring of 1923, Butke entered into another contract with Nachschoen, which resulted in the purchase of a lot for $9,000 by Butke and a transfer

of the lot to Nachschoen on July 7, 1923. The 12,000-dollar first mortgage and the 3,500-dollar second mortgage were released on October 17, 1923, and a first mortgage for $30,000 and a second mortgage for $10,000 were taken on the whole building, including the additional lot. Said mortgages were dated October 1, 1923, due in ten years.

On July 24, 1923, Herman Nachschoen transferred real estate, known as the Herman Apartments; that is, the south 48 feet of lot 4, block 44, in Omaha, to his wife Anna, the consideration recited in the deed being one dollar, love and affection. Nachschoen testified that at the time of the conveyance he had a credit rating of $50,000; had paid $7,500 for the lot upon which the original garage was erected, and had paid $3,000 on the contract when the garage was being built; and had no existing debts; that the mortgage on the garage was foreclosed, and a deficiency judgment, in the sum of $18,843.07, was obtained on June 28, 1934. Anna Nachschoen testified that she withdrew from the Omaha Loan & Building Association $4,000 and took $1,000 from her safe deposit box. Her pass-book shows a withdrawal of $4,021.45 as of date July 24, 1923, the date of the conveyance of the real estate by her husband to her; that Butke was present when she made the withdrawal, and that her husband paid the money to Butke in the purchase of the 9,000-dollar lot. At the same time she contracted with Butke to build some porches on the property, just conveyed to her by her husband, in the amount of $500. Her husband told substantially the same story, stating that $500 of the $5,000 was paid on the porches, and that the deed was made from him to his wife for the amount of money advanced to him; that he gave a check for $3,000 on July 30, and that $1,000 was kept out, as security for the building, by the architect Guth. This testimony is corroborated by exhibit 28, in a statement of account rendered by Butke on January 6, 1924, in which appears the following: "The one thousand dollars you agreed to pay December 4, 1923, are now due according to the referee." Butke's bank book from the First Na-

tional Bank of Omaha showed a deposit of $3,000 on July 30, 1923, and a deposit of $5,278.20 on the same day. Butke's explanation of the latter deposit was that it was the proceeds from the sale of liberty bonds, and that the 3,000-dollar deposit came from Guiou Lumber Company, being surplus money which he had permitted the company to use in its business and for the use of it the company paid him a percentage. Butke denied that Nachschoen had paid him anything on the 9,000-dollar lot. Butke's testimony that on October 1, 1923, settlement was made, as per agreement, by the giving of the new mortgages for $40,000, would indicate that this amount was made up of the balance due on the original mortgage of $15,000, the amount paid by plaintiff for the lot, upon which the addition was built, for $9,000, and the amount of the contract for the addition in the sum of $20,000, making a total of $44,500. Five hundred dollars was paid on the principal of the original second mortgage, and some interest payments were had. This would leave $44,000 due and owing, and Butke stated that the two mortgages for $40,000 were taken in payment. This evidence, defendant Nachschoen contends, corroborates the testimony of himself and his wife as to the 4,500-dollar payment which they say was made at the time the plaintiff purchased the lot for the addition, and this does seem to be established by the documentary evidence as herein set out. Butke's statement in this regard was to the effect that he had made a proposition to build the addition for $17,000; that Nachschoen was not satisfied with the price, desired to finish the roofing himself, and Butke gave him a credit of $550; that the architect was given a credit of $250, making a total credit of $800, which was deducted from the $17,000, leaving a balance of $16,200. This added to the items $15,000 and $9,000 for the lot purchased made a total of $40,200. Butke eliminated the $200 and considered the debt at $40,000. The garage building, when completed, together with the addition, was rented for $400 a month for the first three years and $450 a month thereafter, and every payment of

principal and interest becoming due on the $40,000 was paid by Nachschoen up to April of the year, 1931. There is some evidence in the record that Nachschoen did not pay the taxes, amounting to $3,993, which were finally purchased by Butke, and Nachschoen's note was taken in payment of the back taxes.

Appellee contends that the plaintiff was an existing creditor of the judgment debtor at the time of the conveyance from Nachschoen to his wife Anna; that the burden of proof is on the defendants to show by a preponderance of the evidence that the transfer was in good faith and for a valuable consideration, and that defendants have failed in their proof. Appellee cites *Omaha Brewing Ass'n v. Zeller,* 4 Neb. (Unof.) 198, 93 N. W. 762, wherein it was held: "An indebtedness on notes, which is by express agreement incorporated, with other indebtedness, into other notes, and finally merged into a judgment on the last note, will be held to have existed from the inception of the first note, although open accounts have been made and settled in much larger amounts in the meantime,"—indicating that plaintiff was an existing creditor of defendant Nachschoen on July 1, 1922, more than a year before the conveyance in question was made; that the conveyance from Nachschoen to his wife was presumptively fraudulent, and the burden of proof was on the defendants to establish good faith by a preponderance of the evidence, and citing *Christensen v. Smith,* 123 Neb. 388, 243 N. W. 118, and other cases. The principal contention of the appellants is to the effect that the evidence is sufficient to sustain the transfer by Nachschoen to his wife Anna on the basis of an adequate consideration.

We believe, after a careful reading of the record and considering the documentary evidence introduced in this case, that at the time of the transfer of the real estate in question by Nachschoen to his wife he was solvent, had no existing debts, and, in fact, had a credit rating, according to his own testimony, in the sum of $50,000. The mortgage on the garage was not excessive, and when the

extension was built thereon and the new lot purchased and new mortgages taken, the rentals indicated that the property was valuable. The payments required of him were made by Nachschoen up to April, 1931. Butke knew that Nachschoen owned the property which he conveyed to his wife, and the consideration passing from Anna Nachschoen to her husband, as shown by the evidence, was, in reality, $4,000. The property she received had an encumbrance of between $4,500 and $5,000 against it, and the total value of such property was $10,000. The transfer from Anna Nachschoen to Joseph Bohan and the reconveyance for the loan made to Anna by John Bohan, father of Joseph, fail to show fraud, especially when such conveyances were made in 1932, and the conveyance sought to be set aside was made in 1923.

In 27 C. J. 415, fraudulent conveyance is defined as follows: "A conveyance is declared to be fraudulent when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making the transfer."

The burden of proof in this case, as established by the law of Nebraska, is on the defendants below. *Lincoln Trust Co. v. Sweeney,* 124 Neb. 686, 248 N. W. 67; *Christensen v. Smith, supra.* And if the evidence discloses that the conveyance was made in good faith for an adequate consideration then such conveyance may be sustained.

In *Farrington v. Stone,* 35 Neb. 456, 53 N. W. 389, it was held: "While a transfer of property to a relative by a person liable on a claim, where the effect will be to defeat the payment of the same, will be scrutinized very closely, yet it will be sustained, if made in good faith for an adequate consideration."

In *Blair State Bank v. Bunn,* 61 Neb. 464, 85 N. W. 527, it was held: "A transfer of property by a debtor to a relative, which has the effect of hindering or delaying other creditors in the collection of their debts, will be scrutinized very closely; yet it will be sustained if made in good faith and for an adequate consideration."

In *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414, it was held: "A *bona fide* debt due from husband to wife is a good and sufficient consideration to support conveyance of property as security for such debt."

"The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors." *Tanner v. Frink,* 103 Neb. 817, 174 N. W. 417.

The defendants have proved the *bona fides* of the conveyance, and the judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

PERSONAL FINANCE COMPANY OF LINCOLN, APPELLANT, V. PERSONAL LOAN SERVICE, APPELLEE.

275 N. W. 324

FILED OCTOBER 8, 1937. No. 29871.

1. **Trade-Names:** UNFAIR COMPETITION. Unfair competition means conduct in any trade or business whereby one party, in a deceptive manner, transacts his business with the public in such a way as to leave the impression it is dealing with another.
2. ———: ———: INJUNCTION. In order for one to be entitled to enjoin the use of a trade-name as unfair competition, it must appear that ordinary persons, dealing with ordinary caution, are likely to be misled or confused. Where there is no probability of deception there can be no unfair competition.
3. ———: ———. As a general rule, descriptive terms, or generic words, are not susceptible of exclusive appropriation. They may be used by all the world in an honestly descriptive or nondescriptive manner; but if by their use one person, intending to avail himself of another's reputation, is enabled to transact his business as that of his rival, and prospective customers are likely to be misled or confused thereby, such use then becomes unlawful.
4. ———: ———. The law does not require the plaintiff to prove that deception or confusion actually occurred; he will be entitled to equitable relief if he shows a calculation on the part of the defendant to deceive and a reasonable likelihood that deception or confusion will result therefrom.

5. **Corporations.** A permit to transact business issued to a corporation by the secretary of state is not binding upon the courts as *res adjudicata.*
6. **Evidence** shows defendant to be conducting its business in such manner as to amount to unfair competition.

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

Woods, Aitken & Aitken, for appellant.

Max G. Towle, contra.

Heard before GOSS, C. J., EBERLY, DAY, PAINE and CARTER, JJ., and ELDRED and CHASE, District Judges.

CHASE, District Judge.

This is a suit in equity, in which the plaintiff seeks to enjoin the defendant from using its corporate name, claiming the use thereof constitutes unfair competition. The trial court, by its decree upon the merits, denied the injunction, and the plaintiff presents the record here for review.

The pleadings are so involved we can only epitomize them. The plaintiff asserts that it is a corporation organized under the laws of the state of Delaware, licensed to transact the business of a small loan and finance company in Nebraska, under the name of Personal Finance Company, of Lincoln, and is engaged in such business at Lincoln; that it began business on June 15, 1931; that on the 6th day of June, 1935, the defendant was incorporated under the laws of the state of Nebraska to carry on a similar business under the corporate name of Personal Loan Service; that one Joseph J. Hynes had been active manager of plaintiff's business until the incorporation of the defendant, at which time he left plaintiff's employ and organized the defendant corporation for the purpose of carrying on a finance business, also at Lincoln, in competition with the plaintiff; that the plaintiff's business had been built up because of its reputation for honesty and fair dealing; that the defendant Hynes, during this period, was its chief managing officer; that the plaintiff's name had thus become a valuable trade-name; that the said Hynes

and his associates knew these facts, and for the purpose and with the intention of appropriating the good-will and trade-name of the plaintiff adopted its corporate name and advertised such name through newspapers, telephone directories and listings; that the defendant adopted the name in pursuance of a preconceived fraudulent intention of deceiving the customers of the plaintiff and winning them over to the defendant; that customers intending to contact plaintiff were deceived, misled, and diverted, and induced to communicate with the defendant, with the result that plaintiff lost considerable business through the defendant's unfair conduct, and the defendant thereby became enriched and benefited to the damage of the plaintiff; that the intention of the defendant in adopting a name of such similarity to that of the plaintiff was to confuse the customers of the plaintiff and induce them to deal with the defendant under the belief they were dealing with the plaintiff; that the damages resulting from such conduct are not susceptible of adequate legal measurement, but that they have accrued and will continue to accrue in the future, and plaintiff is without adequate remedy at law.

The defendant, after traversing the general allegations of the petition, admits that it is incorporated under the name Personal Loan Service and is doing business as such. It avers as an affirmative defense that the secretary of state has issued a permit to the defendant to use such trade-name.

From the evidence it appears that the plaintiff began business in Lincoln in 1931, spent approximately $200 a month for advertising; that it made about 1,200 loans every year; that one Joseph J. Hynes, the secretary-treasurer of the defendant, was employed by the plaintiff as its managing officer in June, 1932, and continued in such employment about three years; that he was assisted by one Fern Beardsley as cashier; that in 1935 Hynes left the employ of the plaintiff voluntarily, and with one Waller organized the defendant company; that shortly after the organization of the defendant company the cashier, Fern Beardsley, volun-

tarily left the employ of the plaintiff and became cashier of the defendant; that both Mr. Hynes and Miss Beardsley, during their employment with plaintiff, made contact with plaintiff's customers at its place of business in the Sharp building in Lincoln, Nebraska. The defendant's place of business is in the Federal Securities building, immediately across the street from that of the plaintiff. During the time Hynes was in its employ the plaintiff contacted about 2,600 customers. It is claimed that about 35 of these customers have since transferred their business from the plaintiff to the defendant. Whether this abandonment of the plaintiff by these customers is due to confusion, business dissatisfaction, or otherwise, is not disclosed by the record; neither is their identity established. The plaintiff, in its endeavor to establish the charge of confusion, proffered a witness who testified he had previously been a customer of the plaintiff, and had some loans with them; that he knew Hynes had moved his offices to the Federal Securities building; that such information had been gleaned by newspaper advertisements. While he admitted that he was aware that Hynes was not then working for plaintiff, he was confused, however, in the nature of Hynes' business; that he believed Hynes was now engaged in the insurance business. There was also offered in evidence a letter written by a man at Fairmont, by which he sought to procure a loan, the envelope having been addressed to the plaintiff, the inclosed letter addressed to the defendant. These were the only specific instances in which the plaintiff sought to prove any particular confusion of customers.

The stationery adopted by defendant at the commencement of its business bore striking similarity to that previously used by the plaintiff.

The question for decision here is whether the manner in which the defendant was conducting its business under its corporate name amounts to unfair competition. The courts say that unfair competition means any conduct in a trade or business whereby one party, by deceptive means, transacts his business with the public in such a manner as to

leave the public with the impression that they are actually dealing with another. The doctrine involves misrepresentation, either express or implied. *Peters Milling Co. v. International Sugar Feed No. 2 Co.*, 262 Fed. 336. It will be noted that to invoke this rule some deception must be practiced upon the public whereby it is likely to become misled or confused. The effect of the defendant's conduct upon the public is the gist of plaintiff's right to equitable interference. Such deception will not arise from its effect upon a particular class. On the other hand, it cannot be logically argued that no deception takes place because the cultured, alert, or perceptive are not misled, nor should it be argued that because the untutored or indolent, not possessing the capacity to analyze or the energy to investigate, are likely to be misled. Neither constitutes the true test. The law ordinarily does not recognize extremes, but concerns itself in this particular with what effect the defendant's conduct would produce upon that vast multitude of persons of ordinary intelligence, which may include both extremes, but not necessarily confined to either. Such is the meaning of the word "public" in this connection. If then it can be said that ordinary persons, dealing with ordinary caution, are likely to be misled, then it follows that deception is the natural and probable result of the defendant's acts. Either actual or probable deception, or confusion, must be shown to entitle the plaintiff to the protection of the rule. This is usually accomplished by showing circumstances from which courts might justly conclude that persons are likely to transact business with one party under the belief they are dealing with another. Where there is no probability of deception, there can be no unfair competition. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Charles Broadway Rouss, Inc., v. Winchester Co.*, 300 Fed. 706.

While rival tradesmen may lawfully compete for the patronage of the public, they have no right, by either imitating devices, or unfair means, to beguile prospective customers into dealing with them under the erroneous be-

lief that they are dealing with their rivals. The right to protection is not based on the harmless use of particular words, or a name, but upon the likelihood of an appropriation of the competitor's business to his injury under a mistaken belief. To entitle the plaintiff to such relief, it is not necessary to prove that deception has actually resulted, but sufficient to show a calculation to deceive, and from all the facts and circumstances deception and confusion is likely to arise. *Carter Transfer & Storage Co. v. Carter,* 106 Neb. 531, 184 N. W. 113; *Riggs Optical Co. v. Riggs,* 132 Neb. 26, 270 N. W. 667; *Atlas Assurance Co. v. Atlas Ins. Co.,* 138 Ia. 228, 235, 112 N. W. 232, 114 N. W. 609; *Weisman v. Kuschewski,* 243 Mich. 223, 219 N. W. 937.

Courts are quite unanimous in declaring that descriptive terms or generic words are not susceptible of exclusive appropriation by any one, but may be used by all the world in an honestly descriptive or nondescriptive manner. This rule rests upon the theory that every one should have the right to properly describe his goods or business, and should be able to use all terms necessary or appropriate for that purpose. It has also been said that corporate names made up solely of generic or descriptive terms, ordinarily cannot be exclusively appropriated. *Amoskeag Mfg. Co. v. Trainer,* 101 U. S. 51, 25 L. Ed. 993.

There seems to be one well-recognized exception to the general rule. The courts hold that, even though the words used may be descriptive or generic in their nature, if by their use, either singly or in combination, one person intends to avail himself of another's reputation, and is enabled to transact his business as that of another, it may become unlawful. In such cases intent or calculation to accomplish the result must be established. *American Wine Co. v. Kohlman,* 158 Fed. 830. In the case just cited the names of plaintiff and defendant were identical, and the court held, notwithstanding such identity, the plaintiff would not be entitled to enjoin their use unless he established a specific intent on the part of the defendant to transact its business as the business of the plaintiff.

Where the plaintiff does not establish a reasonable likelihood that deception will result by reason of the name under which the defendant transacts business, courts will refuse injunctive relief. *Fidelity Bond & Mortgage Co. v. Fidelity Bond & Mortgage Co.*, 37 Fed. (2d) 99.

Generic words whose primary meaning is merely descriptive of the business to which they are applied, or are such as are in common use for that purpose, or such as to convey facts applicable with equal truth and right to others, cannot be exclusively appropriated as a trade-name. As a matter of law, no one is entitled to the exclusive use of the descriptive adjectives of the language. *Iowa Auto Market v. Auto Market & Exchange*, 197 Ia. 420, 197 N. W. 321.

The law being abhorrent of monopolies, courts will not, except where unfair competition is clearly established, hold that an individual or corporation has acquired such a property right in the use of a word, or combination of words, that it can exclude all others from the use of such words or combinations, bearing some similarity in import but dissimilar in meaning.

Complaint is made that the trial court found that the permit to transact business issued to the defendant by the secretary of state operates in the nature of *res adjudicata.* While it appears that the trial court made no such positive finding, we agree that such language should not have been used. Courts are creatures of the judicial department of government, constituted for the purpose of reaching conclusions of both law and fact as to all questions justiciable. The judicial department need not recognize a finding of fact made by an officer of the executive department as binding upon it. The issuance of the permit by the secretary of state was purely a ministerial act. The findings of fact made by an officer of the executive department cannot be held to be binding or conclusive upon the courts so as to bring it within the rule of *res adjudicata.*

After making a *de novo* investigation of all the evidence presented by the record, we think the proper inference to be drawn therefrom is that the defendant, by adopting its

trade-name and conducting its business thereunder, intended to mislead and confuse the customers of the plaintiff, and to beguile them into dealing with the defendant under the belief that they were dealing with the plaintiff; and continued confusion is likely to result from such conduct. We do not believe the conclusions reached by the trial court are correct. The case is, therefore, reversed.

REVERSED.

CITY OF MCCOOK, APPELLANT, V. RED WILLOW COUNTY, APPELLEE.

275 N. W. 396

FILED OCTOBER 8, 1937. NO. 29980.

1. **Municipal Corporations:** HIGHWAYS. A highway or public way which a city has the power to pave, and to levy a special assessment to pay for the cost thereof, under section 4283, Comp. St. 1922, as amended by chapter 135, Laws 1923, is a public highway within the corporate limits of the city as distinguished from a street.
2. **Highways.** "To constitute implied dedication by the owner of land of its use for a public highway, there must be present the intent to appropriate the land for public use. The intent may, however, be expressed in the visible conduct and open acts of the owner. If the acts are such as would lead ordinarily prudent men to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.

   "In such case the facts and circumstances must be such as indicate an unequivocal intent to devote the strip of land to the public use." *Burk v. Diers*, 102 Neb. 721, 169 N. W. 263.
3. ———. "In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities. It may be accepted by the public itself, and the acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered by user." *Carpenter v. Schnerle*, 91 Neb. 806, 137 N. W. 850.
4. ———. The facts set out in the opinion *held* not to show such an intent to dedicate, and acceptance by the public, as is necessary to establish a public highway by dedication.
5. **Municipal Corporations.** Under the facts set out in the opinion, *held*, that the road paved and improved by the plaintiff upon

land owned by the defendant, used for county fair ground purposes, was not a public highway which the city under its charter was authorized to pave and improve, and to levy a special assessment to pay for such improvement, and the special assessment levied therefor was unauthorized and void.

6. ———. Where special assessments against property to pay costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands.

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

Butler & James, for appellant.

Charles E. McCarl and *John F. Cordeal, contra.*

Heard before ROSE, DAY, PAINE and CARTER, JJ., and HASTINGS, MUNDAY and RINE, District Judges.

HASTINGS, District Judge.

This action was brought in the district court for Red Willow county, Nebraska, by the city of McCook against the county of Red Willow, to recover certain instalments of pavement assessments levied against the lands of the defendant county. The court found the issues generally in favor of the defendant and entered judgment dismissing the cause. From that judgment the city prosecutes this appeal. The facts are not in dispute.

In the year 1920 defendant purchased 120 acres of land for a county fair ground, approximately 40 acres of which were within the corporate limits of plaintiff city. During that year the county fair board had a part of the grounds located within the city inclosed by a fence. Within the inclosure a grandstand and other buildings were erected, and a race track was laid out, and in this inclosure county fairs were held. A gate was installed along the east side of the inclosure directly opposite the west terminus of O street in said city. This gate is the principal entrance to the inclosure. O street, the most northerly street in the city, extends west from Main street a distance of 3 blocks,

its west end being coterminous with the west side of Third street. In 1920 the first county fair was held upon these fair grounds. In 1921 the county constructed a road from the west terminus of O street west to the main gate, a distance of 750 feet. From the time of its construction the road was used by those attending the county fair in going to and in leaving the fair grounds. It was not used otherwise by the public generally. The road to the point of entrance into the fair grounds was open at all times, but the gate was kept locked, except when a fair was in progress. When fairs were to be held the road was maintained by the county and the county fair board so as to make it more available for use for those attending a fair.

In 1925 the city authorities created a paving district known as "Paving District No. 8," and included in the district that part of the fair grounds east of the inclosure upon which said fair ground road was located; also included in the district, along with some other streets and alleys of the city, was that part of O street from the alley west of First street to Third street. O street runs east and west, and Third street runs north and south. Third street is a part of Highway No. 183, which extends from the northern terminus of Third street to the northeast corner of the fair grounds, thence west along the north side of said inclosure. The city, as a part of its program for paving its streets and alleys within the paving district, paved that part of O street from the alley west of First street west to the west side of Third street, and from that point constructed pavement 30 feet wide on the road on the fair grounds extending west therefrom for a length of about 520 feet, and terminating within said district a short distance east of the gate maintained by the county, or fair board, as an entrance to the inclosure. Neither Third street nor Highway No. 183 was paved, except that part at the intersection of O street and Third street.

Two of the members of the county board and the secretary of the fair board knew of the creation of the paving district, and knew of the improvement being made on the road in question, and made no objection thereto.

Upon completion of the improvement, notice, as required by law, was given of the time and place a hearing would be held by the city council for the purpose of levying special assessments on lots and parcels of land within the district abutting upon or adjacent to any highway, street, avenue, or alley specially benefited thereby in proportion to such benefits, to pay the cost of such improvements. At the time and place set for the hearing no one appeared in behalf of the county to protest or object to the levying of an assessment against the county for benefits derived by it, and the city council found that the land of the county within the district had received benefits in the sum of $4,507.69, and levied an assessment therefor payable in instalments, none of which has been paid.

In this action recovery is sought of one-half of the instalments, the remaining instalments having been barred by the statute of limitations.

Section 4283, Comp. St. 1922, as amended by chapter 135, Laws 1923, under which the city acted, gave the city the right "To curb, pave, repave, gravel, macadamize or otherwise improve and gutter any highway, street, avenue or alley therein, and for that purpose to create suitable improvement districts, and to levy a special assessment on the lots and parcels of land abutting on or adjacent to such highway, street, avenue or alley, or specially benefited thereby in such district, in proportion to such benefits to pay the expense of such improvements. * * * Provided, if in any city or village governed by the provisions of this chapter, there shall be any real estate belonging to any county, school district or municipal or other quasi-municipal corporation, adjacent to or abutting upon the street or other public way whereon paving, repaving or other special improvement has been ordered, it shall be the duty of the board of county commissioners, board of education or other proper officers to provide for the payment of such special assessments or taxes as may be assessed against the real estate so adjacent or abutting, or within such improvement district belonging to the county, school

district or municipal or quasi-municipal corporation. In the event of the neglect or refusal so to do, the city or village may recover the amount of such special taxes or assessments in any proper action, and the judgment thus obtained may be enforced in the usual manner."

It is the contention of counsel for the county that the road extending from the west end of O street to the entrance gate was not a "highway" or "public way" which the city was authorized to pave, and levy special assessments against the land of the county to pay the cost thereof.

A "highway" or "public way" which a city has power to pave or improve, and levy a special assessment to pay for the cost thereof, under the foregoing statutory provisions, is a public highway within the corporate limits of the city as distinguished from a street.

The road paved and improved by the city upon the land of the county was not a street within the meaning of the statute, there having been no express or formal dedication by the county of the road as a street, nor an acceptance by the city as required by section 17-507, Comp. St. 1929, neither was the road a public road as defined by section 39-103, Comp. St. 1929.

The contention of the city is that the road in question was a public highway by implied dedication. By the decisions of this court the law is well settled that a public highway may be established by implied dedication. *Graham v. Hartnett,* 10 Neb. 517, 7 N. W. 280; *Rube v. Sullivan,* 23 Neb. 779, 37 N. W. 666; *Brown v. Stein,* 38 Neb. 596, 57 N. W. 401; *Close v. Swanson,* 64 Neb. 389, 89 N. W. 1043; *Cassidy v. Sullivan,* 75 Neb. 847, 106 N. W. 1027; *Carpenter v. Schnerle,* 91 Neb. 806, 137 N. W. 850; *Burk v. Diers,* 102 Neb. 721, 169 N. W. 263.

In *Burk v. Diers, supra,* we held:

"To constitute implied dedication by the owner of land of its use for a public highway, there must be present the intent to appropriate the land for public use. The intent may, however, be expressed in the visible conduct and open

acts of the owner. If the acts are such as would lead ordinarily prudent men to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation.

"In such case the facts and circumstances must be such as indicate an unequivocal intent to devote the strip of land to the public use."

And in *Carpenter v. Schnerle, supra*: "In order to constitute a highway by dedication, it is not necessary that the offer of dedication be accepted by the public authorities. It may be accepted by the public itself, and the acceptance by the public itself is shown by its entering upon the land and enjoying the privilege offered by user."

It is contended by counsel for the county that the facts in this case fail to show an implied dedication by the county of the strip of land upon which the road paved by the city was located, but that the facts do show that the road was merely a roadway or passageway constructed and maintained by the county solely for the convenience of patrons of the fair in going to and from the inclosure where fairs were held.

In 18 C. J. 105, it is said: "Where the proprietor of land constructs a road over it for his own convenience, the mere user thereof by the public, by sufferance of the proprietor, no matter how long continued, will not show a dedication of the way to the public use nor vest any right in the public to the way. In applying this rule, it has been uniformly held that a way constructed merely to provide convenient access to the owner's place of business, as for instance, to a railroad depot, a wharf, or a store, does not become a public way from user by the public in going to and from such place of business."

Counsel for the city contends that, while the rule announced applies where the owner of the land over which the public highway is sought to be established by dedication is a private person or private corporation, it has no application in case the owner is a governmental subdivision.

Counsel argues, as the land used for fair ground purposes was public land, the road constructed by the county board thereby became a public highway or public way open to the use of the public generally. We think the law, as announced in the authority cited, is applicable to the facts in this case. The mere fact that the road was on public land would not of itself make it a public highway. The county acquired the land to be used for the one purpose of holding county fairs thereon. It established the place for holding fairs a short distance from the eastern boundary line of the land used for fair ground purposes. To carry out the purposes for which it acquired the land, the county board constructed and maintained the roadway or passageway over the uninclosed part of the fair grounds to the inclosed part where fairs were held. The sole purpose in constructing and maintaining the road was that those attending fairs might have a way over the uninclosed part of the fair grounds in going to and from the inclosed part. It is a matter of common knowledge that county fairs are held annually, and then for only three or four days at a time. At times when a county fair was not being held on the fair grounds the road was not used by the general public. The road at its western terminus connected with no highway or public way and was of no use to the public generally. It is clear from the evidence that the road was not intended as a public highway for the use of the general public at any and all times, but only for the purpose stated.

We hold that the evidence is insufficient to show such an intent to dedicate the strip of land upon which the road in question is located for the use of the public, or reliance thereon and acceptance by the public, as is necessary to constitute a public highway by dedication.

The road in question was not a "public highway" or "public way" which the city, under its charter, was authorized to pave and improve, and to levy a special assessment to pay for such improvement. The special assessment was unauthorized and void.

We have held in numerous cases, where special assess-

ments against property to pay the cost of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. *Harmon v. City of Omaha,* 53 Neb. 164, 73 N. W. 671; *Leavitt v. Bell,* 55 Neb. 57, 75 N. W. 524; *Batty v. City of Hastings,* 63 Neb. 26, 88 N. W. 139; *Henderson v. City of South Omaha,* 60 Neb. 125, 82 N. W. 315; *John v. Connell,* 61 Neb. 267, 85 N. W. 82; *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734.

Counsel for the city concedes this to be the law, but urges that, even though the road in question was not a "highway" or "public way" which the city was authorized to pave under its charter, the city had the undisputed right to pave and did pave O street from the alley west of First street to Third street, and the property of the defendant being adjacent to or abutting upon that street, that for the improvement on said street the city had a right to levy a special assessment, and if the amount of benefits received by the property of the county was not as great as assessed against it, the county should have appeared before the city council, sitting as a board of equalization, and objected, and not having done so the assessment made is now beyond dispute. While the city may have had the right to levy a special assessment against the county for any benefits received from the paving of O street, it does not appear from the record that such right was exercised. It is apparent from the record that benefits the county might have received from the paving of O street were not included in the special assessment levied against the county. It appears that the special assessment levied was to pay for the cost of paving and improving the road upon the county land.

The special assessment levied being void for the reasons stated, the judgment denying a recovery therefor is right and is

AFFIRMED.

JEAN LANG, APPELLANT, V. GAGE COUNTY ELECTRIC COMPANY, APPELLEE.

275 N. W. 462

FILED OCTOBER 22, 1937. No. 30258.

Workmen's Compensation. Under the workmen's compensation law, compensation can be allowed only for personal injuries or for death of an employee by accident arising out of and in the course of his employment.

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

Hubka & Hubka, for appellant.

Jack, Vette & Lovewell, contra.

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

GOSS, C. J.

This is an action for compensation brought by Jean Lang, a dependent minor son, by Hazel Lang Henderson, his mother and next friend, on account of the death of his father, Leo Lang.

It is claimed in the petition that on or about October 17, 1936, while Leo Lang was wheeling rocks in a wheelbarrow out of the river near Blue Springs, Nebraska, over a temporary plank runway, he slipped and fell into the river and became soaked and wet; that he continued to work, was chilled, and contracted a severe cold which later developed into pneumonia, from which he died November 27, 1936, all as a result of the above-described accident.

Both the compensation court and the district court held against appellant, dismissing his respective petitions. The compensation court expressly held that the evidence did not substantiate the claim that Leo Lang's death resulted from accidental injuries arising out of and in the course of his employment. The district court did not give the explicit reasons for its decision but merely found against plaintiff on the evidence and dismissed the petition.

Lang was employed with others in clearing the channel of the river of rocks. His duty was to push a wheelbarrow loaded with rocks over a platform made of two twelve-inch planks on wooden horses from a point out toward the middle of the river to the low bank. The river was shallow, being two or three feet at the deepest point, and the platform or runway was a few inches above the water. There is some evidence that he slipped and one foot went off the platform into the water. He was wearing hip boots. It is not clear that he got wet, but there is some evidence indicating that he may have wet one leg. He complained that he injured his hip, to which he had received a previous injury. The wetting, if any, did not seem to attract much attention among his fellow employees. He finished the work that day and continued several days longer until that job was completed. About midnight of October 23 or the early morning of October 24, Dr. Hepperlen was called to attend him. He testified for plaintiff that the patient "appeared to have the flu. At that time he was complaining of having pain in his right hip, which he said was an old hip injury; that he thought he had caught the flu and the hip flared up and started giving him trouble, as it had previously." The patient was put to bed on the 24th and on the morning of the 27th was removed to the hospital. The immediate cause of death was pneumonia.

Dr. Hepperlen was the only medical witness. He testified that he did not know how long Lang had had the flu when he began to attend him on the 24th, that no one could tell definitely, and he did not think Lang told him. In answer to a hypothetical question, stating among other facts that on October 17 Lang fell "into the river and became wet, that water ran into one of his boots and the whole side of his body became wet on the left side," that he worked the next day, that on that Saturday night he came home and had a cold, the doctor expressed the opinion that the patient's condition when he first saw him was due to "exposure." Witnesses had testified that the weather was chilly. The temperature and statements as to the velocity of the wind are lacking in the evidence.

There is no doubt under the evidence that the cause of death was pneumonia, that when Lang first had medical attention he was suffering from influenza, and that was probably preceded by what is commonly called a "cold." Can it be said that, conceding the existence of these conditions in the evidence, it must follow that his death was primarily the result of an accident, as required by the compensation law?

The only accident claimed to have been suffered by the employee in the course of his employment was the slipping from the platform, on which he was pushing a wheelbarrow, into the shallow water. The statute defines an accident as follows: "The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Comp. St. 1929, sec. 48-152.

Blair v. Omaha Ice & Cold Storage Co., 102 Neb. 16, 165 N. W. 893, is a very similar case. There the employee cleaned boiler flues for about a week. It was hot work and caused him to perspire freely. Then he went back to his former work of "pulling" ice—that is, of removing ice from the cans in which it is manufactured. This being in the winter did not take all his time. His claim was that "he was put to work, after the ice was pulled each day, to lower two pumps which were supported by brick pillars above the well outside of the building; that while engaged in this work water dripped upon him and he became very cold, the temperature being about 15 to 18 degrees below zero; and that, after having engaged in this work for about a week, he contracted sciatic rheumatism, became unable to work, suffered severe pain and was incapacitated from that time to the time of the trial." Judge Letton, who wrote the opinion, discusses the cases, distinguishes them, and holds that no compensable accident has been shown under the requirements of our statute.

It has not been shown in this case that such an accident

as described by statute was the inception of the cause of death. The employee may have taken his cold in many ways common to others in the same climate and circumstances. The judgment of the district court was right and it is affirmed.

Our conclusion on the point discussed renders it unnecessary to pass upon the appellee's challenge of the right of the mother to maintain the suit as next friend of the minor.

AFFIRMED.

ALFIO ROBINO V. STATE OF NEBRASKA.
275 N. W. 463

FILED OCTOBER 22, 1937. No. 30126.

Criminal Law. Circumstances sufficient to sustain a conviction for a felony must be such as to prove guilt of defendant beyond a reasonable doubt and exclude every other rational hypothesis.

ERROR to the district court for Douglas county: JOHN W. YEAGER, JUDGE. *Reversed.*

Hotz & Hotz, 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.

ROSE, J.

In a prosecution by the state in the district court for Douglas county, Alfio Robino, defendant, was convicted of setting fire to and burning a dwelling-house situated at 1213 South Eleventh street, Omaha, Douglas county, Nebraska. For that felony he was sentenced to serve in the penitentiary a term of not less than two years nor more than three years. As plaintiff in error he presents for review the record of his conviction.

The only question for determination is the sufficiency of

the evidence to sustain the conviction. The proofs show that the dwelling-house was destroyed by a fire of incendiary origin, but there is no direct evidence that defendant was the guilty person. The conviction rests on circumstantial evidence. Its sufficiency therefore must be tested by the oft-repeated principle of criminal law that circumstances sufficient to sustain a conviction for a felony must be such as to prove guilt of defendant beyond a reasonable doubt and exclude every other rational hypothesis. The house had been the home of defendant and his family. There is no direct evidence to prove that any one of them was in or near the house immediately before or at the time of the fire. There is evidence they were elsewhere. There is proof that the house was insured, but the interest of defendant in the insurance was inferior to that of others. While there are circumstances pointing to defendant's guilt, they do not exclude every other reasonable hypothesis, within the meaning of the criminal law. The sentence, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. RICHARD C. HUNTER, ATTORNEY GENERAL, APPELLEE, V. FOX BEATRICE THEATRE CORPORATION ET AL., APPELLANTS.

275 N. W. 605

FILED OCTOBER 22, 1937. No. 30203.

1. **Lotteries.** A lottery contains the elements of chance, prize and consideration.
2. ———: INJUNCTION. "Bank night," as operated by the Fox Beatrice Theatre Corporation, includes the elements of chance, prize and consideration and is a lottery and a perpetual injunction to prevent it from continuing to do so is a proper remedy.

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

Wright, Wright & Kennedy and *John C. Mullen,* for appellants.

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

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

ROSE, J.

This is a suit in equity brought in the district court for Gage county by the state of Nebraska on the relation of the attorney general, plaintiff, to perpetually enjoin Fox Beatrice Theatre Corporation, a corporation, and Lewis B. Sponsler, its manager, defendants, from operating a lottery known as "bank night" in connection with the Fox and the Rivoli theaters, motion picture houses in Beatrice. Defendants denied that "bank night," as operated by them, is a lottery. That issue was properly raised by the pleadings. Upon a trial of the cause, the district court found that "bank night" is a lottery and granted an injunction forbidding further operation of it. Defendants appealed.

The question determined by the district court is the same on appeal: Is the device called "bank night" a lottery? The constitutional provisions and the statutes making lotteries unlawful are plain in meaning. An amendment to the Constitution in 1934 provides: "The legislature shall not authorize any games of chance, lottery or gift enterprise," with a limitation not applicable to the present inquiry. Const. art. III, sec. 24; Comp. St. Supp. 1935, p. 14. A section of the lottery statute provides:

"Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known * * * shall be fined in any sum not exceeding five hundred dollars." Comp. St. 1929, sec. 28-962.

This legislation was enacted in a form to include every scheme operating as a lottery without regard to form or

kind. There is no material fact in dispute. The nature and operation of "bank night" are explained in a stipulation of facts. It is conducted by defendants and their agents in connection with Fox and Rivoli motion picture theaters. A registration book was personally presented to 5,000 adult persons in and around Beatrice, who, without payment of any money, wrote their names therein, each line giving the address and identifying the registrant by a permanent number. Thereafter the book was open to the adult public for registration in the outer lobby of the Rivoli theater behind the ticket seller's booth where there was notice that neither purchase of a theater ticket nor attendance at the theater was required as a condition of registration. Thereafter the registration increased to more than 10,000 names. Defendants advertised by oral and printed announcements that money would be paid at the Rivoli theater to a registrant on each "bank night," being Tuesday night of each week. The prize winner is determined by chance. Cards an inch square, each bearing the number of a registrant, are placed in a receptacle containing the numbers of all registrants. One card is drawn from the receptacle at random on the stage at 9:00 o'clock on "bank night." It identifies the winner, whose name is announced inside and outside of the theater. If the winner appears in person within two minutes, the award is $25. If he does not so appear, the drawing is futile and the prize is added to the prize for the succeeding "bank night." If the prize winner is outside of the theater, admission thereto is free. The plan abounds in what amounts to emphatic assurance to the public that registration is free and that there is no consideration for the prize offered. This feature of the plan has prominence in the advertisements of defendants and in the stipulation of facts.

No attempt is herein made to give intricate details of "bank night." The foregoing outline is sufficient for a determination of the appeal in view of the frankness and clearness with which counsel for both sides have presented the controversy. The "bank night" system, including the

elements of chance, prize and consideration, was taken from its literary vestments and its real nature as a lottery exposed in its nakedness less than a year ago in *State v. Fox Kansas Theatre Co.*, 144 Kan. 687, 62 Pac. (2d) 929. That case is supported by the great weight of authority and is also reported in 109 A. L. R. 698, where the entire plan is shown in detail, including its origin, and where many cases are considered. By the judgment in that case, the Fox Kansas Theatre Company lost its corporate charter in Kansas for operating a lottery called "bank night." Cases of a similar nature are collected in 103 A. L. R. 866; 57 A. L. R. 424; 48 A. L. R. 1115.

A lottery must contain three elements—prize, chance and consideration. The attorney general argues that all three are present in "bank night" and cites cases in support of his position. Defendants concede what the scheme shows on its face—prize and chance, and the sum of their defense is that consideration is lacking and that the plan is a lawful and successful one to advertise the theater and increase the attendance. Cases supporting that view are also cited.

Is consideration an element of a lottery in "bank night?" Prize winners are limited to registrants. Registration is not necessary to admission to a theater by ticket. The hope of a prize was the inducement to register. Registration meant nothing to registrants but eligibility for a prize. The offer of a prize increased attendance on "bank night" and earnings of defendant, without regard to the merit of the entertainment. The general understanding of chance for a prize is explained by the large number of registrants. Registered buyers of tickets bought more with their purchase money than the privilege of attending motion picture shows in a theater, notwithstanding assertions to the contrary. They bought a chance, while in the theater itself, to be beneficiary in a drawing for a prize there, where it could be claimed within two minutes. They made a contribution to increased income out of which a prize could be paid, a fund created by many to be drawn by the holder

of a single lucky number on a tiny card. This contribution, under the practical operation of "bank night," is the consideration actually paid by the registered ticket holders for a chance for a prize and it is no less effective for that purpose because large numbers of registrants do not pay for theater tickets or occupy seats at the drawing. The prize offered to a registrant without a theater ticket, if he can personally claim it within two minutes after the drawing, though outside at the time, is a cloak to hide an evil design and to evade or cheat the law. "Bank night" as operated by defendants includes all the evils of an ordinary lottery, aggravated, as those evils are, by the appearance of innocence. Its tendency is to draw people without tickets in crowds in front of theaters for something they did not buy or earn, a place of idleness. It encourages in men and women the gambling instinct and the propensity to sustain life on the industry and earnings of others. Idleness, pauperism and crime are some of its bitter fruits. It helps to destroy the initiative essential to individual livelihood and good citizenship. It increases the burdens of law enforcement which fall on the people generally throughout the state, as shown by court records. The lottery laws are directed against these and other evils and it is the duty of courts to give effect to the remedies when properly invoked by prosecuting officers.

The district court made no mistake in finding that defendants are conducting a lottery and in perpetually enjoining them from doing so.

AFFIRMED.

FARMERS EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, APPELLANT, V. FARMERS EDUCATIONAL AND COOPERATIVE STATE UNION OF NEBRASKA, APPELLEE.

275 N. W. 464

FILED OCTOBER 22, 1937. No. 29992.

1. **Contracts:** CONSTRUCTION. Where a contractual relation exists by virtue of a written contract expressed in clear and unambiguous language, the court will not look further to construe it.
2. ———: ———. The contractual relation is fixed by the several documents and the action thereunder by the parties.
3. ———: ———. Where a contract is ambiguous, the court may consider its construction by the parties to ascertain its true meaning.
4. ———: ———. Where, as in this case, 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.

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

Battelle, Strehlow & Morearty, for appellant.

A. C. Pancoast and *F. H. Woodland, contra.*

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

DAY, J.

This is an action brought by the Farmers Educational and Cooperative Union of America against the Farmers Educational and Cooperative State Union of Nebraska to recover the dues of members collected by the state union to which the national union avers it is entitled. This case was tried to a jury in the district court, but at the conclusion of all the testimony both parties moved for a directed verdict, whereupon the court dismissed the jury, took the matter under consideration, and rendered judgment in favor of the defendant. The plaintiff prosecutes an appeal from this judgment.

A resumé of the history of the two organizations will

help an understanding of this case. The national union organized local unions in Nebraska prior to 1913, until there was a sufficient number of such local unions with adequate membership to form themselves into a state union. The state union was formed, and a charter was taken from the national union. The by-laws of the national union, incorporated under the laws of the state of Texas, provided for the payment of 25 cents a year *per capita,* which was to be collected and remitted quarterly by the secretary of the state union. It is the contention of the state union that it is a separate and distinct entity, and that its members are not members of the national union. It claims that it is not bound by the by-laws of the national union. The state union collects its dues in a lump sum, and it has for a number of years paid the national union dues of 25 cents a member from this money. There was no controversy about this payment until the year 1934. The fiscal year for both national and state unions is from November 1 until October 31 of the next year. The time involved in this action is from November 1, 1933, until October 31, 1934. During this period, on January 10 and 11, 1934, the state union held its annual meeting. At that meeting a resolution was adopted that a committee of two members from each director's district should be appointed to investigate the national union officers, and "that their decision shall be the guide as to further contribution of dues to the national union." This committee was appointed, and, after investigation, reported to the board of directors on May 3, 1934, which report is a part of the record. It is brief and clear, and as far as material is: "We recommend the payment of dues to the national farmers union conditional upon the resignation of the present national secretary." The national secretary did not resign, and the dues were not ordered paid by the board of directors, nor paid by the secretary. The defendant contends that they could not be paid except by such an order under the articles of incorporation of the state union. The national union suspended the state union for nonpayment of dues November 19, 1934,

after the 1934 fiscal year was ended. The organization of the national union and the state union was a sort of representative plan. Each local union and each county organization was entitled to one voting representative in the annual convention. The national union holds annual meetings, and each state union is entitled to representation in such a meeting graduated according to its membership. The delegates from Nebraska were present at the annual meeting held in November, 1933, but were not present at the annual meeting held in Sioux Falls, South Dakota, on November 20 and 21, 1934. There is no question that the amount in controversy is $4,095.85, the defendant, of course, insisting that it is not liable for payment of any sum. The defendant paid subsequent dues calculated upon its membership, and was given representation, but never paid the dues for the 1934 fiscal year, and was not suspended until that year had ended.

This case is not particularly complicated if the issues are closely attended. The cause of action of the national union against the state union is based upon contract. Under the alleged contractual relation it is averred that the state union has collected the sum of $4,095.85 for the national union, which it has refused to pay it.

The first question for our determination is the relation existing between the national and state unions. If this relationship were established by a written contract expressed in unambiguous terms, the relationship would necessarily be determined by that instrument. It is a general rule that, where a contractual relation exists by virtue of a written contract expressed in clear and unambiguous language, the court will not look further to construe it. *Crancer v. Reichenbach,* 130 Neb. 645, 266 N. W. 57; *Michigan Stamping Co. v. Michigan Employers Casualty Co.,* 235 Mich. 4, 209 N. W. 104.

But such is not in accord with the facts. The contractual relation exists, if at all, by a number of documents which are not signed by the other party. The acceptance is only by act of the party. When the local unions formed the state

union, the defendant, they secured a charter from the national union. Incorporating under that charter they in fact acquiesced in the terms of that charter, and the articles of incorporation under which it was issued. They had that charter during the year in controversy. For approximately 15 years they had retained this charter. During that time the defendant union through its officers had paid 25 cents a member. Every year they set up on their books the sum based upon 25 cents a member for payment to the national union. They did this in 1934. They reported the amount to the national union officers. The articles of incorporation of the state union did not provide for such payment. The contractual relation is fixed by the several documents and the action thereunder by the parties. *Hull Co. v. Westerfield,* 107 Neb. 705, 186 N. W. 992; *Cady v. Travelers Ins. Co.,* 93 Neb. 634, 142 N. W. 107. Where a contract is ambiguous, the court may consider its construction by the parties to ascertain its true meaning. *Ord Hardware Co. v. J. I. Case Threshing Machine Co.,* 83 Neb. 353, 119 N. W. 682.

Every action of the parties and every interpretation of the parties leads us to construe the contractual relation between the parties as one that requires the payment of the sum sought in this case. They collected and set apart the money to pay this sum. This action is not to recover during time of suspension, but while the relation continued. The judgment is reversed, with direction to the trial court to enter a judgment for the plaintiff.

REVERSED.

TAMARA KLOTZ, APPELLANT, V. SWIFT & COMPANY, APPELLEE.

275 N. W. 667

FILED OCTOBER 22, 1937. No. 30226.

1. **Workmen's Compensation.** An award of compensation cannot be based upon possibilities or probabilities, but upon sufficient

evidence supporting a finding that death of the employee arose from an accident occurring in the course of his employment.

2. ———. The long length of time intervening between the accident and the death weakens the presumption that the accident caused the death.
3. ———. An examination of the evidence reveals it is insufficient to support a finding that the accident to the plaintiff's decedent in the course of his employment caused or contributed to death for which compensation is sought.
4. ———. The compensation act does not authorize an award in a case of death from a peril common to all.

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

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

Brown, Fitch & West, contra.

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

DAY, J.

This is a compensation case brought by the widow and sole dependent of an employee. At the close of the plaintiff's evidence in the district court a motion to dismiss was sustained, for that the evidence was insufficient to support a finding that the pneumonia from which the employee died, April 18, 1936, was attributable to an accident sustained by deceased while employed by the defendant, Swift & Company. The only issue, therefore, presented by the record is whether or not the evidence supports a finding that the death of Tevel Klotz, husband of appellant, was attributable to the accident of April 10, 1930.

The history of the case is that the decedent, Tevel Klotz, was injured in the course of his employment with Swift & Company. He ran a sliver of wood into the thumb of his right hand, which became infected. This infection necessitated the amputation of his right hand on June 2, 1930. Afterwards he returned to work for the company, but because of the infection in his hand, his leg became infected, and he was totally disabled. Several orders were

entered by the district court during the period of disability from the date of the accident, April 10, 1930, until the date of his death, April 18, 1936. At the time of his death he was receiving a compensation award under a decree of the district court for Douglas county finding he was totally and permanently disabled.

He was confined in the insanity ward of the Douglas County Hospital when, in the early part of April, his son desired to take him home for the Jewish holiday. During this period away from the hospital he contracted pneumonia, from which he died. The widow, sole dependent, seeks to recover compensation on the theory that the pneumonia from which decedent died was caused by the accident.

It is a well-established rule in this state that an award of compensation cannot be based upon possibilities or probabilities, but upon sufficient evidence supporting a finding that death of the employee arose from an accident occurring in the course of his employment. *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418; *Porter v. Brinn-Jensen Co.,* 131 Neb. 611, 269 N. W. 96.

The long length of time intervening between the accident and the death weakens the presumption that the accident caused the death. *Omaha & C. B. Street R. Co. v. Johnson,* 109 Neb. 526, 191 N. W. 691. Six years intervened in this case. Perhaps the presumption is not to be indulged in here. Only one physician testified. He did not attend the deceased during the accident, but only when he was stricken with pneumonia. He testified that the decedent's resistance was lowered because of the accident. Of course, the decedent had drawn compensation for all the years for that reason. The evidence does not disclose the fact that the accident caused or contributed to the death. Even the testimony of decedent's physician is not to that effect, except as above noted.

Some argument is made as to the manner of trying cases on appeal in this court upon appeal from the district court. There has been no adjudication upon this question

because, as in this case, it has not been necessary. The statute as amended, section 48-174, Comp. St. Supp. 1935, provides: "That a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the judgment, order, or award was procured by fraud. (3) 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. (4) That the findings of fact by the court do not support the order or award."

The judgment of the district court cannot be disturbed.

AFFIRMED.

ELLA FREDA HOFF, APPELLEE, V. PARK EDGAR, DOING BUSINESS AS EDGAR OIL COMPANY, APPELLANT.

275 N. W. 602

FILED OCTOBER 22, 1937. No. 30270.

1. **Workmen's Compensation.** An employer who attempts to avoid liability on the ground that employee was wilfully negligent must prove a deliberate act knowingly done, or at least such conduct as evidences a reckless indifference to his safety.
2. ———. In a liberal interpretation of the workmen's compensation law, it is *held* that the deceased met his death while in his line of duty, and that the fatal accident arose out of and in the due course of his employment.

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

C. S. Wortman, for appellant.

Moran & James and *Hubka & Hubka, contra.*

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

PAINE, J.

This is an appeal from a judgment of the district court, allowing compensation to the widow of a deceased employee.

There was also argued at the same time a demurrer challenging the sufficiency of the petition, which was filed in the district court.

Claim was filed with the Nebraska workmen's compensation court on May 25, 1936. A hearing was had before one member of that court on December 1, 1936, and an award made in accordance with the prayer of petitioner. Thereupon, a waiver of rehearing before the whole compensation court was filed on February 16, 1937, and an appeal lodged directly in the district court for Gage county.

The evidence discloses that Arlan G. Hoff was the husband of the plaintiff, Ella Freda Hoff, and that Valjean Hoff is their only child, aged 17 years, and that the mother and daughter were solely dependent upon him for support; that said Hoff had been working for Park Edgar, of Ashland, Nebraska, for a period of about two weeks. Hoff was one of two drivers of a large, long wheel-base Chevrolet truck, with a Butler 2,300-gallon gasoline tank, the whole making what is known as a transport truck, and was engaged in hauling gasoline from Eldorado, Kansas, to Nebraska. The employer was in the gas and oil business as a Skelly oil jobber, and transport loads of gasoline were delivered to Ashland, Wahoo, or to Wilber, as ordered. The two drivers made alternate trips and kept the transport truck on the road, night and day, continuously. The drivers were paid $6 a trip, and Hoff had made four or five trips in the two weeks that he had been working at this job.

Mr. Hoff drove the empty transport truck to Eldorado, where it was filled, and he immediately started back, driving through the night, and at 9:00 a. m., April 24, 1936, had reached a point on the highway where it crosses the branch line of the Chicago, Burlington & Quincy Railroad running from Wymore to Beatrice. The railroad ran from the southeast to the northwest, and this Highway No. 2, running north and south, crossed it at an angle. A train, consisting of a large engine and three small passenger cars, was proceeding northwest, and the transport truck, going north, approached the crossing on the left-hand side of

the train, the driver of the truck being on the far side of his cab from the train, which came up from his rear. Each was moving at a speed of 35 to 40 miles an hour; neither slackened speed nor put on brakes, although the engineer whistled. It resulted in a head-on collision, the truck struck the front end of the engine between the pilot, and the cylinder burst into flames, and Hoff was killed.

A farm hand saw the accident, and said that as the truck drove past him, as he was working in the field about 600 feet from the crossing, he waved to Hoff and Hoff waved back, and then he turned and looked west, being attracted by the whistling of the engine, and saw the train coming up. He watched the collision, heard an explosion, and saw a big puff, and a fire started immediately.

It is charged by the appellant that the deceased had made many trips over the highway, was familiar with all of the railroad crossings and, as there was no obstruction in the way, he could have seen the approaching train a considerable distance, but that wilfully, recklessly, and negligently he proceeded to the collision which resulted in his death, and that the trial court committed error in excluding evidence of wilful negligence, and that the judgment entered is contrary to the facts established by the evidence.

Section 48-101, Comp. St. 1929, provides that an employee cannot receive compensation if he was wilfully negligent at the time of receiving an injury. It is argued that gross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences, and that the deceased showed such a reckless indifference to, and intentional disregard for, his safety as to prevent the allowance of compensation in this case.

The appellant argues further that the appellee's case is founded on the theory that, as the employee was killed while in the regular course of his employment, therefore the employer must pay, which puts the employer in the position of being an absolute life insurer to his employee, which is not what the law intends.

Appellant insists that he has been unable to find any case on all fours with this case where a recovery has been allowed, and argues that, if Hoff was alive at the moment of the collision, it would prove that he wilfully refused to do any one of three things for his own safety, i. e., to turn from his course with steering wheel, or to lift his foot from the gas feed, or to apply the footbrake, and that he was guilty of reckless indifference to his own safety, or had wilfully decided to beat the train across the track, and his heirs are not entitled to compensation.

Appellant argues that if Hoff had not died of heart disease just an instant before the crash, or had not dropped to sleep, but was wide awake, then under the holding in *McNaught v. Standard Oil Co.*, 128 Neb. 517, 259 N. W. 517, he was not within the zone of his general duties as therein set out, to which we do not agree.

There is also presented the question whether Hoff might not have deliberately committed suicide by running his truck into this engine, but this court held in *Farmers Grain & Supply Co. v. Blanchard,* 104 Neb. 637, 178 N. W. 257, that, where there was a question as to whether a violent death had been caused by accident or by suicide, there is no presumption in favor of suicide, and that the law presumes the death was caused by an accident until suicide is established by the evidence. There is no scintilla of evidence in this case of a deliberate suicide, and that theory must be rejected by this court.

We will first consider the demurrer. It is insisted that the plaintiff's allegations are entirely insufficient to base any judgment upon.

Appellant argues that the deceased committed a misdemeanor in traversing a grade crossing without bringing his transport truck to a full, complete stop, as provided in sections 39-1036 and 39-1136, Comp. St. Supp. 1935.

Further, that there is no allegation in the pleading that the employer, Park Edgar, was guilty of any negligence which was the natural and proximate cause of employee's death. It is a sufficient answer to say that section 48-110,

Comp. St. 1929, allows recovery "without regard to the negligence of the employer." After a careful examination of the pleadings, the demurrer is hereby overruled.

In all actions at law brought under the workmen's compensation act, the burden of proof to establish wilful negligence of the injured employee is on the defendant (Comp. St. 1929, sec. 48-107), and no evidence is offered to sustain the charge of wilful negligence upon the part of the deceased. To avoid liability on that ground, the employer must prove a deliberate act knowingly done, or such conduct as evidences a reckless indifference to his safety. *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42.

This court cannot account for the cause of this young man's death except on the ground that for some unexplained reason he absolutely failed to see the train approaching the crossing. There is no evidence that he increased his speed to beat it, or that he tried to stop his truck.

In our opinion, he met his death while in his line of duty, and the fatal accident arose out of and in the due course of his employment. The judgment of the trial court is affirmed, with an additional $100 attorney fees allowed for services in this court.

AFFIRMED.

RAMONA B. OAKES, APPELLANT, V. DORIS F. GREGORY ET AL., APPELLEES.

275 N. W. 607

FILED OCTOBER 22, 1937. No. 30076.

1. **Automobiles:** INJURY TO GUEST: DIRECTION OF VERDICT. Where, in a personal injury action commenced by a guest against the driver of an automobile, the guest fails to produce evidence that the accident causing his injury was the result of some negligent act of the driver, the trial court should direct a verdict against him.

2. ———: NEGLIGENCE. Where a person driving an automobile is suddenly confronted with an emergency requiring instant decision, he is not necessarily guilty of negligence in pursuing a course which deliberate judgment might prove to be wrong.

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

F. A. Hebenstreit, for appellant.

Jean B. Cain, contra.

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

CARTER, J.

This action was commenced by Ramona B. Oakes to recover for personal injuries sustained by her while riding in an automobile driven by Doris F. Gregory. The trial court directed a verdict for the defendants. From the overruling of her motion for a new trial, plaintiff appeals.

The evidence in this case shows that plaintiff and her son, Charles, 12 years of age, were riding in an automobile driven by Doris F. Gregory, as her guests. They left Salem, Nebraska, for Humboldt, Nebraska, about 1 o'clock on the afternoon of February 12, 1936. When they arrived at Dawson, Nebraska, they stopped at a filling station and had their windshield cleaned. After proceeding two or three blocks, the car left the traveled portion of the road and ran into a tree about 10 or 12 feet from the road they were traveling. The road was paved but it had some snow and ice on it. There was much more snow on the side of the road, the testimony being that it was approximately a foot deep between the edge of the paving and the tree that was struck. Plaintiff testifies that the car was being driven between 20 and 25 miles an hour at the time of the accident. The car was equipped with chains on the rear wheels. Plaintiff further testifies that Mrs. Gregory was a good driver and that she made no complaints as to her driving. There is no testimony in the record of any specific act of negligence on the part of Mrs. Gregory that contributed

to or caused the accident. The situation can best be summarized by quoting from plaintiff's evidence wherein she said: "Well, it is just one of those accidents that you can't account for, it simply went straight into the tree and to my knowledge it did not skid."

The case comes within the provisions of the guest statute, section 39-1129, Comp. St. Supp. 1935, the material part of which is as follows: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest * * * unless such damage is caused * * * because of the gross negligence of the owner or operator in the operation of such motor vehicle."

"Gross negligence," as used in this statute, has been defined by this court as negligence in a very high degree, or the absence of even slight care in the performance of a duty. *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96; *Lemon v. Hoffmark,* 132 Neb. 421, 272 N. W. 214.

The evidence in this case shows that the driver of the car had no knowledge of any impending danger. The car was being driven at a reasonable rate of speed and without any protest from the plaintiff. The evidence of plaintiff was that Mrs. Gregory had been driving carefully until the accident occurred. There is no evidence in the record as to the cause of the accident. Neither does the record disclose any act done by the driver of the car that even indicates that it was the result of any fault of hers. There is no evidence of any negligence on the part of the driver of the car, and necessarily no evidence of gross negligence as required by the guest statute. The rules of law applicable are stated in the case of *Lemon v. Hoffmark, supra.*

Plaintiff contends that Mrs. Gregory was negligent in failing to drive the car between the trees after it left the pavement. The evidence was that the car traveled only 10 or 12 feet after it left the pavement until it struck the tree and that it happened very suddenly. When we consider the speed of the car, the condition of the ground over which it traveled and the distance to the tree, we

are convinced that the driver of the car, which was clearly out of control when it left the pavement, had no reasonable opportunity to avoid striking the tree. The driver of the car was confronted with a sudden emergency requiring immediate decision. Under such circumstances, a person is not necessarily guilty of negligence in pursuing a course which mature reflection or deliberate judgment might prove to be wrong. *Belik v. Warsocki,* 126 Neb. 560, 253 N. W. 689. Under the facts in this case, Mrs. Gregory was not guilty of negligence in failing to drive between the trees.

After a consideration of all the evidence in the light most favorable to the plaintiff, we find that it was not sufficient to sustain the allegation of gross negligence on the part of Doris F. Gregory, the driver of the car. The trial court therefore correctly directed a verdict for the defendants.

AFFIRMED.

ALBERT QUIJAS V. STATE OF NEBRASKA.

275 N. W. 588

FILED OCTOBER 22, 1937. No. 30134.

1. **Homicide:** MALICE. Malice is one of the essential elements of the offense of first degree murder as well as of second degree murder.
2. ———: ———: INSTRUCTIONS. Where the jury are to determine the grade of the offense, depending upon the question of malice, from the evidence of the witnesses who saw the transaction, uninfluenced by any presumption against the defendant, then an instruction presuming malice, where there are eyewitnesses to the transaction, is erroneous.
3. ———: ———: ———. An instruction that presumes malice, where the witnesses to the transaction are eyewitnesses, is erroneous, where malice is one of the principal ingredients of the offense charged, as being violative of a fundamental right of defendant, in that such instruction lessens the burden of proof upon the part of the state.
4. **Criminal Law.** For a reviewing court to analyze the evidence to determine the degree of guilt, if any, of the defendant would be tantamount to deciding, in a proceeding in error, an issue of fact within the exclusive province of the jury.

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

Morrow & Morrow, for plaintiff in error.

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

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

MESSMORE, J.

This is a proceeding in error from the district court for Scotts Bluff county, wherein the jury found the plaintiff in error (hereinafter called the defendant) guilty of murder in the first degree and recommended life imprisonment.

The offense occurred on the night of November 20, 1936, in Scottsbluff, Nebraska, and involves the Black Cat ballroom, which faces east on First avenue on a paved street, running north and south, one block east of Broadway. The dance hall is in the middle of the block. There is a doorway about the center of the hall. The space north of the hall is occupied by a filling station, located at Fifteenth street and First avenue on the west side of the street north of the dance hall.

The principal parties are the Guevara and Rojas families. The Rojas family included the mother, Lydia, and several sons, Gilberto, Rodrigo, Ted, Manuel and Fermin. The Guevara family consisted of Jose, Abundio, sons of Juana and her husband, Hilario, numbering five children, the mother and father. The defendant, Albert Quijas, also known as Gucho, is a nephew of Juana Guevara and a cousin of Jose and Abundio Guevara. Abundio Guevara, at some time prior to the transpiring of the events involved herein, separated from his wife, who was a daughter of Lydia Rojas. Gilberto Rojas had assaulted Jose Guevara, had been prosecuted therefor and convicted of assault, with intent to wound, at the same term of court in which this case was tried.

A detailed statement of the evidence in this case is neces-

sary in explanation of defendant's contention, as hereinafter set out.

Gilberto Rojas, a brother of Fermin Rojas, the deceased, testified that he was present at the Black Cat hall in Scottsbluff on Friday night, November 20, arriving at about 8:30; that he and Fermin Rojas went to the dance. The witness first saw the defendant standing south of the dance hall about 20 minutes before the trouble started. The witness and his brother, Fermin, were standing 15 to 20 feet north of the door, and the witness stood talking for about five minutes at the south edge of the curb north of the entrance; then defendant walked out, and when he was right south of the witness he said: "Gilberto, I want to talk to you." The witness said: "I will go with you, but I have nothing on me," and the defendant shot at the witness at that time. The witness' mother came from the dance hall, running towards defendant, and stood in front of the defendant, saying, "Don't shoot, don't shoot my sons." Defendant ran around a car parked in front of the witness. This car was parked in front of a lamp post located south of where witness was standing. When the defendant got around the car he shot twice again. The witness did not see or hear just how many shots were fired. Fermin was running north along the sidewalk, and when the witness first noticed him he was going towards the parked car, stooping down after two shots had been fired. The defendant was running fast, going over to Fermin who was walking fast. The other boys had left their mother behind and the defendant shot three or four times towards the filling station; then Fermin walked towards the car, leaned on the front fender of the car and fell dead. Defendant started running northeast. This witness was back of the lamp post at that time. On cross-examination the witness testified that Fermin got past the defendant; the defendant kept going back; Lydia Rojas followed him, and defendant was following Fermin.

Rodrigo Rojas testified that he first saw defendant at the dance while walking towards the musicians, and heard

the defendant ask Hilario for a gun; that Jose Guevara motioned and turned his back to the dancers, took a nickel-plated gun out of his belt and handed it to the defendant; that defendant went right out, as did Hilario and Jose and two other men. The witness heard defendant say in Spanish: "Let me kill one of them Rojas guys, I can get away with it; I have no family or anything, a single man." The witness went out to tell his brother and saw the defendant in the middle of the street and ran straight to the filling station to call the police. He heard a shot and ran over to Gilberto and Leo and took hold of Gilberto who was standing on the curb north of the entrance. Then witness saw his mother, Lydia, in front of the defendant, waving her hands and telling defendant not to shoot, and the defendant was trying to "duck around my mother and shoot at us." Fermin was walking toward the car north. Defendant fired three or four times when he was out in the street, and as Fermin was in front of the filling station. Fermin stooped down, and defendant started to run. On cross-examination, the witness testified that the first time he saw Fermin after he had taken hold of Gilberto, Fermin was north and the defendant farther east, about half way up to the pumps, and his mother was between Fermin and the defendant but farther south.

The witness Leonard Clark, a police officer, testified to finding three shells, and officer W. H. Nadler testified to finding one shell, in direct line with the first pump. The first empty shell was probably 20 feet from the body and out in the street about 10 feet from the sidewalk to the right of way, from the curb down to the pavement. The other two shells were probably another 10 feet but were about three feet apart. The body was immediately behind the car facing northeast, with the face up. Officer Nadler testified that automobiles on the west side of the street were parked parallel to the curb, and on the east side of the street edgeways. Charles I. Nycum, a police officer, was at the scene of the trouble a few minutes after midnight, with Captain Hedge of the police department. Nycum and

other officers testified that they found no broken glass nor a bottle from the front of the dance hall up as far as Fifteenth street.

Lydia Rojas testified that Fermin was 30 years old and married; that she saw the defendant with Jose Guevara and Hilario. She was sitting at the right side of the hall and had been there about a half hour, saw the two Guevaras and the defendant standing together, and saw defendant turn around with a gun in his hand; then put it in his pocket and go outside, followed by the two Guevaras. Fermin and Gilberto were not in the hall, only Rodrigo; she saw Rodrigo going out, and she ran out also; when she got to the outside of the hall she saw two of her sons there, and the defendant before them with a gun in his hand, telling Gilberto: "Come, Gilberto, I need you." To which Gilberto replied: "Yes; I will go with you but you must know that I have no weapon;" Gilberto took a step towards the defendant, who fired a shot; the witness approached defendant, put her arms out and said: "Please not to shoot, that my son was not armed." The defendant was right off the sidewalk, in the street, and had retreated a little towards the left of the dance hall. The witness testified that Fermin was walking along the sidewalk north when she first saw him; that the defendant was out in the street and ran towards Fermin to shoot and fired two shots when Fermin was approaching the parked car; that she followed the defendant north, standing in front of him and waving her arms, and the defendant kept following Fermin. The witness saw Fermin when he was approaching the car and then saw defendant run. When the first shot was fired by the defendant, he was about five steps from Gilberto and Rodrigo. On cross-examination the witness testified: Defendant kept going backward to get away from her and did not go far from her; he just kept going one way and another, but he did not go to the other side of the street.

When the body of Fermin Rojas was picked up, it was found that he was shot twice. One bullet entered the left

thigh approximately four inches below the hip, and the bullet which caused his death entered the left side about four inches below the shoulder, apparently going through the heart.

The witness Earl H. Plaster, attendant at the filling station, which was equipped with flood lights, the light extending the length of the pavement covering the "drive-in," was standing in front of the grease door on the south end of the building on the night of the shooting and saw the defendant coming from the street and back of the car, waving a revolver, and a woman pursuing him. The back end of the car was about even with the lamp post. The woman was waving her hands; they came around from behind the parked car and about even with the flat of the "drive-in." The witness heard a shot. Defendant seemed to be shooting in the direction in which the woman was following him, and apparently shooting around her. She was almost within arm's length and seemed to be chasing defendant up the street. Witness saw a man (later proved to be Fermin Rojas) running fast towards and "about to the pumps." The defendant backed up, with the woman still following him, and at about that time defendant was going behind the parked car. This happened when the shooting was going on. The defendant "pulled in about to the middle of the street," and the man who came in towards the pump (Fermin Rojas) "was running all of the time." He ran to the parked car, and as he approached the pumps he slowed down and then started towards the car. Two shots were fired in the direction in which Fermin Rojas was running. At that time the defendant and Fermin were about 30 feet apart. Fermin Rojas "carried himself from the car and turned a complete right turn and fell on his back behind the car." He was unarmed and apparently no one had attacked him. On cross-examination the witness testified that the woman followed the defendant all the way north to the corner, where he broke and ran, the woman still following him.

S. K. Warwick, a guard and state's witness, was asked

the following question: "I will ask you if at that time you asked him if he got the one he wanted, and if he said to you, in substance, 'I didn't care particularly which one I got,' " to which he answered, "Yes, sir." The witness Harry Heinicke testified to a conversation and interview he had with defendant at noon on November 21, and at that time the defendant stated: "There never was any trouble between me and the other boy," and "I don't know where the gun came from; it is not mine. I think some one slipped it into my hand."

The substance of defendant's testimony material to this case is as follows: He arrived at the Black Cat hall some time after 9:15 p. m. of November 20. As soon as he reached the door he saw Gilberto and Fermin Rojas standing south of the door; they called to him saying, "You don't want to fight my brother, Mike, you son-of-a-bitch, but we'll get you." Defendant then walked away from them about five steps and went north into the dance hall. He saw Jose Guevara coming from the west end of the dance hall and talked to him. Defendant testified: "I asked him if he had anything on him to protect myself, and he said, 'About what?' I told him the Rojases were after me, they are going to get me, and then he said, 'Well, the only thing I have got here is an automatic.' * * * He took it out and gave it to me and I put it in my coat pocket. * * * Then I was heading to go outside when I seen old man Guevara standing against the wall over by the door and I was figuring on asking him about my brother, but as soon as I got to him the Rojases came from the outside again and said, 'We will get you, you son-of-a-bitch,' and then I asked Mr. Guevara if he seen my brother. He said, 'No; you better go.' " Defendant testified that he then left the hall and as he got out on the sidewalk he felt something grab him; that he turned and it was Fermin, and with him Gilberto. Defendant said to them: "Don't follow me because I have got a gun in here," and they said: "Well, you have got a gun, use it, you son-of-a-bitch." Shortly thereafter Mrs. Rojas, mother of deceased, came out in front of

defendant and Rodrigo joined them. The mother was in front of the three boys, and defendant was backing north in the street; he took out his gun to show it to them and shot in the air two or three times. Mrs. Rojas was waving her hands and shouting: "Don't shoot; they are not armed." The defendant backed about 90 feet north, with Lydia Rojas and the Rojas boys following him. Defendant told them to stay back and leave him alone, and he testified that something hit him in the head and made him dizzy, and that he did not recall what happened from that time on. The alleged insult to defendant by the Rojas boys was testified to only by defendant himself.

Defendant's testimony is substantiated by Mrs. Guevara, who testified, in addition, that when she got outside the Rojases had surrounded defendant; that defendant ran and they followed him; that she saw Fermin throw a bottle at defendant; that it hit him on the head, and that several shots were fired after that time. The testimony of Hilario Guevara substantiates the story told by defendant as to the witness' conversation with defendant, as related in his testimony, and that the Rojases followed defendant. This witness further testified that he was near the door of the Black Cat hall, and that when the defendant came into the hall the Rojases followed him, saying "they were going to get us and they sweared at us;" that the Rojases followed defendant out of the hall. The witness heard the first shot; did not hear defendant say he would kill one of the Rojases. Jose Guevara testified substantially as to the conversations that he had with the defendant about the gun; that he saw the mother and the Rojas boys follow the defendant out; that the defendant was in the middle of the street, to the east and north of the entrance to the dance hall; that Mrs. Rojas was "rushing Albert" and the "Rojas boys were behind their mother." The witness saw Fermin pick up a bottle and hit defendant in the head, and that was when defendant fired. He testified that defendant was telling Mrs. Rojas "not to get close to him or he will shoot;" that Mrs. Rojas "kept trailing Albert"

north to about the corner of the dance hall, and that defendant started running north. There is other testimony in the record as to the condition of the defendant in the hospital when he had a conversation with the news reporter, and evidence of his being beaten with a revolver by the Rojas boys immediately after the killing. All of the facts and circumstances relative to the shooting were testified to by eyewitnesses.

There is some evidence given by defendant as to certain statements made to him by the Rojas boys, who called him vile names. The Rojas and Guevara families had had considerable trouble just prior to the time of the killing. There is some evidence that defendant walked backward and the mother of the boys followed him to the corner; that the distance he was backing up, followed by Mrs. Rojas, was approximately 90 feet; that at that point defendant broke and ran. There is further evidence that Fermin Rojas was running north along the sidewalk, and that he cut over towards the parked automobile, going towards the defendant. There is also evidence that just before the trouble started the defendant was surrounded by the Rojas boys and their mother, and evidence that immediately after defendant had fired the two shots at Fermin and broke and ran, two of the Rojas boys ran after him and beat him.

Defendant contends that the trial court erred in giving instruction No. 9, as follows: "In case of homicide, the law presumes malice from the unlawful use of a deadly weapon upon a vital part, and when the fact of unlawful killing or shooting causing death is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation or excuse on the other, the law implies malice, and the offense is then murder in the second degree. You are instructed that in law a loaded gun is a deadly weapon, and if you believe from the evidence, beyond a reasonable doubt, that the defendant, Albert Quijas, wantonly and cruelly, and without justification or excuse, shot and caused the death of Fermin Rojas with a deadly weapon, then the

law presumes such shooting was done maliciously, unless you believe from the evidence it was done without malice."

In support of his contention, defendant cites *Vollmer v. State,* 24 Neb. 838, 40 N. W. 420; *Lucas v. State,* 78 Neb. 454, 111 N. W. 145; *Kennison v. State,* 80 Neb. 688, 115 N. W. 289; *Davis v. State,* 90 Neb. 361, 133 N. W. 406; *Egbert v. State,* 112 Neb. 129, 198 N. W. 1014; and *Styskal v. State,* 116 Neb. 8, 215 N. W. 465, to the effect that, where the circumstances attendant upon a homicide are fully testified to by eyewitnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing by the use of a deadly weapon. The state virtually concedes that instruction No. 9, given by the court, is erroneous, but argues in this court that it is not prejudicially erroneous; that, in fact, there is nothing to be presumed; that the facts which the jury believed constitute murder in the first degree; that the cases cited by counsel for defendant are for the most part cases of second degree murder, and that such instruction only goes to second degree murder.

In the opinion in *Lucas v. State, supra,* it is said (p. 457): "If, then, the law does not presume malice from the fact of the killing when all the circumstances connected with the transaction are testified to by eyewitnesses, this instruction was wrong. If the jury are to determine the grade of the offense depending upon the question of malice from the evidence of the witnesses who saw the transaction, uninfluenced by any presumptions against the defendant, then the instruction cannot be sustained."

In *Egbert v. State, supra,* in the body of the opinion we find this language (p. 131): "Under the law of Nebraska malice is an element of murder in the first degree and also in the second degree."

In *Kennison v. State, supra,* it is said (p. 691) that the "burden of proof in a criminal case does not shift, but remains with the state until the end of the trial, and that it is incumbent upon the state to prove beyond a reasonable doubt that the defendant's act was actuated by malice at

the time the fatal shot was fired." This being true, the defendant herein was deprived of a fundamental right guaranteed to him by law, and the presentation of his defense of self-defense, given by the court, would be practically barred. For a reviewing court to analyze the evidence to determine the degree of guilt, if any, of the defendant would be tantamount to deciding in a proceeding in error an issue of fact within the exclusive province of the jury.

We therefore conclude that the judgment of the district court should be and is reversed, and the cause remanded for further proceedings.

REVERSED.

GEORGE MCGINLEY ET AL., APPELLEES, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

275 N. W. 593

FILED OCTOBER 29, 1937. No. 29821.

1. **Eminent Domain.** The power of eminent domain does not include corporate authority to take away the natural and inalienable right of an individual citizen to acquire, hold and use property and to just compensation when it is condemned or damaged for public use.
2. ———: DAMAGES. In a proceeding to condemn riparian land for public use, consequential damages to other land in the same tract are not limited to governmental sections a part of which is included in the land actually taken, where depreciation in the value of the remainder extends beyond those sections. Syllabus to the contrary in *McGinley v. Platte Valley Public Power and Irrigation District*, 132 Neb. 292, 271 N. W. 864, withdrawn.
3. ———: ———. In a condemnation proceeding, dual or speculative or excessive damages are not recoverable for consequential depreciation in the value of land not taken, though severed from an entire tract of the owner by an exercise of eminent domain.
4. ———: ———. The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.

5. ———: ———. Where pasture lands, forming the principal acreage of a cattle ranch partly taken for a public purpose, will make the same contribution in value to the remainder of the ranch as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken.

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

E. H. Evans and *Beeler, Crosby & Baskins,* for appellant.

Beatty, Maupin, Murphy & Derry and *Gerald J. McGinley, contra.*

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

ROSE, J.

The Platte Valley Public Power and Irrigation District commenced this proceeding in the county court of Keith county September 21, 1934, to condemn and appropriate to its own use 68.7 acres of deeded land and 9.43 acres of accreted land, for a dam, dikes and reservoir in the basin of the North Platte river. This deeded and accreted land was owned by George McGinley and Margaret McGinley, his wife. It is situated in sections 2 and 3, township 14 north, range 38 west, Keith county, and was part of a cattle ranch exceeding in area 46,000 acres.

The county court appointed appraisers who viewed the premises, heard the parties, and, on October 26, 1934, assessed the value of the deeded and accreted land and the damages to the rest of the ranch by reason of the appropriation at $35,000, and the amount of the award was promptly turned over to the county court and possession of the condemned land was taken under the power of eminent domain.

The Platte Valley Public Power and Irrigation District appealed to the district court, where it was designated as defendant, and George McGinley and Margaret McGinley, his wife, as plaintiffs, who claimed damages in the sum of $35,000. On the appeal to the district court, the cause

was tried to a jury. In answer to special interrogatories, the jury found the value of the land actually taken by defendant to be $3,942.80 and damages to other ranch lands of plaintiffs to be $18,400. In addition there was a general verdict in favor of plaintiffs for $23,813.70. From judgment for the latter sum, defendant appealed to the supreme court.

Upon review of the proceedings below, the right of plaintiffs to full compensation for the land condemned and taken was recognized and the inquiry limited to the extent of consequential damages, if any, to lands not taken, but extending from the southern boundary of the ranch in the river northward a distance of 15 miles or more and intersected by a fenced railroad and a state highway running side by side nearly east and west. In summer plaintiffs pastured about 4,000 head of cattle on sand-hills, fed them in winter farther south on hay grown on bottom lands and watered them at the unfenced North Platte river which flows eastward along the southern boundary of the ranch. Further details of the claims of plaintiffs are stated in a former opinion. *McGinley v. Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 271 N. W. 864.

The judgment was reversed on the ground that the case was erroneously tried and submitted to the jury and determined on the issue that all the ranch land not taken was diminished in value, including sand-hills used exclusively in summer for grazing purposes, though some of the pasture was 15 miles from the land taken. The ruling which resulted in the reversal of the judgment for plaintiffs in the sum of $23,813.70 was stated in the syllabus of the former opinion as follows:

"In an action for damages arising out of riparian land condemned for a dam and dikes along the Platte river in Keith county, the owner is entitled to recover for the value of the land condemned and for consequential damages to the remainder of his ranch only so far as the consequential damages affect his use of the governmental sections a part of which is included in the land actually taken." *McGinley*

v. Platte Valley Public Power and Irrigation District, 132 Neb. 292, 271 N. W. 864.

Upon reargument and further consideration of the ruling thus stated, a different conclusion has been reached. The syllabus quoted is accordingly withdrawn and the former judgment on appeal vacated. The right of plaintiffs to just compensation for land taken under the power of eminent domain and also to damages for diminution in the value of land not taken is protected by the Nebraska Constitution, which declares:

"The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21.

The power of eminent domain does not include corporate authority to take away the natural and inalienable right of an individual citizen to acquire, hold and use property and to just compensation when it is condemned or damaged for public use. Individual property rights were not created by the Constitution. They existed in the colonies before the American Union was formed or the Constitution adopted. They were previously recognized by some governments. The Romans once abandoned a plan to build a public aqueduct because a private owner of necessary land was unwilling to allow it to be used for that purpose. Later the Roman senate declared in effect that private property could be taken for public purposes, but only upon an estimate of its value. The Code of Napoleon said that one could not be compelled to give up his property except for the public good and for a just and previous indemnity. The Magna Charta contained a provision that no one should be deprived of his property except by the law of the land and by the judgment of his peers. Property of an individual is protected by the Constitution from invasion by corporations and all departments of government. Const. art. I, sec. 21. In a proceeding to condemn riparian land for public use, consequential damages to other land of the owner in the same tract are not limited to governmental sections a part of which is included in the land actually taken, where

depreciation in the value of the remainder extends beyond those sections. Syllabus to the contrary in *McGinley v. Platte Valley Public Power and Irrigation District,* 132 Neb. 292, 271 N. W. 864, withdrawn. It does not follow, however, that dual or speculative or excessive damages are recoverable for consequential depreciation in the value of land not taken for public use, though severed from an entire tract of the owner by an exercise of eminent domain.

George McGinley, plaintiff, testified in his own behalf and in substance and effect said in part: The ranch in its entirety was well balanced, having the proper proportion of hay land and pasturage, with necessary improvements adapted to that situation; 4,000 acres of hay land in bottoms and 400 acres of hay land in hills; rest, sand-hill pastures; residence and other buildings half mile from river and mile from east line; nine-room house; separate barns for 40 head of horses and 40 head of cattle; fenced railroad and public highway side by side across ranch nearly east and west about three-fourths of a mile from defendant's works; farm fences northward from the river and east and west to protect hay land in summer and confine live stock in feeding and pasturing places in winter and spring; cattle grazed on sand-hills in summer and fed and watered in southern part of ranch in winter; about five miles of ranch on river front; mile and a half of river front taken; dike 75 feet wide, 15 feet high and a mile and a half long, east and west, leaving borrow-pit north of dike to collect water, mud, snow and ice; dam and dike raising water in reservoir to overflow meadow; 68.7 acres of deeded land and 9.43 acres of accreted land taken and of value of $50 an acre, or $3,906; fair and reasonable value of ranch before construction of dam and dike $10 an acre or approximately $460,000; value afterward about $414,000.

In arriving at his opinions or conclusions, the same witness estimated the value of his hay lands at $50 an acre and his sand-hill pastures at $3 to $10 an acre and the depreciation in the value of such pasturage at $1 an acre through-

out. Elements of damage considered in proving depreciation in the value of lands not taken were: Destruction of warm springs that furnished water for live stock in winter when freezing weather cut off at the river all other sources of supply; destruction of brush which sheltered cattle during storms; exposure to increased hazards of cattle drifting with blizzards into deep water; new dangers created by borrow-pit; losses of water front; necessity for new fence five miles or more along defendant's right of way at an initial expense of $125 a mile; inconvenience and change of situation depressing values; elements of damage resulting in consequential depreciation of a dollar an acre in value of approximately 46,000 acres of pasture land. The testimony of some other witnesses for plaintiffs was practically the same as that outlined, with emphasis on a dollar an acre as a measure of depreciation in value.

On account of defendant's project, Nature will be no less bountiful with her pastures in the sand-hills than she was before the land taken was condemned. Defendant did nothing in summer pastures to interfere with cattle, fences, shelter, water, windmills, herders' camps or any other species of property. The White Tail creek, described by plaintiffs as a perpetual stream 16 feet wide, 2 feet deep and 8 miles long, flowing through the pastures, will not be disturbed by defendant. Cattle, while grazing on the sand-hills, will not go to the North Platte river for water during the summer. Defendant is not chargeable with interfering with or injuring any property of plaintiffs in the sand-hills, summer or winter. There is nothing in the record to prove that the sand-hill pastures will not make the same contribution to that part of the ranch not taken that they contributed to the entire ranch before defendant exercised the power of eminent domain.

There is no evidence that the sand-hills themselves will be injured by the taking of land or by the completing of defendant's project. If plaintiffs owned and exclusively used contiguous lands extending as far north as the Arctic Circle, reiterated testimony that such vast territory would

be depreciated a dollar an acre in value by the works of defendant would be an unreasonable method of estimating consequential damages to lands not taken and not injured in any respect. The tendency of testimony of that character, under the circumstances of this case, was to influence the jury to return a verdict for excessive damages. In addition, evidence of the personal value to plaintiffs of sand-hill pasture lands for ranch purposes crept into the record, whereas, the measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. In a recent condemnation proceeding, the supreme court said:

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

A similar error occurs in one of the instructions in the case at bar. The jury were left free to find that all the land not taken was diminished a dollar in value on each acre, if the evidence so proved, though there was no proof that the summer pasture land in the sand-hills was of any less value for ranch purposes after the taking than it was before. There must be a limit to remote, unaffected lands that may be considered in estimating depreciation in their value by condemnation of contiguous lands taken for public purposes. *Wiles v. Department of Public Works,* 120 Neb. 689, 234 N. W. 918.

Where pasture lands, forming the principal acreage of a cattle ranch partly taken for a public purpose, will make the same contribution in value to the remainder after the taking as they previously contributed to the whole, they should not be considered in estimating the fair and reasonable market value of the entire portion of the ranch not taken.

The conclusion is that errors in the proceedings below resulted in an excessive judgment which must either be reversed or reduced by remittitur. Plaintiffs will be permitted to file within 20 days a remittitur for that part of the judgment in excess of $17,000. In that event, it will stand affirmed for the reduced amount. Otherwise, it will be reversed and the cause remanded for further proceedings, plaintiffs in any event to pay the costs.

AFFIRMED ON CONDITION.

MARY HARDUNG, APPELLEE, V. KEITH SHELDON, APPELLANT.
275 N. W. 586

FILED OCTOBER 29, 1937. No. 30041.

1. **Automobiles:** NEGLIGENCE. A motorist driving at such speed that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of his vision is usually negligent.
2. **Negligence:** QUESTION FOR JURY. Where reasonable men might draw different conclusions from the evidence, negligence is a question for the jury.
3. **Automobiles:** NEGLIGENCE: QUESTION FOR JURY. If a driver confronted by an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury.
4. **Appeal.** Error in instructions not prejudicial to the complaining party, and not affecting the verdict, does not require a reversal.

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

Glebe & Elliott, for appellant.

F. J. Reed, contra.

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

DAY, J.

This was an automobile collision occurring on a country road in Scotts Bluff county between a car driven by defendant and one in which plaintiff was riding. The defend-

ant appeals from a judgment for damages to the person and damages to the car assigned to plaintiff. Stripped of legal verbiage, the appellant complains that the evidence is not sufficient to sustain the verdict and judgment, and to three particular instructions given by the court to the jury.

Merely to give a background, the appellant, Keith Sheldon, was under sixteen years of age, and took the car he was driving without permission from his grandfather, Addison E. Sheldon. Mary Hardung, the appellee, was farming with her son, George Hardung, 24 years of age, the owner and driver of the car in which she was riding. The accident occurred on a state highway about five miles east of Lyman. At this point in the road is a steep, sandy hill. The appellant was driving up the hill on the left side of the road. The appellee's car was coming over the brow of the hill, and the two cars were confronted with an impending collision. The drivers of both cars either turned to the right, or at least George Hardung did, and the collision was on the appellant's right-hand side of the road.

Each driver seeks to justify his conduct in driving on the wrong side of the road at different times by the exigencies of the situation. The appellant asserts that the road was covered with a sand-blow commencing at the bottom of the east side of the hill, and extending fifty or seventy-five feet up the hill. He contends that it was customary and necessary to drive up that hill on the left side of the road. He supports this claim with other witnesses, and with photographs of the road.

On the other hand, George Hardung, the driver of the car in which appellee was riding, asserts that he was driving over the brow of the hill on his right side when he was confronted by the appellant driving on the wrong side of the road; then he "slammed on" his brakes, and turned to his left when the collision occurred. There is considerable testimony as to the relationship of the parties, but since Keith Sheldon is the only appellant, it does not concern us here.

Within the issue presented here after determination by the jury, one driver is proceeding uphill along the wrong side of the road because of its condition, and the other is proceeding over the brow of the hill, when there is a collision. Of course, the evidence is in dispute as to speed, condition of the road, the distances at which they could see each other, and the route of the cars at or before the impact. It is a typical automobile accident case.

It is the contention of the appellant that the car in which appellee was riding was negligently driven on a public highway, over the brow of a hill, at a rate of speed such that it could not be stopped or turned aside to avoid an obstruction within the range of vision. In this jurisdiction, as well as in most others, it is a well-established rule that a motorist driving at such speed that he cannot stop or turn aside in time to avoid an obstruction discernible within the range of vision is usually negligent. *Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465; *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572. There are, of course, certain exceptions, where an object's visibility is obscured, which are recognized in the *Roth* case, such as an unlighted ditch across a highway which could not be anticipated, and an obstruction similar in color to the highway. Subsequent cases have recognized these exceptions. *Adamek v. Tilford,* 125 Neb. 139, 249 N. W. 300; *Anderson v. Lee,* 130 Neb. 258, 264 N. W. 666; *Monasmith v. Cosden Oil Co.,* 124 Neb. 327, 246 N. W. 623, and others.

The entire question in this case devolves to one to determine the negligence of the appellee's driver. Where the evidence is seriously in dispute, as here, and where reasonable men might draw different conclusions from the evidence, negligence is a question for the jury.

We will now consider the contention that the collision occurred on the right side of the road for the appellant, due to the driver for the appellee turning to his left of the road. This is a considerable feature of the appellant's charge of negligence. But the driver contends he was confronted with an emergency at the time. If his theory

of the case is correct, he was faced with an unusual situation. If a driver confronted by an emergency turns his car to the left in an attempt to avoid a collision, the question of negligence is for the determination of the jury. *Anderson v. Lee, supra.*

It is mentioned in argument that the accident occurred on the appellant's right-hand side of the road, and the physical facts demonstrate that the verdict should be set aside. *Hessler v. Bellamy,* 128 Neb. 571, 259 N. W. 514, is relied upon to support this contention. In that case it was said that, when the undisputed physical facts demonstrate a lack of negligence, the evidence is not sufficient to support a verdict. In this case the facts surrounding the physical facts are disputed and excused, and therefore the matter of negligence is for the jury.

The appellant complains of two instructions, numbered 11 and 19, for that they gave the rule of concurring negligence of the two drivers of the cars. The undisputed evidence, he says, indicates that appellee and the driver of the car in which she rode were on a joint enterprise. Even assuming the appellant's position, the instructions are not prejudicial to the appellant under any theory of the case. Error in instructions not prejudicial to the complaining party, and not affecting the verdict, does not require a reversal. Comp. St. 1929, sec. 20-853; *Live Stock Nat. Bank v. Bragonier,* 98 Neb. 506, 153 N. W. 504.

Another complaint has also been examined, and nothing prejudicial to the appellant is revealed. This controversy was submitted to a jury upon the several disputed questions of fact, and the jury upon this conflicting evidence found against the appellant. This court will not disturb the verdict.

AFFIRMED.

INDEPENDENT LUBRICATING COMPANY, INC., APPELLEE, V. WILLIAM T. GOOD, APPELLANT.

275 N. W. 668

FILED OCTOBER 29, 1937. No. 30221.

1. **Appeal.** Where a sole defendant dies after filing notice of appeal and a supersedeas bond, his attorney during his life does not confer jurisdiction upon this court by filing a transcript after his death.
2. ———. By statute (section 20-1912, Comp. St. 1929) an appeal to this court is taken by filing a transcript of the judgment within three months of rendition.
3. ———. Ordinarily, an appeal cannot be prosecuted in the name of a party who died before the appeal was perfected.
4. ———: DISMISSAL. An appeal prosecuted in the name of a sole defendant, who died before the transcript was filed in this court, must be dismissed for want of jurisdiction.
5. ———. Where a sole defendant dies after judgment of district court, and before the appeal is perfected, the supreme court cannot substitute the administrator of his estate.

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

Loren H. Laughlin and *Alva Gaylord,* for appellant.

G. Porter Putnam, Jr., and *Bruce Fullerton, contra.*

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

DAY, J.

This matter is before the court upon a suggestion of want of jurisdiction filed by attorneys for the plaintiff who secured judgment in the district court. The attorneys for the defendant in the district court have filed a brief opposing the suggestion of want of jurisdiction, and seeking leave to revive.

The plaintiff brought an action against the defendant in the district court, and secured a judgment. The defendant filed a supersedeas bond and notice of appeal on April 17, 1937. The defendant died May 8, 1937. Thereafter, on June 24, 1937, the transcript for appeal was filed in this

court by the attorneys for the defendant during his lifetime. Thereafter, on July 23, a special administrator of the estate of the deceased defendant was appointed. The special administrator filed appellant's brief in this court, and seeks an order of revivor. It has long been the rule in this state that the filing of the transcript shall confer jurisdiction in a cause upon the supreme court in a law case. This matter has been discussed in many cases, but was thoroughly investigated in *Long v. Krause,* 104 Neb. 599, 178 N. W. 188, and in *Ritchey v. Seeley,* 68 Neb. 129, 133, 97 N. W. 818.

Long v. Krause, supra, is relied upon to sustain the opposition of the subject of want of jurisdiction, but that case is strictly related to the facts therein. John and Herman Krause were charged with fraud in the purchase of land, and a judgment was entered against them. They filed a notice of appeal and a supersedeas bond. John Krause died before the appeal was prosecuted. Herman Krause filed a transcript of the proceedings in this court. He, as administrator of the estate of John, filed a motion to revive the action when a motion to dismiss the appeal was filed. These cases are parallel, except that in the *Krause* case the judgment was against two joint tort-feasors, one of whom had prosecuted the appeal. It was especially stated "that the death of John Krause destroyed the relation of attorney and client, and that the acts of this attorney from that time forward were neither the acts of the deceased person nor of his representative."

But it was held in that case that, inasmuch as the deceased was not required to do anything to confer jurisdiction upon this court, he was a party to the appeal by reason of being a joint tort-feasor. Ordinarily, an appeal cannot be prosecuted in the name of a party who died before the appeal was had, although under permissive statutes the regular representative of such party may be substituted, and the appeal proceed. 4 C. J. S. 869. An appeal prosecuted in the name of a sole defendant who died before the transcript was filed in this court must be dismissed be-

cause of no jurisdiction. *Powers v. Standard Oil Co.*, 62 S. Dak. 33, 251 N. W. 187. It was necessary in this case for the representative of the deceased to get an order of revivor of the action in the district court, as provided by section 20-1414, Comp. St. 1929. The supreme court did not have jurisdiction until the transcript was filed in this court, and when the transcript was filed the defendant was dead. Therefore, when a sole defendant died after judgment and before appeal, the supreme court could not substitute his representative as defendant, but the substitution must be had in the court having jurisdiction. The appeal must be dismissed.

DISMISSED.

FRANK SVOBODA, APPELLEE, V. GABRIELA MANDLER, APPELLANT.

275 N. W. 599

FILED OCTOBER 29, 1937. No. 30143.

Workmen's Compensation. Two alleged trivial accidents, which did not cause deceased to lose any time from his work, and did not accelerate, aggravate, or change in any way the slow, steady progress of an occupational disease, cannot be made the basis for a recovery under the Nebraska workmen's compensation law.

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

Anson H. Bigelow, for appellant.

Votava, McGroarty & Sklenicka, contra.

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

PAINE, J.

This is an appeal from a disallowance by the trial court of a claim for compensation made by the widow of a deceased workman.

A hearing was first had in May, 1935, before Stephen Vail, deputy labor commissioner, of Omaha, who dismissed the claim, and then a hearing was had before Lawrence Welch, one member of the compensation court, in June, 1936, and the claim was again denied. An appeal was then taken and a hearing was had before the three members of the compensation court, and claim was allowed at $15 a week for 350 weeks, together with an allowance of funeral benefits, medicine, drugs, autopsy, and the claims of a number of doctors, the whole allowance amounting to more than $5,600.

From this award of the compensation court, appeal was taken to the district court, and after a trial in that court a decree was entered, and the award of the compensation court was vacated, and the claim was dismissed.

The evidence discloses that Michael Mandler, deceased, sailed from Hamburg to the United States in December, 1923, and in 1926 entered the employ of the defendant, Frank Svoboda, manufacturer of monuments at Omaha, and for about a year and a half did general work in repairing machinery, setting monuments, helping about the yard, and then started work as a sand-blaster, which occupation he continued for about six years, losing very little time from his work except for an attack of pneumonia and nose bleed in 1932.

In sand-blasting in the defendant's plant, the side of the monument to be carved is covered with hot glue, and the letters or designs to be carved are then outlined upon this coating of glue, and with a sharp knife the glue is then cut through and pulled away, exposing the bare granite or marble where it is desired to be cut away. The monument is then placed in one small room, and the sand-blaster takes his station in another small room, separated with a wooden partition except for a portion of the wall directly in front of the monument, where the partition is replaced by a screen and rubber, permitting the sand-blaster to move his arms in all directions, while holding a heavy hose, ending in a metal jet, through which fine, sharp

silica sand is blown under a pressure of about 100 pounds to the square inch against all the portions of the monument which are to be cut away by the sand-blast. The sand-blast makes no impression upon that part of the monument protected with the thick coating of glue, but eats away the surface of the hard stone which is exposed where the glue has been cut away with a sharp knife. The room in which the monument is placed is filled with dust of this sharp sand rebounding from the monument, and it is impossible to prevent some of this dust from coming through the opening through which the sand-blaster works with his hands and directs the jet of sand at the monument.

The defendant testified that he had given positive orders that the sand-blaster must wear a mask while at this work, and had provided a number of kinds of masks, but Mr. Mandler (whose habit it was to smoke a pipe almost continuously during the working hours) would repeatedly take off the mask, against orders, and in hot weather often refused to wear it, as he said he could not breathe.

A number of medical experts testified in this case, some upon each side, and while they differed in some of the details, yet the principal facts relating to Mr. Mandler's increasing disability, and the resulting death, were about as follows:

When he wore a properly-fitting mask of approved design, scarcely any dust could get into his nose. When he breathed through his nose, if any of the fine particles of dust were in the air they would be trapped in the passages through the nose, and practically no particles of dust would reach the lungs. The particles of sand lodging in the passages of the nose on the mucous membrane are at first taken care of by nature, by coughing out, and by the lymphatics. As time goes on, increasing deposits of dust lodged in the nose caused catarrh, the inflammation of which thickens the passages of the nose, making a person resort to occasional mouth breathing to get sufficient air.

When a sand-blaster discards the mask and breathes through his mouth, there is no protection by nature to

trap the dust particles, many of which lodge in the cells of the lungs. Some particles can be coughed out, but an increasing number remain, and this silica dust remaining in the cells of the lungs brings about a disease known as silicosis, and this causes miliary tuberculosis, which usually runs for six months to a year, which it did in this case, and finally death resulted from complications on September 13, 1934. The experts testified that silicosis, or stonecutter's disease, usually resulted in death in from five years to fifteen years, depending upon whether they worked outdoors or in a closed room, whether they wore masks, and depending somewhat upon the constitution of each individual, some resisting the onslaught of the disease much longer than others.

Silicosis is a definite occupational disease of the lungs, caused by breathing in air containing sharp particles of dust which lodge in the lungs. It follows a definite course, with a period of onslaught, then increasing severity in which the normal lung tissue is gradually replaced by fibrous or scar tissue over each particle of dust lodged in the lung, and miliary tuberculosis usually ensues, together with other complications, before death occurs.

The general term of this disease, covering both metallic and mineral particles, is pneumoconiosis, which is acute in metal mining, quarrying, drilling, tunneling, smelting, foundries, potteries, glassworks, as well as in stone, marble, and granite manufacturing, especially in sand-blasting. The United States department of labor, in a report published in April, 1937, states that 900,000 laborers are exposed to the disease; 105,000 of them have incipient pneumoconiosis, without tuberculosis, while there are between 4,000 and 5,000 workers who are disabled by the disease, with tuberculosis complications.

In section 48-152, Comp. St. 1929, the terms used in the Nebraska workmen's compensation law are defined, and one statement reads: "The said terms shall in no case be construed to include occupational disease in any form, or any contagious or infectious disease contracted during the

course of employment, or death due to natural causes, but occurring while the workman is at work."

The plaintiff in this case alleges that the death of Michael Mandler was caused by two accidents, the first when the nozzle came off the hose in May, 1932, and, second, in September, 1933, by the breaking of a hose while sand-blasting, and sand was forced into his nose, and alleges that such accidents were the proximate cause of his death, and this court has carefully examined all of the evidence relating to the two accidents alleged, and will briefly set out the same.

The defendant, on September 12, 1934, filed a written report, exhibit No. 3, with his insurance carrier, showing that Michael Mandler had been employed by him about eight years; that he drew wages of $26 a week; that he was not injured and had had no accident, and that on April 14, 1934, he became ill and said the "sand got him," and defendant states that he had tuberculosis; that a mask had been provided, but was not used except when defendant was present and insisted on it; that the sand-blasting room had a door that could be kept open for ventilation, and that there was also a suction to draw the dust out of the sand-blasting room, and says definitely, "Mandler never had an accident while working for us," and this report was signed by both the defendant and his wife.

At a hearing held nearly two years later before the compensation court in 1936, the defendant was called as a witness by the plaintiff, and on direct examination in response to questions about the alleged accidents stated that, when the nozzle comes off from the sand-blasting hose, it makes a terrible noise, and he was sitting in his office one day in May, 1932, and heard this noise and ran to the sand-blasting room, and that Mandler was there, trying to disconnect the hose, and the end of the hose was going like a snake wiggling his tail; that the room was full of dust; that Mandler had it all over his face, and his hand was hurt, but that the defendant did not see any cuts on his face, and he told him to wash up and go home, but

Mandler did not go home. The evidence also discloses that he worked the next day, and that he did not lose any time from his work because of this happening in 1932. It is also claimed by the plaintiff that in September of 1933 the hose broke, but that he did not lose any time on account of it. William Huebener, an employee, testified, as to this second alleged accident, that he remembered when it broke, but did not go and look; that Mandler just came out and said the hose broke, and he had to have a new hose, "so I got the new hose," and "that is all I know."

In response to further questioning, he said: "I can't remember whether it was 1930 or 1931. I am there so many years, and so many fellows change, I can't remember the dates."

The widow and the daughter of decedent testify to his telling them about having trouble with the nozzle and his nose bleeding.

George Svoboda, son of defendant, said Mandler came out and said it blew off, and they replaced the hose for him. The nearest he can come to fixing the date is that he thinks it must have been in the fall before witness started to work.

Dr. Frank J. Mnuk, the family physician, testified, as to the first accident, that he was called to the home and found what appeared to be a chest cold, he had an abrasion in his nose one-quarter to three-eighths inch long, and a chronic sinus condition, and chronic nasal catarrh; that Mr. Mandler said he had an affair down at the shop where he worked, where a nozzle came off the hose, and following that he began to feel a little worse until he developed a cold and a post-nasal drip.

In a report two days before death, signed by the attending physician, and made to the insurance carrier, being defendant's exhibit No. 1, he described the condition as follows: "Man has acute tuberculosis, which he claims is the result of inhalation of dust while sand-blasting in room without ventilation or mask."

The written report of the autopsy, made by Dr. Sven

Isacson for Dr. W. J. Egan, attending physician, at paragraph No. 11, reads as follows: "The condition here pictured is one of a very extensive Pneumoconiosis or so-called, Stone-mason's Lung, or Silicosis, which has led to a chronic Interstitial Pneumonia, invasion of lymph nodes, miliary tuberculosis and death." This is the typical history of this occupational disease.

Dr. Harold E. Eggers, pathologist, University of Nebraska, Dr. Claude T. Uren, nose and throat specialist, and Dr. E. L. MacQuiddy each testified that in his opinion the alleged accident did not cause, aggravate, or combine with the silicosis to hasten or bring about the death of Michael Mandler.

It may be admitted that, "Where an accident accelerates a disease, and produces disability, and the disease would not have developed without the accidental injury, that must be regarded as the contributory proximate cause." 71 C. J. 605.

But the evidence relating to the two alleged accidents in the case at bar is not convincing. The employer, in his written statement before employee died, definitely states there were no accidents, but some two years later, when called to testify for the plaintiff, recounts two minor incidents of a breaking of a nozzle and also a hose. Neither incident caused employee to lose any time. The increased dust in the room doubtless caused him to breathe more of it into his nose, but the evidence fails to show any permanent disability following either of the alleged accidents.

It appears to be settled in law that, to warrant a recovery for death by accident, it must be of such a character as to be the immediate and proximate cause of death or disability, and, further, be an accident for which the law authorizes compensation. *Rushonosky v. Lehigh Valley Coal Co.*, 293 Pa. St. 150, 141 Atl. 851; *Keith v. Narragansett Electric Co.*, 53 R. I. 160, 164 Atl. 907; 71 C. J. 605; *Bartlett v. Eaton*, 123 Neb. 599, 243 N. W. 772; *Metropolitan Dining Room v. Jensen*, 126 Neb. 765, 254 N. W. 405.

In the case at bar, it is not shown that the alleged minor

accidents accelerated, or aggravated, or changed in any way the slow, steady progress of an occupational disease. This has been well described as "drop by drop," little by little, day after day, for weeks and months in *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, 148 N. W. 485, L. R. A. 1916A, 283, Ann. Cas. 1916D, 689.

Cases are cited to us from states in which the compensation law is entirely different from that in Nebraska, and allows recovery for death from injuries (not accidents), and for occupational diseases, such as that of *Sullivan Mining Co. v. Aschenbach*, 33 Fed. (2d) 1, in which case a painter became totally disabled in the course of a week from inhaling gas from poisonous carbon disulphide, used as a thinner, and it was held that under the workmen's compensation law of Idaho this was an injury, and not an occupational disease. Also, *Minns' Case*, 286 Mass. 459, 190 N. E. 843; *Schaefer & Co. v. Industrial Commission*, 220 Wis. 289, 265 N. W. 390; *North End Foundry Co. v. Industrial Commission*, 217 Wis. 363, 258 N. W. 439.

We have given a careful study to all of the evidence in the bill of exceptions, and especially the evidence of the medical experts, and we are satisfied that the breaking of the jet at the end of the hose, and later the breaking of the hose itself, were but trivial incidents in the everyday work, and in no way affected the progress of the occupational disease, silicosis, from which he was then suffering, and from which he died months later. The judgment of the trial court is therefore

AFFIRMED.

GEORGE SKOCHDOPOLE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS AND IRRIGATION, APPELLEE.

275 N. W. 665

FILED OCTOBER 29, 1937. No. 30171.

Workmen's Compensation. Record examined, and *held* insufficient to support a claim for compensation, and judgment of district court in dismissing the same is affirmed.

APPEAL from the district court for Richardson county: VIRGIL FALLOON, JUDGE. *Affirmed.*

Chambers & Holland and *Roland A. Locke,* for appellant.

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

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

PAINE, J.

This is an appeal from a judgment of the district court dismissing a claim under the workmen's compensation act.

Plaintiff filed a petition before the workmen's compensation court, alleging injury to his hands and arms, which entitled him to an award under the laws of Nebraska. To this the state of Nebraska filed an answer, asking that relief be denied. A hearing was had at Falls City, Nebraska, before Charles E. Jackman, a judge of the Nebraska workmen's compensation court, on May 15, 1936, and on August 3, 1936, an order of dismissal was entered, finding that the disability of the plaintiff was not the result of an accident arising out of and in the course of his employment. On August 5, 1936, plaintiff filed a waiver of rehearing before the full compensation court, and gave notice of his election to appeal to the district court for Richardson county, Nebraska. Pleadings were duly filed and trial was had upon the issues joined on April 30, 1937, and on May 4, 1937, the district judge entered a judgment dismissing the plaintiff's petition for the reason that he found the disability of the plaintiff was not the result of an accident arising out of and in the course of his employment.

The evidence in this case discloses that the plaintiff went to work for the state highway department under Walter Meier in August, 1933, at 40 cents an hour, and was transferred to Falls City, Nebraska, a month later, where he was engaged in putting in guard-rails on state

highway No. 73. On this job it was necessary to dig into frozen ground, and the men were furnished frost-bars. This soil was frozen so hard that it was necessary to devise a particular form of frost-bars to make the holes, and this plaintiff and other workmen bruised their hands from using the frost-bars, and got water-blisters the first day, and later blood-blisters during the course of this work. The foreman got them some cold cream to put on their hands at night, and they bathed them in water, and the result was that during the time that plaintiff was at Falls City his hands became badly inflamed.

Plaintiff's hands remained in a sore condition, and he was transferred to Broken Bow and other towns as a rod man, and from that time to this, plaintiff testifies, his hands were sore; although they have calloused over and healed, they are still in a bad condition. Plaintiff was then transferred into the blue-print department in the state house at Lincoln, and in January, 1936, there was work out on North Tenth street, and the plaintiff accepted a job out there, as it would pay him more money, and again it was cold and they had to use frost-bars, and as soon as he picked up a frost-bar, plaintiff testifies, "I got a shock that I had never felt before; I had severe pains in my hands, and from then on I never used a frost-bar."

He went to Mr. Lobdell, who sent him to Mr. Culwell, who attends to compensation cases for the highway department. The plaintiff then consulted Dr. John C. Thompson, who said that he was suffering from a contracture which had developed, and he then brought an action for compensation. He was thereafter referred to Dr. Czar Johnson by the attorney general's office for a careful examination. Dr. Johnson testified that he had Dupuytren's contracture. Dr. Thompson's testimony was definitely that plaintiff had an infected condition of his hand.

From this statement of the evidence, it appears that the sole question in this case is whether the plaintiff sustained a compensable injury. Dr. Thompson testifies that there is no question but what a continued low-grade infection set

in from the time of his first injury, in 1933, and continues.

The evidence of Dr. Thompson was that he specializes in internal medicine and diagnosis, and is a member of the medical advisory commission, appointed by the governor; that plaintiff came to him for examination on February 17, 1936, and complained of pain in his hands and arms after doing hard work, also numbness in his fingers, especially on the left hand.

Dr. Thompson states that, if the history of the case as given by the plaintiff is correct, an inflammatory condition was started in both hands by the blisters, and that it is progressive, and greater and greater contracture will result.

When asked to give the name of plaintiff's trouble, Dr. Thompson said: "The name has been applied to similar contractures,—the name of the man who first described it was Dupuytren, Dupuytren's contracture. I don't know whether we should use the term for this condition or not. This is a Dupuytren-like contracture."

The state relied upon the testimony of its only witness, Dr. Czar Johnson, who said he was a Fellow of the American College of Surgeons. He said he had had 16 cases of this kind in 30 years of practice. He spent parts of two days in examining the plaintiff. He found he had heart trouble and bad tonsils, and that he had a typical Dupuytren's contracture in both hands, which is a specific disease of unknown origin. Dr. Johnson testified that in some cases there is a history of trauma, but no author will say it is caused by trauma; that it occurs more frequently in bankers, or school teachers, or individuals who have never used their hands for manual gripping; that it also occurs in ministers and housewives.

In the medical text-book, "Accidental Injuries," by Dr. Henry H. Kessler, who has been orthopedic surgeon to several New Jersey hospitals, which text-book was used in the argument by counsel, we find this definition on page 190: "Dupuytren's Contracture:—This condition is due to

a slow but progressive contraction of the palmar fascia, involving chiefly the last two fingers, and ultimately rendering them useless. Trauma plays no part either in initiating or aggravating the condition. The work of Koch and Kanavel, in the treatment of this condition by free full thickness skin grafts, is worthy of consideration."

Our court has said: "Awards for compensation cannot be based upon possibilities or probabilities, but must be based on sufficient evidence showing that the claimant has incurred a disability arising out of and in the course of his employment." *Bartlett v. Eaton,* 123 Neb. 599, 243 N. W. 772; *Townsend v. Loeffelbein,* 123 Neb. 791, 244 N. W. 418.

And, that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that personal injury was caused to the employee by an accident arising out of and in the course of his employment. *Mullen v. City of Hastings,* 125 Neb. 172, 249 N. W. 560; *Kuhtnick v. Carey,* 124 Neb. 762, 248 N. W. 89.

The record shows that both the compensation court and the district court, after a full trial, dismissed this action. This court has reached the same conclusion, and believes that the plaintiff failed to prove his case, for, in order to recover in a compensation case, the burden is upon the plaintiff to show with reasonable certainty that his ailment was caused by the injury sustained; and this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. The judgment of the trial court is

AFFIRMED.

EDWARD LOEHR, APPELLEE, V. ALAMITO DAIRY COMPANY, APPELLANT.

275 N. W. 596

FILED OCTOBER 29, 1937. No. 30145.

Workmen's Compensation. Evidence examined and *held* insufficient to sustain a finding that plaintiff suffered an accident arising

out of and in the course of his employment which resulted in the injury for which an award is sought.

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

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem,* for appellant.

James J. Fitzgerald, contra.

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

CARTER, J.

Plaintiff commenced this action under the workmen's compensation law to recover for the loss of an eye alleged to be the result of an accident arising out of and in the course of his employment with the Alamito Dairy Company. The trial court awarded compensation for a 90 per cent. loss of function of plaintiff's left eye, the award being for a total loss of the eye minus a preexisting 10 per cent. loss of function of the same eye. From this award, the defendant has appealed.

The defendant contends that plaintiff failed to prove his case in two respects, first, that plaintiff suffered an accident while in defendant's employ, and, second, if he did suffer such an accident, that it was the proximate cause of the loss of vision for which compensation is claimed.

It appears from the record that in May, 1933, the plaintiff, while working on a farm in Iowa, was injured by a piece of steel entering his left eye. He was brought to Omaha where he was treated by Doctors Stokes and J. H. Judd, both of whom appeared as witnesses in the case at bar. Dr. William Stokes attempted to remove the steel splinter without success and recommended the removal of the eye because of the danger of subsequent complications that might destroy the uninjured eye. Plaintiff refused to have the eye removed. The eye improved and the plaintiff subsequently began work for the defendant. On September 7, 1935, plaintiff ceased work for the purpose

of going to a hospital for an operation upon the previously injured eye. The record discloses that Dr. J. H. Judd, the attending physician, diagnosed the trouble as a retinal detachment. On September 25, 1935, Dr. Harold Gifford attempted to reattach the retina by an operation upon the eye. The operation was not successful and the plaintiff is now totally blind in the left eye.

Plaintiff testified that on September 2, 1935, while in the employ of defendant, he suffered a bump upon his head which is alleged to have been the proximate cause of the retinal detachment. It appears that it was his duty to enter a condenser through a manhole and wash and scrape the coils of pipe within it. It was necessary for him to bend low to do this work which was made difficult because of the closeness of the quarters. His testimony is that, in doing this work, one foot slipped on the rounded bottom of the condenser and he bumped his head just back of the left eye on a pipe projecting into the condenser. This accident is alleged to be the primary cause of the injury of which he complains. There was no witness to the accident and no report of it was made to the defendant at the time. The only evidence tending to corroborate plaintiff's story is that of his wife who testified that when plaintiff returned home that evening his head appeared swollen just back of the left eye.

Defendant produced evidence that plaintiff, on September 7, 1935, talked with the plant superintendent about the condition of his eye, in which he stated that his physician had informed him that he had a retinal detachment resulting from a bump upon his head, and, in response to a question by the superintendent, stated that he had not bumped his head while working for defendant. In reply thereto plaintiff testified that he told the superintendent on this occasion of the injury received while working in the condenser. Defendant also produced the evidence of two officers of the Employees Benefit Association, a voluntary association of employees providing relief to sick and injured employees not within the provisions of the work-

men's compensation act. Both of these men testified that they interviewed plaintiff in the latter part of August or the first part of September, 1935, about his eye trouble and that he informed them that he had been injured at home by stepping on a garden rake which flew up and struck him alongside of the nose and injured his eye. Plaintiff admits that he received a broken nose by stepping on the garden rake but says that this occurred more than six years before the date of the present injury. The history of the case taken by Doctors Judd, Stokes and Gifford does not reveal any claim of an accident on the part of plaintiff while in defendant's employ until November 14, 1935. On this date a notation appears in the record of Dr. Delbert Judd to the effect that the patient said he bumped his head five weeks ago against a staircase. Plaintiff came back on the stand and testified that he bumped his head on the staircase leading up to the condenser platform within one hour after he bumped his head while washing the condenser and that it was the injury received in the condenser that was the more severe and the cause of his injury.

It appears from the evidence of the eye specialists testifying in this case that, after the injury to the eye in 1933 and the subsequent failure to remove the steel splinter, natural processes walled off or encysted the steel splinter within the eye. Dr. Stokes testified that he attempted to remove the steel splinter in 1933 and, not being able to do so, recommended the removal of the eye for the reason that complications were bound to come sooner or later which might seriously damage the uninjured eye. Dr. Stokes also testified that the steel splinter was the cause of the detached retina, that it was bound to occur sooner or later, and that the alleged trauma to the head was merely coincidental with the development of the condition resulting in the detachment of the retina. He further testified that the steel splinter was reduced in size during the two years it was imbedded in the eye and that this breakdown of the foreign body would produce a low-grade inflammatory reaction in the retina which would ultimately cause a

detachment of the retina. The evidence of Dr. Gifford is substantially the same as that of Dr. Stokes.

The testimony of Dr. J. H. Judd is to the effect that the steel splinter would cause plaintiff no harm after it became encysted, in the absence of trauma. He also testified that during August, 1935, plaintiff suffered from sinus infection that required a drainage of the sinuses by operative surgery. After the operation the sinuses cleared up, but plaintiff's left eye was inflamed to such an extent that medical treatment was continued. This condition existed prior to the date of the alleged accident and continued until it was diagnosed on September 4, 1935, as retinal detachment. Plaintiff offered in evidence quotations from medical text-books citing instances where steel and copper foreign bodies had been retained in the eye for many years and even for a lifetime. An examination of these authorities convinces us that they were cited as rare exceptions to the general rule that an eye containing a steel or copper splinter generally breaks down as a result thereof in a much less period of time. One text offered in evidence states: "Four dangers threaten the eye containing iron or copper particles in the retina: 1. Retinal detachment. 2. Recurring severe attacks of inflammation. 3. A new form of inflammation which leads to retinal degeneration and blindness. * * * 4. Changes at the macula." Injuries of the Eye, Harry Vanderbilt Wurdemann, p. 606.

It is necessary, in order that plaintiff be entitled to recover, that he prove by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment which resulted in the injuries for which he claims an award. This the plaintiff has failed to do. The only proof in the record that plaintiff suffered injury while in the employ of defendant is the evidence of the plaintiff himself. His testimony that he was injured while working in the condenser is impeached by the testimony of the plant superintendent and two officers of the Employees Benefit Association. The medical histories of the case obtained from the plaintiff tend to impeach plaintiff's

evidence and to sustain the theory of the defense. It also appears that a detachment of the retina is a recognized and common result of a retained particle of steel or copper in the retina of the eye.

The evidence indicates that plaintiff had an inflammation of the left eye after the sinus infection had been corrected and prior to the date of the alleged accident which continued until the trouble was diagnosed as a detachment of the retina. The fact that the left eye only was inflamed during this period is indicative of the commencement of the deterioration of the eye before the alleged accident occurred. That inflammation of an eye retaining a steel particle is a sign of an impending retinal detachment seems to be sustained by the testimony and the medical authorities cited. We are therefore convinced, after a consideration of all the evidence, that plaintiff lost the sight of his left eye as a result of the lodging of the steel splinter in his eye in 1933, and that any accident plaintiff may have suffered was merely coincidental to the natural deterioration of an eye containing such a foreign body.

We necessarily conclude that plaintiff has failed to prove by a preponderance of the evidence that he suffered an accident arising out of and in the course of his employment with defendant that resulted in the injury for which an award is sought. The judgment of the trial court is therefore reversed and the action dismissed.

REVERSED AND DISMISSED.

BERNICE RASMUSSEN, ADMINISTRATRIX, APPELLEE, V. JOHN BENSON, APPELLANT.

275 N. W. 674

FILED OCTOBER 29, 1937. No. 30073.

1. **Trial:** INSTRUCTIONS. "Where the instructions as a whole clearly present to the jury the issues of fact and the law applicable thereto, harmless error in instructions separately criticized on appeal do not require a reversal of the judgment

on the verdict." *Interstate Airlines, Inc., v. Arnold*, 127 Neb. 665, 256 N. W. 513.

2. **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.
3. **Trial.** Where the evidence in a case fails to disclose negligence on the part of the plaintiff, it is not error for the trial court to refuse to submit to the jury the issue of contributory negligence.
4. **Action.** An action started by a decedent for pain and suffering, loss of earning, etc., may be revived by his personal representative and joined in the same proceedings in an action for the wrongful death of said deceased, for the benefit of the widow and next of kin, by pleading them separately as two causes of action.
5. **Death.** Where the evidence discloses that the direct and proximate cause of the defendant's negligence resulted in death to certain live stock, and rendered other live stock useless, and resulted in loss of business, and, in addition thereto, caused extreme mental shock and a physical and mental breakdown of the owner thereof, resulting in the owner's death, and where such negligence constitutes a continuous succession of events, so linked together as to make a natural whole, and no new and independent cause intervening between the defendant's negligence and the resulting damage, then, in that event, the administratrix, as plaintiff, may recover for loss of live stock, loss of business, and for pain and suffering endured by the decedent in his lifetime, when such action was started during his lifetime, and for pecuniary damages for the benefit of herself and children at his death, when properly pleaded and proved.

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

Edmund Nuss and *P. E. Boslaugh*, for appellant.

Carl T. Curtis and *King & Bracken, contra.*

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

MESSMORE, J.

This is an appeal from the district court for Adams county, wherein a jury returned a verdict for plaintiff below in the sum of $3,500.

Plaintiff's amended and supplemental petition alleges that defendant, at a farm sale on May 15, 1935, with the assistance of his agents and auctioneer, negligently offered for sale a part of a sack of bran as feed for live stock; that the bran had been treated for poisoning grasshoppers, and contained a poison known as arsenic; that defendant, knowing the bran contained poison, had removed the red tag which labeled the sack as poison and caused the bran to be sold as fit for consumption by live stock. Plaintiff further alleges that, relying upon the oral representations and warranties of defendant, made by him through his auctioneer, Alfred Rasmussen, a dairyman, purchased said poisonous bran, believing it to be ordinary bran, fit to feed to live stock, took the bran home and fed it to his live stock; that as a result certain of the live stock became ill and died, some cattle survived but were useless to Rasmussen in his business, and he lost his dairy business; that, by the negligent acts of defendant, Rasmussen was harassed, excited and injured, suffered an increased heartbeat, producing the decompensation of his heart, which resulted in a complete physical and nervous breakdown in health as a direct and proximate cause resulting from the negligence of defendant; that Rasmussen became totally disabled and was confined to a hospital on two separate occasions; that previous to this time his health was good. Plaintiff also alleges pain and suffering endured by virtue of the damages, causing a severe shock to Rasmussen; and then pleads in a second cause of action the death of Rasmussen, and prays damages for the benefit of the deceased's wife and family, as provided by law. The answer pleads the defense of contributory negligence and a general denial.

The facts developed by the evidence are as follows: Alfred Rasmussen, a dairyman for ten years, 44 years of age, living near Minden, Nebraska, having a milk business of approximately 50 customers and delivering about 75 quarts of milk a day, on May 15, 1935, purchased at public auction at the farm sale of the defendant a part of a

sack of bran which was not labeled, containing arsenic, a poison. A witness, Rudolph Jensen, testified that at the time of the purchase the auctioneer represented that the bran could be used for feeding live stock. This testimony was disputed to a great extent by witnesses for the defendant, which testimony was to the effect that defendant Benson was not near a rack from which certain articles were being sold at the time the bran was offered for sale, did not know that the bran had been offered for sale, had forgotten about the bran, made no representations about the bran, and was in no position to do so; that the farm sale was handled by others for him, he being a man 83 years of age. Rasmussen took the bran to his home, fed it to his live stock, and the live stock became sick. He obtained the services of a veterinary surgeon, but was unable to save his stock; five cows died, five became very sick and were useless to his business; one hog and 20 chickens died.

Plaintiff's evidence further discloses that Rasmussen's health was good; that he took care of his business, doing all things necessary and incident to carrying on a dairy business, prior to May 23, 1935. On that day, when the men came from the rendering plant to take away the dead stock, Rasmussen collapsed, became nervous and was taken to a hospital on May 25, 1935, where he remained until May 29; was again confined in a hospital from October 5 to October 9, 1935; from and after May 25 he was confined to his bed a great portion of the time, did sit up at times and was assisted up and down stairs when he went to the doctor's office, but was unable to do any work of any kind around the dairy farm, and employed labor to work in his stead; that at the time Rasmussen went into the dairy business, ten years before, he was indebted to the local bank in the sum of between $1,500 and $2,000; that at the time of his death he owned a complete set of machinery, ten cows, other live stock, an automobile, and was in debt about $200.

The medical testimony is rather lengthy and technical and, for the purposes of this opinion, only parts thereof

which point to Rasmussen's physical condition over the period of time, as alleged in the petition, will be stated. His family physician, who had known him for 21 years, who had served him for 18 years and who operated the hospital in which he was confined at the times herein mentioned, testified that he was in the hospital in the month of May, 1935; that Rasmussen was at that time very nervous, unable to sleep; his heart racing, pulse hard and fast, and he was almost irrational. This hospitalization was from May 25 to May 29, 1935. This physician further testified that he saw Rasmussen in July and August; that his mental condition was better, more rational; that he could sit down and talk about ordinary things; that his heart was still in a decompensated state; that witness had taken care of him in September a good deal of the time; that Rasmussen was brought to the hospital again on the 5th of October and there remained until the 9th; that the condition of his heart was bad in that the heart muscle was weak. This witness testified that in 1928 he operated on Rasmussen for hernia; that prior to the operation he had detected, in an examination, a leaky heart, but that subsequent to that date the heart was large but had become compensated and was able to take care of the ordinary work and strain necessary to carry on life; that he had not had occasion to serve Rasmussen from 1928 up to May 25, 1935; that he had seen him on various occasions carrying on his work as a dairyman and delivering milk, and that Rasmussen made no complaint; that on May 23 Rasmussen had a decompensated heart due to stress placed on it which could have been caused by shock and mental worry; that the immediate cause of the decompensation of the heart was either a great physical strain or a great mental shock.

The foregoing evidence was substantiated by Rasmussen's attending physician who was an associate of the family doctor. This witness testified that on May 25, 1935, he went to Rasmussen's home, examined him, found him in a very critical state, almost maniacal, with complete

nervous upset; that Rasmussen complained of pains in his right leg and both wrists, shortness of breath and insomnia; that the examination disclosed a cardiac fibrillation. The doctor testified that Rasmussen was taken to the hospital and treated by him from May 25 to May 29 for myocardial failure; that he attended him daily until June 2, 1935, and saw him frequently until October 5, 1935, at his home and three or four times a week at his office; that this condition was brought about, in the doctor's opinion, by extreme mental and physical shock, coupled with previous rheumatic endocarditis; that the profound shock to which Rasmussen had been subjected added a burden to his heart and was the immediate cause of his breakdown.

Plaintiff called another physician who qualified as an expert. In answer to the following hypothetical question: "Doctor, if a person had a compensated heart in 1928, the heart having been diseased because of rheumatic infection, but which was so compensated he was able to perform ordinary labor from that time until May, 1935, and then developed mitral cardial failure, could such failure be caused by mental shock or worry or an emotional upset?" the witness answered, "Yes, sir." The defendant called as a witness a physician whose testimony was in disagreement with that of the physicians called by plaintiff, in that the witness testified that no amount of emotional strain could cause decompensation of the heart.

Appellant contends that the court erred in submitting to the jury an issue not raised by the pleadings, and in support of this contention states that this action is based on representations alleged to have been made by the agent or auctioneer of defendant, and that the defense was prepared accordingly, as shown by the evidence; that the court, in instruction No. 2, changed the issues, stating that the action was one for negligence, and instructed accordingly.

After a careful reading of the amended and supplemental petition, we believe that the allegations therein are sufficient to state a cause of action in negligence against the

defendant. It is true that the plaintiff claimed representations had been made that the bran could be used for feeding live stock. However, plaintiff did allege that the defendant wrongfully and negligently caused and permitted poisonous bran to be sold. The burden of proof was properly placed on the plaintiff by the court in instruction No. 2.

The court, after defining negligence in instruction No. 3, imposed a duty on the defendant in this language: "And if the defendant at the time of the sale knew, or in the exercise of proper care should have known, that he had poisonous bran and that it was, or was likely to be, in the articles offered at his sale and to be so assembled or put out by himself or by others assisting him in preparing for the sale, then it was his duty to exercise a high degree of care to see that prospective purchasers were properly notified or warned of the dangerous character of the bran."

We also find that instruction No. 1, offered by defendant, as to defendant's theory of the case, was properly refused for reasons hereinbefore stated. The instructions as a whole fully and fairly state the law applicable to the issues and the evidence. *Interstate Airlines, Inc., v. Arnold,* 127 Neb. 665, 256 N. W. 513.

In 49 C. J. 1045, it is said: "All persons who deal with deadly poisons or noxious and dangerous substances are held to strict accountability, and the highest degree of care must be used to prevent injury from their use." And in the same volume, at page 1046, it is said: "Where one who knows that a substance is poisonous carelessly or negligently leaves it where he knows, or has reason to know, or by ordinary care should know, that it may cause injury to some one ignorant of its character, he is liable for any injury resulting from such exposure."

The appellant contends that the court erred in not submitting to the jury the defense of contributory negligence. There is no evidence in the record that would in any manner point to negligence on the part of Alfred Rasmussen.

Prairie Life Ins. Co. v. Heptonstall, 105 Neb. 829, 182 N. W. 483.

Appellant contends that the court erred in not directing a verdict for the defendant, where the defendant asked for a dismissal of that part of plaintiff's case involving pain and suffering and recovery under Lord Campbell's Act. This action was originally started by Alfred Rasmussen, and at his death it was revived in the name of Bernice Rasmussen, as administratrix of the estate of Alfred Rasmussen, deceased. In the original petition Rasmussen prayed for damages for his pain and suffering, and in the amended and supplemental petition recovery is asked for pain and suffering.

This court in *Hindmarsh v. Sulpho Saline Bath Co.,* 108 Neb. 168, 187 N. W. 806, in an opinion by Flansburg, J., held that an action started by a decedent for pain and suffering, loss of earning, etc., may be revived by his personal representative and joined in the same proceedings in an action for the wrongful death of said deceased, for the benefit of the widow and next of kin, by pleading them separately as two causes of action.

Defendant contends that the only possible connection between the purchase of the bran and Rasmussen's physical condition was a purely mental link—Rasmussen's anxiety and worry over the illness and loss of his cattle—that the mental condition was not naturally or proximately caused by the sale of the bran, and was a condition over which defendant had no control; that it was a new subjective force or condition which arose after the alleged negligence of the defendant, and was purely personal to Rasmussen.

In this case the evidence is strong and convincing that at the time the bran was fed to the live stock by Rasmussen he had an extreme shock which affected him physically and mentally. What caused this condition? The wrongful act of this defendant in the sale of the poisonous bran to this dairyman, who relied upon his live stock to furnish a living for himself and his family, caused the mental anxiety

and the shock which produced his pain and suffering and his death. There was no intervening cause, for the reason that, if the bran had not been poisoned, Rasmussen, according to the testimony of the experts, would have probably lived his expectancy. A wrong-doer is liable for all the injury directly resulting from his wrongful acts, whether their particular form or character could or could not have been foreseen by him. *Hanford v. Omaha & C. B. Street R. Co.,* 113 Neb. 423, 203 N. W. 643; *Netusil v. Novak,* 120 Neb. 751, 235 N. W. 335.

Whether or not the negligence of defendant is the proximate cause in this instance must be determined by ascertaining whether or not, in the natural and continuous sequence of events, there was a causal connection between such negligence and the mental and physical condition of Rasmussen, without some efficient, independent cause that was disconnected with such negligence and self-operative, intervening to produce such mental and physical condition in Rasmussen, and his death.

Defendant cites the case of *Spratlen v. Ish,* 100 Neb. 844, 161 N. W. 573, wherein it was held: "The proximate cause of an injury is that cause which, in the natural and continuous sequence, unaccompanied by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

It is logical to say that in a continuing course of events, due to negligence on the part of the defendant, great shock and mental anxiety were caused to Rasmussen without any intervening or independent cause set in motion to contribute to the result of his physical and mental disabilities. His mental and physical disabilities were the continuing result of the negligence of the defendant. Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrongdoing and the injury? There may be a succession of intermediate causes, each produced by the one preceding, and producing the one following it. It must appear that the

injury was a natural consequence of the wrong act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it and adequate to bring about the injurious result.

In this case, the only cause that can be suggested as intervening between the negligence and the injury is Rasmussen's condition of mind, to wit, the shock and fright sustained. Could that be a natural, adequate cause of a complete physical breakdown, culminating in his death? A mental shock or disturbance sometimes causes injury or illness to the body, especially to the nervous system. Now, if the shock or fright was a natural consequence of what was brought about by the circumstances of the loss of Rasmussen's business,—the death of his live stock,—then such nervous shock was the proximate cause of Rasmussen's physical and mental condition that led to his death.

For the reasons given in this opinion, the judgment of the district court is

AFFIRMED.

CHAPPELL, District Judge, dissents.

WALTER NELSON, ADMINISTRATOR, APPELLANT, V. LILLIE NELSON, APPELLEE.

275 N. W. 829

FILED OCTOBER 29, 1937. No. 30083.

1. **Appeal.** "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." *Citizens Ins. Co. v. Herpolsheimer*, 77 Neb. 232, 109 N. W. 160; *Miller v. Banner County*, 127 Neb. 690, 256 N. W. 639.
2. ———. "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.

3. Witnesses: COMPETENCY. A granddaughter, heir of her grandmother, testified to a conversation between her mother and grandmother, in an action brought by the administrator of the grandmother's estate against the witness' mother, to subject the interest in real estate of the witness' deceased father to the payment of a note; *held* not barred from testifying under section 20-1202, Comp. St. 1929, where such witness is not a party to the litigation and will not gain by the result thereof if such witness' testimony prevails.

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

Fred A. Nye, for appellant.

Minor & Minor, contra.

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

MESSMORE, J.

This is an appeal from the district court for Buffalo county in a cause tried to the court without the intervention of a jury, wherein said court found for the defendant below.

The action is upon a promissory note, in the amount of $2,780, dated November 1, 1924, due one year thereafter, signed by John E. Nelson and Lillian Nelson, designated in this case as Lillie Nelson. The petition alleges that in February, 1933, the sum of $25 was paid on the note, and on January 25, 1935, a further payment was made thereon. Plaintiff prays judgment for $4,276.47, with interest and costs of suit. Plaintiff asks for no personal judgment against the defendant, but desires to subject the son's interest in his father's estate to the payment of the note. For the purposes of this opinion, the defense pleaded is payment and a general denial of the allegations of plaintiff's petition.

The evidence discloses that the note was found among the effects of Christine Nelson after her death and inven-

toried as an asset of her estate, was signed by John E. Nelson and his wife, Lillie Nelson, on November 1, 1924, and that it was due in one year from said date. The note was made payable to Christine Nelson, mother of John E. Nelson, one of the makers of the note. Shortly after the note was signed, John E. Nelson and his wife, defendant herein, conducted a restaurant in Big Springs, Nebraska. Their daughter, now Mildred Watson, who helped her father and mother in conducting the business, testified that two payments were made on the note in suit, each in the sum of $500, which she sent by check to her grandmother, Christine Nelson. The checks are not in evidence, the witness stating that they had been destroyed. Later the restaurant was sold at a profit for the sum of $3,000, part of which ($2,000) was paid in cash, and $1,000 taken in a note, and paid to Lillie Nelson as administratrix of John E. Nelson's estate. John E. Nelson was an heir of his father, John Nelson, who died in 1908, and his interest in his father's estate at that time was an undivided one-fifth of the fee title in 240 acres of land in Buffalo county, subject to the life estate of his mother, Christine Nelson, payee of the note in suit. John E. Nelson died on the 1st of February, 1927, leaving as his heirs his wife, Lillie, and his daughter, Mildred Watson. Christine Nelson died November 10, 1932.

Mildred Watson further testified that at the time the restaurant was sold she had a conversation with her father to the effect that everything had been settled between him and her grandmother. She also related a conversation had between her mother, defendant herein, and her grandmother, to the effect that, in the event anything should be owing to the grandmother on the note, she should file a claim against her son's estate; that is, the estate of John E. Nelson. There was no claim filed against the John E. Nelson estate. A brother of the defendant testified that, in a conversation had with Christine Nelson, she told him, in substance, that she had settled with her son, John E., and that they were doing well in business in Big Springs.

On cross-examination, the defendant testified that her husband had settled with his mother. Objections were interposed to this testimony offered by defendant on direct examination, as being in violation of section 20-1202, Comp. St. 1929.

The evidence offered by the plaintiff, both in main and in rebuttal, consisted of the offer of the note, which was received in evidence, and exhibit No. 2, which is a written order, directing the administrator of Christine Nelson's estate to pay any amount that might be owing Lillie Nelson for her interest in the John E. Nelson or the Christine Nelson estates, and apply the same on the note in question. The note bears this indorsement: "Feb. 1933, $25, paid on this note by Lillie Nelson order;" and the further indorsement: "January 25, 1935, $5 Paid by Distribution in Est." It developed that the attorney for plaintiff had inclosed this order in a letter sent to California for this defendant to sign. She denies having signed the exact order, and there is a dispute in this evidence. The administrator of the estate of Christine Nelson testified that at the time the first indorsement was made on the note, showing payment of $25, he had no money of Lillie Nelson in his possession, but made such indorsement in anticipation that he might, at a later date, have money belonging to her. There is testimony of two disinterested witnesses to the effect that, in conversations had with Christine Nelson, she had stated that John E. Nelson had received his share and owed her "lots of money," and that it should come out of his share and be counted against him. On the foregoing evidence, the cause was submitted to the court.

The contentions of the plaintiff are that the decision of the trial court is not sustained by sufficient competent evidence as to payment of the note sued on and is contrary to law; that the court erred in admitting, over objection of the plaintiff, the evidence of Mildred Watson, witness for defendant, in regard to alleged payments upon the note, for the reason that she was interested in the result of the suit, plaintiff being the administrator, and that the evi-

dence offered by Mildred Watson was in violation of section 20-1202, Comp. St. 1929.

We believe that the trial court, who had an opportunity of hearing the witnesses and observing their general demeanor while testifying, was the best judge of the credibility of the testimony of each and every witness before the court. The court tried this cause without the intervention of a jury and, therefore, performed the same functions and duties of a jury as the trier of fact. This court has so held repeatedly in similar situations.

In *Dravo-Doyle Co. v. Metropolitan Water District,* 102 Neb. 184, 166 N. W. 558, it was held that where a jury is waived the court's finding of fact will not be disturbed if sustained by sufficient competent evidence. This holding was reaffirmed in *Duncan v. Ross,* 122 Neb. 877, 239 N. W. 645.

It is a rule that, in the trial of a law action to the court without a jury, findings of fact, based on conflicting evidence, will not be disturbed on appeal unless clearly wrong. *Vohland v. Barron,* 126 Neb. 50, 252 N. W. 470; *Elmcreek Ditch Co. v. St. John,* 127 Neb. 253, 255 N. W. 16.

In *Citizens Ins. Co. v. Herpolsheimer,* 77 Neb. 232, 109 N. W. 160, this court held: "In a case tried to the court, the presumption obtains that the court, in arriving at a decision, will consider such evidence only as is competent and relevant, and this court will not reverse a case so tried because other evidence was admitted." Reaffirmed in *Miller v. Banner County,* 127 Neb. 690, 256 N. W. 639.

Objection is made to the admission of testimony of Mildred Watson as being in violation of section 20-1202, Comp. St. 1929. Said section reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or con-

versation or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation."

Mildred Watson was an heir of her father, John E. Nelson. He was entitled to an undivided interest in the estate of his father, subject to the life estate of his mother, Christine Nelson. Mildred Watson and her mother, defendant herein, were each entitled to one-half of one-fifth interest of John E. Nelson in his father's estate. Mildred Watson was also an heir of her grandmother, Christine Nelson, and was interested, according to plaintiff's contention, directly and adversely to the administrator of the Christine Nelson estate, plaintiff in this action.

The witness Mildred Watson is not a party to this litigation, has no interest in the alleged claim of the administrator, plaintiff, or in the defense of her mother, defendant; nor has she a direct legal interest in the property of her mother, as far as it may or may not be affected in this action. The administrator has no interests adverse to this witness. In no event, under her testimony in this case, can this witness profit, which constitutes the main and essential test as to competency of the witness, under section 20-1202, Comp. St. 1929. See *Hageman v. Estate of Powell*, 76 Neb. 514, 107 N. W. 749; *Oft v. Ohrt*, 128 Neb. 848, 260 N. W. 571; *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189.

The judgment of the district court is

AFFIRMED.